IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVISION No. 22 OF 2021

(Original Civil Case No. 74 of 2018 of the RMs Court of Arusha)

HENRICK WILLEM TIMMER.....APPELLANT

VERSUS

ANNA KEMILEMBE BAHIGANA.....RESPONDENT

RULING

27th June & 20th July 2022

TIGANGA, J.

Henrick Willem Timmer, hereinafter referred to as the applicant in this application, moved this court under section 44(1)(b) of the Magistrate's courts Act, [Cap 11 R.E 2019] and section 79(1)(c) of The Civil Procedure Code [Cap 33 R.E 2019) via a chamber summons supported by the affidavit sworn by the applicant himself and asked for this court for the following reliefs.

i. That, this Court be pleased to call for and examine the records, proceedings, judgment, decree including subsequent execution proceedings in Civil Case No. 74 of 2018 before Hon. Baro RM and Hon. Mushi. RM respectively to satisfy itself of its propriety and

legality for there being an error material to the merits of the case which occasioned injustice on the part of the applicant.

ii. That, this Court be pleased to order that, the decretal sum amounting to Tsh 200,000,000.00 illegally schemed and paid by the applicant to the respondent be refunded to the applicant herein.

iii. Costs of this application.

iv. Any other relief this Court may deem fit and just to grant

The applicant raised several grounds upon which he relied while filing this application for revision which mostly are in his affidavit filed in support of the application as follows;

i. That, the trial court's proceedings, judgment, resultant decree and execution application were marred with gross illegality and impropriety and at worst a carefully executed extortion scheme executed against him.

ii. That, the entire proceedings were a sham orchestrated by the counsel for the plaintiff (the respondent in this application) and a person who had identified himself as the defendant's appointed counsel in the original matter.

iii. That, he was never made aware of the proceedings and was never served with summons to appear neither in the course of hearing nor during the execution proceedings.

iv. That, he was illegally detained as a civil prisoner without being given an opportunity if he could satisfy the decree.

v. That, upon completion of the matter before the trial court, he was lured into this country where he was forthwith arrested and forced to settle the matter at Tsh 200,000,000/=

vi. That, he was never afforded the right to be heard contrary to the principles of natural justice.

vii. That, the summons for hearing was received by one person stating that he was instructed so by him, whereas he has never instructed anyone in respect of these proceedings.

viii. That, the said person only appeared long enough to initiate the matter and disappear thereafter to ensure the matter proceeded ex parte and then resurfaced on execution and oversaw culmination of the illegal proceedings and latter luring the applicant into the country in order to extort him as evidenced by annexure HWT – 5

ix. That, the summons for execution was published in local newspaper whereas he is a foreign national and at the time he was residing in

Netherlands the fact which was proved by a copy of passport with VISA attached to the affidavit in support of the application.

To appreciate the reasons behind this revision, a brief background of this matter is important. The background as may be deciphered from the record of the trial court are that; the respondent, Anna Kemilembe Bahigana, was the plaintiff in Civil Case No. 74 of 2018 before the court of Resident Magistrate of Arusha, claiming from the applicant who was the Defendant in those proceedings, for judgment and decree that, the Defendant be ordered to pay Tsh 300,000,000/= being payment for compensation for breach of contract and obligation. General damages and an order that the defendant pay interest at a commercial rate of 30% per annum basing on the amount of compensation ordered to be paid as well as the general damages.

The original case was determined *ex parte* following the failure by the applicant to appear and the execution also was done without the involvement of the applicant, in which an applicant was ordered to pay the respondent Ths. 300,000,000/= as compensation and Tsh 10,000,000/= as general damages.

The applicant having been aggrieved by that decision, he applied for revision before this Honourable Court as indicated hereinabove.

After filing the application and the same was collected for service, on 08th day of June 2021 the affidavit of the process server was filed proving that the service was effected. However, the respondent never appeared, following that state of affairs, the court on 07th June 2022 ordered the application to be heard exparte. The hearing of the application at hand was heard by way of written submission which was filed by the applicant as ordered.

In the submission filed in support of the application, the Counsel for the applicant submitted that, the applicant was ordered to pay Tsh. 300,000,000/= as compensation for breach of contract and Tsh. 10,000,000/= as general damages. He further submitted that, the matter was determined *ex parte* without a trace of the applicant's whereabouts, since 2018. That the applicant leaved for the Netherlands and there is no summons issued and sent to him.

He proceeded to submit that, there is nowhere the evidence stands to justify that the applicant instructed an Advocate to represent him surprisingly, for reasons unknown the one who purported to represent the applicant is Advocate Shabibu Mruma whom there is no a single day they ever agreed with the applicant to represent him in Civil Case No. 74 of 2018. It goes without saying that, the plaintiff was as well acting through

a self-identified defendant's Advocate. He referred to paragraph 15 of the affidavit with annexure HWT-4 which renders credence to this assertion, as it contains an extract of a WhatsApp chat from phone number 0767126797 registered in respondent's personal names.

The Counsel for the applicant further submitted that, the judgment was delivered on the 21st January 2019, both the findings and the date of judgment were not communicated to the applicant, on the 21st March 2019. The respondent moved the court to enforce the illegally obtained decree by arrest and detention as a civil prisoner. Summons was returned unserved by a Court Broker one Allan Mollel with an affidavit stating that the applicant was nowhere to be found in his last known address.

The affidavit of service of execution application was dated 27th March 2019 while the summons was dated 28th March 2019, this means the Court Broker served the summons a day before he had it. The notice to show cause was published in a local news paper as per annexure HWT – 4, notwithstanding the applicant being outside the country, which means that he was out of the reach of the newspaper.

The records are unclean on what transpired from 28th March 2018 to 23rd October 2019, (more than a year and a half). Abruptly, on the 23rd October 2019 the respondent's Advocate appears on record informing the

court that, the applicant herein is a foreigner and has not been found for a long time. That, at the material time he was in police custody hence, they were there to hear from him.

He submitted further that, the records do not indicate that, there was no order of arrest, there were no affidavit filed alongside the execution form stating that there were no other means to satisfy the decree by the applicant except for arrest and detention.

The record shows that, the settlement agreement was entered on the 24th October 2019 and the decretal sum was adjusted from Tsh. 300,000,000/= to Tsh. 200,000,000/= the amount which the applicant painfully remitted to purchase his liberty. He submitted that, it was the settlement which altered the decretal sum as there is no decree which was made therefrom.

He also submitted that, the applicant had the option of applying for revision only, since he was outside the country at the time when the proceedings were conducted. Hence, he did not know what was going on. In the deed of settlement which implies a consent judgment, indeed barred him from lodging an appeal. He cited the case of **Yusuph Seleman Kimaro versus Administrator General**, Civil Appeal No. 266 of 2020 CAT – DAR, (unreported) at page 20 where it was observed that,

a fraudulent judgment, order or decree can be avoided without necessary having recourse to setting it aside and that a judgment, order or decree obtained by fraud will be treated as a nullity by any court be it an inferior or a superior court.

He proceeded to submit that, the right of the applicant to be heard was infringed because the records clearly evidence that, there was no summons issued to the applicant. Expounding the complained illegality, he said, there was the absence of notification of the date of *ex parte* judgment and improper or absence of service of the notice to show cause, as well as an illegal arrest carried out in absence of arrest warrant, order of the court or proceedings, but also absence of elements proving neither the alleged contract as admitted by the trial magistrate on the last paragraph of the judgment, the alleged deserted children were not shown.

In his view, the proceedings are confusing as to the nature of the cause of action or claim. It is not sure as to whether it was breach of commercial agreement or a family dispute. Also the presence of depravity of freedom of movement and coercion of the applicant into executing an illegal deed of settlement under duress. He also raised the concern that, even the execution was done by another Magistrate Hon. A. L. Mushi, RM

who was not the Magistarate in charge as it is known that the execution is done by the Magistrate in charge.

He further submitted that, the absence of summons served to the applicant in the original suit, but also the resultant execution proceedings, demonstrate that the applicant was deprived his right to be heard. The applicant was also illegally arrested as a means of enforcing the court decree. There was no arrest warrant as well as the notice to show cause why the execution should not proceed. Thus, conditions for the detaining of a judgment Debtor as a civil prisoner were not met as provided by Order XXI (39) (2) of the Civil Procedure Code (supra).

He also submitted that, there are two judgments of the court in the same matter. That, the amount decreed in the judgment is not the one which was found to have been paid in the deed of settlement. This contravenes Order XXI (39) (2) of the Civil Procedure Code (**supra**).

He concluded his submission by praying before this court to quash the trial court's proceedings and the resultant decree and order the sum illegally obtained from the applicant to the tune of Tsh. 200,000,000 to be refunded to the applicant by the respondent.

The above summary presents the background of the matter and the materials submitted in support of the application at hand. From them, I

find only one main issue for determination, that is whether the application for revision by the applicant is merited. Looking at the nature of the complaints raised, it can also be framed as to whether there was a proper handling of the suit and execution process before the trial Court.

As earlier on pointed out, there is a complaint to the effect that, the case before the trial court was substantively and procedurally flouted with the intent to illegally obtain money from the applicant. The second complaint is on the failure of the trial court to adhere to the principle of the right to be heard. And, the third is, failure to observe the rules of the right of representation. Forth is, that the deed of settlement contravened the rules of parties' consent. Fifth is, the alleged desertion of children is unjustifiable, and; sixth is, that service of summons was conducted unreasonably.

As earlier on pointed out, the cause of action is the breach of the promise to marry, the alleged promise to marry attracts the presence of agreement between the parties, which should have contractual elements to be proved at the required standard of civil cases, that is, proof on the balance of probabilities. It was expected therefore that, the evidence by the respondent before the trial Court proved the case at that standard.

In dealing with the complaints, I will handle them, sequentially from the start to the end of processing civil cases. In so doing, I will start with the complaint relating to service of summons to the defendant who is the applicant in this application. I start with that aspect because, once the case has been filed, section 23 and Order V Rule 1 of the Civil Procedure Code (supra) the summons needs to be issued to the defendant to appear and answer the claim. The manner in which the service may be effected is as provided for under section 24 read together with Order V Rules 12 that it shall be served to the defendant in person or his agent empowered by the defendant to receive the service on his behalf. Rule 17 of the same order provides for the procedure when the defendant cannot be found. The second reason as to why I have decided to start with this, is because issuing and service of summons encompass a very important principle of natural justice (right to be heard) which under **Article 13(6), (a) of the Constitution of the United Republic of Tanzania,** Cap 2 of 1977 is a constitutional right. This means, failure to serve the summons or to properly do so, infringed not only the natural justice but also the constitutional right of fair haring as enshrined under the constitution as cited herein above. To appreciate the provision and for easy reference I hereby reproduce it in extensor.

"13(6)To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) when the rights and duties of any person are being determined by the court or any other agency, ***that person shall be entitled to a fair hearing*** *and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

It goes without saying that, the right to be heard is the mandatory principle to be observed by courts as well as other organs in dispensation of justice as provided by the above provision of the mother law.

While passing through the records of the trial court to satisfy myself as to whether service was made to the defendant, I realized at page 1 and 2 of the Trial Court's original proceedings that, the Counsel for the respondent by then the Plaintiff evidenced before Court to have served the summons to the Counsel for the applicant who was by then the defendant and told the trial court to have the proof of service.

Unfortunately, I have passed through the whole proceedings and realized that, the one said to have been instructed by the applicant

(previously the Defendant) as his Advocate had never appeared before Court. There is also no reason as per the Trial Court's records which is shown as to why, if the served counsel was really duly instructed by the applicant failed to attend his client's case diligently. The other question which remain nagging is, normally, the service is done to the defendant personally, who upon being served instruct a lawyer to represent him. The other party may know the advocate of the defendant after being introduced by the defendant. That was a new case, there is no history of the two having cases before in which the said Advocate represented him. There is no evidence to show that, the respondent's counsel was introduced by any body to the counsel who posed to represent the applicant.

It is upon the same pages of the trial court's original proceedings at pages 1 and 2, I realized that the Counsel for the respondent who was plaintiff in the original case file, stated before this Court on the 31st October 2018 that, the defendant, who is now the applicant in this application is outside the Country.

Upon passing through the trial Court proceedings, it is my considered view that despite the fact that the trial Court was informed that the defendant (Applicant) was outside the Country, the trial Court did

not bother to call upon the alleged Counsel for the defendant to come before it and tell the Court on the whereabouts of his Client, and satisfy itself as to whether he was dully instructed. Instead, in the whole proceedings neither the Counsel for the defendant nor the defendant himself entered appearance before the Court and the matter was determined *ex parte* upon the prayer by the Counsel for the plaintiff.

It should be noted that, the constitution under article 13 (6)(a) casts the duty to the court, therefore, the court was duty bound to satisfy itself that the defendant was dully served before it proceeded to hear and determine the case *ex parte*.

In further perusal of the record of the trial Court, I find the Advocate Mr. Shabibu Mruma, to have appeared at execution stage when the decree holder of the decree which he did not appear for to defend was to be executed. His appearance is evidenced by the record. The Court coram at pages 64 and 66 of the Trial court's hand written proceedings, says it all.

In line with the above position, it is my considered view that failure to adhere to right to be heard as observed by the court renders whatever went on to be questionable.

As already pointed out, the respondent's counsel informed the court before the case took of for hearing that the defendant was outside the country and that he is a foreigner. The law that is Oder **V Rule 29 of the Civil Procedure Code, [Cap 33 R: E 2019],** clearly provides that:

> *29. Where the defendant is believed to reside outside Tanzania, elsewhere than in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept service, the court may, on the application of the plaintiff, order that service of the summons be affected*
>
> *(a) by posts*
>
> *(b) by the plaintiff or his agent, or*
>
> *(c) through the courts of the country in which the defendant is believed to reside.*

Looking at its phraseology, it requires the court after being satisfied that the defendant is out side Tanzania after being so informed by the counsel for the plaintiff, to order the service to be effected as directed by Order V Rule 29 of the CPC which he did not.

The problem, seems to reappear in execution process. It seems from the record that after the application for execution had been filed, the executing Magistrate ordered the notice to show cause to be issued. That notice is on record to have been issued on 26th March 2019 notifying the

judgment debtor to appear and show course on 28th March 2019. It seems also that, for the very same reason that the judgment debtor was not in Tanzania, he was not physically served. Following that non service, and his failure to appear on 28th March 2019 and on 29th March 2019 an order was made that the service be by way of publication for the judgment debtor to appear on 03rd April 2019. That publication had two problems, one, it gave the judgment debtor a very short time, as it was published on 01st April 2019, requiring the Judgment debtor to appear on 03rd April 2019. A rhetoric question can be asked, as to whether the trial court intended to notify the judgment debtor to appear and show cause. As they were aware that he was in foreign country specifically in Europe, I do not think that, one day that is only 02nd April was enough for him to arrange and travel to appear on 3rd April 2019. The second problem is that, the published summons was not the summons to show cause but to appear and defend. The third problem is that; the publication was made via local newspaper which is Mwananchi. This was very unreasonable while knowing that the Decree holder is outside the Country.

Although it is difficult to believe that, the notice was communicated to him, but even if we believe that it was communicated to him, it was a misleading notice. That ascertained, we cannot confidently say that, the

procedure for execution was also not followed. The judgment debtor was really arrested without first being given opportunity to satisfy the decree as required by Order XXI Rules 20 and 21 of the CPC, (supra). And even if we assume for the sake of argument that, the application filed on 21 March 2019, was correct, then under Order XXI Rule 35 the court was supposed to summon him by a notice to show cause as to why he should not be committed as a civil prisoner. To understand what the provision provides, it is hereby reproduced for easy reference:

Order XXI Rule 35

> (1) *Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.*
>
> (*2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment debtor.*"

There is no evidence proving that, after the arrival of the applicant he was given such a chance to appear and show cause to as to why he

should not be committed as a civil prisoner. That said, it is apparent that the procedure was flouted.

With regards to the deed of settlement as alleged to have been entered, there is complaint that it was entered under a coercive environment. I have gone through the records and observed that, parties agreed to settle the matter and they adjusted the decree by reducing the amount from Tsh. 300,000,000/= and agreed to pay Tsh. 200,000,000/=. However, there is enough evidence that the applicant concluded that said deed of settlement while under police custody. The settlement deed should contain all elements of a valid contract as per section 10 of the **Law of Contract Act, [Cap 345 R. E 2019]** which provides as follows;

> *"10. All agreements are contracts if are made by **free consent** of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby declared to be void"* [Emphasis supplied]

Under section 14 of the **Law of Contract Act, [Cap 345 R.E 2019],** the law went further to show as to what amounts to the free consent. It provides that;

> *14(1) Consent is said to be free when it is not caused by*
>
> *a) **Coercion**, as defined under section 15 of the Act*

b) Undue influence, as defined under section 16 of the Act

c) Fraud, as defined under section 17 of the Act

d) Misrepresentation, as defined under section 18 of the Act

e) Mistake, subject to the provisions of sections 20, 21 and 22 of the Act.

(2) Consent is said to be free when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. [Emphasize added].

The same law of contract defines under section 15 defines coercion as follows;

15(1) Coercion is the committing or threatening to commit any act forbidden by the Penal code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with an intention of causing any person to enter into agreement.

It is my considered view that, as already been demonstrated, the holding of the applicant in custody was nothing but unlawful detention. I hold so because the matter was civil in nature, the detaining was without following the procedure laid down under Order XXI Rule 35 of the CPC. That being the case, then the detention of the applicant was with intent

to threaten him. Therefore, the said agreement was entered into under coercion, which is lacking quality to be an agreement worthy a name.

To conclude on this, I subscribe to the submissions of the applicant's Counsel that the deed of settlement was a result of coercion on the part of the applicant.

That said, the proceedings and the decision of the trial court were the outcome of irregularities which are indeed intolerable in dispensation of justice. The trial court's decision is hereby quashed and set aside, a trial denovo order is made for the case to be heard by another magistrate with competent jurisdiction. Meanwhile, the respondent **Anna Kemilembe Bahigana** is ordered to return Tsh. 200,000,000/= accrued from the irregular proceedings, illegal execution and deed of settlement. The return of the money should be with immediate effect and without undue delay as they were illegally obtained to say a least.

It is so ordered.

DATED at **ARUSHA** on this 14th day of July 2022

J.C. TIGANGA

JUDGE.