

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL REFERENCE NO. 6 OF 2021

(Arising from the decision of Deputy Registrar of this court in Execution of Civil Case No.10 of 2019)

NCL INTERNATIONAL LIMITED..... APPLICANT

VERSUS

ALLIANCE FINANCE CORPORATION LIMITED.....RESPONDENT

RULING

15/03/2022 & 22/04/2022

E. L. NGIGWANA, J.

This is an application for Reference arising filed by the applicant challenging the orders and findings of the Deputy Registrar (J.M. Minde) in Execution of Civil Case No.10 of 2019.

The application has been brought under the provisions of Order XLI Rule 1, Order XLIII Rule 2 and section 95 of the Civil Procedure Code (Cap 33 R.E 2019), and it is supported by the sworn Affidavit of Zedy Ally, the learned counsel for the Applicant. On the other hand, the respondent's counsel filed a counter Affidavit and challenged the application.

For a better understanding and appreciation of the context issue, I find necessary to narrate the factual background albeit briefly: The respondent was a Plaintiff in the suit filed in this court, Civil Case No. 10 of 2019 which was marked withdrawn on 15th October,2020 after the Applicant and

respondent entered into Deed of Settlement dated 12th February, 2020. It appears that the Deed of settlement had a clause which regulated the final payment date to be on 25th July 2022.

The respondent on 27th day of July, 2021 before the final date of payment had elapsed, put into motion execution proceedings for Civil Case No.10 of 2019 by filing Amended Application for Execution of a decree praying for attachment and sale of applicant's properties and arrest and detaining applicant's directors as civil prisoners.

The applicant after being served with that application for execution on 24th August, 2021, filed a reply where he raised two points of preliminary objections which had the effect that the application for execution was prematurely filed and that it was defective and bad in law for being an abuse of court process.

It appears that the preliminary objections were neither withdrawn nor heard on merit, instead parties were ordered by the Deputy Registrar to insert a default clause in the Deed of settlement dated 12th February, 2020. Following to that order, on 27th September, 2021 the other Deed of settlement was introduced in court by being filed on the same date. The said Deed of settlement was admitted and marked to have settled the execution proceedings.

The said new Deed of settlement is what is being challenged by the applicant's counsel that the applicant was not involved and it was substantially and procedurally tainted with illegalities among other faults,

one is that the Deputy Registrar is not clothed with power to alter and vacate from the former decree passed by the judge of the High Court.

Upon mutual consent, Parties through their respective advocates were availed a chance for oral submissions. Advocate Zedy Alli cheered for the applicant, so did advocate Luqaiya for the respondent. For the purpose of brevity, I will have to pick the relevant arguments that I find to have substance connected to the application in question.

Invited to take a floor, Advocate Zedy urged this court to quash and set aside the orders/decrees and findings of the Deputy Registrar in execution Civil Case No. 10/2019 which resulted to the settlement deed dated 15/10/2020. He narrated that the first Deed of settlement which is not under dispute was to be fulfilled on 25th July, 2022 but before that date the respondent filed application for the execution before this court. The applicant who was a judgment debtor filed the reply and raised two preliminary objections on a point of law that the execution was prematurely filed and that it was bad in law for abuse of court process.

He further told this court that, he was surprised when the execution came for hearing on 25/08/2021, however, the hearing did not take place after a short discussion with parties as a result, the matter was adjourned for mention until 27/09/2021 where parties were advised to sit down to see if they can insert the *default clause* in the deed of settlement. According to the applicant's counsel, He was also surprised on 27/9/2021 when the respondent's counsel came in court with a new deed of settlement dated 02/09/2021 which was already filed in court Registry on 27/09/2021.

The applicant's counsel contended that they were not aware of the Deed of settlement as a result; the matter was adjourned till 10/11/2021 so that the applicant's counsel may communicate with the applicant on the authenticity of the document. After the applicant's counsel had communicated with the Managing Director and Majority shareholder, they notified him that they were also not aware of the filed Deed of settlement and that the director had never signed the same.

On 10/11/2021 when the applicant's advocate appeared before the court to give the feedback from his clients, the Deputy Registrar ordered that the Directors of both companies have to appear in court on 22/11/2021 where on that date he informed the court that his director did not attend as he was attending his sick wife and prayed for adjournment till on January 2022. That his prayer was not accommodated, instead the Deed of settlement was admitted and the Deputy Registrar marked the matter settled by Deed of settlement. In that regard, the applicant's advocate submits that the applicant has been aggrieved on the following grounds which he averred in the adopted affidavit in paragraph 12 as points of law which smell illegalities.

That **firstly**, they asked themselves as whether the Deputy Registrar had mandate to admit the deed of settlement dated 02/9/2021 which was filed without the court order or direction. To him, that is a point of law which is required to be corrected by this court as it was improper in law.

Secondly, another point which he urges this court to look into is whether the Deputy Registrar was right to decide that execution was settled while

the parties were still disputing the same. **Thirdly**, he further argued another point of law that the Deputy Registrar as executing officer had no power to admit a new Deed of settlement dated 2/9/2020 and which altered and amended the former one. To buttress that the said act of altering a decree was illegal, he cited the case of **National Insurance Corporation of Tanzania Ltd vs Steven Zakaria Kiteu and 2 Others**, Civil Reference No. 07 of 2020, HC at Arusha (Unreported) at page 6-7 which held that the executing officer has no power to amend or alter the decree.

Fourthly, he also complained whether it was right for the court not to afford parties a right to be heard in execution No. 10/2019. That the application was never heard and the P.O was never entertained or withdrawn instead the court went on and dealt with another issue.

Fifthly, another issue, the applicant's counsel is challenging is whether it was right for the Deputy Registrar to order that the matter was settled while there was a P.O which was neither determined nor withdrawn and **Sixthly**, whether the execution was so properly settled.

Invited for the reply to the applicant's submission, Advocate Ruqaiya for the respondent, responded on the submitted legal point which was adopted in the applicant's affidavit. To start with, she substantiated by answering whether the Deputy Registrar was right to admit the Deed of settlement dated 2/09/2021 and whether execution was settled and whether the Deputy Registrar was clothed with power to do so.

She clarified that, the applicant served the respondent with reply to execution instead of affidavit to show cause why execution should not proceed, meaning that, he waved his right.

She added that respondent raised that concern in court but also told the court that the applicant communicated with the respondent that he would like to settle the matter amicably. Hence the matter was scheduled for mention on 27/9/2021, with an advice by Deputy Registrar to parties to negotiate as it was admitted by the applicant in para 5 of the affidavit. That parties (managing directors) i.e., the applicant and respondent after having different correspondences outside the court and agreed to carry negotiations which were successful and hence filed the Deed of settlement.

She further submitted that the respondent's advocate served the applicant's advocate the Deed of settlement after filing the same. She therefore concluded that the executing officer is clothed with power to conduct execution proceedings per the law and per the agreement of parties as long as parties intend to settle the matter, courts cannot force parties to prolong the disputes while parties intend to settle.

Responding on the validity of the Deed of settlement dated 2/09/2021, the learned counsel submitted that the Companies Act No. 12 of 2019, Cap. 212 provides for the validity of the Deed of settlement under section 38, 39(1) and (2) and that matter, the Deed of settlement in question has clearly complied with the said law.

That, under Paragraph 8 of the founding affidavit, the applicant disputes the validity of the Deed of settlement by denying the Director's signature.

The respondent's counsel emphasized that, even looking at the applicant's affidavit, the one who swore the affidavit is the applicant's advocate and not the company and its directors and that, there is no any given time, directors or shareholders are disputing signatures, Settlement deed and any act of the Deputy Registrar save that it is only the applicant's advocate who is complaining, which the respondent's counsel views it as hearsay.

Along with that, she argued that the applicant's advocate did not even submit any retainerhip letter to show that he was engaged as the advocate of the company hence the Deputy Registrar remained with no any other option than admitting a Deed of settlement. Ms. Ruqaiya informed the court that it came into the knowledge of the court that all allegations and objections came from the applicant's advocate and not shareholders or company directors.

She bolstered her stance by referring the a case of **NBC LTD vs Superdo Trader Manufacturing Co. Ltd**, Civil Application No.13 of 2022 cited with approval in the case of **Sabene Technician Dsm Ltd and Michael Luku**..Civil Application No. 451/2020 where the Court held that an affidavit which mentions another person is hearsay unless that other person as well swears affidavit. She also cited the case of **Benedict Kimuya vs Primary Security Ministry of Health** Civil Application No.31/2000 cited with approval in the same case as cited earlier, she added that Cap 33 R.E 2019, Order XIX rule 2(2) of the Civil Procedure Code Cap. 33 R: E 2019 is very clear that affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. The respondent's counsel was to the effect that Mr. Zedy telling the court about the information of Mr. Muhuza

Mungi's wife and pretend that his wife was sick without telling how he was able to prove, thus it was hearsay.

She concluded that the root cause of this matter is that the applicant took loan from the respondent which has not been paid in full; hence the advocate is deploying delaying tactics.

In rejoinder, Advocate Zedy responded that it is not in dispute that the applicant took loan from the respondent and it was settled through deed of settlement which is still alive and the applicant started paying but the application for execution was prematurely filed. He submitted that if the court wanted proof of sickness of the director's wife, it would have issued summons to directors and he insisted that it cannot be said that they waived their right. He was to the effect that there was no order issued to them so that the applicant can be condemned to failure to comply or obey with the order.

He reiterated that the court which issued the decree is the one which can vary it and not executing officer. That what was advised by the Deputy Registrar was the possibility of inserting a default clause. That, there were no correspondences done before the parties. He also rejoined on the complaint registered by the respondent's counsel of filing a reply instead of Affidavit to show cause why execution should not proceed, he cemented that, if they filed the reply instead of affidavit to show cause, the respondent's advocate ought to have raised a Preliminary Objection. Mr. Zedy reiterated that the order issued by the judge cannot be vacated by the Deputy Registrar and that the Deed of settlement could not have been

adopted without first withdrawing a P.O. He concluded that the applicant has no intention to prolong the matter but wants justice to be done.

Having examined the entire record and paying due consideration on the rival submissions by the counsels for the applicant and respondent, I am now in a position to determine the merit of the application for reference.

I agree with Mr. Zedy that, the position in our jurisdiction is settled, once a decree by Deed of settlement has been recorded by the Court under Order XXIII Rule 3 of Civil Procedure Code Cap. 33 RE 22019, it cannot be changed/altered or challenged in other proceedings by the other court except through review by the same court which issued it. See **National Insurance Cooperation of Tanzania Ltd** (supra) as referred by the Applicant's counsel.

On the same stance, I wish also to borrow a leaf in the holding of Hon. Kija, JA in the celebrated case of **Arusha Planters and Traders Ltd. & 2 Others vs Euro African Bank** (supra) where the Court of Appeal said:

"...for a Commercial Division of the High Court to declare a consent settlement recorded by the Main Registry of the High Court null and void thereby vacating it as prayed for in prayers (a) and (b), would not augur with good administration of justice as it would give a false impression that a Commercial Division of the High Court can overrule a decision made by the High Court Main Registry, For the foregoing reasons, we agree with Prof. Mwaikusa that in the circumstances of the instant case, it was not proper to challenge the consent judgment by way of instituting a separate suit"

I am also further inspired by the holding of my learned brother Kalunde, J in **Grace Furaha Lugoe vs Furaha Ngeregere Lugoe and 2 others**, Land Case No.120 of 2017, HCT (Land Division) Unreported that *"where the law requires that a matter has to be started and concluded in one court it is proper for that matter and the resultant effects to be concluded in that court."*

Coming back in our present case, there is no dispute that, on 15th October, 2020 this court before Mtulya, J registered the Deed of settlement between the applicant and the respondent which was dated 12th February, 2020 upon which Civil case No.10 of 2019 was marked settled. There is also no dispute that in the Settlement deed, parties had inserted their final payment clause upon which the applicant was offered twenty-nine (29) successive months starting from 25th March 2020 to 25th July 2022 to have paid the agreed total amount of 631,502,982/= to the respondent.

It is further not in dispute that before the final payment date had elapsed, the respondent filed execution case No.10 of 2019. It is on that execution proceedings which was objected through raised preliminary objections by the applicant that it was prematurely filed and abuse of court process, which gave rise to the **second deed of settlement** by the Deputy Registrar which altered the terms of the former decree of this court.

In this saga, the pertinent question to be answered by this court is that, can the decree or Settlement deed passed by the court which is still in force and binding to the parties be altered or challenged in the execution proceedings before executing officer? Consistently whether or not the

executing officer, to wit; the Deputy Registrar (particularly in this case), is clothed with such power?

In endeavor to answer the above question, I find it apposite to reproduce what was discussed by **Madare Justice Itemba, J** in **Joseph Geoffrey Jimbika vs Elizabeth James**, Civil Revision No. 14 of 2020 HC at DSM (Unreported), by defining what the term "execution" entails. *"...the meaning of the term "execution" can simply be found in Words and Phrases Legally Defined volume 2 and 3^d edition London and Butterworth's 1989 at page 195-196 where it is written that:*

"In its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice."

This court went further that, *"reference can be made to the holding of Denning MR on the meaning of "execution" and completion of execution in the English case of **Re Overseas Aviation Engineering (GB) Ltd** [1962] 3 All ER 12 at page 16 under 325:"Execution "means, quite simply, the process for enforcing or giving effect to the judgment of the court..."*

From the above definition of execution, one may note that the only duty of the Deputy Registrar as an executing officer in execution proceedings, is to enforce the decree as it **is so as to give effect to the issued judgment without altering the former because the former binds parties.**

In our particular case, the former decree was still in force, meaning that it had not come to an end. In other words, there was no default by either

party as there was a clause of final payment. By so doing, the Deputy Registrar admitting another new Deed of settlement in place of the former, she misdirected herself and made her own decree different from that which was before her to enforce which did not augur good administration of justice.

I hold such view because the executing court has no power to entertain an objection or validity of the decree or as to its legality or correctness of the decree. **See National Insurance Cooperation case.** (Supra) If the Deputy Registrar could have found difficult in executing the same or if parties wanted to insert a clause of default for each month of payment she would have advised parties to revert to the court which issued the said decree to challenge it through review or **otherwise through appeal.**

See again the well-established principal in **Arusha Planters and Traders Ltd. & 2 Others vs Euro African Bank** (supra) which stated that **a consent judgement can be challenged by way of review which would allow the court to vacate its previous decision or through an appeal if there is a claim of fraud.**

Indeed, the act of the Deputy Registrar vacating the former decree/Deed of settlement was totally misdirection and bad in law.

I do not subscribe the argument by Ms. Ruqaiya, the respondent's counsel that parties corresponded to settle execution proceeding amicably by adopting a new Deed of settlement in the execution proceedings. In my view, the move was not legally correct as the former Deed of settlement was still binding to the parties and in force. Perhaps this is the reason

behind why parties are still in disagreements and with grievances today as the Deputy Registrar attempted to grant the relief which was not issued by the court which passed a consent decree.

Besides, the preliminary objections which were raised on the prematurity of the execution proceedings were neither withdrawn nor determined. I am not ready to labour myself in the argument advanced by the respondent's counsel that it was only the applicant's advocate who challenges the move on the new Deed of settlement and not the applicant/Company Directors, because her argument does not hold water. She is trying to challenge the *locus standi* of the advocate representing his client, the argument which has no any sentiment of merit here.

Leave alone all those pitfalls, to say the least, it is surprising how possible could the Registrar proceed to mark the execution settled in the situation where the new Deed of settlement was still contested and the record shows that the same Deed of settlement was still under inquiry as the record reveal that the Registrar had ordered Directors of the applicant's company to appear to clear out authenticity issues over the new Deed of settlement. All these flaws, suggest that parties were therefore left in disagreement and perhaps that is why the second Deed of settlement remains questionable.

Leave all that, the procedure taken to challenge the former decree before the executing officer and alterations of the former which introduced new terms in the new Deed of settlement was going beyond powers of executing officer and was fatal too. I wish to borrow leaf to the persuasive

case of India which was also referred and quoted in **Joseph Geoffrey Jimbika** (Supra) that of **V. Ramswami Versus T.N.V.Kailash Theyar** reported in AIR 1951 S.C,189 (192), it was observed that,

"The duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation"

Also in the same jurisdiction, in **Topanmal Versus M/s Kundomal Gangaram** reported in AIR 1960, SC 388, it was held by the Supreme Court that:

"An executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree. Therefore, determining the validity of the consent judgment at this stage, will be allowing the applicant to take advantage of proceedings"

Being guided by the above binding and persuasive sources of law, it is now learnt that since the Deputy Registrar had the duty to enforce the former decree passed by this court as it was decreed, which by itself had a clause of final payment on 25th July, 2022 which an application for execution of it was prematurely filed, she ought to have struck out the application for execution as it was filed prematurely or otherwise, advise parties to opt for review. And since the act of altering and adding some terms to the

detriment of the applicant, is now viewed and implies that the respondent was allowed to take advantage of the execution proceedings to vacate it.

It can therefore be deducted that the Deputy Registrar as executing officer went beyond her power and had no jurisdiction to do so. Hence the resultant orders of the Deputy Registrar to admit the new Deed of settlement was a nullity and cannot be left to stand. It goes without saying that even the purported admitted second Deed of settlement dated 2nd of September, 2021 was therefore a nullity and has/had no legal effect whatsoever.

If I may cement further though it is worthless to say, even an order to file it or alter the former one to include a default clause, as parties submitted, is not reflected anywhere in the record of the executing court.

In the end result and from the aforestated reasons, and by avoiding discussing other arguments which are engulfed in the point of law discussed above, I allow this application to the extent discussed. The entire proceedings which emanated from enforcing a premature decree which resulted in altering a former decree of this court by admitting the new one is hereby declared a nullity and *void abinitio*. The resultant decree from the purported Deed of settlement is hereby quashed and set aside.

I restore the former Deed of settlement dated 12th February, 2020 which was registered and passed by this court through Civil Case No.10 of 2019 before Mtulya, J since it was legally obtained by both parties after they had agreed to settle their dispute amicably in the legally accepted procedure. It should therefore continue being in force as formerly agreed by parties.

Given the nature of this dispute upon which parties intention had already been expressed in their former Deed of settlement by settling their dispute amicably, where upon they had successfully returned home in a friendly relationship by avoiding wasting time and incurring costs, of which I support the move, I therefore exercise my discretion and refrain from granting costs. Each party shall bear its own costs in this application.

It is so ordered.

Dated at Bukoba this 22nd day of March, 2022.

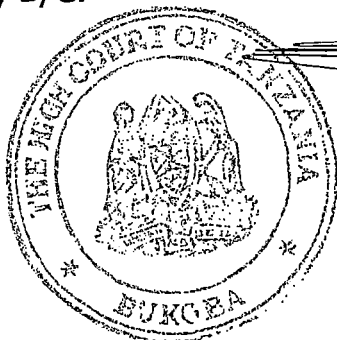


E. L. NGIGWANA

JUDGE

22/03/2022

Ruling delivered this 22nd day of March, 2022 in the presence of Mr. Zeddy Ally, learned counsel for the for the Applicant, Mr. Samwel Kilua, learned advocate holding brief for Ms. Ruqaiya, learned advocate for the respondent, Hon. E. M. Kamaleki, Judges' Law Assistant and Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

22/03/2022