IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND REVISION NO. 3 OF 2021

(*Arising from DHLT Kahama Execution Application No. 57 of 2021 originating from Land case No 5 of 2020 of Busangi Ward Tribunal*)

MIHAYO MAZIKU MISANA *(Administrator of the Estate of late MAZIKU MISANA*) **.....APPLICANT**

VERSUS

ABDALLAH MASHIMBA NZINGULA..... ...RESPONDENT

RULING

21st June & 29th July 2022

MKWIZU, J:

The applicant in this application was an applicant in Land Application No 5 of 20200 at Busangi Ward Tribunal where he was declared owner of the suit land subject matter of the dispute between the parties. It appears that no appeal was preferred against that decision prompting the filing of an application for execution before the DLHT baptized as Execution No 57 of 2021. It is in the applicant's affidavit that, instead of executing the decree brought before it, the executing court went ahead to suo moto nullify the entire decision for deficiencies exposed in the decision without the involvement of the parties.

It is this decision that irritated the applicant, (former decree holder) to file these revision proceedings moving this court to revise the ruling in Misc. land Application for execution No 57 of 2021 emanating from Land case No 5 of 2020 by Busangi Ward tribunal to ascertain its legality. The application is by a chamber summons made under section 43(1)(b) of the

Land Disputes Court's Act (Cap 216) RE 2019 supported by the affidavit by Majura Magafu Mfungo, the applicant's counsel.

The respondent's counter affidavit in opposition was accompanied by a notice of preliminary objection to the effect that the application is incompetent for being time-barred.

When the matter came before me for hearing on 21/6/2022, it was ordered that both the preliminary objection and the main application be heard together but the determination of the main application would depend on the outcome of the preliminary point of law raised.

Submitting for the preliminary objection, the respondent who was in court without legal representation argued that the application was filed three months after the decision of the trial tribunal contrary to the law.

Ms. Magreth Lyimo advocate for the applicant contended that the application was filed within time. She in elaboration said the decision was delivered on 15/7/2021, followed by their request for a copy of the decision which was served on them on 16/9/2021, and that the time for obtaining the copy of the decision is excluded in reckoning the requisite time for filling revision under section 19 (2)(5) of the Law of Limitation Act. She added further that, the Revision application is, under item 21 of the law of limitation Act to be filed within 60 days after the impugned decision. And that they electronically filled this revision on 7/10/2021 before its registration on 21/10/2021 thus within time.

I find it apposite to conclude on the issue of the raised preliminary objection before I move to the merit if need be. The key issue is whether the application is time-barred. It is from the records that though the

complained decision was delivered to the parties on 15/7/2021, that decision was certified on 16/9/2021 and this is the day the applicant counsel claims to have been issued with the copy. In convincing the court that the application was filed within time, Ms. Lyimo said they electronically filed their application on 7/10/2021 which came to be registered later on 21/10/2021. This court had stretched a little bit to see the records as they appear on the Court file, unfortunately, the information on when exactly the application was electronically placed before the court systems is not appended together with the hard copy documents in the court file. What is apparent from the records is that the application was filed on 26/10/2021. However, counting from 16/9/2021 to 26/10/2021 still, the revisions seem to have been filed within 60 days period required by the law after service on the applicant of the copy of the impugned decision. The preliminary objection is therefore without merit.

This takes me to the merit of the application.

Submitting in support of the application, the applicant's counsel apart from narrating a brief background of the matter, prayed to adopt the affidavit in support of the application and the prayer in the chambers summons to form part of her submissions inviting the court to ascertain to the legality or otherwise of the DLHT decision.

In response to the above, the respondent's submissions are in support of the DLHT's decision. He said, the tribunal chairperson was right in raising the points and deciding upon them in the execution proceedings. He was of the view that this application is without merit.

Having careful considered the parties application and their submissions, I find only one issue for determination, whether the execution court went amiss to determine issues outside its jurisdiction and without the parties involved.

The word "Execution" is not defined in the Code of Civil Procedure. It simply means the process for enforcing the decree that is passed in favour of the decree-holder by a competent court. Execution of the land decree is guided. Part V of the Land Disputes Courts (The district land and Housing Tribunal) Rules, GN No 174 of 2003 regulates Execution of decrees and orders by the DLHT. Regulation 23 reads:

> *"23 – (1) A decree holder may, as soon as practicable after the pronouncement of the judgment or ruling, apply for execution of the decree or order as the case may be.*
>
> *(2) An application for execution of orders and decrees under sub-regulation (1) shall be made in the appropriate forms prescribed in the second schedule to these Regulations; and shall indicate the mode in which the execution is sought to be carried out.*
>
> *(3) The Chairman shall, upon receipt of the application, make an order required a judgment debtor to comply with the decree or order to be execution within the period of 14 days.*
>
> *(4) Where after the expiration of 14 days there is no objection or response from the judgment debtor, the Chairman shall make execution orders as he thinks fit.*
>
> *(5) The Chairman shall, where there are objections from the* ***judgment debtor consider the objection and make such orders as may be appropriate****.*
>
> ***Provided that hearing of objections under this sub-regulation shall be limited to the subject matter of the objections****."(emphasis added)*

The proviso to Regulation 23 above confines the executing tribunal to determine all questions arising between the parties during the execution and not otherwise. The rationale behind this is not far-fetched. By its definition, decree under section 3 of the Civil; Procedure Code means

> " *a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include rejection of a plaint and the determination of any question within section 38 or section 89 but shall not include: -*
>
> > *(a) An adjudication from which an appeal lies as an appeal from an order; or*
> >
> > *(b) Any order of dismissal for default."*

Meaning that the existence of the decree itself presupposes the end of the dispute between the parties. Thus, the powers of the executing court are limited to the implementation of the decree brought before it unless it is objected to by the parties. For that reason, a decree cannot be altered anyhow during execution except by a superior court acting on appeal or in revision or by the court passing it on review. Discussing the jurisdiction of the executing Court in **Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker** on 7 July 1960, AIR 1961 All 1 it was observed

> *"I hold it to be a correct proposition of law that a Court executing a decree is bound by the terms of that decree and cannot go behind them. It is equally true as a general proposition that such Court can neither add to such a decree nor vary its terms."*

In this case, the hearing of the execution application was conducted on 7/5/2021. And both parties were allowed to express their views on why the decree should not be executed. On what transpired before the court, the record shows:

> ***"Mshindwa Tuzo:***
>
> *Napinga kukabidhi eneo kwa kuwa eneo husika ni langu na sipakani nao kabisa keani mimi napakana na msitu wa Serikali na kwamba wakati anaenda kuonyesha eneo husika mimi sikuwepo na pia wakati hukumu inatolewa sikuhusishwa*
>
> ***Mshinda Tuzo:***
>
> *Nimemsikiliza Mshindwa Tuzo ila sio kweli alichokisema kwa kuwa alikuwepo kwenye kila hatua ya uendeshaji wa shauri husika*
>
> ***Majibu kutoka kwa mshindwa Tuzo:***
>
> *Mimi sikuhusishwa kabisa*
>
> ***Amri***
>
> *Maamuzi – 31/5/2021"*

Unfortunately, the decision could not be delivered on the scheduled date. It was later rendered on 15/7/2021. The executing court in this case however, abstained from enforcing the decree presented before it. It turned itself into an appellate court, raising suo- moto several issues from both the trial court's proceedings and the decision relating to the composition of the trial ward and the competence of the proceedings and the decision as well including; (i)change of the tribunal members, (ii) recording of evidence from witnesses without swearing or affirmation,(iii)absence of the summary of what transpired at the visiting

of the locus in quo and (iv), determination of the matter without a proper description of the suit land and its value. The executing court went ahead to determining the raised issues without even an address by the parties an ending into nullifying the decree and the entire proceedings with instructions that the parties should file a fresh suit in an appropriate forum.

The executing court here, in my view, went beyond its powers because both the decree-holder and the judgment debtor were all comfortable with the decree. Had one of them been disappointed with its terms or the way it was arrived at, he would have exercised his right of appeal, revision or review before a competent court or tribunal. This wasn't done.

And if the executing tribunal was convinced that the decree is invalid, , the appropriate remedy would have been to refuse to execute the decree and advise the parties to take appropriate measures to rectify identified error. But not sit on appeal and determine matters that were not legally brought before it and without affording parties a right to be heard.

The application is indeed justified. The revisions application is allowed. I hereby quash and set aside the decision of the execution court and order that the case file be remitted to the execution court for composition of execution decision in accordance with the law. It is so ordered.

DATED at Shinyanga this **29th day** of **JULY** 2022.

E.Y MKWIZU
JUDGE
29/7/2022

Court: Right of appeal explained.

E.Y MKWIZU
JUDGE