

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DISTRICT REGISTRY

DC CIVIL APPEAL NO. 3 OF 2022

*(Originating from Execution Case No. 12/2020 of the Tabora District
Court and Original Civil Case No. 06/2012)*

SALUM HASSANI KIWEMBE -----APPELLANT

VERSUS

DIRECTOR TABORA MISITU

PRODUCT CO. LTD -----RESPONDENT

JUDGMENT

Date: 30/08/2022 & 30/09/2022

BAHATI SALEMA, J.:

This appeal emanates from Tabora District Court Execution Case No. 12/2020 whereby the appellant's application for execution was declared *res-judicata* and therefore on 28/09/2021 was dismissed.

Being dissatisfied with the decision of the District Court, the appellant **Salum Hassan Kiwembe** appealed to this Court couched with four grounds of appeal namely: -

- 1. That the trial Resident Magistrate erred in law and fact in holding that the case is res judicata while the same only related to execution case of which no appeal was preferred*

from the High Court to Court of Appeal by the judgment debtor.

- 2. That the trial Resident Magistrate erred in law and fact by refusing to execute Civil Case No. 6/2012 based on trivial error caused by Court on different dates of judgment and decree but both having equal award of TZS. 50,000,000/= and application to rectify the same which was rejected on 3/01/2019 but the Court on its own motion rectified it on 25/01/2019*
- 3. That the trial Resident Magistrate erred in law and fact when misapplied the law that the Court may on its own motion or upon party's application rectify any error in judgment or decree.*
- 4. That the trial Resident Magistrate erred in law and fact in dismissing the Application for execution contrary to the law on execution.*

For the foregoing grounds, the appellant prayed for the appeal to be allowed with costs as well as the decision of the District Court to be quashed.

Before going on the merits of this appeal, I find it pertinent to briefly state the history and circumstances that evolved from Original Civil Case No. 06/2012 until the present appeal. In the year 2012, the appellant Salum Hassan Kiwembe successfully sued the respondent, Director Tabora Misitu Products Company over a claim of TZS: 50,000,000 (fifty million) as compensation after sustaining injuries in

an accident that was caused by the respondent's negligent driver. The judgment was delivered on 10/10/2013.

The appellant filed Execution Case No. 24 of 2018 in Tabora District Court four years later, the application was struck out for contravening Order XX Rule 7 of the Civil Procedure Code, Cap. 33 [R.E 2002] because the decree in Civil Case No. 6 of 2012 was at variance with the judgment.

To rectify the errors, the applicant filed another application in the District Court Misc. Civil Application No. 07/2018 this time praying the Court to rectify the decree. Unfortunately, on 03/01/2019 the application was dismissed by Hon. Tengwa for being brought under the wrong provision of the law.

The court record reveals that after dismissing the applicant's application on 25/01/2019 the Court through the same Magistrate (Hon. Tengwa) on its own motion rectified the errors on the previous decree and issued a new decree which reflected the proper reliefs granted by the Court in Civil Case No. 06/2012.

Promptly, after the decree had been rectified, the applicant filed a fresh application for execution. In the cause of the hearing, Mr. Katabazi, learned counsel for the respondent filed a preliminary objection on a point of law that since the Misc. Civil Application No. 7/2008 was dismissed by the Court the applicant was barred from opening a fresh application.

The Preliminary Objection was heard orally but during submission in reply, the appellant's counsel prayed to withdraw the application and on 05/06/2020 the application was marked withdrawn. At this time the applicant did not pray for leave to refile and the trial magistrate never stated anything as to whether the applicant had a right to refile the application or not, the proceedings are silent.

A month later from the date of withdrawal, the applicant filed another Execution Case No. 12 of 2020 the case which is the basis of this appeal. In the said case the respondent's counsel Mr. Katabazi raised a preliminary objection on point of law that, the application was finally determined in Execution Case No. 7/2018 before Hon. Tengwa so the application is *res-judicata*.

After hearing the preliminary objection, the learned Magistrate Hon. Nsana agreed with Mr. Katabazi's submission that the application was *res judicata* therefore on 28/09/2021 the applicant's application was dismissed with costs hence this appeal.

When the matter came for hearing on 30/08/2022, this Court granted a prayer for an ex parte hearing after being satisfied that the summons were properly served to the respondent but the respondent opted not to show up.

Supporting his appeal, Mr. Sichilima made a very short submission that the District Court decided that Execution Case No. 12/2020 was a *res-judicata* while the application had never been

heard or determined by any court. He prayed to the Court to set aside quash the decision of the District Court.

The appellant submitted that the matter has never been heard on merit so it was wrong for the trial magistrate to consider their application a *res-judicata*.

Having traversed through the record of the previous case which was alleged to be *res-judicata*, I had to inspect the entire proceeding to find out what has been decided in the judgment that the trial magistrate considered *res-judicata*.

It is settled law under section 9 of the Civil Procedure Code, Cap.33 and leading authorities are at one that, for the plea of *res-judicata* to operate the following conditions must be proved, namely:-

- (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim under the same title;
- (ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively.
- (iii) The party in the subsequent suit must have litigated under the same title in the former suit;
- (iv) The matter must have been heard and finally decided;
- (v) That the former suit must have been decided by a court of competent jurisdiction.

Having thoroughly scrutinized the record in Misc. Civil Application No. 07/2018 I have noted that the applicant was seeking an order of the District Court to rectify errors on the decree extracted from the judgment in Civil Case No. 06/2012 but he encountered a Preliminary Objection on point of law that the application was brought under a wrong enabling provision of law.

The first paragraph on first page of the ruling that followed preliminary objection reads, I quote: -

*"The prayer of the applicant to rectify his decree under section 96, 95 and Order XX Rule 8 of the **Civil Procedure Code, Cap. 33 [R.E 2002]** and section 14(1) of the Law of Limitation Act Cap 89 [R.E 2002] was resisted by the counsel for the respondent on account of the wrong citation of enabling provision of the law."*

And the last paragraph on page 5 of the same judgment reads as quoted below;

*"Taking into account the entire statute of the Law of Limitation and the cited section 14(1) has no room to play due to the wording of section 96 of the **Civil Procedure Code Act, Cap. 33 [R.E 2002]**, the court finds itself being moved under the wrong provision of the law."*

Moreover, the record in Execution Case No. 12 of 2020 reveals that in the course of the hearing the counsel for the respondent raised a

preliminary objection to the point that the application for execution was heard and finally determined by the District Court in Misc. Civil Application No. 7/2008.

The learned magistrate in her ruling observed that: -

"It is not in dispute that an application No. 7/2018 before Hon. Tengwa was dismissed on 3rd day of January, 2019 and there is no any appeal which was preferred by the decree holder to that effect. It is not in dispute either that an application case No. 1/2019 before Hon. Ngaeje was also withdrawn on 05th June, 2020 with an order that the same should not be refiled. I join hands with the submissions of Mr. Katabazi learned Counsel that, since there is no appeal which was preferred after an application case No. 7/2018 having been dismissed, this application case was not supposed to be filed."

Different from what was pleaded in Misc. Civil Application No. 7/2008 the appellant in Execution case No. 12 of 2020 was seeking to execute the decree of the judgment in Civil Case No. 6 of 2010. It was improper for the learned magistrate to consider the application a *res-judicata* while the two applications emanated from different claims.

Also in her judgment, the learned magistrate touched the decision on Execution Case No. 1/2019 that the same was withdrawn on 5th June, 2020 with an order that the same should not be refiled.

Upon my perusal of the record in Execution case No. 1/2019, I found that the learned magistrate misconstrued submissions by the parties and the last order of the court. Here is how it reads:-

"Following the application by the applicant to withdraw the matter, and as respondent's counsel has not objected, same(sic) for there be cost and the matter be not allowed for refiling, the court allows the withdrawal and marks the same withdrawn."

However, there is no order as to costs bearing in mind the circumstances that occasioned on both sides who had advocates and the applicants having highly been attending the court in absence of the respondent. The parties to find a better way to catch a correct forum and steps where justice for both parties may be realized."

The first paragraph in the quotation above shows a reproduction of the party's submission on withdrawal of the application. The point where the Hon. Nsana was confused is to separate the submissions and orders of the court from that paragraph. The orders of the court were that "the court allows the withdrawal and marks the same withdrawn"

The words ***"there be cost and the matter be not allowed for refiling"*** were submissions by the respondent's counsel and Hon.

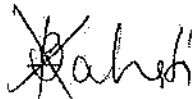
Ngaeje did not make it to the court's order after the withdrawal of the application.

Assuming that the order passed by Hon. Ngaeje was to bar the appellant from filing a fresh application still the order would not be proper because the time limit for executing decrees under Part III of the Schedule to

In the upshot, I am of the considered view that the applicant in Misc. Civil Application No. 7/2018 was litigating on a different title from that in Execution Case No. 12/2020. In the former application, the applicant was seeking rectification of the decree while in the later application the applicant was seeking to execute the decree.

For that reason, the principle of res-judicata cannot apply. Therefore, I allow the appeal and remit the case to the trial Court to accordingly hear and determine Execution Case No. 12/2020. No order as to costs.

Order accordingly.



**A. BAHATI SALEMA
JUDGE**

30/09/2022

Court: Judgment delivered under my hand and seal of the Court in the Chamber, this 30th day of September, 2022 in presence of Timothy Sichilima, learned counsel for the appellant only via virtual court.

A. Bahati

A. BAHATI SALEMA
JUDGE
30/9/2022

Right to Appeal is hereby explained.

A. Bahati

A. BAHATI SALEMA
JUDGE
30/9/2022

