

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB- REGISTRY OF MWANZA  
AT MWANZA**

**PC CIVIL APPEAL NO.68 OF 2021**

*(Arising from the Ruling of Ilemela District Court in Civil Revision No. 02 of 2021)*

**RAHEL CHOSSA.....APPELLANT**

Versus

**GABASEKI KUBOJA MGEWA.....1<sup>ST</sup> RESPONDENT**

**JAMES MUHOJA BUNZALI.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*Sept. 23<sup>rd</sup> & Oct. 7<sup>th</sup>, 2022*

**Morris, J**

It is not yet over, in civil litigation, until execution processes land to effectuality. Holding a court's decree or order is sometimes heartwarming to a winning-litigant but to translate it into tangible results, oftentimes, one travels on an overly protracted route. That is what I can simply remark for this appeal. The appellant had a marriage with the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent was the appellant's in-law: a mother to the 2<sup>nd</sup> respondent. The subject marriage was dissolved by Ilemela Primary Court on July, 22<sup>nd</sup> 2011. Auxiliary to the decree of divorce, was the order on division of matrimonial property. Dissatisfied with the division

of matrimonial property the appellant appealed to Nyamagana District Court. She also lost her desired pie of the property.

Still aggrieved by the decision of the latter court, the appellant escalated the matter to the High Court. This time, she won the appeal. The matter was remitted back to the trial Primary Court with an order that the impugned division should be guided by a prior valuation exercise of the property by a competent government valuer. Therefrom, each party would get a half of the determined value. In the course of execution of such order, the 1<sup>st</sup> respondent filed an objection against inclusion of the matrimonial home to the then on-going execution proceedings. The trial-cum-executing court investigated and dismissed her claims for want of merit. Dissatisfied with that decision, the 1<sup>st</sup> respondent herein applied for revision at the Ilemela District Court under civil revision no 2 of 2021.

In its ruling, the District Court held primarily that the Primary Court had no jurisdiction to preside over and decide on the objection proceedings before it. Consequently, it was observed that whoever was still interested, was supposed to refer the matter to the proper forum for land disputes prior to proceeding with execution processes. The appellant is now before this Court challenging the District Court's ruling thereof.

The presented petition of appeal contains nine (9) grounds of appeal. I undertake to paraphrase the gist of such grounds, in the interest

of both brevity and coherence. One, the District Court is challenged for overruling the preliminary objections raised by the appellant. Two, the court is faulted for dealing with incompetent application for revision. Three, that the court failed to hold liable the respondents who tampered with court records. Four, that the court should have held that the proceedings before it were respondents' execution-frustrating techniques. Five, that the said court failed to hold that ownership of the property had been conclusively determined by the High Court. Six, the revision before the court was sheer abuse of court process. Seven, it was wrong for the District Court to quash the executing court's decision in objection proceedings. Eight, that the execution should have been allowed to continue at the trial court. Nine and last, the appellant faults the District Court to have stayed execution without a corresponding application to such effect.

The appeal was argued by way of written submissions, after parties obtained the Court's leave. I commend them to have adhered to the filing scheduled given to each. The appellant appeared in person. Advocate Bahati Kessy appeared for the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondent enjoyed services from Advocate Naomi Charles. It is noted that the 2<sup>nd</sup> respondent opted not to file his reply submissions.

Submitting for the first ground of appeal, the appellant argued that preliminary objections filed in the district court were upheld but instead of the court striking out the applications it ordered amendments. She faults the ruling which contains the statement that such objections were overruled. To her, that is incorrect state of affairs. The 1<sup>st</sup> respondent countered by submitting that this ground is misconceived because the amendments were ordered following upholding the preliminary objections. According to the 1<sup>st</sup> respondent, the court in giving the appropriate order was mindful of the overriding objective principle.

The second ground is argued on the basis that the application for revision sought to revise a non-existent court order. Detailing this position, the appellant submitted that the subject application sought to revise the Probate Cause (*Shauri la Mirathi*) No. 77/2010 instead of matrimonial cause (*Shauri la Talaka*) No. 77/2010. She observed that the former did not represent any record from the trial primary court. Hence, she argues further that the District Court was invited to revise emptiness. The 1<sup>st</sup> respondent joined issues with the appellant by submitting that the District Court, having realized the existence of mix up of case citation ('matrimonial cause' versus 'probate cause' headings), it ruled that the appropriate one (matrimonial cause) should be adopted. So, the said court should not be faulted anyhow.

The third ground premised on what the appellant submitted that in the course of filing the amended application the 1<sup>st</sup> respondent attached a copy of the altered court decision (to indicate that the matter originated from a probate cause). Accordingly, she argued that after the District Court finding that the 1<sup>st</sup> respondent had falsified court decision, it should have held the holder thereof accountable and/or dismiss her application. Moreover, she asserted that the respondent's arguments from the bar should not be entertained. Reference was made to the case of **TUICO v Mbeya Cement Co. Ltd. and NIC (T) Ltd.** (2005) TLR 41. In this connection, the 1<sup>st</sup> respondent reiterated what was submitted in respect of the third ground above. He also stated that appellant's allegations of fraud are unfounded because no criminal machinery has been activated in such connection.

Submitting in favour of the fourth ground she stated that the revision process was initiated by the two respondents out of their secret mission to frustrate execution. She supports such view with the fact that the respondents were aware of the entire valuation and all pre-execution processes but kept quiet until very late. The 1<sup>st</sup> respondent, however, was categorical that the 1<sup>st</sup> respondent went to court in order to resist illegitimate inclusion of her property in the proceedings she had not taken part in.

The fifth ground is supported by appellant's submissions that when the High Court ordered the matrimonial property to be evaluated and divided equally between the parties to the matrimonial cause, it had taken cognizance of the fact that the said property belonged to the matrimonial domain. Thus, the appellant submitted that it was wrong for the District Court to adjudicate on the matter which had been conclusively settled by the superior court in appeal no. 13 of 2012 (Hon. Makani, J). Countering this ground, the 1<sup>st</sup> respondent submitted that she was not part of the appeal in the High Court. Hence, her rights were not considered. Further, it was submitted that the High Court was not presiding over the land dispute (matter) but rather a matrimonial appeal. Hence, ownership was not being proved in the context which the 1<sup>st</sup> respondent presented in objection and revision proceedings.

The appellant submitted further that the revision proceedings at the District Court was a blatant abuse of court process as per ground number six of the appeal. To her parties must invoke courts' powers for justice and not otherwise. The 1<sup>st</sup> respondent controverted the appellant's submissions by arguing that the step she has taken is justifiable in law.

Regarding the seventh and eighth grounds, it was submitted by the appellant that the District Court should have appreciated the fact that the matter was before the execution court and not a trial/adjudication court.

To her, in the former capacity, the court enjoys powers to investigate the objector's claim. But in the adjudicatory mandate it acts as a trial/court of first instance. Thus, she holds that if the respondent(s) wished to engage the court in the latter capacity, he/she was at liberty to proceed accordingly. She based her arguments on Order XXI Rules 57-62 of the **Civil Procedure Code**, Cap.33 R.E.2019. The 1<sup>st</sup> respondent's counsel strongly submitted against this ground. To him, the jurisdiction of the court is not in the parties' mandate but rather out of statutory creation.

He was insistent that the division of the landed property which resulted into enquiry of the ownership turned the matter into a land dispute. He was of the view that land disputes have their separate line of adjudication machinery under the **Land Disputes Courts Act**, Cap. 216 R.E. 2019. The Primary Court is not named statutory thread of courts. The Court was referred to the cases of **Shyan Thanki and Others v Palace Hotel** (1971) EA 2002; and **Maige Charles Makanza v Kagere Maige**, Civ. Appeal No. 19 of 2016 (unreported).

In respect of the ninth ground, the appellant submitted that the District Court's decision bear serious irregularities whose consequence is to stay execution of the entire process. To her, division of the landed property is one of many orders whose execution process was not subject of the revision application by the 1<sup>st</sup> respondent. It is submitted further



that, the said court ordered stay of execution while it had not been moved to grant such remedy. The 1<sup>st</sup> respondent strongly submitted against such argument. She is insisting that the District was justified to intervene in the execution the entire proceedings were tainted with illegalities, inclusive of which is lack of jurisdiction and failure to frame issues in the objection proceedings.

Finally, she prayed for this Court to allow each and every ground of appeal and grant her all the presented reliefs. To the contrary, the 1<sup>st</sup> respondent prayed for dismissal of the appeal with costs.

Having summarized the parties' material facts and submissions, this court finds that it is being called upon to decide on two (2) issues. Firstly, whether or not the District Court was legally justified to revise the decision of the primary court arising from objection proceedings. Secondly, whether or not the District Court was right to stay execution process at the primary court pending determination of the envisaged land dispute.

The District Court was moved by the section 22 (1) and (2) of the **Magistrates Court Act**, Cap. 11 R.E. 2019 (MCA). The main gist of the cited provision is to empower the subject court call for and examine the record of any proceedings in the primary court with the view to satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, before revising such proceedings, where necessary.



The obvious question which arises from the above explanation is whether the objection against the execution process in the Primary Court is also amenable to revision by the District Court. A point to note here is that, the term 'proceeding' under section 2 of MCA, includes "any application, reference, cause, matter, suit, trial, appeal or revision, whether or not between parties".

It should be noted further that the objective of objection proceedings is to protect interests of those who were not party to proceedings from which the decree has been obtained. This position is also covered in the case of **Katibu Mkuu Amani Fresh Sports Club v. Dodo Umbwa Mamboya and Another** [2004] T.L.R. 326.

Integral to this appeal, is the Primary Court decision which was revised by the Ilemela District Court. The Primary Court's proceedings arose out of the objection preferred by the 1<sup>st</sup> respondent. The relevant law governing the step taken by the objector is **the Magistrate's Courts (Civil Procedure in Primary Courts) Rules** (MCA Rules). Rule 70 thereof provides:

- (1) *Any person, other than the judgment debtor, who claims to be the owner of or to have some **interest in property** which has been attached by the court may **apply to the***

**court to release** the property from the attachment, stating the grounds on which he bases his objection.

- (2) On receipt of an application under subrule (1), the court shall fix a day and time **for hearing the objection** and shall cause notices thereof to be served upon the objector, the judgment-creditor and the judgment debtor.
- (3) No order for the sale of such property shall be made until the application **has been determined** and if any such order has been made, it shall be postponed.
- (4) On the day fixed for **the hearing**, the court shall **investigate the objection** and shall receive such evidence as the objector, the judgment-creditor and the judgment debtor may adduce.
- (5) If the court is satisfied that the property or any part of it **does not belong** to the judgment debtor, it shall make an order releasing it, or such part of it, from the attachment.

Reading the excerpt above, especially the emphasis provided in bolding, this court is of the view that: One, the objector should not knock on the doors of another judicial forum for trial before the executing court has received such objection for investigation. It is good and settled practice (**Kangaulu Mussa v Mpunghati Mchodo** [1984] TLR 348).

Two, the hearing envisaged under the above provision is by way of investigation of the objector's interest in the property being attached. Three, investigation covered here is not the substitute of adjudication or trial. Four, investigation is a process that is less intensive than the hearing of the main suit. Five, its aim is to establish a *prima-facie* interest of the objector in the property so attached.

Six, the outcome of the investigation about the lodged objection, particularly if it is not sustained, does not bar the interested party to go for litigation afresh. Seven, the investigation does not render the subsequent matter between parties as *res judicata* (**Omoke Oloo v Werema Magira** [1983] TLR 144). Eight, the court which was involved in the investigation does not become *functus officio* for the newly filed suit (assuming the fresh matter is determinable in the hierarchy to which such court belongs).

Faced with circumstances similar to the present case in **Sosthenes Bruno and Dianarose Bruno v Flora Shauri** CAT-Dar Es Salaam, Civ. Appeal No. 249 of 2020 (unreported), the Court of Appeal applied the provisions of the **Civil Procedure Code**, Cap 33 R.E. 2019 (which are *in pari-materia* with the **MCA Rules**) and laid down a precise and elaborate procedure in objection proceedings. Part of the relevant holding is quoted below:

*'Under rule 62 of that Order, the decisions of the court under rules 59 and 60 are final and not appealable, as per the decision in **Thomas Joseph Kimaro v Apaisaria Martin Carl Mkumbo and Another** [2002] T.L.R. 369 and many others. However, a party aggrieved by the decision, under rule 62 of Order XXI, may lodge a suit in the court of competent jurisdiction as per this Court's decisions in the **Bank of Tanzania v Devram P. Valambhia**, Civil Reference No. 4 of 2003 and **Kezia Violet Mato v. the National Bank of Commerce and Three Others**, Civil Appeal No. 127 of 2005 (both unreported). Obviously, where one loses in a subordinate court in a suit filed pursuant to Order XXI rule 62, has a right to challenge such a decision to the High Court according to law.'*

The above legal architecture stated, this Court finds that the 1<sup>st</sup> respondent herein was not supposed to file revision to the District Court but rather to file a land dispute in the appropriate forum for eventual full determination of her title over the property. The reasons for my view are stated herein. In principle, the District Court's revision does not determine the matter between the objector and the parties to finality. That is, the District Court cannot assume the powers of a trial court for the envisaged

cause of action. It follows therefore that the revision cannot, for instance, declare the objector a lawful owner of the attached property. Further, if the revisional court quashes the executing court's proceedings and orders, as is evident in the case at hand, parties' *status quo* will be restored. The effect is obvious, no execution will ever take off. The then objector may decide not to take any step after the ruling in revision. The whole execution exercise will thus be permanently frustrated. Moreover, if the revision proceedings are concluded and the objector decides to file a fresh suit, then time wasted in pursuit of revision will be less advantageous to parties and the court. Lastly, to allow appeal and revision proceedings to emanate from the objection process (while the end result is not to determine the matter to finality) is undistinguishable to condonation of multiplicity of litigation. No one really benefits commensurably.

The second issue aims at determining the District Court's mandate in staying execution process at the primary court pending determination of the envisaged land dispute. I have, while deliberating on the first issue, given uncertainties which obviously taint the execution process if the losing objector or respondent keeps escalating the matter higher in the court's hierarchy. This court, apart from holding that the District Court was not mandated to revise the primary court's objection proceedings;

assuming it had such powers, it should have refrained to order stay of execution in the way it did. I give the reasons below.

Vividly herein, the objection was only directed to one aspect of the matrimonial reliefs. The other orders were not envisaged or controverted by the objector. Hence, it would be unjust for, as an example, beneficiaries of an order for maintenance to wait for finalization of the land dispute settlement – maybe; all the way from the Ward Tribunal, District Land and Housing Tribunal through the High Court and finally to the Court of Appeal.

Further, the District court was not moved by the applicant thereat to give the said order. In law, reliefs are granted by the court on intertwined fold: the court has to be specifically invited whereby the enabling law and provision(s) will have to be conspicuously stated. Further, reliefs are integral part of the jurisdiction of the court. That is, before the court can grant the sought reliefs, it must ascertain whether it is adequately clothed with such mandate. Reference may be made to cases of **Patrick William Magubo v Lilian Peter Kitali** CAT-Mwanza, Civ. Appeal No. 41 of 2019 (unreported); **Alisum Properties Limited v. Salum Selenda Msangi** (*As Administrator of the Estate of the Late Selenda Ramadhani Msangi*) CAT-Dar Es Salaam, Civ. Appeal No. 39 of



2018 (unreported); and **Shabir Tayabal Essaji v Farida Seifudin Essaji**, CAT-Dar es Salaam, Civ. Appeal No. 180 of 2017 (unreported).

In the final analysis, this appeal succeeds. Grounds 6, 7, 8 and 9 of the appeal are merited on the basis and reasons disclosed above. The proceedings of the District Court in civil revision number 2 of 2021 are hereby nullified, ruling therefrom quashed and all ensuing orders set aside. I further order that the file should be remitted to the executing court for eventual processes. If the 1<sup>st</sup> respondent is still interested in pursuit of her rights in the identified property only, she is at liberty to commence the fresh proceedings in the competent forum according to law. Each party to bear own costs.



**Sgd. C. K. K. Morris**

**Judge**

**07/10/2022**

Judgement delivered today in the presence of Rahel Chossa, the appellant and Ms. Naomi Paul, learned Advocate for the 2<sup>nd</sup> Respondent and in the absence of the 1<sup>st</sup> Respondent.

**Sgd. C. K. K. Morris**

**Judge**

**07/10/2022**