

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBWA DISTRICT REGISTRY

AT BUKOBWA

MISC. CIVIL APPLICATION NO. 17 OF 2022

(Arising from taxation Cause No.16 of 2016)

ALLI CHAMANI.....APPLICANT

VERSUS

BAPTIST CHURCH OF KARAGWE..... RESPONDENT

RULING

9/8/2022 & 16/9/2022

E.L. NGIGWANA, J.

Before me is an application made under section 38 (1) (2) and (3) and 95 of the Civil Procedure Code preferred by the applicant one Ali Chamani. As usual, the said application is supported by the Affidavit deposited by the Applicant.

The facts of this case are not complicated either. This matter was still pending for determination of the application for execution before the Deputy Registrar (Executing Officer). The said execution proceeding was opened inside the Taxation Cause file No.16 of 2016 so that the orders of Taxing Master following the taxed amount therein could be executed.

The said Taxation Cause No.16/2016 resulted from (HC) Misc. Civil Application No. 29/2014 which had two prayers; **one**, application for extension of time in order to impugn the decision of the District Court of Karagwe in Original Civil Case No.03 of 2003 which the applicant herein (Alli Chamani) was the plaintiff who lost the case. **Two**, stay of execution. The said case was dismissed with costs by this court (Before Bongole, J)

The respondent therefore preferred the said Taxation Cause No.16 of 2016 which ultimately, the Deputy Registrar (Minde DR), taxed the costs to the tune of **Tshs.3, 976,000/=** against the Applicant Alli Chamani.

On 24th day of March 2022, the applicant was issued a notice to appear before the Deputy Registrar of this court on 21/04/2022 to show cause why execution should not be granted. The copies of the ruling of the Taxing Officer and the notice were annexed to the applicant's affidavit as **"A" collectively.**

There is nothing annexed to this application indicating that the applicant complied with the notice of the Deputy Registrar. Thereafter, what was witnessed is the instant application brought under section 38(1), (2), (3) of Civil Procedure Code Cap.33 R.E 2019 challenging the same execution of bill of costs where the applicant is praying to be heard and granted the following reliefs;

- 1. That, the decree is a nullity for being awarded to a non-existing entity, hence non-executable.*
- 2. That, the representative of the respondent one Dionizi Karawani is not the legal representative of the respondent*
- 3. Costs*
- 4. Any other and further relief this court may deem just to grant.*

The respondent through Pastor Dionis Karwani filed a counter affidavit and disputed all the facts.

At the hearing of this application, the Applicant submitted that this court has powers to hear this application. He cited the Court of Appeal decision in **Hassan Twaibu Ngonyani versus Tanzania Pipe Line**

Ltd, Civil Appeal No.201 of 2018 page 18. He contended that this court is the executing court.

The applicant further submitted that the major issue is the correctness of the decree against a non-existing entity. He cited the case of **Integrated Property Investment (T) and 2 others versus the Company for Habitat and Housing in Africa (SHELTER AFRIQUE)**, Misc. Commercial Application No.168 of 2020 where at page 6 it was held that illegality can be rectified even at the executing stage.

All the authorities he referred was to convince this court that the amount awarded in Bill of costs which is **Tshs. 3,976,000/=** to the respondent cannot be executed as the respondent is a non-existing entity. He therefore prayed for the court to declare that what was done in this matter was a nullity. He fortified with the case of **Full Gospel Bible Fellowship Church versus El goodness Emmanuel Rwatto**, Civil Revision No.4/2021 High Court Bukoba Registry where it was held that religious institutions have to be sued in their respective names.

Responding on paragraph 3 and 4 of the respondent's counter affidavit, the applicant said that, it is true that the pleadings reflected that in this application, the respondent was sued as the Baptist Church of Karagwe, likewise in Misc. Application No.29 of 2014 which was dismissed with costs for being time barred, though the plaint in respect of Civil Case No.03 of 2003 shows that the respondent was Pastor, Baptist Church Omurushaka. The applicant, further submitted that the issue here is the illegality and not whom to blame.

Coming on the issue of legal representative, Alli Chamani submitted that the one who had a locus to appear in this court is the member of the

Board of Trustees of the Baptist Church of Karagwe. He cited the case of **Ilela Village Council versus Ansaar Muslim Youth Centre and another** Civil Appeal No.317 of 2019, CAT Iringa Registry at page 13 and page 14 where it was held that; it is only members of the Board of Trustees who can transact on behalf of the Board. He concluded that Dionis has no such power.

In reply, Advocate Raymond Laurent for respondent submitted that; this application is not properly before this court. That, it is prematurely as it would have come by way of reference but not coming to this court by separate suit as the execution proceeding before the Deputy Registrar is still pending. Mr. Raymond submitted that the applicant was summoned to show cause why execution should not take place. That, instead of showing a cause to the executing court before the Deputy Registrar, he has now come to this court which did not summon him. Mr. Raymond added that, that the case of **Hassan Twaibu** (Supra) is distinguishable at the moment, this court is not executing court in the meaning of orders issued by the registrar exercising powers emanating from taxation matters.

Also, the case of **Integrated (supra)** is distinguishable as it discusses the remedy of the case being brought under the wrong party but in our case, the issue that the decree is not executable was at first supposed to be dealt by the Deputy Registrar as executing officer, executing orders resulting from taxation cause.

On the issue of Legal representative, it was Advocate Raymond's submission that this matter has 19 years history and the applicant himself is the one who chose who to sue and he sued Pastor, Baptist

Church Omurushaka, therefore the argument that Pastor Baptist Church of Murushaka is different from Baptist church of Karagwe has no merit.

In rejoinder, Chamani reiterated that this application is properly before this court that the executing court is the High Court and the execution proceedings are still in this registry and that the registry is the same. Responding on the issue raised by the respondent's advocate that it is the applicant who chose who to sue, he responded that, at that time of the institution of Civil Case No.3 of 2003, he was still a layperson.

After studying the record available in conjunction with the submissions of both parties which were addressed to me, I learnt that both arguments which were advanced for and against triggered the determination of competency of this application before determining the merit of this application.

It is trite that once the issue of point of law is raised or apparent to the record, whether orally spoken or put in writing by way of preliminary objection at any stage or raised by the court **suo moto**, the court should refrain from determining the merit until such point of law is disposed.

When he was replying to the submission in chief, the respondent's counsel Mr. Raymond submitted that this application is misconceived as all issues raised by the applicant pertaining challenging the execution were supposed to be raised before the Deputy Registrar in the execution file when the applicant was called upon to show cause why execution should not proceed. More so, the respondent argues that if the applicant in fact seeks to challenge the execution arising from taxation cause, he would have come by way of reference to this court. In his submission in

chief, the applicant uprightly started his speech by saying that this court has power to determine the application. In other way, the applicant opposes the respondent's stance that the application is competent as the executing court is the High Court and therefore the matter is properly before this court.

I am constrained to reproduce the provision upon which this application was brought. The law on section 38(1) of CPC(Supra) provides that:

*“ 38. -(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the **execution, discharge or satisfaction of the decree**, shall be determined by **the court executing the decree** and not by a separate suit.*

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

I have no problem concerning this court as executing court having powers to determine questions arising from execution of decree as provided in the herein above provision as it was sufficiently underscored in the case of **Karata Ernest and Others versus Attorney General**, Civil Revision No. 10 of 2010 CAT (Unreported). It enjoins that all these questions shall be determined by the executing court and not by a separate suit. In a nutshell, Section 38 of the CPC deals with the

jurisdiction of the executing court. It is confined to determining all questions arising between the parties to the suit in relation to the execution, discharge or satisfaction of the decree.

The problems which still this court has to resolve are that; did the Applicant apply the provision of section 38 correctly to file this application in this court? Is this court an executing court within the meaning of section 38 of CPC? Can the Judge of the High Court interfere the execution of taxation cause or bill of costs which was yet to be determined by the Registrar?

Explaining the difference between powers of the Registrar when dealing with taxation cases and the way those powers can be challenged, from those powers exercisable by the Deputy Registrar when issuing orders while executing a decree of the High Court, Kagomba, J. in the case of **Nizar Abdallah Hirji versus Rehema Salumu Abdallah**, Misc. Civil Application No. 34 of 2020, the High Court at Dodoma had this to say;

"It is my view that, unlike in taxation matters, the decision of the Deputy Registrar being a decision made in execution of a decree by a Court which passed the same, is a decision of this Court. It is my further view that unlike in taxation matters where a reference on a decision of a Taxing Master could lie to a Judge of the same Court, the Deputy Registrar who presides over execution matter in the executing Court is deemed to have concurrent jurisdiction with a Judge of the same executing Court".

In my view the message carried by the herein above decision is to the effect that a decision or order rendered by the Deputy Registrar of the High Court is a decision of the High Court and may be challenged by

way of an appeal, reference and/or revision to the Court of Appeal because the Deputy Registrar who presides over execution matter in the executing Court is deemed to have concurrent jurisdiction with a Judge of the High Court. **But the only way a party may challenge the orders issued by the Deputy Registrar in taxation matters or execution of bill of costs to High Court (judge) is by way of reference made under the Advocates Remunerations Order.** I have no good reasons to differ from the position laid down the here in above case. See also the case of **Sogea Satom Company versus Barclays Bank Tanzania and 2 Others**, Misc. Civil Reference No.15 of 2021

Coming to the matter at hand, one may quickly rush to say that this court is the executing court and therefore the Judge of the High Court has jurisdiction to entertain this application. However, through painstakingly looking at this application in its broadest context in which it was brought, one will discover that application was misconceived in the sense that this court lacks jurisdiction to determine it as it was not supposed to be filed under section 38 of CPC since the Deputy Registrar was not executing a Decree of this court rather was administering taxation matters thus section 38 of CPC was uncalled for in the circumstances and could not have moved this court.

As already hinted out, the taxation cause No.16 of 2016 was taxed by the DR as taxing Master under his/her powers in taxation causes and therefore the order which is being executed is executed by the High Court through the executing officer who is a Deputy Registrar and not a Judge. I am alive that the registry is one that of the High Court as submitted by Chamani but cases for enforcing bill of costs or taxation

orders are only bestowed to the Deputy Registrar of the High Court who has jurisdiction to determine and should any party wish to challenge the same is at liberty to come again in the High Court Registry **by way of Reference to the Judge of the High Court.**

The rationale of the judge being excluded in determining issues of executions resulting from taxation, in my view and among other reasons is to avoid his or her decisions if later on challenged through reference to be placed by his fellow judge of High Court as they are all judges of High Court with concurrent jurisdiction.

However, an application entertained by the judge under section 38 of CPC (supra) for matters not resulting from taxation causes (like in our case) is appealable or revisable to the Court of Appeal of Tanzania just do the orders of Deputy Registrar executing the Decree issued by this court. See **Nizar Abdallah Hirji versus Rehema Salumu Abdallah**(supra). In my view, it should be well underscored that execution of orders emanating from bill of costs or taxation do not fall within the meaning of section 38 of CPC.

In the matter at hand, the applicant was issued a notice to appear before the Deputy Registrar of this court on 21/04/2022 to show cause why execution of the taxed amount of **Tshs. 3,976,000/=** in taxation Cause No.16 of 2016 should not proceed. It should be noted that, the said taxation cause was heard interparty and no reference was ever filed by the applicant who is very senior and experienced advocate to challenge the decision of the Taxing Officer. Instead of appearing before the taxing Master (Deputy Registrar) as per notice, he filed the present

application. It is on that premise among the afore explained, I find the application incompetent.

In the event, this application is incompetent and is hereby struck out with costs.

It is so ordered.

Dated at Bukoba this 16th day of September 2022.




E. L. NGIGWANA

JUDGE

16/09/2022

Ruling delivered this 16th day of September, 2022 in the presence in the presence Mr. Raymond Laurent, learned advocate for the respondent, Hon. E .M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.




E. L. NGIGWANA

JUDGE

16/09/2022