

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL REVISION NO. 16 OF 2022**

**TAHERA SEIFUDDIN DAWOODBHAI *as administrator***

***of the Estate of the late SEIUFUDDIN DAWAOODBHAI.....*APPLICANT**

**VERSUS**

**SADOCK D. MAGAI.....RESPONDENT**

**RULING**

*Date of Last Order: 06/09/2022*

*Date of Ruling: 21/10/2022*

**E.E. KAKOLAKI J.**

Moving this Court by way of chamber summons taken out under section 79 (1) (a), (b), (c) and section 95 of the Civil Procedure Code Cap 33 R.E 2019 and Section 44(1) (b) of the Magistrates Court Act, [Cap. 11 R.E 2019], the applicant has invited this court to revise Execution Cause No. 71 of 2020 arising from Civil Case No 72 of 2000 and satisfy itself whether the Resident Magistrates Court for Dar es salaam at Kisutu acted with jurisdiction and without material irregularities in its ruling and orders dated 9<sup>th</sup> June 2022. She is therefore inviting this Court to be please to quash and set aside the said ruling and orders thereto and allow costs of the application to be in the course. The application is supported by the affidavit deposed by Tahera Seifuddin Dawoodbhai, the applicant, supporting the prayers in the chamber

summons. In response the respondent filed counter affidavit deposed by one Sadock Doto Magai, the respondent, vehemently challenging the merits of the application.

Garnered from the affidavit, the applicant is the daughter and administratrix of the estate of her late father one Seifuddini Dawoodbhai, who was also the plaintiff in RM Civil Case No. 72 of 2000 before the Resident Magistrate Court of Dar es Salaam at Kisutu, seeking among other reliefs to be declared as lawful owner of the suit premises namely Upper Floor on plot No 1459/94, Market (Indira Gandhi) street Dar es Salaam under C.T No.2585 and the prevent the respondent/defendant and two others from evicting him from the suit premises. From her averment it appears that, at all material time since her child hood, she was residing in the suit premises together with her parents, the place where she continued staying even after death of her father Seifuddin Dawoodbhai in October, 2013. To the applicant's knowledge, her father purchased the suit premise on 12<sup>th</sup> August, 1974 from one Amin Habib Walijiji Kanji, at the consideration of Tshs. 90,000, but he did not take legal steps to transfer the same in his name thus, Mr. Amin Habib Walijiji Kanji took that advantage and fraudulently sold the same to

one Mr. Abdulhamid Noor Mohamed Khatari who quickly effected the transfer of the suit premise in his name.

It is also learnt from applicant's affidavit that, her father unsuccessfully instituted a case in the Resident Magistrate Court of Dar es Salaam at Kisutu vide RM Civil Case No 72 of 2000 against the respondent here in and two others, seeking to defend his ownership, as the same was dismissed and the eviction order issued against his father.

Aggrieved by that decision applicant's father unsuccessful appealed to the High Court vide Civil Appeal No. 128 of 2000 as the appeal was also dismissed by Rugazia PRM (Ext-Jurisdiction), confirming the trial court's decision. Discontented, he filed a Notice of Appeal to the Court of Appeal but due to persistent illness he was unable to file the intended appeal thus, Sadock D. Magai applied for striking out of the Notice of Appeal vide application No. 81 of 2014, hence the said notice of appeal was struck out on 9<sup>th</sup> August, 2017. Through the notice to show cause dated 27<sup>th</sup> Day of August 2020 addressed to her as administratrix of the late father seeking to execute the drawn order dated 2<sup>nd</sup> October 2000, she discovered that the drawn order does not bear the name of the disputed premises and that, the execution was time barred since the order was dated 2<sup>nd</sup> October 2000, thus

he filed an objection to the intended execution which was determined in Execution No. 71 of 2020. The applicant averred further that, to her surprise the Court's ruling delivered on 11<sup>th</sup> May, 2022, Hon. G. Isaya, SRM (as he then was), bore the name of the suit premises which has never been indicated in the original ruling and drawn order of the court in RM Civil Case No. 72 OF 2000. According to the applicant, she has been staying in the suit premise believing that it is the family property and the property is not subject of any court execution for it is not the property mentioned in the original ruling and decree and that she has nowhere else to go in case she is evicted.

As alluded to earlier on, the respondent resisted the application and among other things contended that, the issue of drawn order referred by the applicant was for the first time raised by the applicant through objection proceedings in Misc. Civil Application No. 46 of 2018 and in which in its ruling the trial court stated the particulars of the premises to be upper floor on plot No. 1458/94 CT No. 2585 Market Street Dar es Salaam.

Hearing of the application was conducted by way of written submission as both parties were represented, the applicant being represented by Mr. Hamisi Katundu while the respondent hiring the services of Mr. John Kamugisha.

Submitting briefly in support of the application, it was Mr. Katundu's submission that, as the pleadings reflects, it is the applicant who instituted RM Civil Case No. 72 of 2000 in the RMs Court of Dar es Salaam at Kisutu against the respondent, before the respondent filed his Written Statement of Defence raising among others a counterclaim under summary suit lodged. And that following that summary suit the applicant (deceased) preferred an application for leave to defend the counter claim despite the fact that, he had never mortgaged the said property before the Court erroneously proceeded to determine the summary suit against the person who is not a mortgagor. He said in so doing the court dismissed applicant's application for leave to defend summary suit and went on to summarily dismissing applicant's suit (main suit) and order for his eviction without determining the summary suit brought by the respondent.

Mr Katundu submitted that, despite all irregularities, the trial court in its ruling and drawn order did not mention the suit property which was the subject of the order. In his view this material irregularity is fatal and in law renders the order not executable for not mentioning Plot No. 1459/94 under C.T.No.2585 located at Market Indira Gadhi Street or any property from which the judgment debtor is bound to be evicted.

According to him, since the drawn order did not mention the suit property the same was in conflict with the provisions of Order XX Rule 9 of the Civil Procedure Code, [Cap. 33 RE 2019] (the CPC), providing that, a decree of the immovable property shall contain a description of such property sufficient to identify the same and if such property can be identified by the title number under the Land Registration Act, shall specify such title number. With such mandatory requirement of the law it was unjustifiable for the Honourable Magistrate in Execution Case No. 71 of 2020 to mention the property comprising of C.T. No. 2585 located on Plot No.1459/94 at Market Indira Gadhi Street, to be the property in which the applicant is to be evicted from, Mr. Katundu stressed. In view thereof he submitted, the decree in RM Civil Case No. 72 of 2000 is not executable as it is unlawful for the court to import descriptions of the property which were not mentioned in the original decree/order. It was therefore his submission, the trial court acted with material irregularities warranting this honourable court to revise the said ruling and orders, quash and set them aside.

In response, Mr. Kamugisha was of the contrary view that, the so-called irregularities touching on the merits of the decision in RM Civil Case No. 72 of 2000 is misconceived and cannot be raised now by way of revision

because, **firstly**, the applicant being aggrieved by the decision in RM Civil Case No.72 of 2000 unsuccessfully preferred an appeal to the High Court, which appeal was dismissed on 28<sup>th</sup> September, 2001 and failed to pursue her notice of appeal to the Court of Appeal hence, the same was struck out on 9<sup>th</sup> August 2017. He referred the court to paragraphs 7.0 and 8.0 of the affidavits in support of the application and annexure SLA2 and SLA 3 and argued that, her grievances on the merit of the decision should have been raised in the said appeal and not in this revision after lapse of 22 years. **Secondly**, this revision is not seeking to revise the decision in RM Civil Case No. 72 of 2000 in which the complaint of defective drawn order is rooted but rather the ruling and order by Hon. Isaya, SRM dated 11<sup>th</sup> May, 2022 in Execution Case No. 71 of 2020. Hence the said ruling and order by Hon. Isaya, SRM cannot be faulted.

Mr. Kamugisha went on submitting on another irregularity pointed out by the applicant on none mentioning of the suit property in the trial Court's ruling and order in RM Civil Case No. 72 of 2000. Referring the court to paragraphs 8 and 10 of the counter affidavit he submitted that, the issue of none mentioning of suit property in the ruling and drawn order was solved on by the trial court on 21<sup>st</sup> November, 2018 in its ruling in Misc. Civil

Application No. 46 of 2018 which ruling satisfied the same court the issue of particulars of the suit premise was already determined when dealing with Execution No. 71 of 2020. It is therefore from that satisfaction the Court proceeded to grant the application of eviction of the applicant from the property under CT No. 2585 located on plot 1459/94 at market/Indira Gadhi Street as per annexure MKB2.

On the strength of the above factual evidence it was his submission that, since the decision in Misc. Civil Application No. 46 of 2018 which clarified the description of the suit property remained intact and unchallenged then, court was justified in mentioning the property as it did in execution case No. 71 of 2020, thus there were no any irregularity at all on the face of the said decision. While referring the court to page 16 of the said ruling annexure SLA 5 of the affidavit, he submitted that, the court was functus officio in as so far as the issue of description of the property is concerned. Hence had to follow its findings on the same issue. He summed up his submission by imploring this Court to dismiss the application for want of merit and allow the execution to proceed as the executing court was justified to grant the application in terms of Order XXI Rule 21(1) of the CPC, following applicant's



failure to satisfy the Court as to why execution should not proceed against her.

I have given due consideration to the affidavit, counter affidavit and all the materials on the record in the light of the submissions by both parties. It is Mr. Kitundu's assertion that the drawn order in which ruling and order in Execution No. 71 of 2020 is premised does not describe to the property in which an order of eviction should be directed as dictated under Order XX Rule 9 of the CPC, hence apparent irregularity on the face of decision of the court. To the contrary Mr. Kamugisha argues that, the applicant failed to raise the issue when pursuing her appeal and that since the issue of effect of the drawn order ought to be raised against the decision in RM Civil Case No. 72 of 2000 and not in the decision subject this revision, and since the issue of description of the suit property was resolved in Misc. Civil Application No. 46 of 2018 before the same trial court then, the applicant is estopped from raising it now as the decision of the trial court in Execution No. 71 of 2020, was rightly held. The question this Court is called to determine therefore is whether there is irregularities in the ruling and order of the Resident Magistrates Court of Dar es salaam in Misc. Civil Application No. 71 of 2020, dated on 11<sup>th</sup> May 2022, ordering eviction of the applicant from

upper floor on Plot No. 1459 under CT No. 2585 Market, (Indira Gandhi) street Dar es salaam.

It is a common fact that, the order or decree sought to be executed by the respondent against the applicant herein in Execution No. 71 of 2020, is the drawn order issued by the Resident Magistrates Court of Dar es salaam at Kisumu in RM Civil Case No. 72 of 2000, on 3<sup>rd</sup> October, 2000. For the purpose of appreciating the contesting arguments by parties I find it apposite to reproduce part of the drawn order in RM Civil Case No. 72 of 2000.

**DRAWN ORDER**

*The applicant prays the following orders:-*

- (1) That the applicant be granted leave to file defence to the summary suit, herein filed.*
- (2) That costs of this application be paid to the applicant.*

*This application coming for final disposal on 2<sup>nd</sup> day of October, 2020 before Honourable G. W. Mirumbe Resident Magistrate in the absence of the Plaintiff/Applicant and in the presence of Mr. Kamugisha Advocate for the Defendants/Respondents.*

**ITS HEREBY ORDERED THAT**

*The main suit is hereby dismissed as prayed eviction order is hereby issued against the plaintiff.*

*Cost to follow the event.*

*Given under my hand and seal of the court this 3<sup>rd</sup> day of October, 2000*

*Sgd:*

*Resident Magistrate*

While I am in agreement with Mr. Kamugisha that, the applicant ought to have raised the issue of defect of the drawn order subject of the present revision, I differ with him on the assertion that the same was resolved in Misc. Civil Application No. 46 of 2018, hence cannot be raised at this stage. I so do as in that matter the said drawn order was never rectified to include descriptions of the property in which the eviction order was directed to, instead it ended up making a new decree which is against the law as that application was not for decree or drawn order rectification but rather for objection proceedings. In making its own decree under the guise of interpretation of the formerly issued drawn order of 03/010/2020 cited above, the RMs Court in Misc. Civil Application No. 56 of 2018 in its typed ruling at page 10 said and I quote:

*Therefore in my opinion, what was dismissed by the court was the prayer on declaration that the plaintiff was the owner of the suit, i.e the upper floor on Plot No. 1459/94 CT. No. 2585, Market Street Dar es salaam City. And who was order to evicted was the plaintiff one Sefuddin Dawoodbhai.*

It is learnt from the impugned decision of the executing court in Misc. Civil Application No. 71 of 2020, dated 11/05/2020 that, the above quoted findings was the basis of the trial magistrate decision on the issue as to

whether in its decree/drawn order of 03/10/2000, the Court failed to mention the plot numbers of the suit plot, hence rendering the drawn order unexecutable. To let the Court speak for itself I quote part of the typed ruling at page 16:

*"...Mr. Said alleged that the ruling and the decree did not mention the plot numbers, that is inexecutable. This point should not take much of my time as I have quoted above, this point has been well elaborated that the suit plot is the upper floor on plot Ni. 1459/94 CT No. 2585 Market Street Dar es salaam. Having been determined by this court, I also subscribe to the same position.*

The follow up question would be was the act of the court in importing descriptions of the property in Misc. Civil Application No. 46 f 2018, which were not mentioned in the original decree/drawn order in RM Civil Case No. 72 of 2000, the description which were followed in Execution No. 71 of 2020, lawful in law. In my considered view the answer is no, as the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond that. As alluded to the court's act of describing the particulars of the property which were not stated in the original drawn order is tantamount to making a new decree for the parties under the guise of interpretation, something which contravenes the law. In reaching that firm

view I am persuaded by the Indian case in **V. Ramswami Vs. T. N. V. Kailash Theyar** (1951) AIR S.C, 189 where it was observed that:

*"The duty of an executing Court is to give effect to the terms of the decree. It has not 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..."*

In this matter since the trial court in Misc. Civil Application No. 46 of 2018, in the course of interpreting the original drawn order of the said Court in Civil Case No. 72 of 2000, gave descriptions of the suit premises which were never indicated in the said drawn order, and since it the said decision which was followed by the same court in Execution No. 71 of 2020 to issue eviction order to the applicant, I agree with Mr. Katundu that, the same was an irregularity warranting this court revise the ruling and order of the said Court dated 11/05/2020. I so find as the descriptions of the suit property were never drawn from the drawn order of 11/05/2000 which also is in conflict with the provision of Order XX Rule 9 of the CPC, for not providing the description of the property and specify its title number. The said Order XX Rule 9 of the CPC reads:

***9. Where the subject matter of the suit is immovable property, the decree shall contain a description of such***

***property sufficient to identify the same, and where such property can be identified by a title number under the Land Registration Act, the decree shall specify such title number. (Emphasis supplied)***

As demonstrated above, the drawn order did not describe the particulars of the property in which the applicant was to be evicted nor was it ever rectified by the respondent as provided under section 96 of the CPC, so as to comply with the requirement of the above cited provision of Order XX Rule 9 of the CPC, before an application for execution could be preferred in Execution No. 71 of 2020. Under the circumstances, I hold there was no valid decree for the executing Court to rely on to issue an eviction order against the applicant in respect of the suit premises in Plot No. 1459/94, Market (Indira Gandhi) Street, Dar es salaam under CT. No. 2585 as it did, hence the whole proceedings, ruling and orders of the executing court in Execution No. 71 of 2020 were rendered a nullity. Similar effects go to the proceedings and ruling of the trial Court in Misc. Civil Application No. 46 of 2018 which purportedly imported the descriptions of the suit property which in fact were not provided by the original drawn order in Civil Case No. 72 of 2000. The issue is therefore answered in affirmative that there as fatal irregularities in the decisions of the executing court.

Having so found, I accept Mr. Katundu's invitation and proceed to invoke the revisionary powers bestowed to this Court under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019]. I quash the proceedings in both Misc. Civil Application No. 46 of 2018 and Execution No. 71 of 2020 and set aside the rulings and orders thereto. The respondent is advised to rectify the drawn order in accordance with the law before applying for its execution if he so wishes.

Consequently, the application is allowed.

Each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 21<sup>st</sup> October, 2022



E. E. KAKOLAKI

**JUDGE**

21/10/2022.

The Ruling has been delivered at Dar es Salaam today 21<sup>st</sup> day of October, 2022 in the presence of Mr. John Kamugisha, advocate for the Respondent who is also holding brief for Mr. Hamis Katundu, advocate for the applicant, , and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
21/10/2022.

