IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVISION NO. 07 OF 2020

(C/F Application for Execution in Matrimonial cause No. 10/2015, at the Resident magistrates Court of Arusha at Arusha)

JANETH MABULA MUYA .....APPLICANT

VERSUS

JUSTINE JACKSON SWAI ..... RESPONDENT

RULING

01/03/2022 & 26/05/2022

KAMUZORA, J.

This is an application for revision brought under section 79(1) (c) and 95 of the Civil Procedure Code CPC [Cap 33 R. E. 2019]. The Applicant is calling upon this court to call for the proceedings of the Resident Magistrate's Court of Arusha in an Application for execution in Matrimonial Cause No. 10 of 2015 in order to satisfy itself of the legality propriety and correctness of the proceedings and decision thereon. The application is supported by Affidavit of the Applicant Janeth Mabula Muya.

Briefly, the Applicant and the Respondent were married until 12th December 2016 when the decree for divorce was issued by the Resident

Magistrate of Arusha. After the dissolution of their marriage the court issued an order for division of the matrimonial properties. The Respondent was given 20% of the matrimonial house and the remaining percentage of the house was given to the Applicant. The custody of the child Gryson Jaustine was pressed to the Applicant with an order for child maintenance and school fees to the Respondent.

After the matrimonial dispute was determined, the Respondent filed an application for execution in the Resident Magistrates Court of Arusha praying for his share in matrimonial house as ordered by the court which is 20%. The Applicant filed a cross claim for maintenance of the child. The Respondent's application for execution was allowed and the cross claim raised by the Applicant was partly allowed. The trial court order the Applicant to pay the Respondent the amount of Tshs. 15,118,200 in three instalments within three months. The Applicant was dissatisfied by the trial court decision hence filed the current revision application on the following reasons: -

a) *That, the trial court erred in law and fact for failure to analyse properly the valuation report of the matrimonial house consequently arriving to an erroneous decision by including the land which was not party to the matrimonial assets capable of being divided.*

b) *That, the trial court erred in law and fact for failure to appreciate the extent of contribution made by the appellant in maintenance of the child and the school fees paid by the appellants right to be paid her arrears of the maintenance and school fees of the child by the Respondent.*

c) *That, the trial court erred in law and in fact for failure to correctly ascertain the date of starting payment for the maintenance of the child consequently arriving to an erroneous decision.*

d) *That, the Trial court erred in law and in fact for giving the Applicant short time of three months for payment of Tshs 15,118,200 to the Respondent without considering the Applicants source of income but who also had duty and heavy responsibility to maintain the two infants born during the existence of their marriage.*

Hearing of the application was by way of oral submission and as a matter of legal representation the Applicant was represented with Mr. Mhyella and Ms. Thea, learned advocates while the Respondent enjoyed the service of Alfa Ng'ondya, leaned advocate.

Submitting in support of the 1st ground the counsel for the Applicant argued that, the Respondent was given 20% of the share of the matrimonial house after the dissolution of their marriage. That, during the execution proceedings the valuation was conducted and the value of the house and the land was ascertained such that the trial

magistrate combined the value of the land and the value of the house and calculated the 20% of the Applicant who is the husband the act which was not stated in the proceedings and infringed the Respondent leading her to apply for the revision praying for the value of land to be deducted from the calculation of 20% as the Respondent is only entitled of the 20% of the house and not the plot of land.

With regard to the 2nd and 3rd grounds Mr. Mhyella submitted that, on the cross claim the Applicant prayed for arrears of maintenance and school fees as awarded by the court in the amended decree dated 7th May 2017 under Item 2 where maintenance of Tshs. 200,000/= per month was ordered. That, since the order was not changed the Applicant prayed that the order should commence from the date of judgment and decree and not on the date when the decision of rectification was issued as the magistrate calculated from when the rectification order was issued.

With regard to the 4th ground Mr Mhyelle argued that, the question was whether the Applicant was capable of paying Tshs 15 million as ordered by the magistrate in execution application. That, the Applicant disputes the said order because the magistrate did not consider the earning capacity of the Applicant per month and also there was no

reciprocity in that issue as there were unequal balance of the responsibility. That, while the Respondent was ordered to pay 200,000/= per month and failed, the Applicant was ordered to pay Tshs 5, 000,000/= per month as compensation for the award of 20% the fact which he claimed to be unfair. He contended that, the amount claimed by the Respondent was required to be settled off from the amount the Applicant was supposed to pay the Respondent as maintenance. That, such fact was not regarded by the trial court and prayed for this court to consider the same.

Responding to the Applicant's submission the Respondent's counsel submitted on the issue of matrimonial house that, the principle of land states that whatever is attached to land forms part of the land. That, the trial court did not error to make the calculation on the amount entitled to the Respondent as it is difficult to separate the land and the house attached to the land.

Regarding the issue of maintenance Mr. Alfa submitted that, both the Applicant and the Respondent are responsible for maintenance of the child. That, the time when the Respondent was required to provide maintenance of the child depended on the time when the decree was fully executed.

Responding to the issue of period set for the Applicant to pay the 20% to the Respondent the counsel for the Respondent argued that, the trial court considered all the circumstance to reach that decision. He insisted that upon lapse of time set for payment matrimonial house was to be sold for each part to get the ordered share. The counsel for the Respondent finalised by stating that the current application is confusing as it shows that the Applicant was dissatisfied by the decision and thus, he was supposed to appeal and not to file the revision.

In a brief rejoinder Mr. Mhyella submitted that, the valuer understood properly the purpose of the trial magistrate order and that is why he identified the value of the house separately from the value of the land. Regarding the 2nd and 3rd ground he re-joined that, the payment of maintenance had to be from the date of the decree. Regarding the issue that the Applicant is living in the matrimonial house he re-joined that, section 58 of the Law of Marriage Act Cap 27 R.E 2019 deals with separate property of husband and wife. With regard to the 4th ground he stated that, the selling of a house for 20% is sabotage and that is why the Applicant is arguing whether the payment of 15 million within 3months is fair basing on the monthly earning capacity.

Re-joining on the issue of set off the counsel for the Applicant insisted that, it can apply to minimise multiplicity of application before the court. That, a cross claim was filed as per Order 21 Rule 16(1)(a)(b) of the CPC to ensure that she gets her rights. Regarding the claim that the Applicant had to file an appeal he submitted that the remedy from execution if one is aggrieved is revision and not appeal.

Before delving into determining the revision and reasons advance, I find it pertinent to address the issue raised during submission that the reasons posed in this revision application was fit for appeal and not revision. It is with no doubt that this application emanated from the execution order which to me the said order is not appealable. Although the wordings of the chamber application made by the Applicant somehow resembles as the grounds of appeal but the same is not an appeal but rather a revision application to this court. The law governing revision as was cited in the Applicant's application is section 79(1) (c) of the Civil Procedure Code Cap 33 R. E 2019. Section 70(1) of the CPC governs appeals to the High Court and an appeal shall lie to this court in respect of any decree passed by the Resident Magistrates Court or District court and not in respect of the execution of the Courts Decree. I

therefore find that revision application was a proper path is to file in this matter.

Turning to the application itself I will start by addressing the first reason on whether there was proper analysis of the valuation report of the matrimonial house. The counsel for the Applicant claimed that it was wrong to interpret the evaluation report by including the value of the land with the value of the house. It is the contention by the Applicant that the award of 20% of the matrimonial house was intended only for the house and not for the land thus the computation during execution should have excluded the value of the land. That was contested by the counsel for the Respondent on account that anything attached to the land is part of the house thus the value of the land should not be excluded.

In my view, the question on whether the land is to be included or not to be included in computation of the 20% awarded to the Respondent will depend on the judgement and decree of the trial court which should lead the computation during execution and not the valuation report as suggested by the counsel for the Applicant. The executing court considered the judgment and decree of the court which precisely stated that the Respondent is entitled to the 20% share of the

matrimonial house to which he found partly built before marriage. Although the trial magistrate did not precisely state that the land was excluded from computation of the 20%, by stating in the judgment and decree that the land was partly built when the parties got married, she intended to show that the Respondent did not contribute in the acquisition of the land rather he had a slight contribution towards the development of the house. Since this court was requested to go through the proceedings and see the legality, I had ample time to also go through the records of the case. Going through the untyped trial proceedings of the matrimonial cause which is the basis of the execution the petitioner who is the Applicant herein did state that before she married the Respondent, she owned that house. For easy reference I quote the said paragraphs,

" Before our marriage I had a gorofa with four rooms I built it myself. I bought a plot on 30.08.2005."

In the typed proceeding it was wrongly typed 2015 and that is why I opted to refer the untyped proceedings which is the original records of the court. With that evidence it is clear that the Applicant purchased the plot and started constructing the house before she contracted a Christian marriage with the Respondent on 2010. The evidence also

indicates that after the marriage ceremony she invited the Respondent in her house at Olorien area in Arusha. The Respondent did not contravene that evidence but supported it as evidenced by his testimony at page 50 of the typed trial proceedings which read: -

> *" During our marriage we finished the house which I met the petitioner living, we built a wall, gate, we roofed that house."*

The said evidence was collaborated by the evidence of DW 2 under page 62 when she stated that,

> *"Parties came to me and said they wanted to get married and I asked them after they get married where will they live, he said his wife has a house."*

Since it was not in dispute that the Applicant and the Respondent contracted their marriage on 10/07/2010, it is my conclusion that the Applicant had already acquired a land and built a house therein which later she invited the Respondent to live with her and the Respondent slightly contributed to the development the house. In my view it is on the basis of that evidence the trial court found that the Respondent's contribution was slight and awarded the 20% share of the house. I therefore find that the Applicant was right to state that it was not the intention of the court to include the value of the land in computing the 20% awarded to the Respondent.

I am a live of the fact that, whatever is attached to the land forms part of the land as submitted by the counsel for the Respondent but, with regard to the scenario of this matter the said principle is not applicable based on the reasons stated above. In must be noted that under the Law of Marriage Act Cap 29 R. E 2019 a party will still be entitled full to the property acquired separately. Section 58 of the Act provides that,

> *"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make,* ***a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled*** *or to prevent either the husband or the wife from acquiring, holding and disposing of any property."* (Emphasis mine).

Reading from the wordings of the cited provision above, it is with no doubt that the land and the house prior to the contracting of their marriage did belong to the Applicant. The judgement and decree of the court indicated such fact by starting precisely that the Respondent found the Applicant living in her house and the Respondent had a slight contribution toward that house. For that reason, the Respondent is not entitled to the enjoyment of the portion of the land but rather to the portion of the matrimonial house only which he slightly contributed to its

development. I therefore find that the computation during execution process was to exclude the value of the land and since the valuation report made it easy by separating the value of the land from that of the house and indicate that the value of the house is Tshs.98,696,000/= and the value of the land is 9,000,000/=, the executing court is directed to exclude the value of the land in computing the 20% of the house awarded to the Respondent. The first reason is therefore answered in affirmative.

The 2nd and 3rd reasons will be determined jointly as they interrelated on the maintenance of the child as well as the date upon which amount ordered for maintenance was to be computed. The contention is on the date to which the payment of the maintenance commences as between the date the decision was made and the date the clarification for the amount payable as maintenance was made. While Applicant claim that maintenance was to be computed from the date the order for maintenance was issued, it was the Respondent argument that the maintenance was to be computed from the date of the execution order.

The records indicates that the trial court judgment and original decree was issued on 16/12/2016 indicating that the Respondent was

ordered to maintain the child but did not indicate the amount. That brought a confusion and upon addressing the same to the trial court issued a clarification order was issued on May 2019 indicating that the amount payable as maintenance is Tshs. 200,000 per month.

It is my settled view that the computation of time requisite for the payment of maintenance is from when the trial court pronounced its judgment and in this case the trial court pronounced its judgment on 16/12/2016 when among its orders the Respondent was to maintain the child and pay for school fees. I therefore differ with the submission by the counsel for the Respondent regarding the time requisite for the payment of maintenance.

The Applicant raised a counter/cross claim against the Respondent who was duty bound to pay the maintenances of their child as per the courts order and requested for set off. It was argued by the Respondent that the issue of set off is not applicable in the application like this one. The law is clear and under Order XXI Rule 17 of the Civil Procedure Code Cap 33 R.E 2019 it provides as follows: -

"Where application is made to a court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then-

(a) N/A

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree."

The issue of cross claims is well covered under the law and the Applicant's cross claim originates from the same decree. The executing court partly considered the cross claim by allowing maintenance only for three months from the date the clarification order on the amount payable as maintenance was issued. The Applicant was dissatisfied claiming to the computation to include the whole period from when the order for maintenance was issued. I agree with the submission by the Applicant that she was entitled to the payment of the arrears arising from the original decree from when the judgment was pronounced on 16/12/2016 to the date of execution of the decree. That being the position, the 2nd and 3rd reasons are answered in affirmative.

On the 4th reason it was contended that the Applicant was unreasonably given 3 months to pay Tshs 15,118,200/= to the Respondent without regarding her earning capacity and without regarding that the Respondent was ordered to pay Tshs 200,000/= per month but still he failed, it is in view that it is the discretion of the court

to decide the proper modality in executing the court decree. In the exercise such judicial discretion the court will regard the circumstances of the case before it. The Applicant did not raise any issue before the executing court regarding her capacity in compliance to the court decree thus that cannot be raised at this stage on account that the court acted unreasonable. The 4th ground cannot stand.

In the upshoot and basing on what was stated above, I find the application to have merit. The computation of 20% share of the house awarded to the Respondent should be done in exclusion of the value of the land. The Applicant's cross claim for maintenance be considered and computed from 16/12/2016 when the trial court pronounced its judgment until the date the execution will be finalised and the amount of cross claim be set off from the amount payable to the Respondent. The revision application is therefore allowed with no order as to costs considering the relationship between the parties.

DATED at **ARUSHA**, this 26th day of May, 2022.

D.C. KAMUZORA

JUDGE