

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

PC. CIVIL APPEAL NO. 42/2021

AT DAR ES SALAAM

**(From Civil Application No. 59 of 2020, in the District Court of Kilombero,
at Ifakara; Original Civil Case No. 102 of 2005 of the Primary Court of
Mang'ula)**

TIMOTH MSELEWA APPELLANT

VERSUS

AGNES MILINGA RESPONDENT

JUDGMENT

25th Febr. & 31st March, 2022

CHABA, J.

This appeal emanates from one of the oldest cases which has lasted in Court for seventeen (17) years under the umbrella of execution. Essentially, it is one of cases with a chequered history and complex sequence of untold event. For better appreciation of those events and the facts which led to this appeal, I will albeit, briefly recount its background: -

The parties to this appeal, contracted customary marriage way back in 1992. They were blessed with three (3) children. About fourteen (14) years later, troubles and misunderstanding began in their marriage. Cruelty and general misunderstanding were claimed to have imperilled their life. On 24/04/2006, the Mang'ula Primary Court through **Shauri la Madai (Talaka) Na. 102 of 2005** dissolved their marriage and divided properties acquired during subsistence of their marriage among themselves. The appellant was given one house that the parties built on

the appellant parents' compound, six acres farm out of ten acres, one coach, one bicycle, one radio, one table, pigs and 2000 bricks. The respondent got; 4 acres out of ten, one bed with a mattress, one small radio, one small table with two chairs and 2000 bricks. Domestic utensils were ordered to be divided as the parties deemed fit.

Aggrieved with the decision of the trial Court, the appellant preferred an appeal before the District Court of Kilombero, at Ifakara and later to this Court, at Dar Es Salaam District Registry on 30th April, 2019, but he was unsuccessful in all attempts. The lower Courts records reveals further that the appellant's brother, one Christian Mselewa, did also attempt to appeal against the trial Court's decision, but it was dismissed for lack of *locus standi*. It appears the respondent in several attempts applied for execution of a decree issued by the trial Court through Civil Case No. 102 of 2005, but her effort proved futile.

There are times when the trial Court ordered eviction against him in 2017. Surprisingly, the house was found to be occupied by Christian Mselewa, the appellant's brother who complained that the house belonged to him and not to the parties. Consequently, the appellant and his brother were ordered to handover vacant possession of the house to the respondent, but they flouted the Court's Order.

It is evident from the lower Court's records that all objections raised by the appellant were eventually dismissed by the trial Court and the first appellate Court. The respondent thus returned to the trial Court in August, 2020 where she prayed for an execution of its orders.

Upon hearing both parties, the trial Court proceeded to appoint Property Master Ltd Auctioneer and Court Broker to execute the trial Court orders. In the course of executing the Court orders, the said Court Broker in September, 2020 issued a notice for vacant possession against the appellant. By typing error, they referred the case as "Kesi ya Talaka Na. 103/2005 instead of 102/2005". The appellant filed a Civil matter before the District Court of Kilombero, at Ifakara of which it was registered as Civil Application No. 59 of 2020 praying that the Court be pleased to stay execution by the Mang'ula Primary Court pending his application, which was unknown and not mentioned.

In his affidavit, the appellant deposed that the said execution had been conducted on an unknown case registered as Civil Case No. 103 of 2005. On her part, the respondent conceded and argued that it was a mere typing error. Therefore, she prayed that the execution should be ordered to proceed. After hearing, the District Court observed that the proper citation was Civil Case No. 102 of 2005 and that there was no genuine reason to stay the execution process only on the ground of the spotted clerical error. However, the appellant was aggrieved with the ruling of the District Court and preferred an appeal before this Court. When he stepped before this Court, he only argued on one ground that, the District Court erred in law and fact in allowing the Mang'ula Primary Court to continue with the execution of the main case while the matrimonial property alleged by the respondent herein, does not exist at all.

In his submission, the appellant contended that, the property so ordered by the Primary Court were not in existence while on the other

hand, he complained that the Mang'ula Primary Court did not visit the *locus in quo* (*scene of the event*) to verify the said properties. He stated that, what the parties acquired was 4 ½ acres only, two roomed house built on his father's Plot Land, a bed with mattress and a small radio make Panasonic. He therefore, prayed the matter to be tried *de novo*.

On her side, the respondent submitted that she got married to the appellant in 1992 and were blessed with three (3) children. She added that, all the properties she mentioned does exist. She argued further that if the said properties do not exist, the appellant would have informed the trial Court.

She went on to state that, the 10 acres' farm is located at Kiberege area in Kilombero District where she resides. The respondent further informed this Court that, when they got married the appellant was living in a single roomed mud house with grass thatch, but they later managed to build a four roomed bricks house with electricity. Later, they bought another place where they managed to build a 1 ½ roomed bricks house roofed with iron sheets and another house with five rooms, but it was demolished when the matter was instituted before the Court. She added that, they also acquired two radios, 4 pigs and a mattress. She stressed that, all these properties are still in the appellant's hands. She therefore prayed that the lower Courts decisions be upheld.

Having heard submissions of both parties, I now proceed to determine the appeal before me. The issue for determination is whether the appeal has merit.

Upon carefully going through the lower Court's records and oral submissions advanced by both parties, I wish to commence with the following observations:

One, it is undisputed that the marriage between the appellant and the respondent was dissolved by the trial Court way back in 2005. **Two**, the trial Court upon dissolving the marriage between the parties, it divided the properties jointly acquired during subsistence of their marriage whereby the respondent was given the farm measuring 4 acres, one house, one bed with a mattress, one small radio, one small table with two chairs and 2000 bricks, whereas the appellant was given one house that the parties built on the appellant's parents' compound, six acres farm out of ten acres, one coach, one bicycle, one radio, one table, pigs and 2000 bricks by the trial Court. **Three**, the trial Court decision which is a subject of the execution in question, is still lawful and binding. It is worthy to note that the appellant appealed against the said decision before the District Court of Kilombero, at Ifakara via **Matrimonial Appeal No. 3 of 2006** and later before this Court (Dar es Salaam District Registry) via **PC Civil Appeal No. 5 of 2019**, but his efforts ended in vain. **Four**, the decision of the trial Court is yet to be executed following several objections including the objection which is a subject to this appeal. **Five**, the appellant has been disobeying Court orders in respect of division of matrimonial properties which the trial Court declared to be the respondent's shares.

In the instant appeal, the appellant is challenging the decision of the District Court which directed the trial Court to continue with the execution processes. His main complaints were to the effect that; the

District Court erred in law and in fact in allowing the Mang'ula Primary Court to continue with the execution of the judgment and decree of a Civil Case No. 102 of 2005 while the matrimonial property(ies) alleged by Agnes Milinga, the respondent herein does not exist at all. It is apparent that his ground of appeal is centred on complaints against the trial Court decision issued way back in 2005 while the same has been finally concluded by the High Court (Dar es Salaam District Registry) in **PC Civil Appeal No. 5 of 2019.**

The complaints against the decision which has been finally concluded cannot warrant the Court of law to stay execution of the decree. The order for stay of execution can be ordered only if there is a pending appeal or an application backed by sound reasons. It is apparent that there is no any pending matter before the trial Court, be it an appeal or an application so connected with the instant case. More so, the reasons advanced as grounds to stay execution are (is) baseless and indefensible. In the light of the forgoing reasons, I find this ground to be unmeritorious.

I now turn to another ground advanced at the trial Court as one of the grounds for staying execution of the Court orders in Civil Case No. 102 of 2005, whereby the same wasn't argued by the appellant before this Court while it was the sole ground which incited him to apply for stay of execution at the District Court. The lower Courts records, unveil that the appellant called upon the District Court to stay execution of the decree on the ground that the Court Broker issued a notice of eviction in respect of the case which doesn't involve the parties. The lower Court records indicates further that the Court Broker mistakenly wrote Civil

Case No. 103/2005 instead of Civil Case No. 102/2005 in the notice issued to the appellant. When the learned counsel for the appellant entered appearance before the District Court of Kilombero, at Ifakara, he submitted that the respondent was intending to execute an order in respect of a case which does not exist. He was of the view that, since the parties did not institute a matter before the trial Court termed as Civil Case No. 103 of 2005, the same could not qualify for execution. He therefore, requested the District Court to stay execution of a judgment and decree pending hearing of his application.

Having in mind the overriding objective principle, I am of settled view that, the spotted clerical errors committed by the Court Broker was not a justifiable ground to bar execution processes. The typing error exhibited on a notice issued by the Court Broker could have been amended by the Court Broker with the leave of the trial Court. That being the case, this Court is satisfied that the findings of the District Court were sound and correct.

Owing to the nature and circumstances of this case, I am impelled to remind parties to this case and the counsel for the appellant that, this matter has been in Court for seventeen years now and the respondent had been denied her legal rights awarded by the trial Court in the year 2005 and later blessed by the first appellate Court and this Court as well. It is apparent that in the instant case, delay techniques have bunged execution of Court orders. It is trite principle of law that litigation must come to an end. His Lordship Samatta, C.J (as he then was) in the case of **Stephen Masat Wasira v. Joseph Sinde**

Warioba and the Attorney General [1999] TLR 334, remarked that:

"The law of this country, like the laws of other civilized nations, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong."

Parties to the case and Judicial officers are reminded and called upon to embrace the remarks stated in the case of **Stephen Masat Wasira** (Supra) and avoid delay techniques as they have largely contributed to delay of justice and clogged execution of lawful Court orders. The reasons advanced as grounds to stay execution process in the instant appeal are unwarrantable.

Basing on the reasons I have stated above while dealing with the grounds of appeal, I find no reason to faulty the decision of the District Court of Kilombero, at Ifakara. Consequently, I order and direct the Trial Court, Mang'ula Primary Court to expedite execution of its orders in accordance with the law in order to avoid further delays.

In the result, this appeal is dismissed in its entirety with costs.

It is so ordered.

DATED at **MOROGORO** this 31st day of March, 2022.



M. J. Chaba

Judge

31/03/2022

Court:

Judgement delivered at my Hand and Seal of this Court in Chambers this 31st day of March, 2022 via teleconference whereby the appellant and respondent were remotely present.



M. J. Chaba

Judge

31/03/2022

Rights of the parties fully explained.



M. J. Chaba

Judge

31/03/2022