

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

AT DAR ES SALAAM

CIVIL REVISION NO. 15 OF 2022

(Arising from the decision of District Court of Kinondoni in Execution No. 20 of 2021 dated
09/03/2022)

ELIZABETH PRODENSIVUS MWEREKE..... APPLICANT

VERSUS

GEORGE MINJA.....RESPONDENT

RULING

Date of last Order: 28/03/2023.

Date of Ruling: 28/04/2023.

E.E. KAKOLAKI, J

The applicant herein under the provisions of section 44(2) of the Magistrate Court Act, [Cap. 11 R.E 2019] (the MCA) and section 79(1)(c) of the Civil Procedure Code [Cap. 33 R.E 2019] (the CPC), preferred this application praying this Court to call for records of the District Court of Kinondoni in particular the ruling and order dated 9th May, 2022, for the purposes of satisfying itself as to the correctness, legality and/or propriety of the said decision basing on two grounds. **One**, the Trial District Court erred in law in

holding that, the judgment of the said District Court dated 15th June, 2020 had predetermined the mode for which execution shall be made (i.e. by attachment of motor vehicles only) and **second**, that, the Trial Court erred in law and fact in failing to hold that, the circumstances of the present case fit the manner the Applicant applied to execute the Decree of the District Court dated 15th June, 2020. The application is supported by the applicant's affidavit.

When served with the chamber summons the respondent strenuously resisted the application by filing his counter affidavit to that effect.

Briefly as garnered from the affidavit, before the District Court of Kinondoni in Civil Case No. 287 of 2019 the applicant successfully sued the respondent and obtained a decree in its decision dated 15th June, 2020 to the effect that, the motor vehicles listed therein be attached, valued and sold in a public auction and the applicant be paid 40% of the proceeds thereof. In execution of the said decree the applicant filed in the same court application for Execution No. 20 of 2021, subject of this application, praying for arrest and detention of the Respondent for reasons that, he sold motor vehicles named in the decree and never remitted any monies (40% of the proceeds) to the applicant as decreed by the Court. Having heard both parties the executing

court refused to grant the application on the ground that the applicant had to choose other mode of execution other than arrest and detention as the decree had ordered the motor vehicle to be attached, valued and sold in public auction and the decree holder to be paid 40% of the proceeds. It is from that decision which dissatisfied the applicant this application is preferred on the two grounds above stated.

Hearing of this application proceeded viva voce as both parties were represented. Ms. Regina Kiumba and Mr. Joseph Assenga, both learned counsel represented the applicant and respondent respectively. It was Ms. Kiumba who took the floor first and submitted on the first ground after adopting the applicant's affidavit to form part of her submission.

On the first ground she contended that, the executing Court was at error to predetermine the mode of execution to be employed by the application in contravention of the provisions of section 42 of the CPC that lists the modes of execution in which the party is at liberty to choose. She argued, when ordering to value, sale of motor vehicles and remit 40% of the dues to the applicant, the trial Court in Civil Case No. 287 of 2019 did not restrict the applicant to the mode of execution to be imposed but rather gave a piece of advice as it was the case in **Grant Alliance Limited Vs. Mr. Wilfred Lucas**

Tarimo and 4 Others, Civil Application No. 229 of 2020 (CAT-unreported), when the Court faced with a situation akin to the present one held that, applicant was only given advice or option to apply for execution of the decree and was free to apply for any mode of execution mentioned under section 42 and Order XXI rule 28 of the CPC, but was not compelled or directed to execute a decree on particular mode. She added similar stance was taken by the Court of Appeal in **Mohamed H. Nasser Vs. Commercial Bank Of Africa (T) Limited**, Civil Application No. 161 of 2014 (CAT-unreported), when observed that, there is no condition attached to section 42 of the CPC that before the process is put in motion, the judge should consider first attaching and selling the properties of the judgment debtor.

On the second ground she complained, the executing court was in error when failed to hold that, circumstances of the case at hand fit the manner the applicant applied to execute the decree as under section 42 of the CPC the applicant was at liberty to choose the mode of arrest and detention of the judgment debtor that was befitting the circumstances of the case, after the respondent had sold the motor vehicles and failed to remit the 40% to the applicant. It was therefore her prayer based on those grounds that, this

application be granted by setting aside the impugned decision and orders thereto while ordering rehearing of the matter.

On the respondent's side Mr. Assenga vehemently opposed the application. He submitted with force argument that, the executing Court was justified to reject applicant's application for execution since its powers under section 38(1) of the CPC were limited to execution, discharge and satisfaction of the decree as it could not go beyond what was ordered in the decree which was 'to attach, value and sale in public auction the listed motor vehicles.' He fortified his argument with the Court of Appeal decision in **Hassan Twaib Ngonyani Vs. Tanzania Pipe Line Limited**, Civil Appeal No. 201 of 2018 (CAT-unreported), where the Court observed that, an executing court has no jurisdiction to execute what is beyond the decree. He further cited to the Court the case of **Fortunata Edga Kaungua Vs. George Hassan Kumburu**, Misc. Civil Appeal No. 71 of 2019 (HC-unreported), in which this Court stressed that, court could not go beyond what is decreed during execution. According to him the decree of the trial Court in Civil Case No. 287 of 2019 issued on 15/06/2020, is closed one as opposed to an open ended decree, since it was limited to attachment and sale of the listed motor vehicles, thus the executing court could not go beyond that limit as to act

otherwise would amount to its alteration which is in contravention of Order XX Rule 3 of the CPC providing that, once the judgment is signed shall not be altered unless it is reviewed or rectified under section 96 of the CPC. He took the view that, under the circumstances the executing court had no mandate to open the closed mode of execution for being functus officio.

Regarding the application of section 42 of the CPC and the case relied on by the applicant he argued the provision is not absolute as it is subjected to other provisions of the law including the conditions and limitations attached to the case. He said in the cases of **Mohamed H. Nassoro** (supra) and **The Grant Alliance Limited** (supra) the decrees were open ended as there was no conditions attached to them unlike the one in the present matter in which he submitted the applicant ought to have chosen the mode of execution provided under S.42(e) read together with Order XXI Rule 10(2)(j)(v) of the CPC. Basing on that submission the learned counsel maintained that, the executing Court was justified to arrive to the decision reached hence prayed the Court to uphold it and proceed to dismiss the application with costs.

In rejoinder submission Ms. Kiumba while in agreement of position of the law as ascribed in **Hassan Twaib Ngonyani** (supra) that, executing court cannot execute beyond what is provided in the decree, she was of the

argument that, there was no invitation by the applicant in this matter for the executing court to do beyond what is provided in the decree. She maintained, what was prayed which was within the ambit of the decree, was arrest and detention of the judgment debtor for selling the vehicles and fail to remit 40% of the sales to the applicant the fact which is supported by paragraph 3 of the affidavit. To her therefore the cited cases of **Hassan Twaib Ngonyani** (supra) and **Fortunata Edga Kangua** (supra) relied on by the respondent are distinguishable to the circumstances of this case as the applicant never request execution beyond what is provided in the decree. Otherwise she reiterated her submission in chief and the prayers thereto.

I have dispassionately considered the rivalry submissions by the parties in respect of the mode of execution in which the applicant ought to have applied when seeking to execute her decree issue by the District Court of Kinondoni in Civil Case No. 287 of 2019 on 15/06/2020. Having subjected the said decree in Execution No. 20 of 2021 to thorough scrutiny, it is undisputed fact that applicant's application was rejected by the executing court on the ground that, she ought to have chosen other mode of execution apart from arrest and detention, since the decree had ordered for attachment, value and sale in public auction the listed motor vehicles and

paid 40% of the proceeds to the applicant the order which was not complied with by the respondent as averred by the applicant in paragraph 3 of the affidavit. Instead it is deposed the respondent sold the said motor vehicles. The issue for determination before this Court therefore is whether the executing court was justified in rejecting applicant's application.

In this matter it is not disputed that the trial court had decreed that, the listed motor vehicles be attached, valued and sold in public auction in which the applicant/plaintiff would be entitled to 40% of the proceeds. It is also evident to the Court as per the impugned ruling of 09/05/2022 that, the applicant in Execution No. 20 of 2021 had applied for arrest and detention of the respondent/judgment debtor as civil prisoner on the reason that, he had sold the listed motor vehicles and failed to remit the said 40% of proceeds to her. While I am in agreement with Mr. Assenga on the principle of law that, the executing court cannot go beyond what is decree as rightly held in **Hassan Twaib Ngonyani** (supra) and **Fortunata Edga Kangua** (supra), I do not subscribe to his proposition that, since the decree subject of this matter was closed one, then its execution by the applicant was limited to attachment, value and sale of the motor vehicles only and not otherwise. The reasons I am so viewing are not far-fetched. **One**, as rightly submitted

by Ms. Kiumba, the submission which I subscribe to, the law under section 42 of the CPC provides for different modes of execution within which the party can employ without limitations as it was correctly held by the Court of Appeal in the cases of **The Grand Alliance Limited** (supra) and **Mohamed H. Nassoro** (supra), since it is not for the Court to choose what mode of execution should a party prefer. **Second**, in this matter specifically the respondent having allegedly sold the listed motor vehicles in the decree as deposed in paragraph 3 of the applicant's affidavit, the applicant was at liberty to choose other mode of execution as the mode ordered by the trial Court was no longer executable.

I disregard the argument by Mr. Assenga that, under the circumstances the applicant ought to have chosen the mode of execution provided under section 42(e) read together with Order XXI Rule 10(2)(j)(v) of the CPC. Section 42(e) of the CPC reads:

42. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree-

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property; (c) by arrest and detention in prison;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require. (Emphasis supplied)

Given the wide options of modes of execution provided in the above section including arrest and detention of judgment debtor and the circumstances that prevailed in this matter, I find there was no reason preventing the applicant from preferring any other manner in which she could execute her decree as Mr. Assenga would want this Court to believe, since she was at liberty to choose any mode amongst the modes provided under section 42 of the CPC, after the one ordered by the trial court became ineffectual. As for Order XXI Rule 10(2)(j)(v) of the CPC, the same provides for the format or contents of the application for execution and not the mode of execution, thus irrelevant to issue at contest. The above issue is therefore answered in negative.

In light of the above this court is convinced that, the execution court was in error to reject applicant's application as it ought to have considered the materials put before it by the parties and proceed to determine whether the respondent had shown cause or not as to why execution should not be carried out against him as prayed by the applicant.

In the event, the application is allowed. I proceed to quash and set aside the ruling of the District Court of Kinondoni in Execution No. 20 of 2021 dated 09/05/2022. As the parties were heard by way of written submissions, I order that a fresh ruling be composed by another competent magistrate after considering whether the required limitations and conditions warranting grant of an order for arrest and detention of the judgment debtor are satisfied or not.

Costs in the cause.

It is so ordered.

DATED at Dar es salaam this 28th April, 2023.



E. E. KAKOLAKI

JUDGE

28/04/2023.

The Ruling has been delivered at Dar es Salaam today 28th day of April, 2023 in the presence of Mr. Joseph Assenga, advocate for the respondent who is also holding brief for advocate Ndehorio Ndesamburo for the applicant and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
28/04/2023.

