

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

CIVIL REVISION NO. 03 OF 2021

(Originating from Civil Case No. 33 of 2016 and Execution Case No. 18 of 2019)

JUMANNE SHABANI RAMADHANI

(Administrator of estate of the late Shabani Ramadhani Mgundu) APPLICANT

VERSUS

MAKENYA KASHINDYE LUTEGE 1ST RESPONDENT

HALIMA SHABANI RAMADHANI 2ND RESPONDENT

RULING

Date of Last Order: 23.05.2023

Date of Ruling: 31.05.2023

KADILU, J.

The applicant has moved this court under Sections 79 (1) and Section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] inviting the court to call for and revise the records of Tabora District Court in respect of Civil Case No. 33 of 2016 and Execution Case No. 18 of 2019 after satisfying itself whether the 2nd respondent had legal capacity to mortgage the house registered in the name of the late Shabani Ramadhani Mgundu without being duly appointed as an administratrix. In addition, the applicant moved the court to examine whether the district court of Tabora was justified to order attachment and sale of the above-named property while the beneficiaries of the deceased's estate were not afforded right to be heard on the matter which carries their rights.

The application is supported by an affidavit of the applicant. The 1st respondent filed a counter affidavit in opposition of the application whereas the 2nd respondent did not file counter affidavit, but she appeared on the day set for hearing. The applicant was represented by Mr. Kanani Chombala, the learned Advocate, the 1st respondent was represented by Mr. Akram Magoti, also the learned Counsel while the 2nd respondent appeared in person, unrepresented.

A brief background of the matter is that sometimes in 2016, the 2nd respondent borrowed Tshs. 6,900,000/= from the 1st respondent and mortgaged House No. 02 built on Block No. 5691 located at Ngoma Street, Gongoni Ward, within the District and Region of Tabora. The 2nd respondent defaulted to repay the loan whereby the 1st respondent filed Civil Case No. 33 of 2016 in the District Court of Tabora. Before the case was heard to the conclusion, the parties agreed to settle it amicably whereby the 2nd respondent committed herself through a deed of settlement to pay the loan by 30th November 2016 which by then had accrued to Tshs. 8,470,000/=.

In the deed of settlement, it was further agreed that in case of any default to pay the loan amount by the 2nd respondent, the 1st respondent would sale the mortgaged house to recover the loan. As it happened, the 2nd respondent did not repay the loan as agreed. The 1st respondent filed an application for execution in the District Court of Tabora as Execution Case No. 18 of 2019 seeking to attach and sale the mortgaged house. The application was granted. On 23rd April 2020, the 2nd respondent was issued

with a notice informing her that the mortgaged house would be sold on 5th May, 2020 to recover the loan amount.

At that juncture, the applicant herein through his Advocate filed an application at the District Court of Tabora and stayed an execution of a decree of the court which resulted from the deed of settlement. He also filed the present application urging the court to invoke revisional powers over Civil Case No. 33 of 2016 and intervene on the execution process in respect of Execution Case No. 18 of 2019 as House No. 02 was wrongly attached and the applicant being an Administrator of the deceased's estate, was not afforded right to be heard in the District Court since he was not a party to Civil Case No. 33.

When the application was called for hearing, Mr. Akram prayed to bring into the attention of the court the following points:

1. That, the applicant's application is bad in law as the chamber summons consists of two prayers at a time, making it an omnibus application.
2. That, the applicant's affidavit is incurably defective for consisting of arguments and conclusions.

Submitting on the first point, Mr. Akram argued that, the applicant is moving the court to make revision of Civil Case No. 33 of 2016 and set aside Execution Case No. 18 of 2019. The learned Advocate said the application offends the law as the applicant is trying to ride two horses at the same time which is an abuse of the court process and this court has a duty to prevent

it. He made reference to the case of Registered Trustees of ***Kanisa La Pentekoste Church Mbeya v Lamson Sikazwe & 4 Others***, Civil Appeal No. 210 of 2020, Court of Appeal of Tanzania at Mbeya.

Mr. Akram explained that the procedure for challenging Civil Case No. 33 of 2016 is different from the procedure for challenging Execution Case No. 18 of 2019 hence, the two cannot be pursued in the same application. According to him, the applicant is correct in challenging Civil Case No. 33 of 2016 by way of revision since he has no room for appeal as he was not a party to it. He however contended that the applicant was supposed to challenge the Execution Case No. 18 of 2019 by way of filing objection proceedings in the district court of Tabora, not in this court.

Mr. Akram argued that this court has no jurisdiction over Execution Case No. 18 of 2019 because it is not the executing court. He referred this court to Order XXI, Rule 57 of the Civil Procedure Code, [Cap. 33 R.E. 2019]. The learned Counsel explained that the applicant was ordered by the Resident Magistrate's Court of Tabora to file objection proceedings in the district court, but he ignored and filed the present application in the High Court. According to Mr. Akram, what the applicant is doing is forum-shopping which is not allowed in law. He prayed the application to be struck out with costs for being incompetent.

Responding to the points raised by Mr. Akram, Mr. Kanani submitted that the case cited by his fellow Advocate is distinguishable. He said in that

case, the application was struck out for the reason that the it was not signed. The applicant therein appealed and at the same time, he applied to restore the struck-out application. For that reason, the applicant was considered riding two horses at the same time. He said the circumstances of the present application are different from that case. He argued that as Civil Case No. 33 of 2016 was not heard to the finality by the district court, he was not bound to file objection proceedings therein because the applicant had an option to explore other remedies available in law.

The 2nd respondent on her part had nothing to submit concerning the points raised by Advocate for the 1st respondent because they were typical legal points whereas she is not a lawyer. Thereafter, Mr. Akram rejoined to Mr. Kanani's submission. He maintained that the modes which the applicant could use to challenge Civil Case No. 33 of 2016 and Execution Case No. 18 of 2019 are different and the forums are different as well. He insisted that the application is incompetent and it has to be struck-out so that the applicant may go back to the district court to file objection proceedings.

From rival submissions of the learned Advocates, it is apparent that the first point raised by Mr. Akram is critical because it shakes the jurisdiction of this court to determine the instant application. After a careful scrutiny of the applicants' affidavit and submissions by their Advocate, I now turn to determine the application before me. It is Mr. Akram's contention that the court has no jurisdiction to deal with Execution Case No. 18 of 2019 rather,

it should be challenged by the applicant filing objection proceedings in the executing court.

Mr. Kanani stated that the beneficiaries of the estate of the late Shaban Ramadhan Mgundu were not afforded an opportunity to be heard when the matter was determined in the district court of Tabora. Notwithstanding, their property rights are now being threatened by the decision which they cannot appeal against. It is on record that the 1st respondent intends to sale House No. 02 to recover his money lent to the 2nd respondent. It is stated in the affidavit that the said house is registered in the name of the late Shaban Ramadhan Mgundu so, the 2nd respondent had no legal right to mortgage it.

I wish to point out that as far as civil cases are concerned, this court derives its revisional powers under Section 79 (1) of the CPC which provides:

"The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears- (a) to have exercised jurisdiction not vested in it by law; (b) to have failed to exercise jurisdiction so vested; or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it deems fit."

From the foregoing provision of the law, in an application of revision like the present one, the applicants must show that there is an error material to the merits of the case involving injustice. I have carefully gone through

the entire records of the district court. It is not in dispute that the present application arises from Civil Case No. 33 of 2016 to which the applicant was not a party. The case ended by deed of settlement signed by the parties and which was sought to be executed through Execution Case No. 18 of 2019. The record shows that the original case was contractual in nature. It is an elementary principle under the doctrine of privity of contract that contractual rights and duties only affect the parties to a contract. This means that contractual rights are only binding on, and enforceable by, the immediate parties to the contract. A person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party.

Among the cherished cardinal principles of the law of contract is the sanctity of a contract. Once parties competent to contract have entered into an agreement freely for a lawful consideration and lawful object, the contract entered becomes sacrosanct. That is, the parties become bound by the terms and conditions stipulated and each has to fulfil his/her part of bargain. Neither a third party nor courts should interpolate or tamper with the terms and conditions therein. The court is not supposed to accept any prayer from the party which amounts to interpolation of new terms and conditions as doing so will amount to tempering with the agreement the parties had entered into. The court's role is to give effect to what the parties have agreed upon.

Having set out the above legal principles, I am of the considered view that the applicant being a third party who is a foreigner to the contract, has

no power to sneak into what the contracting parties have agreed upon. His mandate is limited to the subject matter of the execution which he alleges that he has interest over the attached property. To that end, he can only challenge the mode of execution, not the agreement itself that is, Civil Case No. 33 Of 2016. As rightly contended by Mr. Akram, the only avenue available to the applicant is to file objection proceedings in the district court to challenge the attachment and the intended sale of House No. 02.

The Law is very clear about the procedure and remedy available as far as execution is concerned. Where there are any objections, the same have to be determined prior the execution is granted. Hence a person against whom the execution has been preferred is required to raise his/her objection before the execution order is made. When the matter was before the district court for the hearing of the application for execution (Execution Case No. 18 of 2019), the applicant herein did not raise any objection as clearly seen on the record. So, until the application for execution was determined and an order for execution issued, the applicants had no objection.

Thus, preferring an application for revision after the order of execution had been made was improper. This is to say, the present application for revision lodged in this court is misconceived in law. The contention that the applicant was denied right to be heard is an afterthought as he could have filed objection proceedings to contest the execution if he really had a genuine claim. However, he chose not to follow that path instead, he claimed to be condemned unheard. His other assertion that the suit property is the

deceased's estate is also misplaced as the same cannot be determined by this court at the revision stage.

It is for the reasons above, I hold that the present application is incompetent before the court and it is hereby struck out with costs.

Order accordingly.


KADILU, M.J.,

JUDGE

31/05/2023

Ruling delivered in Chamber on the 31st Day of May, 2023 in the presence of Mr. Jumanne Shabani, the applicant, Mrs. Halima Shabani Ramadhani, 2nd respondent and Mr. Akram Magoti, Advocate for the first respondent who is also present before the court.




KADILU, M. J.

JUDGE

31/05/2023.