

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB – REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 20 OF 2023

(Arising from the Judgment of the District Court of Kinondoni in Matrimonial Appeal No 3 of 2022, Originating from Primary Court of Magomeni in Matrimonial Cause No 109 of 2012)

ANISA CHIWANGO APPELLANT

VERSUS

FARIDA ISSA LUKANGA (as administratrix of the estate of the late FAROOK ABDULMAJID) RESPONDENT

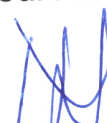
JUDGMENT

09/08/2023 & 23/08/2023

M.MNYUKWA, J.

The appellant in this appeal is the petitioner in the matrimonial cause No 109 of 2012 at Magomeni Primary Court (the trial court) against the then respondent, Farook Abdulmajid. The respondent is now a deceased and the administratrix of his estate, Farida Issa Lukanga is now a respondent.

It is on record that, the Matrimonial Cause No 109 of 2012 proceeded ex parte against the then respondent, where the trial court issued a decree of divorce and gave an order on the division of matrimonial properties, custody of children and maintenance of the issues of marriage. Upon being aware of the said decision, the then respondent filed Revision Application No. 10 of 2013 before the District Court of Kinondoni. Among



other things, the then respondent, who was the applicant in the said Revision Application, complained about denial of a right to be heard at the trial court. After hearing both parties to the case, the District Court ruled out that the then respondent was denied a right to be heard in the trial court and therefore, proceeded to quash and set aside all order and proceedings of the trial court and ordered trial *denovo* before the same magistrate so as to hear both parties.

This order welcomed a number of a legal battle between the parties where by some of them were struck out for being *res-subjudice* as the parties did not go to the trial court as ordered. Finally, the appellant filed a fresh petition which is Matrimonial Cause No 84 of 2017 before Kinondoni District Court which was heard to the finality. Ultimately, the court declare the marriage between the parties dissolved and gave other relief(s) subsequent to the grant of the decree of divorce.

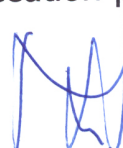
The decision in Matrimonial Cause No 84 of 2017 did not amuse the then respondent, he challenged the same by filling Civil Appeal No 6 of 2020 before the High Court, Dar es Salaam registry. When determining the said appeal which was heard interparties, the court addressed the issue of the competence of revisional proceedings which resulted the filing of Matrimonial Cause No. 84 of 2017 which was subject to appeal before it.



After hearing both parties, the proceedings of the Revision No 10 of 2013 was quashed and set aside and all subsequent proceedings including the Matrimonial Cause No 84 of 2017 were also quashed and set aside. The reason being, the remedy for setting aside ex parte Judgement was not to file Revision Application and therefore, the orders emanated from Revision Application No 10 of 2013 had no legal stand.

The legal battle between the parties did not end there, on 18/01/2022, the appellant wrote a letter to the Magistrate in charge of the Primary Court of Magomeni to execute the decision of Matrimonial Cause No 109 of 2012. The trial court gave its decision on the application for execution and ordered the administratrix of the estate of the then respondent, Farook Abdulmajid to hand over the fruits of the decree except the maintenance order.

The above decision of execution provoked the administratrix of the estate of the late Farook Abdulmajid who appealed against the execution order in the District Court of Kinondoni. The administratrix, who is now the respondent, filed five grounds of appeal to challenge the decision of the trial court in execution. After hearing the parties, the District Court determined only one ground which touched the jurisdiction of the trial court in the application for execution. After hearing, the District Court nullified the decision of the trial court in the execution proceedings for a



reason that, it was not clothed with the jurisdiction to hear and determine the matter since the then respondent is now a deceased and a decree cannot be executed against the person who is dead. Since the point of jurisdiction disposed of the matter, the remaining ground of appeal were not determined.

That decision was not happily received with the appellant who filed the present appeal with four grounds of appeal as reproduced hereunder:

- 1. That the honourable district court of Kinondoni erred in law and in fact by holding that the primary court of Magomeni had no jurisdiction to entertain the Application for execution by the applicant in the circumstances where the spouse has died.*
- 2. That the honourable district court of Kinondoni erred in law and in fact by failure to see that the primary court of Magomeni distributed the matrimonial properties at the time when the late **FAROOK ABDULMAJID** was still alive.*
- 3. That the honourable district court of Kinondoni erred in law and in fact by failure to see that the two decided cases (Judgments) referred and considered in the Judgment were total different and distinguishable in the circumstances.*
- 4. That the honourable district court of Kinondoni erred in law and in fact by failure to see that the hounorable primary court magistrate has jurisdiction to execute its decision issued when the parties were alive even if one party dies during or before execution.*

At the hearing of the present appeal, the appellant was represented by Hussein Mtembwa, learned counsel and the respondent enjoyed the legal

services of Omary Mdemu, learned counsel too. With the prayer of the parties and with the leave of the court, the matter proceeded by way of written submissions. I commend the parties for filling their respective submissions as ordered.

In his submissions in chief, the appellant counsel argued altogether the four grounds of appeal as they are interrelated. In brief, it was his submissions that, when the decree of the Matrimonial Proceedings No 109 of 2012 was issued, both parties to the case were alive, and the then respondent filed Revision Application No. 10 of 2017 which resulted into the filling of Matrimonial Cause No 84 of 2017. He went on that, the Civil Appeal No 6 of 2020 nullified the decision of Revision Application and its subsequent proceedings. He added that, the decision in Civil Appeal No 6 of 2020 had the effect of restoring the judgment of the primary court of Magomeni in Matrimonial Cause No 109 of 2012.

The counsel for appellant further submitted that, the appellant applied before the trial court to execute the decree by virtue of the provision of Rule 58(1),(2) and (3) of the Magistrates' Court (Civil Procedure in Primary Courts) Rules. He was the view that the decision of the trial court was capable of being executed and the trial court had the jurisdiction to hear and determine the application for execution because the then respondent was still alive when the decree was issued.



The appellant's counsel was of the view that, the presence of the judgment in Matrimonial Cause No 109 of 2012 entitle the appellant to enjoy what she was given. He averred that, when the decree at the trial court was passed, the properties subject to execution was in the hands of the respondent when he was alive, whether the same has been now sold out or not, it is a matter of evidence through objection proceedings.

He referred the case of **Hamis Mohamed (as administrator of the estate of the late Risasi Ngawe) v Mtumwa Moshi (as administrator of the late Moshi Abdallah)** [2020] TZCA 13 (TANZLII) to say that the decision of the lower court which is not reversed by the superior court remains intact.

To support his appeal, the counsel distinguished the case of **Jacquiline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others** [2022] TZHC 1694 (TANZLII), the case of **Mr. Anjum Vicar Saleem Abdi v Mrs. Naseem Akhtar Zangie**, Civil Appeal No 73 of 2003 and **Leticia Mtani Mhonde v Adventina Valentina Masonyi**, Civil Appeal No 521 of 2021 with a present case by stating that, in the above cited cases, the decision was to the effect that, where one of the spouse died, the surviving spouse cannot seek distribution of the matrimonial assets in a matrimonial cause and that, any claim or

perceived right thereto, must be sought in the probate and administration cause.

He said in the present case the decree was issued while the other spouse was alive and the same remain intact. He thus prayed the appeal to be allowed.

Contesting, the respondent counsel supported the decision of the District Court of Kinondoni which nullified the decision of the primary court of Magomeni as the same was not clothed with jurisdiction when entertaining the application for execution while the respondent is dead. He said that, it was illogical for the appellant to execute the decision against the administratrix of the estate of the late Farook Abdulmajid since those properties were not in her hands.

He went on that the District Court was correct to rely on the decision of **Jacquiline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others** (supra) and **Leticia Mtani Mhonde v Adventina Valentina Masonyi**, (supra) and insisted that the primary court had no jurisdiction to entertain application for execution since one spouse died. He retires by stating that if one spouse died, family court lose jurisdiction on matrimonial issues. He therefore prayed the appeal to be dismissed.



Now, it is upon this court to decide on the grounds of appeal as presented by the appellant which raised only one issue for consideration and determination that is whether the District Court of Kinondoni was correct to say that the Primary Court of Magomeni was not vested with the jurisdiction to determine the matter.

Admittedly, the issue of jurisdiction is a cornerstone which goes to the root of the matter. It is a trite law that any decision given by a court which is not vested with the power to hear and determine the matter is nullity and unenforceable. The question of jurisdiction is a matter of law as the parties cannot give the court jurisdiction which it does not possess. Thus, it is upon the court to satisfy itself before hearing the matter if it has power to do so under the law.

Coming now to our appeal at hand, the brief fact narrated above, gives out a clear picture that the appellant filed the application for execution to execute the decree of the Primary Court of Magomeni in Matrimonial Cause No 109 of 2012. Parties are not in dispute on the existence of this decree. They locked horns on the question as to whether the decree can be executed while one of the spouse died.

It is the view of the District Court Magistrate and the respondent that since one of the party in original case which is the Matrimonial Cause No



109 of 2012, Farook AbdulMajid is now a deceased, a decree cannot be executed against the legal representative of his estate.

The question now is, whether that is the correct position of the law. The respondent sides with the decision of the District Court which relied its decision in the case of **Jacquiline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others** (supra) and **Leticia Mtani Mhonde v Adventina Valentina Masonyi**, (supra).

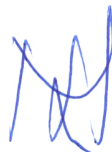
In the outset, I have to state that the above cited cases are distinguishable with our case at hand. As it was correctly stated by the appellant counsel, the circumstances in the above cases concerns with a spouse who died before the finalization of the case in which the matrimonial case must abate. This is different with our case at hand in which the decree was issued and the then respondent attempted to challenge it but in vain. Therefore, the circumstances cannot be the same.

To my understanding, where a Judgment debtor dies before the decree has been fully satisfied, it is the right of the holder of a decree to apply to a court which passed it for purpose of executing the same against the legal representative of the deceased. It is apparent that, when the deceased dies, the administrator or administratrix as the case may be, who is also known as a legal representative, steps into the shoes of the deceased as far as his assets and liabilities is concerned.

Therefore, if it happens that the Judgment debtor died before the decree is satisfied, the same can be executed to his legal representative as the decree does not abate. However, the legal representative is liable to the extent of the property of the deceased/Judgment debtor which come to his hands as the administrator or administratrix at the time when he/she was appointed to take charge in the office of administering the estate of the deceased. Whether at the time of execution by a decree holder those properties are in his possession or not, that is the question of evidence which need to be determine in due course.

From the above analysis, it is my humble view that the District Court of Kinondoni erred to hold that the Primary Court of Magomeni had no jurisdiction to entertain the application for execution since one of the spouse died while the decree issued was not satisfied, and the legal representative is present. Thus, it is my conviction that the Primary Court of Magomeni clothed with the requisite jurisdiction to entertain the application for execution. That being said and considered, I allow the appeal.

In the event, the appeal is allowed, the decision of the District Court is quashed and set aside. Since the other grounds of appeal were not determined by the District Court, the file is remitted back for it to



determine the other grounds of appeal. I refrain to make an order for costs since this appeal originates from the Matrimonial cause.

It is so ordered.

Right of appeal explained to the parties.




M.MNYUKWA

JUDGE

23/08/2023

Court: Judgment delivered in the presence of the appellant and respondent's counsel.



M.MNYUKWA

JUDGE

23/08/2023