IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 32 OF 2022

(C/F Misc. Land Application No. 9 of 2022)

THE REGISTERED TRUSTEES OF KHOJA SHIA ITHNA ASHER JAMMAT..... APPLICANT

VERSUS

ALIASGHER MUKTAR SAAJAN.....RESPONDENT

RULING

28/07/2023 & 29/08/2023

SIMFUKWE, J.

This application was made under **section 78(1)** and **Order XLII rule 1(a) of the Civil Procedure Code, Cap 33 R.E 2019**; whereas the applicant moved this Court to review its ruling in Misc. Land Application No. 09 of 2022 delivered on 10th day of November, 2022. In the said application, the applicant herein had implored the court to summon the respondent and require him to show cause as to why a balance of Tshs

300,000,000/-which is a decreed sum in Land Case Appeal Number 07 of 2017 should not be settled in full satisfaction of the decree. In the alternative, the applicant prayed the court to order the respondent to be arrested and committed to Prison as a Civil Prisoner in case of disobedience of the first prayer.

This court struck out Misc. Land Application No. 9 of 2022 in order to avoid pre-empting Misc. Application No. 11 of 2022.

Consequent to the above decision the applicant filed the instant application on the following grounds:

1. *That, the decision/Ruling and Drawn order was made on manifest error as it denies the Applicant her constitutional right to be heard in Misc. Land Application Number 09 of 2022.*
2. *That, there is apparent error on the face of records as the Court was with no jurisdiction to order the Applicant to re-file her application after determination of the intended application for leave to appeal to the Court of Appeal and the Intended Appeal, in case the said matters will be determined in her favour while the Respondent has not applied for such prayer and has not applied for stay of execution of decree emanating from Land Appeal No. 7 of 2017 High Court of Tanzania at Moshi Org. Application No. 54 of 2016 Moshi District Land and Housing Tribunal.*
3. *That, the decision was made on manifest error as the court decided on what was not before it and was not*

prayed for by the parties hence arrived at erroneous decision which caused miscarriage of justice to the Applicant.

4. *That, there is apparent error on face of records as the court did not decided (sic) on what the parties has submitted, that is on Preliminary Objections, and the court went on to decide on the matter which was not before it causing miscarriage of justice to the Applicant.*
5. *That, there is apparent error on face of records as the decision was made in confusion of the two applications/proceedings which by then were pending before the Court, that is, Misc. Application Number 11 of 2022 and Misc. Land Application Number 09 of 2022 which were distinct in nature. Hence causing miscarriage of justice to the Applicant.*

The matter proceeded through filing written submissions, the applicant was represented by Mr. Gwakisa Kakusulo Sambo, learned counsel while the Respondent enjoyed the service of Mr. Martin Kilasara, learned counsel.

The learned advocate, Mr. Sambo started his submission by narrating the historical background of this matter, which I have already covered in a nutshell herein above.

Supporting the first and second grounds of review in respect of jurisdiction, Mr. Sambo submitted that the court was not vested with jurisdiction to stay the proceedings of execution in Misc. Land Application Number 9 of 2022 because in law the High Court has no

jurisdiction to stay the execution of its own decree. He argued that such power is vested to the Court of Appeal by virtue of **rule 11 of the Court of Appeal Rules 2009, GN 368 of 2009** as amended by **Tanzania Court of Appeal (Amendment) Rules 2017**. It was stated that the act of this court to strike out the application for execution filed by the Applicant and barring the applicant to re-file it pending the intended application for leave to appeal to the Court of Appeal of Tanzania and result of the intended Appeal, is contrary to the law and the court acted without jurisdiction.

Mr. Sambo continued to elaborate that **Rule 11(2) of the Court of Appeal Rules** as amended, clearly states that an appeal to the Court of Appeal is not a bar to the execution of the decree which is being appealed against. He cemented his argument with the case of **Jonas Bethwel Temba vs Paulo Kisamo and Another, Civil Application No. 17 of 2014,** Court of Appeal at Arusha (unreported), and insisted that it is the Court of Appeal only which has jurisdiction to stay execution of the High Court Decree where there is Notice of Appeal in existence and the institution of appeal to the Court of Appeal is not a bar to the execution. That, the said rule state further that there is a condition to be fulfilled by the applicant for her request for stay to be granted.

Mr. Sambo was of the view that after striking out the application for execution by civil prisoner on 10/11/2022, was an error on the face of records for the High Court to bar and prohibit the Applicant to file another application for execution pending hearing and determination of the intended appeal to the Court of Appeal. It was noted that such error needs to be reviewed. It was insisted that barring the applicant to file

application for execution of a decree in Land Case No. 7 of 2017 denied the applicant her right to be heard.

It was submitted further that in Misc. Land Application No. 11 of 2022 which this court took note of, the Respondent had attached a notice of appeal to the Court of Appeal. It was argued that it is well settled principle that when a notice of appeal if filled, the High Court remains with very limited jurisdiction. Reference was made to the case of **Yohana John Kavishe vs The Registered Trustees of E.L.C.T North Central Diocese, Civil Revision No. 6 of 2021**, (HC) in which at page 9 and 10 the Court quoted with approval the decision of **Matsushita Electric Co. Ltd vs Charles George t/a G.G Traders**, Civil Appeal No. 71 of 2001, in which it was held that:

> *"Once a notice of appeal is filed under rule 76, then this Court is seized with the matter in exclusion of the High Court, except for application specifically provided for such as leave to appeal, provision of a certificate on point of law, or execution where there is no order of stay of execution from this court."*

On the 3rd ground of review, it was Mr. Sambo's contention that the court made a manifest error on the court's records because it granted the prayers which were not before it neither were prayed in chamber summons or any part to the proceedings. Hence, ended in reaching erroneous decision. To support his argument, Mr. Sambo made reference to the case of **William Getaru Kegege vs Equity Bank and Another, Civil Application No. 24/08 of 2019** CAT at page 14 and 15 where it was held that:

"In the Managing Director, Kenya Commercial Bank (T) Limited (supra), we were confronted with an analogous situation. There like here, the applicant was granted what he did not pray for. The applicant had applied for leave to appeal but the High Court determined an application for a certificate on point of law, which was not before the it. We held:

> *"We are of the settled mind that the High Court fundamentally erred in law in failing to determine the application for leave to appeal and instead purported to determine an application for a certificate on point of law which was not before it. The error cannot be left to stand as it prejudices the Applicants. We accordingly have no option but to invoke the Court revision powers to nullify and set aside the ruling and order."*

Likewise in the application at hand, what was before the court was the determination of the Preliminary Objections that were raised by the Respondent and not application to prohibit the Applicant from filing execution proceedings for her to enjoy the fruits of the decision of this court.

It was the opinion of Mr. Sambo that to bar filing of execution proceedings against Land Case Appeal No. 07 of 2017 prejudiced the right of the Applicant to enjoy the fruits of the decree of this court. He insisted that the submissions which were before the court were neither a prayer of staying the execution proceedings nor prayer to bar filing of

execution in Land Case Appeal No. 07 of 2017. Thus, it was a manifest error for the court to grant what the parties did not pray for and granted what is not streamed from the pleadings.

The learned counsel noted that this court has right to raise new issue depending on the circumstance of the case in case it comes up with a new issue when composing its Ruling or Judgment. However, the court has the duty to give right to the parties to address it on the new issue or concern that has been raised by the court *suo moto* prior to the issuance of the Ruling or Judgment. He cited the case of **Said Mohamed Said vs Muhusin Amiri, Civil Appeal No. 110 of 2020** in which the Court of Appeal of Tanzania at page 6 said that:

> *As to what should a Judge do in the event a new issue crops up in the due course of composing a judgment, settled law is to the effect that the new question or issue should be placed on record and the parties must be given opportunity to address the court on it. We are fortified in that position by our earlier decision, in Scan-Tan Tours Ltd v ·The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported) where, after referring to Mulla in his book on The Civil Procedure, Vol. II, 15th Edition at page 1432 and the cases of Hadmor Productions v Hamilton (1982) 1 All ER 1042 and Blay v Pollard & Morris, 1930 1 KB 311, the Court concluded that:*
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> *"We are of the considered view· that generally a judge is duty bound to decide a case on the issues on record and*

that if there are other questions to be considered they should be placed on record and the parties be given opportunity to address the court all those questions."

In the case at hand, Mr. Sambo was of the view that this court raised the issue of barring the Applicant to file the application for execution by Civil Prisoner pending determination of the intended application for leave and intended appeal to the Court of Appeal of Tanzania without according parties right to address the court on the issue or concern.

On the 4th ground of review Mr. Sambo believed that the court made an error as it did not decide on what the parties has submitted and decided on what was not submitted by the parties without according right to the parties to address the court to the new issue and or concern, which it raised. He added that, the parties had submitted on the preliminary objections and they were expecting the ruling on such preliminary objections. However, the court did not decide on what was submitted before it and went on to decide on the matter which was not before it. It was suggested that the attention of this court is needed so that the proper decision can be made on what was before the court.

On the ground 5th ground of review, Mr. Sambo submitted that the court mixed up two applications of the same parties, to wit Misc. Application No. 11 of 2022 and Misc. Land Application No. 9 of 2022, which were distinct in nature hence causing miscarriage of justice to the Applicant. That, in Misc. Application No.11 of 2022, The Respondent was seeking extension of time while in Misc. Land Application No. 9 of 2022 the Applicant herein was seeking for an order of this court to arrest and commit the Respondent in prison for his failure to comply with the order

of this court. It was contended that the Respondent was aggrieved by the decision of the High Court in Land Case Appeal No. 07 of 2017; thus, his grievances and intention to Appeal itself if so filed could not operate as a bar to Misc. Land Application No. 09 of 2022 which seeks to execute the Judgment and Decree in Land Case Appeal No. 07 of 2017. That, Misc. Land Application No. 09 of 2022, which was execution application, could not in any way pre-empt Misc. Land Application Number 11 of 2022 since under **Rule 11 (2) of the Court of Appeal Rules** and **Order XXXIX Rule 5(1) of the Civil Procedure Code, Cap 33 R.E 2019** a process to initiate appeal or appeal itself is not a bar to execution. Also, an intended application for leave to Appeal and the intended Appeal by the Respondent cannot be a bar to Misc. Land Application No. 09 of 2022 to proceed because Misc. Land Application Number 09 of 2022 was an application for execution which could not pre-empt an application for extension of time to file leave to appeal. That, it is that mixing up of the applications, which are different and distinct in nature, that needs to be reviewed to put the records clear.

Mr. Sambo prayed this court to grant all the prayers in the Memorandum of Review.

Contesting the Applicant's submissions, Mr. Kilasara for the respondent on the outset submitted that Mr. Sambo's assertion that this court ordered stay of the execution of decree in Land Appeal No. 07 of 2017 is frivolous and grossly misconceived.

Mr. Kilasara elaborated that it is apparent from the record that Misc. Civil Application No. 9 of 2022 was merely struck out with leave to refile; it was never dismissed. Thus, the Applicant's right to be heard

has not been curtailed as he tries to suggest. Reference was made to the case of **Pita Kempap Ltd vs Mohamed I.A. Abdulhussein**, **Civil Application No. 128 of 2004** (CAT) in which His Lordship Ramadhani J.A. (as he then was) at page 5 held that:

> *"When a court strikes out a matter that does not mean that the matter has been refused. All that the court says is that the matter is incompetent and so, there is nothing before the court for adjudication. So, the proper cause of action is to rectify the error and to go back to the same court."*

From the above authority, Mr. Kilasara was of the view that since the decision which is subjected to review is not a decree and considering the fact that the order striking out the said application did not conclusively determine the rights of the parties, then, an application for review is frivolous and grossly misconceived. He explained that in the same vein the court refrained itself from determining the merits of the Preliminary objections raised by the Respondent but it did not order stay of execution as the Applicant tries to insinuate. The learned advocate argued that Rule 11 (2) of the Rules (supra) which was cited by Mr. Sambo is irrelevant as it refers to criminal appeals. That, the cited case of **Jonas Bethwel Temba** (supra) is distinguishable and inapplicable in the circumstances herein.

It was further replied that there is no dispute that the Respondent has already preferred and served the Applicant with Misc. Land Application No. 60 of 2022 seeking extension of time to apply for leave to appeal to the Court of Appeal. That, this Court has the requisite jurisdiction,

and its merits are yet to be determined.

Mr. Kilasara emphasized that in as much as the impugned decision did not finally and conclusively determine the rights of the parties thereof, then the present application for review is bad in law and incompetent before this court.

Mr. Kilasara opted to respond to the 3rd, 4th and 5th grounds of review jointly on the reason that they are interrelated and centered on the allegations that the court mixed, raised and decided on issues not placed before it. He submitted to the effect that Mr. Sambo for the Applicant has misconstrued the essence of the decision of the court. He explained that in the impugned ruling the court clearly stated and it is undisputed that time to lodge notice had been extended as per the previous application.

The learned advocate continued to state that the Court did not order stay of execution and or raise new issue *suo moto* as suggested by the Applicant but merely struck out the application before it with leave to refile. He was of the opinion that the cited cases of **William Kegege** (supra) and **Said Mohamed Said** (supra) are distinguishable to the present matter. The learned advocate contended further that the court can still determine the merits of the said preliminary objections raised by the Respondent as was held in the cited case of **William Getaru Kegege** (supra).

In his conclusion, Mr. Kilasara reiterated that there are no material errors on record and the impugned decision of the court was in conformity with the laws and procedures and did not prejudice the Applicant as she tries

to insinuate. That the application is devoid of merits and should be dismissed.

In rejoinder, Mr. Sambo stated inter alia that their main concern is not striking out the application but their concern is the bar which the court has set, that the execution application by way of civil prisoner should not be filed pending result of appeal. That, this court was not vested with such power because in doing so, it automatically ordered the stay of execution which is in the ambit of the Court of Appeal. The learned counsel distinguished the case of **Pita Kempap Ltd** (supra) cited by the counsel for the respondent. Mr. Sambo added that the court left the preliminary objections undetermined as another error on the face of the record. He stated that the preliminary objections should have been determined first. It was stressed that Misc. Land Application No. 60 of 2022 has nothing to do with Misc. Civil Application No. 09 of 2022 as an appeal is not a bar to execution.

Rejoining on the 3rd and 4th grounds of review; Mr. Sambo stated that Mr. Kilasara has admitted that there is an error on the face of record by the court to proceed with merits of the application while there were pending preliminary objections which had been argued by the parties. He said that, it is a well-established principle in law that once a preliminary objection is raised, it must be determined and disposed first. He fortified his argument with the case of **Meet Singh Bhachu vs Gurmit Singh Bhachu**, **Civil Application No. 144/02 of 2018,** (CAT). He added that, unless and until the ruling and order is reviewed when the raised preliminary objection can be determined.

I have considered the Memorandum of Review and submissions by both parties. I am of considered opinion that the court is required to determine the issue as to ***whether the raised grounds of review are merited for the court to review its own decision.***

Section 78 (1) and (2) of the CPC provides that:

> *"78. -(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-*
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> *(a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is allowed by this Code,*
>
> *may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*
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> *(2) Notwithstanding the provisions of subsection (1) and subject to subsection (3),* ***no application for review shall lie against or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit****."* Emphasis added

According to the above cited provision, an application for review must be against the decision which has the effect of finally determining the suit. In the instant matter the impugned decision was in respect of an application for detention of the respondent herein as a civil prisoner. The said application was never heard on merit and never finally determined. It was struck out with leave to refile. As rightly submitted

by Mr. Kilasara that since the impugned decision did not finally and conclusively determine the rights of the parties thereof, then the present application for review is bad in law and incompetent before this court.

Looking at the grounds of review raised by the learned counsel for the applicant, this court hesitate to believe that it has powers to review its pointed-out errors which most of them are apparent on the face of the record. Admittedly and regrettably, this court overlooked the raised and argued preliminary objections. If that was the only error committed by this court, I concur with the learned counsel for the applicant, the remedy could be to vacate its previous order and compose a ruling in respect of the argued preliminary objections. However, the first, second, third and fourth grounds of review raise issues which are beyond the powers of review of this court and subject of revision by the Apex Court of this country. As a matter of law, this court cannot rectify the said errors which attract correction of the impugned decision and proceedings by the Higher Court.

I am persuaded by the definition from **https://tripakshalitigation.com** *on "Differential of Appeal and Revision under Criminal Law"* which elaborates REVISION as:

> *"The re-examination of legal actions. They may be some* ***assumptions made illegally, non-exercise or exercise of jurisdiction irregularly by a lower court.*** *In this case therefore, a higher court re-examines the decisions made by a lower court to know whether all the legal actions were exercised."* Emphasis mine

I am convinced that the scenario of this case fits the above quoted definition of revision. The grievances of the applicant herein are against the order of this court to stay execution of the decree while it had no such powers as the respondent had already initiated the process of appealing to the Court of Appeal, that this court denied parties right to be heard and that the court granted prayers which were not applied for. In the circumstances, I think the errors complained of exceed the powers of this court to review its decision. The case of **William Getaru Kegege** (supra) cited by the learned counsel for the applicant is relevant.

In the case of **Mathias Rweyemamu vs General Manager (KCU) Limited** (Civil Application 3 of 2014) [2017] TZCA 219 [Tanzlii] at page page 8 to 9 the Court of Appeal stated that:

> *"What amounts to "a manifest error on the face of the record" has been a subject of discussion in a number of cases. Of particular significance in this jurisdiction is the case of Chandrakant Joshubhai Patel v. R. [2004] TLR 218. In that case, the Court, having revisited at some considerable length the law relating to the subject in India, set out principles which have since uninterruptedly been followed in numerous decisions of the Court, some of which have been incorporated in rule 66 of the Rules. In Chandrakant, what amounts to "a manifest error on the face of the record" was also discussed and adopted at page 225 the following reasoning in MULLA 14th Edition at pages 2335-6 (omitting cases cited therein)*
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> > *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that*

is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions ... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review ... ***It can be said of an error that is apparent on the face of the record when it is obvious and self- evident and does not require an elaborate argument to be established...*** "Emphasis added

As already stated herein above, the noted errors in this case are not self-evident and they require to be established.

It is on the basis of the above discussion that I reject this application pursuant to **Order XLII rule 4(1) of the CPC**, with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 29th day of August 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

29/08/2023