

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**(PC) CIVIL APPEAL NO.40 OF 2022**

*(Arising from Civil Revision No. 08 of 2021 District Court of Karagwe Originating from Application for Execution in Civil Case No. 21 of 1993 Bugene Primary Court)*

**CLAUDIAN CHRISTIAN..... APPELLANT**

**VERSUS**

**VEDASTO KAIRUKABI.....RESPONDENT**

**JUDGMENT**

4<sup>th</sup> August and 1<sup>st</sup> September 2023

**BANZI, J.:**

This appeal emanates from the ruling of the District Court of Karagwe in respect of Civil Revision No. 8 of 2021. It traces its root in 1993 when the appellant Claudian Christian under the power of attorney of Mr. Alli Chamani sued the respondent, Vedasto Kairukabi over a piece of land before Bugene Primary Court. In 1996, the decision was made in favour of the respondent. Aggrieved with that decision, the appellant filed Civil Appeal No. 27B before the District Court of Karagwe and on 25<sup>th</sup> October, 1999 the decision of the trial court was overturned and the appellant was declared as the lawful owner of the suit land.

The respondent after being aggrieved with the decision of the District Court, he appealed before this Court vide HC (PC) Civil Appeal No. 15 of 2000 although the copy typed judgment is erroneous entitled as HC (PC) Civil Appeal No. 34 of 1997. However, the appeal was dismissed on 13<sup>th</sup> June, 2005 for being time barred. In the same year, the respondent returned before this Court vide HC (PC) Civil Application No. 35 of 2005 seeking extension of time to file his appeal. However, on 20<sup>th</sup> July, 2009, his application was dismissed for being incompetent. On 6<sup>th</sup> July, 2021, the appellant went back to the trial court with application for execution in Civil Case No. 21 of 1993. The respondent raised two points of objection thus, the application was time barred and the application has been overtaken by event because the suit land had been handed over to him on 31<sup>st</sup> December, 1996. After hearing both parties, the trial court overruled the objection and proceeded to grant the execution.

The respondent was not pleased with the ruling of the trial court and filed revision before the District Court which overturned the decision of the trial court on the following reasons; one, the trial court was *functus officio* for entertaining application for execution which it had already determined; two, the application was time barred as time began to run from 25<sup>th</sup>

November, 1999 when the District Court overturned the decision of the trial court and three, the father of the appellant was Rwandese and hence he had no good title to transfer to the appellant. The appellant being dissatisfied with that decision, he came before this Court with three grounds of appeal. However, with leave of this Court, he filed amended petition of appeal containing four grounds, thus:

- 1. That, the District court erred in fact and in law to reverse the orders of the Primary court and entertaining a civil revision in lieu of an appeal which was against the law.*
- 2. That, the District court erred in fact and law for deciding in favour of the respondent by allowing the Application for revision and holding that the application for execution was time barred.*
- 3. That, the District court erred in fact and law for deciding that the application for execution was res judicata to the application made in 1996 as a result the respondent was left to benefit from his own wrongs.*
- 4. That, the District court erred in fact and law for deciding in favour of the respondent and invoking extraneous matters of citizenship which were not in issue.*

At the hearing, the appellant had the legal services of Messrs. Rogate Assey and Pontian Mujuni, learned Advocates while the respondent was represented by Mr. Samwel Angelo, learned Advocate.

Arguing in support of the first ground, Mr. Mujuni submitted that, the District Court misdirected itself for entertaining the revision in lieu of appeal. According to him, the grounds and prayers indicated that, it was the appeal in disguise of the revision. Since the respondent had a right of appeal, he should have exhausted the same instead of filing the revision. He supported his argument by the cases of **Samwel Gesase v. The Manager TARDECO Tarime**, Civil Revision No. 16 of 2001 HC Mwanza registry (unreported) and **Ramadhani Mikidadi v. Tanga Cement Company Ltd** [2022] TZCA 578 TanzLII.

In respect of the second ground, he submitted that, according to item 7 of the Schedule to the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, GN No. 311 of 1964, the time limit for execution is 12 years commencing when the right of the party began to accrue. In this matter, after the decision of 25<sup>th</sup> October, 1999 which gave victory to the appellant, respondent instituted appeal to High Court which was dismissed on 13<sup>th</sup> June, 2005. After that, he filed application for extension of time which

was also dismissed on 20<sup>th</sup> July, 2009 and the certified copy of its ruling was made on 20<sup>th</sup> March, 2013. To his view, the right to enforce execution began to accrue on 20<sup>th</sup> March 2013 when the certified copy was issued. Thus, the appellant was within time even if the time would be counted from 20<sup>th</sup> July, 2009 because he filed application for execution on 6<sup>th</sup> July, 2021. The appellant could not have filed execution while there were pending matters arising from the same case considering that, execution before the trial court is conducted within the original file which by then, was before the High Court. He cited the case of **National Microfinance Bank and Another v. Stephen Nkaina Marwa and Another** [2021] TZHC 2197 TanzLII which discouraged the practice of proceeding with execution by using duplicate file. He concluded his argument by stating that, the appellant was restricted by law to proceed with execution.

Returning to the third ground, he submitted that, it is not known when and how the respondent proceeded with execution while since 14<sup>th</sup> October 1996 the original file was before the District Court on appeal until 25<sup>th</sup> November, 1999 when the judgment was delivered. Besides, the execution in Primary Courts requires to be confirmed by the District Court which was not done in this matter. In addition, the letter of alleged execution was

authored by the Ward Executive Officer on 31<sup>st</sup> December, 1996 giving feedback to the Magistrate while at that time, the file was before the District Court. Apart from that, the same letter reveals that, the execution was not conducted successfully. In case it was conducted, the same was overtaken by the event because there is judgment of the District Court which overturned the judgment of the trial court. In that regard, the issue of *res judicata* does not arise and by deciding so, the District Court challenged its own decision.

Concerning the fourth ground, Mr. Assey submitted that, the District Court erred in deciding the citizenship of the appellant's father which was not the fact in issue in application for revision. Apart from that, it was not the issue raised in the affidavit of the applicant and never raised during the hearing. The issue just emerged in the judgment and by then, the appellant had no opportunity to counter the same. Besides, by deciding so, the District Court touched the main case while the matter before it, was revision arising from execution. He concluded his submission by praying for appeal to be allowed with costs by quashing the decision of the District Court and upholding the decision of the trial court so that the appellant can proceed with execution.

In response, Mr. Angelo, began his submission by conceding to the submission of the opponent party in respect of the first ground. However, he relied on the case of **Mohamed A. Kwangaya v. Rajabu Said Mbeid (Administrator of the Estates of the late Said Omary Mbeto)** [2023] TZHCLandD 16727 TanzLII and argued that, execution order is not appealable and that is exceptional to the general rule. In respect of the second ground, he submitted that, the decision which gave right to the appellant arises from Civil Appeal No. 27B of 1996 whose decision was delivered on 25<sup>th</sup> November, 1999. Thus, the time for execution began to run from 25<sup>th</sup> November, 1999 considering the position of the law that, appeal is not a bar to execution. Besides, record does not indicate the appellant had attempted to apply for execution or stay of execution.

Concerning the third ground, he submitted that, the first execution was still valid regardless of the decision in the main case being quashed on the appellate level. He urged this Court to consider the letter of feedback on the said execution. As for the fourth ground, learned counsel left it to court to decide. Furthermore, he raised the new issue concerning description of the suit land claiming that, the description that was mentioned in the execution order differs with the one appearing in the main case. Thus, apart from

praying for appeal to be dismissed, he prayed for this Court to give direction to the execution court to rectify the description mentioned in its ruling to tally with the description mentioned in the main suit including the size of land.

In their rejoinder, the learned Advocates for the appellant insisted that, the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, allows an appeal against any decision made by Primary Court and thus, the argument about decision from execution order is not appealable is misplaced. In the same line, the cited case of **Mohamed A. Kwangaya** is distinguishable because it originates from District Land and Housing Tribunal which has its own Regulations. On the issue of time limit, it was insisted that, the time began to run from the final decision and since there was appeal, the decision of the lower court cannot be final. It was added that, the purported execution is invalid because the basis of its decision was quashed. In their conclusion, they did not object on the prayer for directive to executing court concerning description of the suit land.

Having carefully considered the rival arguments by parties, the grounds of appeal and the records of two courts below, the main issue before this Court for determination is whether the appeal has merit.



Starting with the first ground, executions in Primary Courts is guided by the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964. Notably, part III of the law provides for manner of enforcing awards and orders but it does not go further to provide for remedy available to a party aggrieved by the order relating to execution. Apart from that, neither the Magistrates' Courts Act [Cap. 11 R.E. 2019] ("the MCA") nor the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules prohibits appeals arising from execution order. Conversely, section 20 (1) (b) of the MCA allows the appeal against any order or decision of the Primary Court. It provides that:

*"(1) Save as hereinafter provided-*

*(b) in any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established."* (Emphasis supplied).

Observably, according to the provision above, any party aggrieved by order or decision of the Primary Court in the proceedings of civil nature is permitted to appeal to the District Court. Since the laws guiding proceedings in Primary Courts do not restrict appeal from execution, it is the considered

view of this Court that, if the respondent was aggrieved with the decision of the trial court on execution, he could have exhausted his right of appeal before instituting revision. Also, by determining issues which could have been raised in appeal, the District Court entertained the appeal in disguise of revision. Thus, the first ground is merited.

Reverting to the second ground, it is undisputed that, according to item 7 of the Schedule to the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, the period of limitation for proceedings in execution of a decision or order in Primary Courts is 12 years. The period commenced when the right to bring such proceedings accrued. In the matter at hand, the records reveal that, after the decision giving right to the appellant was made, in 2000, the respondent appealed to the High Court but the same was dismissed on 13<sup>th</sup> June, 2005 for being time barred. On the same year, the respondent filed application for extension of time before the High Court which was also dismissed on 20<sup>th</sup> July, 2009. After that, the respondent did not file any matter. In that regard, the time began to run when the last decision in respect of the main suit was made and that is on 20<sup>th</sup> July, 2009. Thus, by the time the appellant applied for execution on 6<sup>th</sup> July, 2021, twelve years prescribed by the law were yet to be lapsed. Hence,

the application for execution was not time barred. In that regard, the second ground has merit.

As far as the third ground is concerned, it is undoubted that, the decision of the trial court which declared the respondent as the lawful owner of the suit land was overturned on appeal by the District Court in its decision made in 1999. Had it been any execution arising from the decision which was overturned, such execution would be overtaken by event and thus, would be no longer valid or existed. However, the practice requires the execution in Primary Courts to be conducted in the original file of the main suit. The original record of Civil Case No. 21 of 1993 reveals that, the proceedings ended on 28<sup>th</sup> February, 1996 after the file was remitted from the District Court which was sent for decision after diverging decision of the majority. Thereafter, there are no any other proceedings except those concerning execution by the appellant started on 28<sup>th</sup> July, 2021. As correctly stated by Mr. Mujuni, one may wonder when and how the alleged execution by the respondent was applied and determined considering that, the same is not reflected on the record. Besides, in December, 1996 when the said execution was alleged to transpire, the original record was not before the

trial court because the record reveals that, the same was before the District Court since 15<sup>th</sup> August, 1996.

Thus, since the main decision upon which the alleged execution would form its basis was overturned, there is no way the issue of *res judicata* against the application brought in 2021 could arise and so as the issue of *functus officio*. The decision of the District Court on this issue would have not only benefited the respondent unjustly but also occasioned injustice to the appellant who up to this point is the lawful owner of the suit land after being declared so by the District Court on appeal. Hence, the District Court erred and misdirected itself by holding that, the Primary Court was functus officio to entertain the appellant's application for execution. That concludes the third ground which I find to have merit.

The fourth ground need not detain me. The issue of citizenship of the appellant's father requires evidence to prove. Despite being introduced in the supplementary affidavit, it was not backed up with any tangible evidence. Besides, the appellant was not given opportunity to file counter affidavit so that, he could have countered that issue. Apart from that, it was not among the issues that were determined in the execution proceeding which was the basis of the revision before the District Court. Moreover, the decision of the

District Court on that matter was based on what is appeared at page 8 of the typed proceedings of the trial court dated 8<sup>th</sup> April, 1994. Before he was sworn, Christian Kajuna Jebele (SM2) introducing himself as Mnyarwanda, 68 years and peasant. This was a mere introductory part and not evidence under oaths. Apart from that, there is variation between the typed proceedings and the original record. According to the original record, there are two tribes recorded therein *i.e.*, Mnyambo and Mnyarwanda. However, the word Mnyambo was struck through and it is not known who made the changes because nobody signed beside the struck through tribe to authenticate the changes. In that view, it was an error for the District Court to determine that issue and by determining so, it touched the substance of the main case which was not subject of revision before it. In those premises, I find the fourth with merit too.

Concerning the issue of variation on the description of the suit land raised by Mr. Angelo, I have carefully perused the record of the trial court against the ruling on execution. Notably, the boundaries mentioned in the ruling and submission of the appellant were the same one contained in the testimony of SM1 and SM2 found in the main suit. Although the size was not mentioned, the same is known as it also featured in the testimony of parties

in the main suit. Thus, for decree to be properly executed, I direct the executing court to rectify the description of the suit land by including its size.

That being said, I find the appeal with merit and I allow it by quashing the ruling of the District Court dated 23/12/2021. The ruling of the trial court on execution dated 30/08/2021 is restored with directive to rectify the description of the suit land by including the size. Considering the parties were in courts' corridors since 1993, I make no orders as to costs. It is so ordered.



**I. K. BANZI**  
**JUDGE**  
**01/09/2023**

Delivered this 1<sup>st</sup> day of September, 2023 in the presence of Messrs. Rogate Assey and Pontian Mujuni, learned Advocates for the appellant who is also present and in the absence of the respondent.



**I. K. BANZI**  
**JUDGE**  
**01/09/2023**