

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA

CIVIL REVISION NO. 3 OF 2023

(Arising from Execution Proceedings in Civil Case No. 17 of 2022, Original Civil Case No.17 of 2022 in the District Court of Mbeya, at Mbeya)

CMG CONSTRUCTION COMPANY LIMITED.....APPLICANT

VERSUS

HERFRID JOSEPH MGENI.....1ST RESPONDENT

MOHAMED ALLY MASHANGO t/a

MASHANGO INVESTMENT COMPANY LTD.....2ND RESPONDENT

RULING

Date of Last Order: 28.07.2023

Date of Judgment: 18.09.2023

NDUNGURU, J.

The applicant, **CMG Construction Company Limited** has made the instant application under section 79 (1) (c) of the Civil Procedure Code, Cap. 33 R.E 2019 and section 44 (1) (a) and (b) of the Magistrates' Court Act, Cap. 11 R.E 2019 praying this Court to be pleased to call for and examine the record of proceedings relating to execution in Civil Case No. 17 of 2022 in the District Court of Mbeya and satisfy itself as to the correctness, legality or propriety of execution

proceedings thereof and the manner in which the subordinate court dealt with the attachment of Applicant's motor vehicles with registration numbers T.742 DWK, T.747DZV, T.503 DXH, T.842 DZZ and T852 DZZ all of them make FAW 340 HP 20 tons. And that this court be pleased to quash and set aside the impugned orders made thereat and issue any decision, directive, order and/or relief which the Court may deem fit and just to grant.

The application was supported by an affidavit of Jumanne Ruhengula Werema one of the directors of the applicant. The grounds for his application are set under paragraph 8 (a-d) of the affidavit to the effect that the applicant was condemned unheard in the impugned execution proceedings, that the impugned execution proceedings were presided over by two different magistrates concurrently, that the District Court issued a warrant of attachment to attach properties in Kyela District without jurisdiction, and that the whole proceedings are marred with illegalities and irregularities.

The application was resisted by the respondents through a counter affidavit sworn by Ladislaus Rwekaza, counsel for the respondents. He refuted all of the facts deposed in the applicant's affidavit. He also raised a preliminary objection on two points that.

- a) The applicant's application for revision is misconceived, premature and unmaintainable for being based on interlocutory and an order which does not determine the matter to its finality.
- b) That the chamber summons accompanied to the applicant's application is defective as the same is neither dated nor signed by the Deputy Registrar.

Before indulging into the deliberation of both the preliminary objection and the main application as they were simultaneously heard. It is pertinent to state the brief background of the matter which led to the instant application. Before the District Court of Mbeya in Civil Case No. 17 of 2022, the 1st respondent **Herfrid Joseph Mgeni** had successfully sued the applicant for breach of contract. The 1st respondent through an *ex-parte* judgment dated 29/08/2022, was awarded a decree of Tanzania shillings 90,000,000/= (Ninety Million only) being specific and general damages. Subsequently, on 15/3/2023 the 1st respondent was issued with execution order where the 2nd respondent **MOHAMED ALLY MASHANGO t/a MASHANGO INVESTMENT COMPANY LTD** was appointed to execute the order. The execution had to be effected by attachment and sale of the applicant's motor vehicles. It appears five motor vehicles with registration numbers T.742 DWK, T.747 DZV, T.503 DXH, T.842 DZZ and T852 DZZ all of them make FAW 340 HP 20 tons

were attached and three of them i.e with registration numbers T852 DZZ, T.503 DXH and T.747 DZV were sold. Aggrieved by the execution processes the applicant approached this court for the orders as hinted above.

Both the preliminary objection and the main application were disposed by way of written submissions. Mr. Kamru Habibu Msonde, learned advocate represented the applicant whereas Mr. Ladislaus Rwekaza, learned advocate represented the respondents. I have to start with the points of preliminary objection.

In support of the preliminary objection, counsel for the respondents argued the first limb that the District Court has not yet finalized the execution proceedings, that the warrant of attachment issued on 17th March 2023 is not a final and conclusive order which determines the impugned execution proceedings hence the application is contradicting section 79 (2) of the CPC which prohibits applications of this nature to be made against any preliminary or interlocutory decision or order. He also relied on the cases of **Catholic Archdiocese of Dar es Salaam and Another v. Latifa Said Saphy (as an administrator of the estates of the late Shukuru Said Saphy)**

Land Revision No. 37 of 2020 HCT at **Mwanza and Kulwa David vs Rebeca Stephen** [1985] TLR 116.

In reply, the applicant's counsel challenged the first limb that the present application is not against preliminary or interlocutory decision. According to him the order of attachment of the applicant's motor vehicles and the subsequent proclamations of sale finally disposed the rights of the parties. That without making this application at this stage the applicant's cause of action would be taken by event if he had to wait for the attached motor vehicles be sold and the proceeds be paid to the decree holder. He referred me to the case of **Junaco (T) Ltd and another vs Harlel Mellac Tanzania Limited**, Civil Application No. 373/12 of 2016 and **Christina Kalinga vs Paul Ngwembe**, Misc. Land Application No. 26 of 2020 HCT at Iringa (unreported) for what entails interlocutory or preliminary order which does not finalize the matter. He insisted that the available remedy for a party aggrieved by the execution proceedings is by applying for revision as the applicant did.

By the submissions of the counsel for the parties, I concur with them that section 79 (2) of the CPC bars revision application against the preliminary or interlocutory decision unless that decision or order be determining the matter to the finality. It provides that:

"(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie 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."

In the matter at hand, the order for attachment or the impugned execution proceedings are neither preliminary nor interlocutory order. Be it warrant of attachment, or proclamation of sale takes a nature of the suit and the proceedings are final when they are effected by the execution officer and they can be challenged through revision application as correctly argued by counsel for the applicant. The contention by counsel for the respondents that the order of attachment is interlocutory does not make sense since counsel did not tell this Court it is the interlocutory of which main proceedings. In the event, the first limb of preliminary objection is overruled.

On the second limb, counsel for the respondents argued that the law requires pleadings to be signed and dated by the parties and officer of the court. Nonetheless, the instant application is neither signed nor dated by the deputy registrar but the parties alone which renders the chamber summons to be fatal defective as the result it is as good as no application before this Court.

On his part, counsel for the applicant has held the view that the second limb of the preliminary objection is a misconception since there was no statutory provisions or case law cited to substantiate the argument. He forcefully submitted that the depicted omission is not fatal as per the decision of this court in **Mahamudu Mohamed Mbilu v. J.S. Khambaita** Revision No.16 of 2022 HCT, Labour Division at Moshi (unreported). That a litigant cannot be punished for the errors committed by the court official. Counsel therefore urged this Court to overrule the preliminary objection with order for costs.

Counsel for the respondents rejoined that the omission is contradicting Order VI Rule 14 of the CPC that the chamber summons unsigned and undated by the registrar does not indicate if was admitted. He thus insisted on his earlier prayer that the application be dismissed.

This second limb of preliminary objection should not detain me, there is no dispute that the application was admitted in the Court and registered that is why it was due for hearing. The signing and dating by the deputy registrar is the process within the court. When the Court omits to do what the law requires, parties or any of them cannot be penalized for the error committed by the Court. Afterwards, counsel for the respondents did not state how the respondents were prejudiced by

the omission. To that effect, I fully subscribe to the decision cited by the counsel for the applicant in **Mahamudu Mohamed Mbilu v. J.S. Khambaita** (supra) that parties cannot be condemned for the error occasioned by the Court. See also **John Hilarious Nyakibari vs Republic**, Criminal Appeal No. 125 of 2020 CAT at Dar es Salaam (unreported). In the premises, this limb of preliminary objection also crumbles.

Now to the merits of the application. It was the applicant's complaint that the execution proceedings were marred with the illegalities and irregularities which he categorized as it will be dealt hereinbelow. The issue for determination therefore, is whether the execution proceedings in civil case No. 17 of 2022 were marred with illegalities and irregularities warranting this Court to grant the application.

The applicant's first complaint was that the act of the trial Court to continue issuing adverse order regarding the execution process despite the presence of two applications, No. 17 and 18 of 2023 one being application for extension of time to apply for setting aside of *ex parte* judgment and another being for uplift of the warrant of attachment was not in order. This complaint may be conveniently resolved together with

that execution proceedings were presided over by two different magistrates concurrently. It was the applicant's counsel argument that the application for uplift of the attachment order was supposed to be presided over by the same Resident Magistrate in charge of the District Court.

On his part, counsel for the respondents submitted that the complained omissions did not affect the execution proceedings since there was no application for stay of execution which would have rendered the process of execution to be not in order if the same had been granted.

I am fortified with the arguments advanced by the counsel for the respondents that presence of the application for uplift of order of attachment or application for extension of time to apply for setting aside of *ex-parte* judgment does not erode the jurisdiction of the execution court to continue with execution proceedings. None of the two applications were for stay of execution, hence the order which followed did not relate with the other applications.

As to the issue that execution proceedings were presided over by two different magistrates concurrently. Indeed, application for uplift of warrant of attachment was supposed to be dealt with the execution

magistrate for this case the Resident Magistrate in charge of the District Court. The act of allowing another Resident Magistrate to proceed with the matter was actually an error and the decision made thereof was a nullity.

Notwithstanding of the flaw committed by the execution Resident Magistrate. I have been asking myself as to when the anomaly was noticed by the counsel for the applicant. I am of the considered view that the same counsel represented the applicant in the Application No. 18 of 2023 why the counsel did not draw the attention of the District Court that it was the same Resident Magistrate vested with jurisdiction to entertain execution proceedings who was supposed to preside over the application. Why counsel for the applicant decided to remain mute thereafter come to this court to challenge the act.

Be as it may, as I have hinted before, the proceedings in application No. 18 of 2023 being presided over by different Magistrate who was not vested with jurisdiction to entertain it was a nullity. As the result I hereby nullify it. Whether now the same affected the proceedings for execution which proceeded by the Resident Magistrate in charge. In my view it did not since the decision made thereat being a nullity, the subsequent proceedings were in order.

Another illegality pinpointed was that the warrant of attachment had been expired. It was the counsel for the applicant submission that the warrant of attachment was issued on 17/3/2023 and was to be returned in the District Court on 21/4/2023. However, that it was executed by the 2nd respondent on 28/4/2023 after had expired of seven days. Counsel argued further that a warrant which is not executed until beyond the days specified becomes invalid unless the time is extended prior to the expiry period. To substantiate the account, he cited the case of **MS. Sykes Insurance Consultants Co. Ltd vs MS. SAM Construction Co. Ltd**, Civil Revision No. 8 of 2010 CAT at Dar es Salaam and **Balozi Abubakari Ibrahim and another vs Ms. Benandys Ltd and Others**, Civil revision No. 6 of 2015 CAT at Dar es Salaam (unreported). On the counsel's view all what was done after the expiry of the period was null and void as they stem from an invalid warrant of attachment. That the 2nd respondent had to execute valid order of the court.

In reply, counsel for the respondents missed a truck as I took the view that he did not comprehend the complaint raised by the applicant's counsel. The complaint was about expiry of the warrant of attachment but the respondents' counsel argued that the sale was conducted after the District Court having issued sale order.

With regard to this issue, I have scanned the record. It is true that the District Court in its order dated 09/05/2023 it indicated that the letter of compliance by the court broker was of 28/4/2023 while it was ordered in the warrant of attachment that the same be returned on or before 21st day of April 2023. According to the counsel for the applicant the execution i.e the attachment was conducted on the same date that is on 28/4/2023. I find this claim lacking proof. It is in the letter of compliance dated 28/4/2023 addressed to the Resident Magistrate in charge of the District Court where the 2nd respondent informed her that he complied with the court's order dated 17/3/2023 and he indicated that five motor vehicles of the applicant have been attached. In that compliance letter the 2nd respondent did not indicate specifically when the attachment was effected.

Assuming that it was true that the attachment was effected on 28/4/2023 after the expiry of 7 days. The question which would arise is whether the execution proceedings made after the attachment to be done out of time is a nullity. The answer to the issue is it depends to the facts and circumstance of each case In the case of **Balozi Abubakari Ibrahim and another vs Ms. Benandys Ltd and Others**, (supra) the CAT said that material irregularities in the execution processes will

not render the subsequent sale void unless substantial injury is proved by the judgment debtor.

In this matter, counsel for the applicant did not show how the judgment debtor has suffered substantial injury for the omission referred above. It has not been shown how the attachment effected on 28/4/2023 followed with the proclamation of sale issued on 19/5/2023 and the subsequent sale prejudiced the judgment debtor. In the circumstance I find the said irregularity unwarranted for this court to revise the execution proceedings.

Counsel for the applicant also pointed the illegality that no notice was served to the applicant. He argued that, according to the requirement of Rule 21 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules of 2017. The execution officer for this purpose the 2nd respondent after being issued with the warrant of attachment had to serve notice of not less than 14 days to the applicant for him to settle the decretal amount or comply with the decree prior to carrying out the execution order. Counsel has relied on **MS. Sykes Insurance Consultants Co. Ltd vs MS. SAM Construction Co. Ltd** (supra).

In reply to this respective issue, counsel for the respondents contended that the notice had been served to the applicant through newspaper of Mwananchi as the applicant had the tendency of not heeding to the summons served to him from the beginning of the case.

In his rejoinder, counsel for the applicant insisted that the execution proceeding was in total disregard of the mandatory provision of the Rule of the Court Brokers and Process Servers Rules. He stood on the previous contention that there was no service of notice as per the law.

As to this issue, though it was just stated in the letter dated 8/5/2023 addressed to the Resident Magistrate in charge of the District Court that he served the applicant with the notice to settle the decretal amount my further perusing did not find any notice to that effect. Even counsel for the respondent did not tell this Court when the said notice was served to the applicant. Nonetheless, I have considered the circumstances of this matter as it is on the record that the applicant had never involved in the proceedings since the case was heard *ex-parte* and the execution application was also heard *ex-parte*. The affidavit attached to the summons to appear for execution process showed that the applicant intentionally rejected the summons. I find issuing of 14 days'

notice was impracticable to the execution officer since the intention of the notice is for the judgment debtor to settle the decretal amount. I have also considered that though the notice was not issued the applicant had ample time to take necessary steps from the time when the motor vehicles were attached to the time they were sold. If the intention of the notice was for her to settle the decretal amount, the opportunity was there during the period of attachment to the date of sale. That being the case, this pertinent ground for application also fails.

There was another complaint by the applicant that the warrant of attachment was issued to attach properties in Kyela district without jurisdiction. That since the properties were out of the jurisdiction of the District Court of Mbeya the respondent had firstly applied for transfer of decree in accordance with section 34 of the CPC.

In his reply, counsel for the respondents contended that the warrant was to be effected to the office of the applicant which is situated at Iwambi within the jurisdiction of the District Court.

Attachment of movable properties like the one in this matter the execution officer had to follow the requirement of Order XXI rule 42 of the CPC which provides that:

"42 Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:"

With the view of certainly resolving this complaint, I have to revisit the complained warrant of attachment. I have not found any order directing the 2nd applicant to attach the properties in Kyela district. What I have gathered in the warrant of attachment is the District Court directing the motor vehicles of the applicant with specified registration numbers to be attached. It was not specified that they are located to certain place. In the premises, it was the duty of the Court Broker (the 2nd respondent) to make sure he attached the same regardless the area he found them. I think counsel for the applicant has failed to distinguish attachment of movable properties and transfer of decree. After all, there was no proof if the said motor vehicles were attached in Kyela District.

Finally, it was complained that the applicant was condemned unheard in the impugned execution proceedings. It was argued by counsel for the applicant that the process of the matter took place through *ex-parte* proceedings. That the process was conducted

inconspicuously, discreetly and one-sided. According to him and armed by the decision in the case of **Mbeya-Rukwa Autoparts and Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251 a decision reached without regard to the principle of natural justice or in contravention of the Constitution is void and of no effect.

In reply, counsel for the respondents objected the applicant's claim. He contended that it was him who waived his right to be heard since there is proof that he was served with summons to appear to show cause why execution order should not be granted but he opted not to enter appearance. He also maintained that the applicant was served with the warrant of attachment, that he was also aware of the attachment process and the auction was announced and advertised through a public newspaper by the 2nd respondents.

In his rejoinder, counsel for the applicant reiterated that the execution process was conducted in violation of law as there was no proof of service attached to the respondent's affidavit.


At the outset, I concur with counsel for the applicant that the right to be heard is fundamental and is one of the principles of natural justice as per the cited case of **Mbeya-Rukwa Autoparts and Transport Ltd vs Jestina George Mwakyoma** (supra). Nonetheless, the

circumstance of this case does not favour the applicant since there is ample proof on the record that the applicant was summoned to appear but decided to waive her right. It is true that the respondents did not attach any proof of service to their joint counter affidavit, but this court had time to peruse the record of the District Court as far as the execution proceedings is concerned. There is summons accompanied with an affidavit sworn by one EUGEN TEMIGUNGA KISONGA (a process server) that the applicant refused to receive the summons at their office of the Manager of the applicant which is situated at Iyunga area. I find nothing to the contrary which may pursue this court to hold that the applicant was not duly served.

In the end, for what I have endeavoured to explain, I find the entire application wanting of merits. I thus, dismiss it without costs.

It is so ordered.




D.B. NDUNGURU
JUDGE
18/09/2023