

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM

PC CIVIL APPEAL NO. 22 OF 2023

(Arising from Civil Revision No. 2 of 2023 in the District Court of Kibaha at Kibaha,
originating from Matrimonial Cause No. 13 of 2021, in the Primary Court of Kibaha
District at Maili Moja)

SHANI ABDALLAH HAMISI APPELLANT

VERSUS

JUMA HASSAN SUKWA RESPONDENT

JUDGMENT

28th Oct & 15th Nov, 2023

KIREKIANO, J.:

The root of this application is the execution proceeding of the Primary Court of Kibaha is Matrimonial Cause No. 13 of 2021. Considering the argument in this appeal I find it appropriate at this stage to give chronological background of the parties' dispute.

The respondent filed a matrimonial cause no 13 of 2021 at the Primary court of Kinaha at Maili Moja. The primary court (Kambadu RM) issued a decree of divorce and ordered division of matrimonial properties. In an appeal to the District Court in Matrimonial appeal no 08/2023 the

district court (Kibona RM) partly allowed the appeal. Before this court on 22 June 2022, the appellant lost her appeal in Civil appeal no 357 of 2022 (Mango J). In all these proceeding the counsel for the respondent represented the respondent.

The respondent therefore sought execution of the decree as issued by this court. On 09 05 /2023 the Primary court granted the application and issued an order of vacant possession. This time the appellant went back to the District Court seeking revision of this order in the district court. The appellant complaint in the district court was that,

First, the trial court misdirected itself in ordering the appellant to vacate the house within 30 days while there was issue of ownership before the District Land and Housing Tribunal DLHT,

Second, the counsel for respondent had conflict of interest in representing the respondent hence not qualified to represent the respondent.

The District Court having examined the record of the Primary Court was satisfied that there was no illegality or irregularity or impropriety in the Primary Court proceedings thus dismissed the application. It was reasoning

of the district court that the complaint that the respondent counsel had interest and represented the respondent before the district court and high court ought to have been raised before those courts and thus the primary court could not declare the proceedings of the high court a nullity.

Dissatisfied the appellant lodged this appeal setting forth two grounds of appeal but during hearing she abandoned one remaining with one thus;

- 1. That, the Learned Magistrate erred in law and in fact for not consider the issue of conflict of interest by the respondent's counsel contrary to Section 7 of Cap 12, R.E 2019 and Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations G.N. 118 of 2018.*

That appellant was represented by Mr. Mangesho Uforo while the respondent is represented by Mr. Benedict Pius, learned advocate.

The parties submissions are brief and focused. It is Mr. Mangesho submission that the District Court was at fault for not considering that the counsel for respondent had conflict of interest. He argued that Mr. Benedict Pius happened to be parties' family lawyer thus had previous information involving the parties included attesting will in 2020.

He submitted that this advocate should not have represented the respondent. To buttress his argument, he cited decision in **Mexon Limited vs. NMB PLC, Commercial Case No. 102/2021** that in view of section 7 of the **Notary Public and consumer for oath Cap 12 and R.E 2019** and Rule 45 of the **Advocate (Professional Conduct and Etiquette Regulation G.N 118/2018** the respondent counsel ought to be disqualified.

Mr. Mangesho therefore was of the view that this court should allow the appeal and quash the proceedings of the lower courts.

Mr. Benedict Pius for the respondent responded arguing that this appeal is misplaced. According to him, he has never been retained by the parties. He represented the respondent in the appeal at District Court before Kibona – RM in Matrimonial Appeal No. 8/2021 but also before this court in Appeal No. 357/2022 before Mango, J, there was no question of conflict of interest, if any, the same ought to be raised by then and not during execution by the primary court.

He said the proceedings before the District Court was on revision of execution proceedings which have nevertheless been accomplished hence this appeal is misplaced.

Mr. Mangesho in his brief rejoinder prayed that this court should make finding that the respondent counsel was in conflict of interest.

It is a common ground that in view of rule 45 of the **Advocates (Professional Conduct and Etiquette) Regulations, 2018** an advocate shall not act or continue to act in a matter where there is or is likely to be conflict of interest unless the advocate has the informed consent of each client or prospective client for whom the advocate proposes to act. This goes along with the cited section 7 of the Notary Public and Commissioner for Oath Act.

It is also not in dispute that the appellant complaint that Mr Benedict represented the respondent in an appeal before the district court and before this court was not raised in those proceeding.

There is no gainsaying that advocates being court officers should conduct themselves with high level of integrity and professionalism. The yardstick on this conduct is as provided under **Advocates (Professional**

Conduct and Etiquette) Regulations, 2018. When question of conflict of interest arises, an advocate is expected to refrain offering his advocacy. If an advocate does not consider to be in conflict of interest but someone else is of different opinion, then the question of enforcement of the rules will arise as it is provided under Rule 142 of the cited rules.

It is also to be noted that when the issue of conflict of interest is raised against an advocate this court has in number of decisions exercised the powers to disqualify an advocate. In **Dawasco vs Robart Mugabe (Revision Application No. 157 of 2021) [2022] TZHCLD 614 (21 April 2022)** for example while citing the decision in **General Trading Co. Ltd Vs Skjevesland (2002) Ewca Civil 1567** the high court observed;

" The court has power under its inherent powers to prevent abuse of its procedure to restrain an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on appeal..."

The high court in the above case quashed the proceedings and award by the arbitrator.

In this case at hand there was no question of conflict of interest raised during the trial, and appeal to the district court and to this high court. The same was raised during execution at the primary court. In this state of affair, the district court held that;

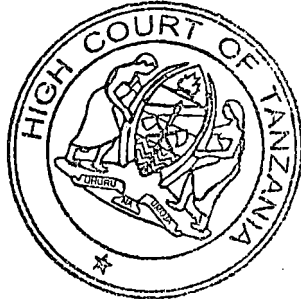
`This court being a subordinate court cannot declare the execution proceedings a nullity whose root is the decision of the superior court because this court has no power to nullify the superiors court proceedings session and order.

Objection of the said counsel would have been made as early as possible to and not at the execution stage.

I agree with the district court that the Primary court conducting execution of a decree as issued by this court on appeal could not decide on issue of conflict of interest in conduct of the appeal before this court. Instead, it was incumbent to the appellant to raise the same. In passing the appellant may pursue other forum in the rule as provided under Rule 142 of Advocate Professional Conduct and rules of etiquette.

From the fore going this appeal is devoid of merit the same is dismissed.

Considering the dispute arose from matrimonial cause, I shall make no order as to cost.



A handwritten signature in black ink, appearing to be "A. J. Kirekiano", written over a horizontal line.

A. J. KIREKIANO

JUDGE

15/11/2023

COURT: Judgment delivered in chamber in presence of Mr. Uforo Mangesho for appellant and in absence of the respondent.

Sgd: A. J. KIREKIANO

JUDGE

15/11/2023