

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT COURT
AT MOSHI**

CIVIL REVISION NO. 1 OF 2023

*(Arising from Execution proceeding of the Judgment of District Court of Moshi
at Moshi dated 4th June, 2021 in Civil Case No. 6 of 2020)*

TANZANIA FEDERATION OF COOPERATIVES LTD APPLICANT

VERSUS

M/S INTERSTAR (T) MINING COMPANY LIMITED.....RESPONDENT

RULING

9th November & 14th December, 2023

A.P.KILIMI, J.:

These revision proceeding was commenced by the Court *suo motu* following a letter of complaint dated 11th January, 2023 addressed to the Deputy Registrar of the High Court Moshi concerning the execution of Civil Case No. 6 of 2020. After considering the said letter this court found appropriate to open a revision file for the purpose of satisfying itself as to the correctness, legality or propriety of the alleged proceedings, rulings or orders made therein.

Subsequently, it was the wisdom of this court to call all parties on the said execution case, so that they can address this court on what revealed

at the said proceeding and whether they have any issues they wish to be considered for helping this court to reach the just decision.

Before embarking to the application on merit, I think I am obliged to narrate, albeit briefly, the facts leading to this revision. The Applicant hereinabove was sued by the respondent at Moshi District Court vide Civil Case no. 6 of 2020. Thereat on 4/6/2021 the respondent secured and ex-parte decree against the applicant and the court ordered the applicant to pay the respondent general damages at the tune of Tshs. 40,000,000/=. Later on, 19/07/2022 the respondent filed an application for execution of the decree said above. It seems the applicant got notification of the said proceeding, and consequently filed two application, Misc. Civil Application No. 22/2022 seeking to extend time to challenge ex-parte decision In Civil Case No. 06 of 2020, and second Misc. Civil Application No, 23/2022 seeking stay of execution of ex-parte decision in Civil Case No. 06 of 2020. According to his complaint's letter, the applicant this second application was dismissed for want of prosecution but the other remained pending hearing. Thus, in his letter claims that, the subordinate court appears to proceed with execution of ex-parte judgment despite it being seized with

Application No. 22/2022 above. Therefore, prayed for this court intervention.

When this matter came for parties to address the court, Mr. Elikunda Kipoko learned counsel appeared for the applicant and prayed their address be by way of written submissions, the same was not objected by the respondent who enjoyed the service of Mr. Ephrahim Kisanga learned advocate. In considering that this is revision sua mottu for checking the correctness and legality of the proceeding, I will not reproduce counsels' submission but will be considered whenever appropriate.

However, upon read the submission by the applicant's counsel seems abhors this revision with multiplicity of the ex- party judgment delivered and application for execution. In my view of the complaint letter the applicant has already started legal procedure to set aside ex-parte judgment, thus the matter to be dealt in this revision is only to the legality of execution proceeding, other applications should proceed by judicial process as started, and if any party will be aggrieved should move this court judicially and to combine the same in this matter initiated by the court after considering justice dictates so.

Now, according to the proceeding of the execution dated 25/07/2022, this is the day the executing court issued initial order and ordered all parties to be notified thus the case was ordered to come for mention on 18/08/2022. When the case came for that mentioned date on 18/08/2022. Mr. Kisanga appeared for respondent (Decree Holder) and informed the court that the applicant was duly served and was evidenced by affidavit of process server and then prayed for directive

From the above, the said executing court issued consequently a ruling and ordered attachment of applicant's house situated at Plot 29 Block M Rau area within Moshi Municipality Kilimanjaro Region, it also proceeded to appoint the court broker one KBM Mponzi and Sons to execute the said order.

In view of the above, I am enforced to ask myself, whether the execution was correct and justified to proceed and issue a ruling as said above. According to the address by the applicant's counsel he contended that the applicant was not issued with notice to show cause against execution taking regard the Application for execution was filed after one year from the date of the decree, as per Order XXI Rule 20(1)(a) of the

Civil Procedure Code CAP. 33 R.E 2019. Therefore, his client was denied with the right to be heard.

The above assertion has triggered me to scan with evasive eye the summons used, it is true, the summons used is headed NOTICE OF MENTION and it states as follows;

"Take note the above case has been fixed for mention on the 18th August 2022 at 09:00 AM before Hon. E.Y. PHILL-RM.

YOU may appear in person or by an advocate or an agent duly authorised to do so and you are directed to produce on that day any documents under which you intend to rely in support on the above-mentioned case.

Given under my HAND and SEAL of this court, this 25th July, 2022"

As correctly pointed above by the applicant's counsel the above is not a summons to show cause but rather was summons to appear and to file document intended to be relied upon. According to the law for execution to proceed the provision of Order XXI Rule 20(1)(a) of the Civil Procedure Code Where an application for execution is made more than one year after the date of the court executing the decree shall issue a notice to the

person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him.

The proper notice to be served to the Judgment debtor like the applicant in this matter, was required to be served with the notice made under section 101 of the Civil Procedure Code Cap 33. This is the Civil Procedure Code (Approved Forms) Notice, 2017 Government Notice No. 388 published on 29/09/2017. The relevant form is **FORM NO. F/6** and for ease of clarity I reproduce its wording hereunder: -

"FORM NO. F/6

Notice To Show cause why execution should not issue (O. XXI, r. 20(1) of the Civil Procedure Code)

To.....

Whereas the *plaintiff/defendant has made application to this Court for execution of decree in the above suit on the allegation that the said decree has transferred to him by assignment or without assignment], this is to give you notice that you are to appear before this Court on the day of 20, to show cause why execution should not be granted.

GIVEN under my HAND and the SEAL of the court, this ... day of 20...

.....

Registrar/Magistrate in charge”

As observed above the decree was issued on 17/6/2021 which is the day the judgment was delivered and signed and the filing of the application for execution was 22/7/2022. Having considered this duration I am of considered view the execution was flawed in issuing a normal summons and it is therefore considered in law that the applicant as judgment debtor was not properly legally informed hence denied his right to be heard.

Nonetheless, despite of the executing court using improper summons to the applicant, the said summons was for mention and not for hearing, practice of the court when the summons is for mention the court cannot proceed with the hearing, there is a need for respecting initial order and final order after the court satisfied that the other party is deliberately absconding the service. The executing court could have ordered hearing of the application *ex-parte* on the next session to pave a way for human error arises from unnatural consequences instead of proceeding to write a ruling on the mentioned date. In view of the above I am settled that the above procedures flawed the right of the applicant and actually he was denied to be heard while there were no exceptional circumstances for the executing

court to proceed with determining the matter the date ordered for mention.

I wish to support the above, that it is settled law that courts should encourage matters to be determined on merit, unless under exceptional circumstances, they cannot. This was emphasized by the court in the case of **Independent Power Tanzania Ltd & Standard Chartered Bank (Hong Kong) Ltd** (Civil Revision 1 of 2009) [2009] TZCA 17 (TANZLII) where the court having discussed the right to be heard as a principle of natural justice enshrined in our Constitution developed a principle that justice is better than speed, the Court went on to say as follows: -

"Ex post facto hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudice apart from being a negation of timely and inexpensive justice, which we all strive for".


(See also **Thomas Peter @ Chacha Marwa vs Republic**, Criminal Appeal No. 322 of 2013 and **Zena Adam Abraham & 2 Others vs The Attorney General & 6 Others**, Consolidated Civil Revision No. 1, 3 & 4 of 2016 (both unreported))

On the premises and from what I have endeavoured to discuss above, I am satisfied that the procedure used by the executing court was tainted with incorrectness and illegality, consequently, I invoke the revisionary powers of this court and I nullify all the proceedings and set aside all Rulings and order thereto. In the event, I order execution to proceed inter parties before another Magistrate. Since this matter was raised *sua motu*, no costs granted to any party.

It is so ordered.

DATED at **MOSHI** this 14th day of December, 2023.



X 

JUDGE
Signed by: A. P. KILIMI

Court; Ruling delivered in the presence of Ephrahim Kisanga for respondent and Lilian Mushi holding brief of Elikunda Kipoko. Applicant and respondent absent.

Sgd: A. P. KILIMI
JUDGE
14/12/2023