

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

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**EXECUTION NO.44 OF 2022**

*(Originating From Land Case No.64 of 2016 High Court at Dar es Salaam)*

**SADIKIEL ZEBEDAYO META.....DECREE HOLDER**

**VERSUS**

**MARTIN MATIKU NYETIKA.....JUDGMENT DEBTOR**

**RULING**

**POMO; J**

The decree Holder, SADIKIEL ZEBEDAYO META, previously filed in this court an Execution Case No.17 of 2018 to enforce a decree against the Judgment Debtor, MARTIN MATIKU NYETIKA to realize the sum of Tshs 196,000,000/- settled and recorded by this court in Land Case No.64 of 2016 on 16<sup>th</sup> September, 2016 Hon. I. Arufani, J.

On 18<sup>th</sup> September, 2019 it was dismissed for want of prosecution the fact which is disclosed by the Decree Holder under the 6<sup>th</sup> column of the instant Execution No. 44 of 2022 filed on 15<sup>th</sup> June, 2022. He so indicated it

in compliance of the legal requirement set under **FORM No. F/5** of the Civil Procedure (Approved Forms) Notice, 2017 GN No. 388 published on 29/09/2017.

Basing on the above fact, the competence of the instant execution application is put into question, the existing decision dismissing Execution Application No.17 of 2018 having not been set aside. This issue was raised by this court on 20<sup>th</sup> July, 2023 and as such parties were invited to address it. I ordered the same be argued by way of written submissions. It is only the decree holder who complied the order of filing the submission

Addressing the court, Mr. Henry Kishaluli, learned advocate for the decree holder is of the contention that the instant execution application is competent before the court. The thrust of his argument is, the dismissal for want of prosecution of the decree holder's previous execution Application No.17 of 2018 is not a bar to bring a new one. In support, Mr. Henry referred this court to **Order IX Rule 3 and section 9 both of the Civil Procedure Code, [Cap.33 R.E.2022]** as well the decisions in **Balozi Abubakar I Ibrahim and Another versus M/S Benandya Limited and 2 Others**, Civil Revision No.6 of 2015 (Tanzlii); **Boniface Vicent Muhoro and 4 Others versus The Attorney General**, Misc. Civil Application No.3 of 2019

(Tanzlii); Johnson Amir Garuma versus The Attorney General and 2 Others, Civil Appeal No.206 of 2018 (Tanzlii); and **Kamunye and Others versus The Pioneer General Assurance Society Limited** [1971] E.A. 263.

That, the dismissed execution Application No.17 of 2018 was for attachment and sale of landed property on plot No.303/J Mbezi while in this execution Application No. 44 of 2022 the subject matter is for committing as civil prisoner the judgment debtor hence not falling in all fours of the principles of *res judicata*. Resting his submission, Mr. Henry asked this court to find the herein Execution Application competent before the court

I have given due consideration the submission made by the decree holder and the record as well. The issue I am constrained to determine is whether this execution application is competent before the court, the former, Execution Case No.17 of 2018 having been dismissed for want of prosecution the dismissal order which is still existing to date.

It is common ground that what is sought to be executed is the decree in Land Case No. 64 of 2016 aiming to realize Tsh 196,000,000/- decreed therein. Be in the dismissed Execution Case No.17 of 2018 or the instant Execution Case No.44 of 2022 the decree holder, in all the two applications intends to realize the said decretal sum.

If I have understood well Mr. Henry, he wants this court to believe him that the decree holder has unfettered right of bringing new applications whenever his execution applications are dismissed by the court for one reason or the other. With due respect to Mr. Henry, such unqualified right does not exist to the decree holder. In my considered view, unless the order dismissing the former Application is set aside, be either through application for setting it aside or other avenues available for challenging it, otherwise the Decree Holder is barred from filing new execution application because the court becomes *functus officio*. For instance, in **Maria Chrysostom Lwekamwa versus Placid Richard Lwekamwa and Another**, Civil Application No. 549/17 of 2019 CAT at Dar es Salaam (unreported) the Court of Appeal, at page 18, held that: -

***"It is a trite law that when a court finally dispose of a matter, it ceases to have jurisdiction over it".***

Again, in **Kamundi vs Republic** [1973] TLR 540 referred at page 13 in **Maria Chrysostom** case (*supra*) it was held thus: -

***"A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this can only be when the court disposes of a case by a verdict of not guilty or by***

*passing sentence or **making some orders finally disposing of the case***". End of quote and emphasis supplied

It is on record that on 18<sup>th</sup> September, 2019 the Taxing Master delivered an order dismissing the Decree Holder's Execution Application No. 17 of 2018. The dismissal order did determine the said execution Application to its finality. As above intimated, the dismissed Execution No. 17 of 2018 and the instant execution No. 44 of 2022 both were filed by the Decree Holder aiming to realize the decretal sum in Land Case No. 64 of 2016 of this Court. Parties are the same in both executions Application. The decree holder has come with an averment that in the former dismissed application, he was applying for attachment and sale of landed property on plot No.303/J Mbezi while in the instant Application is applying for committing the judgment debtor as a civil prisoner thus a different subject matter. In my considered view, what constitute a subject matter in execution applications is what was decreed by the court and not the mode of realizing it. Therefore, I decline to accede to the line of argument taken by Mr. Henry that the two execution applications by the decree holder are different in terms of the subject matter. Equally so, in all the authorities he cited, none supports his stance

That said and done, I hereby find this court is *functus officio* to hear and determine the instant application. This is because the order dismissing the former application on the same subject matter, Execution Application No. 17 of 2018, is still existing to date. I make no order as to costs.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 30<sup>th</sup> day of November, 2023



**MUSA K. POMO**

**JUDGE**

**30/11/2023**



**Court:** - Ruling delivered this 30/11/2023 in the presence of Edgar Myayabuso for Henry Kishaluli for the Decree Holder only

**Sgd: S. B. Fimbo**

**Deputy Registrar**

**30/11/2023**