

IN THE HIGH COURT OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MISC. CIVIL APPLICATION NO. 49 OF 2023

(Arising from Misc. Civil Application No. 74 of 2022, Misc. Civil Application no.29 of 2021, Execution No. 4 of 2019, Application for Execution No.53 of 2020, Originating from the decree in Civil Case No. 18 of 1999 of the High Court of Tanzania, Tanga District Registry at Tanga)

YACOBO GABRIEL MUSHI.....APPLICANT

VERSUS

PRAVICHANDRA CHAVDA.....RESPONDENT

RULING

K. R. Mteule, J.

11/12/2023 & 14/12/2023

This application is brought under **Section 38 (1) and Order XXI Rule 2 (1) and (2) of the Civil Procedure Code [Cap 33 RE 2019]**. The Applicant is seeking for the following orders:-

- (a) That this Honourable Court be pleased to determine all questions arising between the parties to the suit with regard to execution of the decree in **Civil Case No. 18 of 1999**, from the time when the decree holder (the applicant herein) filed application for **Execution No. 4 of 2019**, later on filed **Misc. Civil Application No. 4 of 2019** for civil prisoner, and finally



Execution No. 53 of 2020, relating to the execution, discharge or satisfaction of the decree.

- (b) This Honourable Court be pleased to determine all questions arising in regard to execution proceedings dated 4th May 2021 which was marked closed in the absence of the applicant (decree holder) as to whether the decree had been satisfied fully by the decree holder.
- (c) This Honourable Court be pleased to examine all questions on records of the proceedings in **Misc. Civil Application No. 4 of 2019** for committing the respondent to civil prisoner as to whether there had ever been recorded any compromise out of court and filed before the execution court by the parties to execution?
- (d) This Honourable Court be pleased to examine all questions on records in regard to **Execution No. 53 of 2020** as to whether the said execution had ever been legally closed.
- (e) This Honourable Court be pleased to examine all questions related to the proceedings or ruling dated 25th September 2020 in **Execution No. 53 of 2020** as to whether the decree holder ever stated to abandon the remaining balance of TZS 441,911,492/= out of TZS 566,785,423.79 (the decretal sum).



- (f) This Honourable Court be pleased to examine all questions on the records of proceedings in **Misc. Civil Application No. 4 of 2019** for civil prisoner and **Execution No. 53 of 2020** of the decree as to whether there had ever been recorded any compromise and filed before the executing court by the parties to execution?
- (g) That after examining all questions as stated above, this Honouble Court be pleased to order the judgment debtor to pay the remaining decretal sum of Tshs 441, 911,492/= out of Tshs 566,785,423.79 as per the decree dated 30th May 2008, which was partly satisfied on the last payment effected on the 11th January 2021.
- (h) Costs of the Application be borne by the respondent.
- (i) Any other relief this court finds fit and just to grant.

This application concerns execution proceedings dealt with in various applications in execution of a decree of this Court in **Civil Case No. 18 of 1999**. Vide **Misc. Civil Application No. 4 of 2019**, on 25th September 2020 parties were recorded by the Deputy Registrar to have agreed to settle the decree by payment of TZS 124,873,931/= by the Judgment debtor to the decree holder. On 4 May 2021 the Judgment Debtor appeared and reported to the Deputy Registrar that the amount

agreed on 25th September 2020 to settle the decree was already paid to the Decree Holder. Upon receiving the report, the Deputy registrar Marked the Decree to have been finally settled and closed the execution application. Now the Decree holder is challenging the entire process of execution vide this application with the 9 prayers made herein.

The hearing of the Application proceeded orally. The Applicant was represented by Mr. Peter Bana, whereas the Respondent was represented by Mr. Frank Moshi, Advocates.

Submitting for the Applicant, Mr Bana having adopted the contents of the Affidavit, stated that the application is brought so that the Court may determine all questions arising from the parties in matters relating to execution, discharge or satisfaction of the decree.

The counsel argued that pursuant to **annexure A9** which is the record of **Misc. Civil Application No. 4 of 2019** of the High Court of Tanga, the Corum of the Honourable Deputy Registrar on the 4th day of May 2024 indicated that the Applicant who was the Decree Holder was absent while there was no notice issued to the Decree Holder notifying



about the appearance. In his view the execution was closed arbitrarily without complying with the procedures.

He added that the provisions of **Order XXI Rule 2(1) and (2)** of the **CPC** requires that if parties settle the matter, the compromise shall be recorded by the Court. In his view, Annexure A7 (payment agreement), had no compromise by the parties for the reduction of the decretal amount as the compromise was not signed by the Decree Holder since he disagreed the amount stated therein. According to him, Annexure A7 provided that the entire debt was TZS 124,873,931/=, the Judgment Debtor paid 20,000,000/= and the reminder (balance) is 104,873,931\=. The counsel argued that at page 19 of the proceedings, the Decree Holder did not concede to be paid 60,000,000/= as half of the decretal amount, the Court therefore was supposed to issue a notice to the Decree Holder to appear and confirm the payment.

Basing on that, he considered the irregularity to be fatal since the Applicant was deprived of the right to be heard. He prayed the Court to set aside the order of the Registrar and the execution be re-opened so that the Decree Holder may be asked if he is satisfied.



Besides, the counsel submitted that various modes of execution were engaged including **Execution No. 4 of 2019** and **Misc. Civil Application No. 4 of 2019** which were concerned with committing the Judgment Debtor to Civil Prison while the Decree Holder did not withdraw nor vacate the Application for **Execution No. 53 of 2020** but the same was just marked settled and closed.

The Applicant is challenging the decision of the Deputy Registrar in allowing the decree to be settled on simple interest instead of compounding interests which was in his view, the one decreed. Mr. Bana argued that the Respondent was supposed to appeal against the decree but instead, he withdrew the notice of appeal hence waived his rights. He challenged the Respondent's Counter Affidavit, specifically paragraphs 9, 17, 18, 19 and 20 for containing matters of law speaking of the issue of competence of the application and being time barred.

In reply, the Counsel for the Respondent Mr. Mushi having adopted the contents of the Affidavit as part of his submissions, commenced his submissions by introducing three points of law. The said points concerned on firstly, the competence of the application under section 38 of the CPC, secondly, the competence of the Application under Order



XXI Rule 1 and 2 and Order XXXIII Rule 3 (3) and thirdly, the timeliness of the application.

Mr. Mushi submitting on the competence of the application under **Section 38 (1) of the Civil Procedure Code [Cap 33 RE 2019]** stated that the provision is applicable only when execution proceedings are ongoing. He interpreted the words executing court in section 38 of the CPC to connote an ongoing application for execution. In his view, the Applicant ought to have applied for revision for this execution proceedings which is already concluded and not to apply section 38 of the CPC. He referred to the case of **John Bisilingi vs Justinian Elizeus**, Misc. Land Appeal No. 32 of 2019, High Court of Tanzania at Bukoba, at page 5. He referred to **Mulla the Code of Civil Procedure, 18th Edition, page 632**, which interpreted **section 47 (16) of the Indian CPC** which is *pari materia* with **section 38 of our CPC** to mean that the application must be ongoing. He further cited an Indian case in **Pradeep Mehra versus Harijivan J. Jethwa, Civil Appeal No. 6375 of 2023**, the Supreme Court of India.

On the timeliness of the Application, Mr. Mushi submitted that the Application is time barred. He referred the case of **Gabriel Mushi vs**

Pravichandra Chavda, Misc. Civil Application No. 74 of 2022, High Court of Tanzania at Tanga which in his view, granted extension of time in Application for execution No. 53 of 2020 while the applicant's prayers are referring to **Civil Application No. 4 of 2019** on the decisions of the Deputy Registrars of 25th September 2020 before Hon. Kabwe and that of 4th May 2021 before Hon. Beda Nyaki. In his view, no extension of time was granted to file any application arising from the latter two applications. He referred to the case of **John Bisilingi versus Justinian Elizeus Misc. Land Appeal No. 32 of 2019**, at page 5, where Hon. Kairo J stated that the option available to challenge a decision issued in execution is by a way of revision.

Regarding the applicability of **Order XXI Rule 1 and 2 and Order XXXIII Rule 3 (3) of the CPC**, Mr. Mushi submitted that the two provisions are inapplicable since they focus on adjustment of suits while there was no adjustment and there was no suit in the instant matter.

Regarding the substantive part of the application which he termed as second limb, Mr. Mushi pleaded the Court to consider the issue of sanctity of records where he referred the case of **Upe Mtuta vs Republic**, Criminal Appeal No. 129 of 2022 at page 6, High Court of

Tanzania at Mbeya where the case of **Alex Ndenya vs Republic, Criminal Appeal No. 207 of 2018, CAT** at Iringa (unreported) was referred where it was held that a court record is a serious document and should not be lightly impeached. He referred to page 15 of the proceedings, and submitted that the Respondent was heard on the issue of compound interest and that on page 18 of the same proceedings parties arrived at an amicable solution on the payable decretal amount of TZS 124,673,931.87. He further referred to page 19 of the proceedings of **Application No 4 of 2019** where the Applicant denied to be paid 20,000,000/= as first instalment and claimed to be paid 60,000,000/= as half of the decretal amount and also denied the five instalments for the rest of the amount. According to Mr. Mushi, the Hon. Deputy Registrar issued a ruling that the Judgment Debtor shall deposit the title deed and pay 20,000,000/= on the same day and that the reminder 104,873,931.87 was to be paid in five instalments.

Regarding the issue of compound interest, Mr. Mushi submitted that since there was no clause in the contract on compound interest and that the decree of the Court did not contain compound interest then it cannot be claimed during execution. He referred the case of **Equity Bank Tanzania Limited**, Civil Appeal No. 4 of 2022, CAT at Arusha. He also

referred to the case of **AMI Tanzania Limited vs Prosper Joseph Msele**, Civil Appeal No. 159 of 2020, CAT at Dar es Salaam at page 26 where interest was denied since it was not pleaded and so as the compound interest.

Mr. Mushi denied that assertion that the Respondent did withdraw the appeal. He stated that the Respondent was was not a party in Civil Application No. 18 of 1999 but he was only involved after the lifting of corporate veil.

In rejoinder, Mr Bana responding on the issue of the competence of the Application, submitted that the executing Court has exclusive jurisdiction to deal with all questions relating to execution. He referred to the case of **Twaib Ngonyani vs Tazama Pipeline Limited**, Civil Appeal No. 201 of 2018, CAT at Dar es Salaam and submitted that the Respondent waived his right to appeal against the decree of the Court by withdrawing a Notice of Appeal.

The counsel further submitted that Misc. Civil Application No. 74 of 2022 of the High Court of Tanga which was an application for extension of time granted an application so that the Applicant can file the instant

application as it is arising from **Execution No. 53 of 2020** and consequential orders. He insisted that there were various modes of execution, and all were closed on the 4th day of May 2021. He prayed for the orders therefrom to be set aside.

The counsel proceeded arguing that an Application for **Execution No. 53 of 2023** was not vacated. He prays for the same to be reverted for determination.

Regarding annexure A7 which was an agreement of payment of TZS 20,000,000/= and where the decretal sum was TZS 124,000,000/=, he argued that the Applicant did not sign the document. He therefor prayed for the Court to investigate as to whether the decree was satisfied.

Mr. Bana rejoined at lengthy but mostly, he reiterated what he submitted in the submission in chief, therefore I don't see any reason to reproduce all of his rejoinder. Nevertheless, the entire rejoinder is taken into account.

Having heard from both sides, the issues to be determined by this Court are:-



(i) Whether the Application is proper before the court.

(ii) Whether the Application has merits.

From the above issues, I prefer to start with the issue of the propriety of the application before the merits since points of law if confirmed may render determination on merits nugatory.

I would start with the issue of the propriety of the legal points in the Respondent's submission. Mr. Bana challenged the raising of the legal issues in the submissions instead of being raised as a point of preliminary objection. In law, legal issues need to be addressed at any stage of proceedings. (See **Peter Mpalanzi vs Christina Mbaruku (Civil Appeal 153 of 2019) [2021] found on Tanzlii.**

Since the Respondent raised the legal issues before the conclusion of the matter, this court is obliged to consider it. Therefore, Mr. Bana's submission that it was to be raised as a preliminary objection is insignificant to cause these points neglected.

Starting with the applicability of **Section 38 (1) of the Civil Procedure Code [Cap 33 RE 2019]**, I produce it hereunder for ease of reference;



*"All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined **by the court executing the decree** and not by a separate suit.*

From the above provision, questions arising amongst the parties to a suit on which a decree has passed need to be determined by the executing court on execution. In the instant matter the pertinent question is at what point can **Section 38 (1) be invoked**? This touches the interpretation of the words "***the court executing the decree***". I agree with Mr. Mushi on the interpretation of the words "***the court executing the decree***" which correctly should mean the court in which the execution proceedings are pending. When the Court closed the execution proceedings in **Misc. Civil Application No.4 of 2019** on the ground of full payment of the decretal sum, then, it became *functus officio*. The Law could not have so easily overruled the cardinal principle of *functus officio* to allow such simple reopen of proceedings already concluded before the same court. From the wording of the provision, it is clear that the provision is applicable when execution is still in process.



In the case of **Kamundu v R** (1973) EA 540 the E.A, it was held that;

"A court becomes functus officio when it disposes of a case by a verdict of a guilty or passing sentence or making some orders finally disposing of the case."

Since the issues raised by the applicant concerns an application for execution which was finally disposed of, then the hands of the court are now closed. It is not possible to reopen the concluded proceedings.

The case of **Hassan Twaib Ngonyani vs Tazama Pipe Line Limited** (supra) concerned an appeal against the revision of a decision of the District Court which declined to resolve issues emanating from the decree. In that matter it was the appellate court which reversed the matter for the executing court to deal with the issues arising amongst the parties. This is distinct from the instant matter where the Applicant is moving the same Court which concluded the matter to reopen it. Once the matter is finally concluded by a court, the same court cannot reopen the proceedings. The only remedy available can be revision or any other motion as the



applicant may prefer before a higher court. I disagree with Mr. Bana's suggestion on the applicability of the case of **Hassan Twaibu Ngonyani** in the way he is proposing. The case is distinguishable from his opinion in the sense that the matter involved an appeal where execution proceedings were still pending in Court by way of objection proceedings whereas in this matter, execution proceedings were finalised.

At this juncture, I find that the issue of competence of application, being a valid point of law and basing on it, the application cannot stand. This finding sufficiently disposes this matter. I will not proceed to determine the other issues on the merits of the application. Basing on that point, it is my considered view that the Application at hand is misconceived, and it is therefore dismissed with costs. It is so ordered.

Dated at Tanga this 14th day of December 2023



KATARINA REVOCATI MTEULE

JUDGE

14/12/2023

Court:

Ruling delivered this 14th Day of December 2023 in the presence of Mr. Makaro Advocate holding brief for Mr. Bana for the Applicant and Mr. Frank Mushi for the Respondent.



A handwritten signature in blue ink, appearing to read "Katarina Revocati Mteule", is written above the printed name.

KATARINA REVOCATI MTEULE

JUDGE

14/12/2023