

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

REVISION NO. 34 OF 2023

(Arising from the execution No 22 of 2020 originating from the decision of the District Court of Ilala at Samora in Civil case No. 122 of 2006)

ALLIANCE INSURANCE CORPORATION.....APPLICANT

VERSUS

TUSANGE KALALA MBWAMBO..... RESPONDENT

RULING

MKWIZU, J:

This is a suo moto Revision following a letter of complaint to the Judge in Charge, in the High Court of Tanzania, Dar es Salaam Sub Registry by the Judgment debtor in Execution No. 22 of 2022 in the District Court of Ilala at Samora.

It appears from the records that the applicant was 2006 sued by the respondent at the Ilala Samora Avenue District Court by then for the loss of his vehicle bearing the applicant's insurance cover. The suit was in 2012 resolved in the respondent's favor. According to the judgment and decree in the records, the respondent was awarded 35,200,000/= as indemnity to his lost motor vehicle, interest on the awarded sum above at 12% rate per annum, and 7% interest on the decretal amount from the date of judgment to full payment. This judgment was rendered on 20th December 2012.

Disgruntled, the applicant appealed to this court via Civil Appeal No. 13 of 2013. The appeal was to be disposed of through written submissions and

parties did comply with the order and by 27/12/2013 all the written submissions were already in the court file. The parties remained calm waiting for the judgment in vain and their follow-ups on the matter proved futile.

In the year 2020, the decree-holder filed at the trial court execution proceedings No. 22 of 2020 seeking for the execution of his decree by way of attachment and transfer of a decreed amount of 117,920,000/= from the judgment debtor Bank account No 0827179792 and 0300174027 maintained by the Exim Bank main branch. The judgment debtor advocate filed an affidavit in court resisting the execution of the said decree on three main grounds that there is a valid stay of execution order by this court pending the final determination of civil appeal No. 13 of 2013 which is still pending and that the amount sought to be attached is far above the decreed amount. He was of the view that the actual decreed amount is 85,044,000/= and not 117,920,000/=.

Having weighed the parties' submissions, the executing magistrate agreed to the proposed sum of 85,044,00/= as the correct amount agreed by the parties. She however declined the applicant's prayer to stay execution without a valid stay order and proceeded to issue a Garnishee Order nisi.

The applicant (decree holder) is not happy, he hurriedly filed in this court a complaint letter dated 30th August 2023, listing three issues that require this court intervention namely:-

- 1. There is still a pending appeal at the High Court, i.e. Civil Appeal NO.13 of 2013 originating from Civil Case No 122 of 2006, with the possibility of changing the entire judgment and decree in favor of the judgment debtor herein. It is a crystal-clear fact that should the execution proceed against*

the judgment debtor herein, it will cause irreparable loss to the judgment debtor if the decree-holder is nowhere to be found. Further to this, it is a clear fact that if the judgment debtor secedes in her appeal, it will be difficult for the judgment debtor to recover the same from him, and thus the judgment debtor shall suffer an irreparable loss.

- 2. There is also a stay of execution granted as per the exchequer receipt and the feedback we obtained from Adv Octavian, who had personal knowledge of this file, yet execution proceeded against us. There might be some missing documents from our end since the Advocate, who was handling this matter from the start, Advocate Lyimo is now deceased, but they highly believe that in the court file, there are records.*
- 3. There is high doubt on in whose hands the amount of money withheld from our account will fall since there has been a lot of confusion from decree holders, as at the beginning they stated that one Rudolph Temba has a power of Attorney from Tusange Kalala Mwambo, but at the same time, without having a Garnishee Absolute from the court they have issued a letter to the bank requesting that the said money be channeled to their bank account as per Tusange's instruction. They believe that this is not a procedure and that it is against the advocacy of professionalism.*

When the matter came for hearing on 11th October 2023, Mr. Alan Gabriel Nanyaro the Learned advocate, was in court for the applicant (judgment

debtor) while Mr. Munishi also the learned Advocate was in court representing the respondent, decree Holder.

Apart from giving the historical background of the matter, Mr. Nanyaro's advocate submissions were an elaboration of what he encountered in the process of handling the matter. He told the court that initially his clients were being represented by another advocate to the stage of filing the written submissions at the High Court, in Civil Appeal No 13 of 2013 where parties were notified that the judgment would be on notice but since then, no judgment was rendered by the High Court, until 2022 when the applicant received a summons to show cause why execution should not proceed against her. His efforts to trace the High Court file have proved futile. He then raised four concerns to the executing magistrate **One**, that there is still a pending appeal before this court, **two** there is an order staying the execution pending the final determination of the appeal, **three** that the applicant was worried about the legal capacity of one Rudolph Temba and **four**, the inflated decreed amount from 85,000,000/= to 117,920,000/=. The applicants counsel is, in essence, blaming the executing court for not considering their concerns calling upon this court to investigate on the legality of the execution proceedings. He also raised a new issue complaining of the letter to their client's bank by the respondent counsel directing them to pay the money through the law firm's account.

Mr. Munishi's submission in response to the application was twofold. He first questioned the revisional jurisdiction of this court over Civil Appeal No. 13 of 2013. He contended that revisional jurisdiction is a creature of statute exercised vertically and not horizontally. Relying on **Iron Steel**

Limited Vs Martin Kumalija and Others, Labour Revisions No.169 of 2022, (Unreported), Mr Mushi said, a court cannot exercise a revisional power over the decisions of the same court.

The second segment of his submissions rests on the complained execution Proceedings No. 22 of 2020, originating from Civil Case No 122 of 2006 of Ilala District Court by Hon Kihawa RM. He contended that Hon Kihawa had applied the overriding objective principle to reach her conclusion and this was because the applicant had acknowledged the claim through paragraph 12 of the affidavit filed in court by Mr. Nanyaro's advocate on 6/4/2023. To him, that decision is a decision on admissions equal to an interlocutory order which is not appealable nor revisable. He on this referred the court to Order X11 Rule 4 of the CPC and the case of **Zanzibar Electricity Corporation Vs Infratech Limited**, Civil Appeal No.100 of 2021(unreported) where it was held that;

"In the event, we find and hold that the judgment on admission sought to be challenged is an interlocutory order and thus not appealable. It contravenes section 5(2)(d) of the AJA. We accordingly sustain the preliminary objection raised by the first respondent.

He in addition, argued that according to Order 39 Rule 5(1) of the CPC, an appeal cannot bar the execution of the decree unless there is an order for a stay of execution which is missing in this case. Mr. Mushi was in a way condemning the applicant's counsel for misleading the court that there existed a stay of execution order without availing the said order to the court. He was emphatic that the applicant was inactive for almost 10

years without following up the matter until 2020 when she was awakened by the notice to show cause on why the execution should not proceed

Regarding the locus of Rudolph Temba, Mr Mushi said, this issue was discussed, and he had a registered Power of Attorney. H was also categorical that the letter written to the Bank by them was not a forthwith letter but rather a communication that when the trial court issues a garnishee absolute, the money would be paid to the client's account of the law firm. He lastly urged the court to find the complaints registered baseless.

In his short rejoinder, the applicant's counsel refuted the argument that he admitted the claims. He said, they only calculated the amount from the date of judgment to the date of execution. On the Power of attorney, he said, they were never served with the power of attorney until during the hearing when they complained that it was faded and could not show clearly what it was all about.

He suggested that two issues are noticeable on the letter written by the respondent's counsel to the applicant's bank. One that, the letter to the bank by the respondent counsel shows to have stemmed from the advice given to them by the respondent Tusange Kalala Mbwambo and not Rudolph Temba alleged to have a valid Power of Attorney, and two, that though the letter is directing the Bank to deposit the money to the clients account, the account number given belongs to the advocate firm raising doubt to the authenticity of the person on whom the decreed money are to be deposited.

Lastly, on the issue of stay of execution, he submitted that Advocate Octavian took over the matter and he tried his level best to get the file

but could not get the file in respect of the stay of execution and was told that the file could not be retrieved. While agreeing that an appeal cannot stay the execution, he wondered how the execution could have been stayed for 10 years without a stay order.

I have audaciously considered the party's submissions. I agree with the respondent's counsel that revisional jurisdiction is a statutory issue that is exercised vertically in the sense that there is no room for a court to revise its own decision. This is the legal position in our jurisdiction as of today. As introduced above, this is a revisions suo-moto opened to investigate on the validity of the execution proceedings No 122 of 2020 Ilala District Court and not the Civil Appeal No 13 of 2013 hence properly before the court. The question of whether there is a delivery judgment by this court in Civil Appeal No 13/2013 was necessary here because it is the foundation of the complaint by the applicant.

The applicant's complaint over Execution No. 22 of 2020 is attached on three main grounds as illuminated above. One is that there is still a pending appeal before this court. This argument is clipped on the failure of this court to deliver its judgment in Civil Appeal No. 13 of 2013 to date. Mr Nanyaro argues that there is a possibility of the overturning of the result of the original decree by the appellate court and therefore should the execution proceed against the judgment debtor herein, it will cause irreparable loss to the judgment debtor as it will be difficult to recover the decreed sum in the circumstances of this case where the whereabouts of the decree Holder is unknown.

I have read the records in Civil Case No. 122 of 2006 and the preferred appeal No. 13 of 2013. There is no doubt that Civil Appeal No. 13 of 2013

originates from the Judgment and decree in execution No. 22 of 2020 and that the said appeal is to date still pending. I am also at one with Mr. Nanyaro that the result of the appeal would be either affirming the trial court's decision or overturning the same. However, that, alone is not a guarantee for an automatic stay of execution. There is a plethora of authority in this area. In the case of **The Honourable Attorney General v. Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009 (unreported) the Court of Appeal held that:

"An appeal does not operate as an automatic stay of execution. "

In **D.B. Shapriya and Co. Ltd vs Gulf Concrete and Cement Product Co. Ltd**, commercial case No. 23/2015 (unreported), this court said:

" the court can only stop an application for execution of decree on two grounds, one, the decree has been satisfied, and two, if there is an order for the stay of execution from the court with competent jurisdiction."

And in **Jawinga Co.Ltd Vs Alistepro Investment Co. Ltd**, Commercial Case No. 103 of 2012 (unreported), this court held the same view that the pendency of an Appeal or notice of intention to appeal does not automatically operate as a stay of execution. The only appropriate measure by the applicant would have been to apply for a stay of execution stating why the execution should be stayed pending the final determination of Appeal No 13 of 2013 where his reasons would be gauged under Order XXXIX Rule 5 of the Civil Procedure Code, [Cap 33 R.E. 2019] before a decision is made.

I understand that there is attached in the complaint letter a chamber summons made by the applicants under Order XXXIX Rule 5(2) and section 95 of the CPC, a supporting affidavit, and an exchequer receipt dated 27/12/2012 suggesting that there was an application for a stay of execution at the trial court, but no order was availed to the court to prove that that application was ever allowed by the trial court. It should be noted that an application for a stay like any other application may end up being granted or rejected. The outcome of the application would have been only evidenced by an order of the court granting such an application. In this matter, no such an order was availed to the court making it difficult for the court to ascertain whether the attached chamber summons was granted or not. In such a situation the court is inclined to agree with the respondent's counsel that there is no such an order therefore the execution proceeding is properly before the trial court. I find and hold the 1st and 2nd points in the complaint letter baseless.

The third complaint reposes on the legitimacy of the person on whose hands the decreed amount is to land. His worries are dictated by the facts Rudolph Temba was from the beginning of the trial introduced as a person holding the power of Attorney from Tusange Kalala Mwambo,(the actual decree holder) but later before issuance of a Garnishee order respondent counsel issued a letter to the bank requesting the attached money to be channeled through the advocate's bank account naming Tusange Kalala Mwambo as the source of the instruction. He considers this not only unprocedural but also unprofessional. I think this complaint can suitably be raised and dealt with in the execution proceedings that are still pending before the trial court.

To sum up, the investigation of the record has failed to detect any procedural irregularity in the execution proceedings No 22 of 2020. The records of the execution proceedings are remitted back to the executing court for continuation of the execution.

Parties are also advised to follow up on their pending appeal before this court. Order accordingly




E.Y. MKWIZU

Judge.

15/12/2023