

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)**

AT DAR ES SALAAM

CIVIL REVISION NO. 32 OF 2022

(Arising from the Resident Magistrates' Court of Dar es Salaam in Civil Case No.100 of 1994)

ROSE PETER IDDI

*(As Administratrix of the Estate of Elizabeth Busongo).....***APPLICANT**

VERSUS

ANDREA ELISHA NGIDOS 1ST RESPONDENT

DAR ES SALAAM CITY COMMISSION 2ND RESPONDENT

RULING

02nd February & 09th May, 2024

BWEGOGGE, J.

This is an application for revision lodged by the one Rose Peter Idd in her capacity as the administrator of the estate of Elizabeth Busongo, the judgment debtor in Civil Case No. 100 of 1994 which was registered in

the Resident Magistrates' Court of Dar es Salaam. The applicant prays for an order that this court be pleased to revise the decision of the trial court in respect of the legality and propriety of the eviction order entered in favour of the decree-holder in Civil Case No. 100 of 1994, among others.

The background of this case is an eventful one; briefly, it may be restated as follows: The trial court entered *ex parte* judgment and decree in favour of the 1st respondent in Civil Case No. 100 of 1994 on 06th August, 1998. The judgment debtors were the applicant herein and the 2nd respondent. The 2nd respondent applied to set aside the *ex parte* judgment in the trial court. The application was dismissed on 06th May, 1997. Then, the same lodged an application (Misc. Civil Application No.135 of 1997) in this court seeking an extension of time within which to appeal against the decision of the trial court. Likewise, the application was dismissed on 30th April, 1998. Undaunted, the 2nd respondent filed an application for revision of the *ex parte* decree. The application was registered as Civil Revision No. 29 of 1998. Unfortunately, the revision was dismissed as well by this court on 06th August, 1999. Likewise, an attempt to move the Court of Appeal for *suo motu* revision in the correspondence with Ref. No. HC CR 29/98 dated 01st November, 1998 didn't yield any success, as depicted in the correspondence of the Chief Justice dated 14th February, 2001 vide Ref.

No. JY/C.210/11/3. Seven years later, the 1st judgment debtor (Elizabeth Busongo) along with the 2nd judgment debtor (the 2nd respondent herein) simultaneously lodged subsequent applications in the trial court for stay of execution of the exparte decree and leave to file the application to set aside the exparte judgment. The trial court granted both applications on 26th June, 2006. The decree holder (1st respondent herein) was not amused with the grant of the application by the trial court. He appealed to this court. In allowing the appeal, this court (Hon. Lady Justice Mansoor) observed that the trial court had previously dismissed an application for setting aside exparte judgment lodged by the 2nd respondent; and the appeal against the decision having been dismissed by this court, then the trial court is *functus officio* to entertain subsequent applications of like nature as the matter had been determined in its finality.

It seems the 1st judgment debtor was contented with an order for stay of execution until the execution of the exparte decree was revived recently. Her objection to the execution proceedings was overruled. Hence, this application.

The applicant herein was represented by Mr. Raphael Nyangi Awino, learned advocate, whereas the 1st respondent was represented by Mr.

Barnaba Luguwa, learned advocate. The matter herein was argued by written submissions.

In substance, Mr. Awino argued that the 1st judgment debtor (Elizabeth Busongo) died on 17th December, 2010, 13 years ago. And, on 07th June, 2011 the applicant herein was appointed an administratrix of the estate of Elizabeth Busongo, the 1st judgment debtor in Civil Case No. 100 of 1994. However, it was not until 25th August, 2023 that the applicant was served with a 14 days' eviction notice by the 1st respondent in respect of the ongoing execution proceedings of which she was kept under the dark. That upon follow-up on the matter, the applicant found that the trial court made orders in respect of the execution proceedings dated 31st January, 2023 and 13th August, 2023 which were commenced 13 years later since the demise of the 1st judgment debtor.

Hence, the counsel asserted that since the death of the 1st judgment debtor, the right to sue survived to the applicant as the legal representative of the deceased person in terms of the provisions of Order XXII, rule 4(1) and section 41 of the CPC. Therefore, the commencement of execution proceedings without the applicant being served with notice and, or being a party to the proceedings thereof, then the proceedings amounts to illegality for contravening the provisions of Order XXII, rule

4(1) and section 41 of the CPC. The cases; **Athuman Bakari Kibwigiri vs. Laurent Martine Lowri & 8 Others** (Land Case 7 of 2020) [2023] TZHC 1634 and **Exim Bank Ltd. vs. Yahaya Hamisi Musa** (Civil Appeal 275 of 2019) [2022] TZCA 598 were cited to bolster the point. The counsel concluded by praying this court to take indulgence in revising the execution orders entered by the trial court on 31st January, 2023 and 13th August, 2023.

Mr. Luguwa fiercely contested the application herein on the basis that the applicant has been unleashing procedural legal acrobatics which has kept her in possession of the suit property for about two decades now. The substance of his argument is that the applicant is not a stranger to the proceedings in the trial court as she purports to be. That it is the applicant herein who had taken charge of the proceedings acting as the next of kin to the 1st judgment debtor in respect of the application for stay of execution of exparte decree and leave to file the application to set aside the exparte judgment which was granted by the trial court on 26th June, 2006 whereas she remained inactive until the execution proceedings herein were revived.

Further, the counsel contended that it is misleading on the part of the applicant to allege that the execution proceedings were initiated 13 years

later whereas the 1st judgment debtor received the notice of eviction order of the trial court dated 07th May, 2004 emanating from the execution proceedings of which the respective judgment debtor was well aware of.

Lastly, the counsel enlightened this court that the applicant herein was a party to the execution proceedings of which her objection proceedings were heard and found without substance. The counsel referred the mind of this court to the sound decision of the trial court which is the subject of this application for just determination of this matter. He prayed this court to dismiss the application with costs.

I have keenly attended the submissions made by the counsel of both parties herein, the pleadings filed hereto and the record of the trial court.

I have made the following observations: **first**, the 1st judgment debtor in Civil Case No. 100 of 1994, namely, Elizabeth Busongo was alive when the exparte judgment was delivered on 06th August, 1996 as the same died on 17th December, 2010. The said judgment debtor never bothered to appeal against the impugned judgment of the trial court. **Secondly**, the applicant herein, purporting to act as the next friend to the 1st judgment debtor in the relevant case, instituted an exparte application for stay of execution and interparte application for leave to file application to set aside the exparte judgment. Both applications were duly granted;

however, no legal action was taken. **Thirdly**, the record namely, Notice of Warrant of Attachment Order in respect of the 1st attempt by the decree-holder to execute his decree, was duly served to the 1st judgment debtor on 07th May, 2004. Hence, the 1st execution proceedings were commenced during the period when the 1st judgment debtor was still alive contrary to the depositions made by the applicant herein in that the execution proceedings were initiated 13 years after the demise of the judgment debtor. It is worth noting that the execution proceedings were impeded and delayed by the application for stay of execution mentioned above from which an appeal lay to this court. **Fourthly**, the trial court afforded the applicant the right to be heard in her capacity as a representative of the estate of the 1st judgment debtor though the trial court found the purported representation questionable in the strict legal sense. Thus, the applicant had shown cause why the execution should not be issued and the trial court through its reasoned decision found the cause furnished by the applicant devoid of substance.

In view of the foregoing, it is patently clear that the applicant herein who alleged that, being the representative of the 1st judgment debtor, was not issued with notice to appear in court as legal representative of the deceased person for the interest of the deceased's estate, has been part

of the proceedings in the trial court and fully exercised her right to be heard. The same has deliberately intended to mislead this court. It seems she is fully committed to obstructing the ends of justice to the detriment of the decree-holder. This endeavour should not succeed. However, I found that the decree-holder (the 1st respondent herein) is partly to blame for his apathy and, or lack of diligence for failure to execute his decree since the last appeal was decided by this court on 30th January, 2015. His inaction opened a leeway to the objections proceedings impeding the execution of the decree. Hopefully, the decree-holder would now be committed to seeing that he enjoys the fruit of his decree.

In fine, I find the application herein not only bereft of merit but also calculated to obstruct the ends of justice. I hereby dismiss the same. The respondent shall have his costs.

I so rule.

DATED at **DAR ES SALAAM** this 09th day of May, 2024.



O.F. BWEGOGÉ
JUDGE