

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM SUB REGISTRY  
AT DAR ES SALAAM**

**REVISION APPLICATION No. 16 OF 2023**

*(Arising from Execution No. 7 of 2022)*

**RADVAN SHERCAL .....APPLICANT**

**VERSUS**

**LILIAN JOSEPH OGUTU.....RESPONDENT**

**RULING**

*03<sup>rd</sup> June, 2024 & 13<sup>th</sup> June 2024*

**G. N. ISAYA, J.**

This revisional application has been taken at the instance of the applicant herein, a judgment debtor in the Application for execution No.7 of 2021 in the Dar es Salaam Resident Court at Kisutu. The application sought to execute the decree in Matrimonial Cause No. 6 of 2017. The decree in the said matrimonial cause emanates from a joint memorandum of settlement which the parties agreed out of court and filed in court on 16<sup>th</sup> March, 2018. After the deed of settlement was registered in court and judgment entered, the parties executed two settlement deeds out of court on how to execute the decree of the court but with some adjustments on the distribution of some matrimonial properties. The two subsequent settlement deeds dated 11<sup>th</sup> April 2020 and 12<sup>th</sup> November

2021 on which the parties embarked as a roadmap of the execution of a decree remain a matter of concern and a trigger of this present matter in the executing court and before this court too. The applicant (judgment debtor) pressed for the decree secured after filing the deed of settlement in court on 16<sup>th</sup> March, 2018 be executed without regard to the two subsequent agreement on the execution of the decree. On the contrary, the respondent (decree holder) sought the subsequent agreement be taken abode. The executing court decided in favour of the respondent. The verdict was not well received by the applicant, hence his decision to embark on a new journey to this Court. Basically the applicant in this application is asking the court for the order as follows:-

1. *"That this Honourable court be pleased to call records of the trial court and revise the whole proceedings of the Resident Magistrate Court of Dar es Salaam at Kisutu in Execution No. 07 of 2022 for the purposes of satisfying itself as to the correctness, legality or propriety of the ruling delivered by Hon. F.H. Kiwonde, Senior Resident Magistrate on the 4<sup>th</sup> of April.*
2. *Any other orders this Honourable Court may think fit to grant and cost of this application"*

The application is well supported by the affidavit of Mohamed Chondo, advocate for the applicant. The respondent filed the counter affidavit to resist the application.

The application was argued by way of written submissions, the filing of which complied with the schedule agreed by the parties and ordered by the court.

Mr. Mohamed Chondo, learned counsel, appeared for the applicant, while the respondent was represented by Mr. Shongolo Ramson Charo, Learned advocate

Submitting in support of the application, Mr. Chondo submitted that the trial court while exercising her jurisdiction acted illegally and with material irregularity due to the fact that it has acted beyond the decree passed by the court, but at the same left other orders to that decree unattended.

Building the first premise of his argument under section 38 (1) of the Civil Procedure Code, Cap 33 RE 2022, he submitted that the executing court granted the execution partly leaving a lot of questions unattended which thus contravenes with the law sighted above. He mentioned the unattended matters to be such as relating to their company, **Curtain Palace (TZ)**, and tax liabilities of the matrimonial assets, which according to him, include the company, were not attended to despite that they were decreed. He contended that the Respondent ought to surrender her shares and sign Board Resolution

terminating her directorship with immediate effect. He stressed that all questions arising between the parties to the suit in which the decree was passed about the execution, discharge or satisfaction of the decree, have to be determined by the executing court. He buttressed his position by citing the case of **YACOBO GABRIEL MUSHI V. PRAVICHANDRA CHAVDA, Miscellaneous Civil Application No. 49 of 2023, HC at Tanga.**

In another point, he attacked the two subsequent agreements filed by the respondent in the execution application. He has the view that the gist of those contracts have varied the decree. He complained that the two agreements were not filed before the court that passed the decree, and were witnessed by the respondent's advocate only.

On the other side, Mr. Shongolo Ramson Charo, Learned advocate for the respondent submitted that after the settlement was adopted by the Court as a consent judgement, in different occasions, the applicant and the respondent met and entered into different agreements out of court. That in 2022 the respondent having realized that the applicant has neglected to honor the decree and the two agreements made out of court decided to file an application for execution No.7 of 2022. The executing Court granted execution of

its decree together with the two agreements made out of Court by the applicant and the respondent for the reasons that the parties were in the process of executing their decree.

Having the rival parties have submitted their respective submission above before I dwell to examine the complaints leveled down by the applicant, I should at this juncture start by observing and agreeing with a position of law which after all, is not contested by the parties that the executing court is vested with the power to determine all questions relating to the execution of the decree till the satisfaction of the same. In our jurisdiction, the court is involved in the supervision of the execution to ensure that the rights of all parties are protected under section 38(1) of the Civil Procedure Code Cap.33 RE. 2019. Maybe, I should reproduce the provision that the applicant also cited hereunder:-

*"38.-(1) 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."*

The law under the cited law above enacts a helpful rule that all questions relating to the execution, discharge, or satisfaction of the decree should be determined in the execution of the decree and not

by a separate suit. If there is ambiguity in the decree, an executing court can construe the decree to decide the precise meaning thereof. In doing so it can refer to the judgment, pleadings of the parties, and other proceedings leading to the passing of the decree. It should be earmarked that in the execution of the decree, the court cannot go behind the decree because it has to take the decree as it stands and execute it according to its terms.

Let us now turn to the complained area;

The complainant has complained that he submitted that the executing court granted the execution partly leaving a lot of questions unattended. He pointed out matters unattended are such as those relating to their company, **Curtain Palace (TZ), and** tax liabilities of the matrimonial assets which according to him, include the company. The respondent has briefly replied that the company has in all time been under control of the applicant, and in no way she could hand over anything to the respondent. In this complaint, I took time to visit through the records in the executing court. Admittedly, the ruling of the court and the order thereof made no mention of the Curtain Palace Company, nor matters of tax and liabilities were discussed or deliberated in the said ruling. However, in the submissions made leading to the ruling those matters were not subject to contest. The bitter contest was on the two subsequent agreements made out of the

court and which were not registered in court by the parties. Therefore, matters which were not attended to in the decision of the executing court were not litigious or inviting controversy at that time for the court to attend them. It should be noted, however, that, execution of a decree is the process through which a court ensures the enforcement of the decree in a judgment reaches its fulfillment or satisfaction. Being a process, the execution process may not be complete through a single act or decision depending on the circumstance of each case. As stated under **section 38(1) of the Code**, the satisfaction of the decree is determined in the execution of the decree and not in a separate suit. This means the execution process cannot be brought to a halt till all questions relating to the execution are determined and the execution has been carried out to the satisfaction of the decree. Henceforth, the applicant is not prohibited to raise again any question relating to the execution, discharge, or satisfaction of the decree for determination in execution of the decree and not in a different suit. This single decision of the executing court may not be the end in itself provided there are still questions relating to the execution of the decree which can be raised for determination. The complaint becomes under the circumstances, not a big deal at all.

The second complaint is that the executing court acted beyond the decree

by recognizing the two subsequent agreements made out of court and which were not filed in court. Mr. Chondo was unhappy and has the view that the effect of those contracts have varied the decree contrary to the law. He also complained that the two agreements were witnessed by the respondent's advocate only. On the other hand, Mr. Charo admitted that on different occasions, the applicant and the respondent met and entered into different agreements out of court in which they adjusted some terms in the decree. Having carefully examined the documents filed and submissions thereof, I should start by agreeing to the general principle that the executing court cannot vary or alter the decree. It cannot go behind the decree. It has to take the decree as it stands and execute it according to its terms. It has no power to question the correctness of the decree. {See an Indian case of **STATE BANK OF TRAVANCORE V. INDEXPORT REGISTERED, (1992) 3 SCC 159: AIR 1992 SC 1740**}

In this matter, it is common ground that the parties entered two different executory agreements out of court which adjusted the terms of the decree on 11.04.2020 and on 12.11.2021. Both parties signed in the subsequent agreements which were witnessed by an advocate. Following the agreement made on 12.11.2021, the



Applicant in this matter sold the house in plot No. 28, Block 14 to one Hafidh Hamdoun. Again, acting on the executory agreement of 11. 04. 2020, the Applicant in this matter received as payment TZS. 250,000,000/= that the house located at Mikocheni Phase II remain in the sole ownership of the Respondent. The applicant has not disputed all those facts, instead he is challenging the subsequent executory agreements since they altered the terms of the decree entered on 22.03.2018, and were not filed in court. He is unhappy because the executing court considered the subsequent agreements alongside the original decree.

I have again very carefully considered the circumstances of this case. The advocate for the applicant is not disputing that his client entered into those agreements wilfully. He complains that both advocates were to witness or be present. I think, this complaint has no legs to stand since the parties agreed themselves and the single advocate was enough to witness their agreements. As regards the status of the subsequent agreements, let me start with the case of **IRENE MADEJA MLOLA VS MASUDI IDDI SHOMARI & 20THERS, Misc. Land Case Application No.235 of 2020, (HCT-DSM)**. (Unreported) On page 4, my sister Hon.

Makani, J stated that:

*"Parties having agreed to the adjustment of the decree and correction in the Register of Lands to the satisfaction of the decree in the Land case No. 90 of 2010, the court cannot refrain from granting this application"*

In an Indian case of **YASHPAL SINGH V. ADDL DISTT. JUDGE, (1992) 4 SCC 504**, it was stated that *an executing court can mould relief in the light of changed circumstances.*

In **Mulla, the Code of Civil Procedure, 16th Edn.** Vol.3 at page 2448, that *"if the decree-holder enters into a fresh contract is legally enforceable, and though still executory, may amount to adjustment of the decree".*

But again, **Order XX1, Rule 2 of the Civil Procedure Code, Cap. 33 RE, 2019** allows adjustments of the terms of the decree by parties in agreements made as far as execution of the decree is concerned.

In our case, I agree with the wisdom of the executing court to include and have the required consideration of the subsequent agreements since the parties wilfully entered into the two executory agreements, and had started to execute them. It is the parties who adjusted the terms of the decree and not the court. In the circumstance of this matter, the court is allowed to wisely

navigate into the change made by the parties. Failure to recognize them can indeed bring injustice and miscarriage of justice, especially to the party that had performed its part.

In the upshot, I hold that this application is barren of fruits. Consequently, I dismiss the application and uphold the decision and order of the executing court. The Applicant is to bear the costs.

It is so ordered.



**G. N. Isaya**

**JUDGE**

**13/06/2024**

**Court:** Ruling delivered this 13<sup>th</sup> June 2024 in the presence of Advocate Shongoro Ramson Charo for the Respondent and also holding brief for Advocate Mohamed Chondo for Applicant, Ms. Veronica B/C and Hon. Kisaka (JLA).



**G. N. Isaya**

**JUDGE**

**13/06/2024**