

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

REVISION APPLICATION NO. 3 OF 2023

HUSNA KACHULU@ VIOLETH EDMUND KACHULU.....APPLICANT

VERSUS

AWADHI SEIF KAIRA.....RESPONDENT

RULING

10th & 26th June, 2024

A.P. KILIMI, J:

This is the revision application wherein the applicant is moving this court under section 44(1)(b) of the Magistrate Courts Act [CAP 11 RE 2019] 'MCA' and section 79(1)(b) (c) and (3) of the Civil Procedure Code [Cap 33 RE 2019] 'CPC'. Whereas prays for this court to call and examine the records of application for execution No. 2 of 2023 of Moshi District Court and make appropriate revisionary orders thereof.

A brief background leading to the application at hand is that; at Moshi District Court, the respondent herein filed for divorce among other things against the applicant in Matrimonial Cause No. 2 of 2019. The decision was entered in favour of the respondent herein. Being aggrieved by the trial court

decision, the applicant herein appealed to this Court vide Matrimonial Appeal No. 14 of 2020 where her appeal bared no fruits, thus lost the appeal. Being aggrieved by the first appellate Court decision, she lodged a notice of appeal to Court of Appeal and successfully applied for leave of appeal in this court. While waiting for processing her appeal, the respondent herein applied for execution in the District Court of Moshi, execution No. 2 of 2023.

The applicant herein being the judgment debtor lodged a Preliminary objections against execution to the effect that; the court lacked prerequisite jurisdiction to entertain application, second the application was bad in law and incompetent before the court for being in contravention with the mandatory provisions of civil Procedure (approved of Forms) Notice, 2017 GN No. 388 of 2017 as read together with written law of Marriage (Matrimonial Proceedings) Rules, GN No 246 of 1997 and third the application was bad in law and incompetent before the court for being in contravention with the decree. And in alternative the applicant replied to the respondent application and prayed the same not to be granted since there was a notice to Court of Appeal to appeal against the High Court decision.

Upon a full trial, the trial Court overruled the preliminary objections and proceeded to determine the application in merits by appointing the court

broker for execution process to continue. The applicant being dissatisfied with such orders, she then filed the application at hand for appropriate revisionary orders for the reason that such ruling and orders contained illegality as the trial court failed to exercise its power judiciously and the applicant was condemned unheard. On the other hand, the respondent in reply against the application stated that the applicant was not denied the right to be heard as both parties were accorded right to be heard and that no further steps were taken by the applicant after he lodged his notice to appeal to Court of Appeal thus was not a bar to execution.

Arguing this application by a way of written submissions upon allowed by this court to do so, both parties were represented by learned advocates, the applicant was represented by Mr. Kilasara whereas the respondent was represented by Mr. Omary G. Gyunda.

It was Mr. Kilasara submission that, the applicant was never accorded the right to be heard by the trial court during the hearing of execution application and that what was before the trial court for determination was the merit of the said Preliminary Objection and not otherwise. He stated that the trial court failed to exercise its power judiciously leading to the impugned decision nullity. To bolster his assertion on the importance on the right to be

heard, the counsel referred to the decision of **Hai District Council and another vs. Kilempu Kinoka Aizer** and 15 Others, Civil Appeal No. 110 of 2018 CAT at Arusha and **Abbas Sherally and Another vs. Abdul Fazalboy** Civil Application No. 33 of 2002. (both unreported)

In reply Mr. Omary Gyunda submitted that the applicant was given the right to be heard because after being served with the execution application, she entered her appearance by filing a preliminary objection which were argued by way of written submissions as provided for under order XX1 rule 21 sub-rule 1&2 of Civil Procedure Act 'CPC'. The counsel further stated that order XX1 Rule 21(1) of the CPC requires the execution to proceed if the judgment debtor fails to show cause as to why decree should not be executed. He submitted that the applicant ought to apply for stay of execution and not to appeal to the Court of Appeal 'CAT' as appeal are not a bar to execution. He prayed the application be dismissed with costs.

In a brief rejoinder, the applicant counsel stated that the counsel failed to take into account the procedure on notice as provided for in order XXI Rule 21(1) and (2) of the CPC. The applicant counsel stated that the trial court erred after overruling the objections and proceeded to grant the

application without hearing the said application as the Preliminary Objection were only on point of law and not to determine the case to its finality.

I have considered the rival arguments of the parties, and the attached annexures, the issue for determination is one, whether the applicant was condemned unheard in execution No. 2 of 2023 at the District Court of Moshi.

It is a trite law that courts should not decide matters affecting rights of the parties without according them the right to be heard as it is a fundamental constitutional right. See decisions of **R.S.A Limited vs. Hanspaul Automechs Limited and Another**, Civil Appeal No.179 of 2016 [2021] TZCA 96 and **Mbeya-Rukwa Autoparts and Transport Limited vs. Jestina George Mwakyoma** [2003] T.L.R 251. In **R.S.A Limited vs. Hanspaul Automechs Limited and Another** (supra). The court observed that;

"The Court in a plethora of decision has emphasized that courts should not decide matters affecting rights of parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned without being heard"

In this matter as per the affidavit in support of the application herein, item 5 and 6, the applicant claims that she was condemned unheard in execution No.2 of 2023 since the trial court after determining the preliminary objection proceeded to determine the application in merits by appointing the court broker without according her the right to be heard. In reply to that assertion, the respondent herein strongly denied and argued that the applicant was never denied right to be heard by the trial court as it properly granted the execution after hearing the 'PO' raised thus there were no illegality conducted. He added that the applicant failed to show cause as to why the execution ought not to be granted.

I have perused the trial court records proceedings and its ruling to see whether the applicant was condemned unheard in the execution No. 2 of 2023. The trial court records proceedings at page 3 and 4 on 15/06/2023 reveals that after the 'PO' was raised by the respondent who is now the applicant herein, the parties prayed to argue it by way of written submissions. The trial court allowed and scheduled the date for filling submissions in respect to that PO. In a drafted ruling at page 6 of the ruling, the learned. trial magistrate after determining the first limb of objection, proceeded to ask on whether the applicant herein/the judgment debtor

advanced good cause for stay of execution. For ease reference, I hereby quote;

"...the question to be asked now is whether judgment debtor advanced a good cause to stay execution..."

Again, at page 13 of the ruling, the trial magistrate proceeded and I quote;

*"...Before penning up, this court wishes to state that in this application judgment debtor was merely invited to show cause as to why decree should not be executed. Seems, the objections raised were only factor for staying execution. The fact that all the objections have been dismissed, there is no other factor to hinder execution process.....finally, **this court find the application by the applicant has legal merits...**"*

[Emphasis is mine].

From the above quoted excerpt of the trial court ruling, it seems that the trial Magistrate after determining the PO raised, proceeded to determine the application before it. But in my entire perusal of the record, the applicant through his advocate on 10th May 2023 filed his reply in writing, I have read this reply document objecting execution applied by the decree holder,

therein three objections were raised as alluded above and prayed the application be dismissed. Nonetheless, the applicant proceeded and used the word "*without prejudice*" to the above objections stated other three reasons on why execution should not proceed.

Therefore, despite of objections raised which to me I subscribe with the decision of the trial court, there were other reasons stated by the applicant for the executing court not to proceed, and in my view that reasons were required to be the next proceeding to be dealt with by executing court after dismissing the objections raised.

Now, in the above regard, the next sub-issue is whether those proceeded reasons advanced were determined by the trial court; I have scanned the entire ruling of executing court dated 18th July, 2023. In my view some of these three reasons were discussed and answered.

To start with the reason that, the judgment debtor avers that the said decree sought to be executed is subject to appeal to the court of appeal of Tanzania, and the notice of appeal to the said court was annexed. This was discussed from page 5 to 7 of the executing court ruling and reached conclusion that there is no evidence advanced by the judgment debtor that notice of appeal has been filed. I also subscribe to the reasons and decision

thereon; the applicant did not prove with evidence that he has filed a notice of appeal at the court of appeal. Thus, the district court was correct.

In respect to the reason that judgment debtor to be evicted from the suit property is not reflected in the decree to be executed, also the same was discussed by the learned Trial Magistrate from page 11 to page 13, and executing court reached a conclusion that eviction was the manner to affect the decree of the court, which in my view the executing court was correct because the decree holder was implement the order of the court which gave him possession of the house situated at Kwambwaruki area in Moshi Municipality which was in possession of the judgment debtor, then how can he possess it without eviction, I think the answer is eviction. Thus, the trial court was right.

Lastly, in respect to the reason advanced by the applicant in his document filed as said above which was, the house sought to be evicted is occupied by the issue of marriage, one Nasri Awadhi for his welfare; while the decree holder remains adamant to provide school provisions for his sons as ordered. I have entirely scanned ruling of the trial court; I am settled the same was not discussed and decided to give the way out. In such regard, since the applicant at the Executing court raised this ground as ground the

execution should not proceed, and because the executing court did not reply on it, I am of considered opinion the applicant was not heard on this matter specifically.

Therefore, on above premise, I am satisfied that the trial magistrate did was a fundamental breach of principle of natural justice in terms of right to be heard only on this third reason which was wrote by the applicant in alternative to the objections raised. I'm therefore in disagreement with the respondent counsel that the applicant was accorded right to be heard when the trial court ordered the parties to file their submission which in my view this reason was not contemplated therein and decided.

Therefore, I invoke my revisionary jurisdiction as under section 79(1) (2) and (3) of the Civil Procedure Act Cap 33 R.E. 2022 and I hereby nullify and set aside the order of Executing Court in execution No. 2/2023 of evicting the judgment debtor therein. I order the file be returned to the trial Court for the parties to be accorded rights to be heard in such regard stated above. The application allowed to such extent; in the circumstance no order as to costs is granted to any party.

It is so ordered.

DATED at **MOSHI** this 26th day of June, 2024.



A. P. Kilimi

**A. P. KILIMI
JUDGE**

Court: Ruling delivered today on 26th day of June, 2024 in the presence Mr. Martin Kilasara for applicant who is present in person. Also holding brief of Mr. Omari for respondent who is also present in person.

**Sgd: A. P. KILIMI
JUDGE
26/06/2024**

Court: Right of Appeal explained.

**Sgd: A. P. KILIMI
JUDGE
26/06/2024**