**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO 83 OF 2006**

**1.BALBIR SINGH SAINI .....1ST DECREE HOLDERS**

**2.PARVEEN BALA SAINI.....2ND DECREE HOLDERS**

**V.**

**1. SAVINGS AND FINANCE COMMERCIAL**

**BANK LTD .....1ST JUDGEMENT DEBTOR**

**2.BHRYA ENGINEERING CONTRACTING**

**CO. LTD.....2ND JUDGMENT DEBTOR**

**RULING**

**BUKUKU, J**

The matter before me is an application for execution of a decree of the Court of Appeal dated 24th November, 2009. The application was filed under Order XXI Rule 1 of the Civil Procedure Code, (Cap 33 R.E. 2002). On the date fixed for hearing, by consent, parties prayed for an adjournment in order for the Decree Holders to verify the position as given by the second Judgment Debtor that he has already complied with the Court orders. Prayer for an adjournment was granted and the matter was set for hearing on 25th May, 2011. On that date, Counsel for the Decree Holders, Mr. Ngiloi, submitted that, in the course of verifying if their clients

have been paid, it was discovered that, the second Judgment Debtor had paid back the monies into 1st Judgment Debtors' bank way back in 2009.

It is the 1st Judgment Debtor who is holding the Decree Holders' monies for not crediting the same into the Decree Holders' account. He submitted that this has caused great inconvenience to his clients and his family and therefore sought guidance of this court. On its part, Counsel for Judgment Debtor informed this Court that, the 1st Judgment Debtor Savings and Finance has instructed the second Judgment Debtor, to release payment and that 2nd Judgment Debtor is in the process of releasing the same.

Considering the conflicting statements from the Decree Holders against those of the Judgment Debtor, I found it prudent to summon all parties so that the Court is rightly guided on the status of execution of the decree. The first issuance of summons to parties to verify on the allegations, was argued on 25th June, 2011. On that date, I found as a fact that the Chief Executive Officer of the 1st Judgment Debtor who was summoned to appear before the Court did not appear before me. The object was for him to inform this Court, the exact status of the implementation of the decree. So, I invoked the provisions of OXXI Rule 35(1) of the CPC by ordering the appearance in Court of the Chief Executive Officer of the 1st Judgment Debtor.

On the 8th of June, 2011 as ordered, Mr. James Bushiri, the Chief Executive Officer of the 1st Judgment Debtor appeared before me accompanied by his Counsel, Mr. Kesaria. On the part of the Decree Holders, Mr. Ngiloi submitted that, despite the order issued by the Court of Appeal on 1st April, 2010, the account of Judgment Debtor has not been credited as called upon by this Court. Either, it has been discovered that, the money which Decree Holders has been claiming from Judgment Debtors has been paid even before Judgment was pronounced in 2009 by the Court of Appeal. He submitted that, knowing fully that the monies

were fully paid, Counsel for 1st Judgment Debtor disputed the findings of this Court and went ahead to file an appeal to the Court of Appeal.

When the appeal was heard, orders of this Court for reliefs claimed were adjusted in part to his clients' detriment. Counsel for Decree Holders submitted that further that, they were aggrieved by the discovery and they personally wrote to the Counsel for Judgment Debtor who did not respond. The Decree Holders were also prepared for a settlement but Counsel for Judgment Debtor was not moved.

Counsel for Decree Holders maintained that, it is based on the conduct of this Counsel for Judgment Debtor that they have wasted their time and efforts to struggle in Court for claims which were obvious. The Court was informed by Counsel for Decree Holders that, as they were waiting to appear before me, Counsel for Judgment Debtor informed him that, his clients account has already been credited. However, upon enquiry from Judgment Debtor agent, it was revealed that, no monies had been deposited in those accounts. Based on that discovery it was evident that, the Court order was yet to be satisfied by Judgment Debtor.

Mr. Kesaria, Counsel for Judgment Debtor countered by submitting that, what Counsel for Decree Holders submitted was incorrect, untrue and nothing else than a statement from the bar. The submissions are statements which must be deponed under oath so that they can be challenged and contested. Apart from that, Counsel for Judgment Debtor submitted that, the issue to be determined by this Court, is the application for execution which was filed by Decree Holders in this Court on 30th March, 2011. He submitted that, if one looks at the application for execution, it has itemized the amounts claimed by Decree Holders. Counsel submitted that, he is prepared to prove to this Court that the amount claimed in the execution have been paid in full and therefore, there is nothing more to execute. He prayed to be given permission to file in Court proof of payment of the decretal sum to show proof. That prayer was granted.

As for the other complaints, Counsel submitted that they are incorrect and untrue and irrelevant because the decree of this Court was appealed to the Court of Appeal. If anything, the Decree Holders should take up his grievances with the Court of Appeal. He therefore called upon this Court to dismiss the application.

In reply, Mr. Semu, also Counsel for the Decree Holder, submitted that, the matter before the Court is for verification of the payments said to have been made by the 2nd Judgment Debtor into Decree Holders account. He maintained that, in their discovery, it was revealed that the monies were paid way back in 2009. The Counsel for Judgment Debtor misdirected this Court and the Court of Appeal and concealed the facts. Finally, he submitted that, the account of the Decree Holders shows that the monies are not deposited as opposed to what has been submitted by Counsel for Judgment Debtor. He therefore prayed the Court to protect its integrity and power and to make sure that there is no abuse of Court process.

It is a fact that, before this Court, there is an application for execution filed by the Decree Holders. It is also a fact that, the said application is yet to be disposed of. What has transpired is for the Decree Holders to seek indulgence of this Court to set aside the decision of the Court of appeal delivered on 1st day of April, 2010. Upon perusal of the judgment, I observed that, the Court of Appeal did not upset the ruling of Hon Werema, J, rather, some of the reliefs sought were adjusted downwards to the detriment of the Decree Holders. Counsel for the Decree Holders is now claiming foul play by Counsel for Judgment Debtor.

Before I move further, I need to satisfy myself whether this Court is properly moved in entertaining this application. The matter was brought to me in a form of a complaint. No affidavit was filed to support the claim so that it could have been challenged in the normal cause of proceeding, nor was there any evidence has been led by way of an affidavit or otherwise, to show that repayment of the monies in question was done way back in 2009 as alleged. If the monies were paid, the Decree Holders had a duty to

certify in this Court such payment, according to Order XXI sub rule (1) of rule (2) of the CPC. If the same was not certified as aforesaid, such payment cannot be recognized by any Court executing the decree. In the circumstances, and as far as the law is concerned, I cannot entertain this application. Even if the application was proper before this Court, yet against it, could fail for the simple reason that I am functus officio on it having been determined by the Court of Appeal.

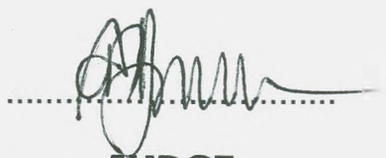
The normal principle of the law is that, once judgment is pronounced or an order is made, the Court becomes functus officio. Such judgment or order is final and it cannot be altered or changed. As a general rule, once an order has been passed by a Court, a review of such order must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort. It is called for only where a glaring omission, patent mistake or like grave error has crept in earlier by judicial fallibility. Once a decision has been made, it is that appellate jurisdiction decision alone which subsists and is operative and capable of enforcement.

In the case of **Transport Equipment V. Devram Valambia, TLR 1998 Civil Application No. 18 of 1993,** the Court of appeal held:

> *"The Court of Appeal of Tanzania has limited inherent jurisdiction to review its decision when such decisions are a nullity, or where a party is wrongly deprived of opportunity to be heard; and there is also inherent jurisdiction in the Court to review its own decision whether such decisions are based on manifest error on the face of the record resulting in a miscarriage of justice."*

Perhaps it is pertinent to point out that, if Counsel for the Decree Holders considered himself aggrieved with the decision of the Court of Appeal for adjusting the decretal amount, he was not without remedy. It was open to him to seek revision or review against that decision, after obtaining leave to do so of course, but certainly, not to claim to this Court against the decision of the Court of Appeal.

From the above foregoing, I do not see the need to reopen the matter again. All said and done, in the circumstance, the decision of the Court of Appeal is solidly in force. Any issue that had been adjudicated upon cannot be entertained again by this Court through a side wind. In the circumstances, the application fails. What needs to be entertained is the application for execution of the decree as submitted by the Decree Holders.



**JUDGE**

20 June, 2011

**Words: 1706.**