

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 88 OF 2020

LAURA LUCAS CHOGO.....DECREE HOLDER

VERSUS

INTERNATIONAL COMMERCIAL

BANK TANZANIA LIMITED.....JUDGMENT DEBTOR

Date of Last Hearing: 22/06/2023

Date of Ruling: 26/07/2023

RULING

MKEHA, J:

Through an application for execution of a decree, the applicant is moving the court for issuance of an order compelling the respondent to handover to the former, original Certificate of Title No. 80752 along with its relevant properly executed instruments of discharge of mortgage as well as payment to the applicant by the respondent, of TZS 2,100,000/= being the amount of costs taxed in favour of the applicant, or else, the respondent's Chief Executive Officer or General Manager, be imprisoned

as a civil prisoner. Upon filing of the application, a summons to show cause was issued to the respondent. Thereafter, an affidavit to show cause in opposition of the application for execution was filed on behalf of the respondent. The affidavit was affirmed by Mr. Vitalis Evarist Salim, Principal Officer of the respondent.

In the affidavit for showing cause and the submissions made in court by Mr. Richard Madibi learned advocate for the respondent, it was stated that, in the court's ruling, whose orders are subject of the present application for execution, the court ordered permanent injunction restraining the respondent from selling the disputed property and the decree in Commercial Case No. 143 of 2014 was declared null and void. It was submitted also that, in the said ruling, there was no specific order in which the court ordered the respondent to handover Certificate of Title No. 80752 in respect of Plot No. 33, Block "C" at Kunduchi Mtongani Area to the applicant. Further, it was submitted that, although the mortgagor of the disputed Certificate of Title had since passed on, the applicant was not claiming return of the said Certificate in the capacity of the administratrix of the estate of the deceased mortgagor. Finally, the learned advocate for the respondent concluded by submitting that, the applicant was moving the

executing court for execution of a non-existing order. There was no attempt on part of the respondent, to challenge execution of the taxed amount of costs in favour of the applicant.

The counter affidavit sworn by the applicant made reference to the trial court's permanent injunctive order which restrained the respondent from selling or alienating the applicant's matrimonial mortgaged property. Then Mr. Heri Kainga learned advocate for the applicant submitted in reply that, the injunctive order ought to be construed by the executing court to mean that, the respondent was no longer authorized to retain the disputed Certificate of Title. The applicant's counter affidavit was silent, as to why the applicant was asking the court to send the respondent's Chief Executive Officer or General Manager to prison as a civil prisoner, in execution of an order resulting from civil proceedings, to which s/he was not personally a part thereto.

The only determinative issue is **whether the executing court has jurisdiction to modify the trial court's decree or order, to make it executable.** Before I start venturing in responding to the issue, it is necessary to recall, the operative portion of the decision sought to be executed. It provides:

"In the upshot, this application succeeds and this Court settles for the following orders:

- 1. That, an injunction is hereby issued permanently restraining the Respondents, their agents or servants or any other person from selling or alienating the Applicant`s matrimonial property on Plot No. 33 Block "C", Kunduchi Mtongani, Kinondoni Municipality, registered under CT. No. 80752.*
- 2. That, the Compromise of Suit and the Decree issued in respect of **High Court Commercial Case No. 143 of 2014**, was obtained by fraud. Since the decree was obtained by fraud, the same is illegal, null and void.*
- 3.*
- 4. The Respondents are to pay costs of this Application"*

According to Mr. Richard Madibi learned advocate for the respondent, in the trial court`s decision quoted hereinabove, there was no specific order compelling the respondent, to hand over the disputed Certificate of Title to the applicant. As such, in view of the learned advocate, the applicant was moving the court for execution of an order which was nonexistent. On the other hand, Mr. Heri Kainga learned advocate for the applicant held a firm view that, an order compelling the respondent to hand over the disputed

Certificate of Title to the applicant was implicit, in the permanent injunctive order of the trial court.

It is true that, before issuing execution orders the executing court can provide clarity, interpret or construe a decree or order while keeping intact and undisturbed, the decree or order as passed by the trial or appellate court. However, while exercising its jurisdiction, the executing court is not permitted to alter materially, the terms and conditions of the decree or order of the trial or appellate court. In an Indian case law it was the holding of the Supreme Court of India that, the executing court may look into the proceedings to find out the correct meaning of the decree and consequently may construe the decree to effectively implement it. **See:**

BHAVAN VAJA VS. SOLANKI HANJUJI KHODAJI MANSANG, A. I. R. 1972 S. C. 1371. I subscribe to this position.

In this case, looking at the Chamber Summons which initiated Miscellaneous Commercial Application No. 88 of 2020 one finds that, the applicant had moved the court for two main reliefs. The applicant had moved the court for an injunctive order restraining the respondent from selling or alienating in any way, the applicant's matrimonial mortgaged property. The applicant had further asked the trial court to investigate

legality of the decree in respect of High Court Commercial Case No. 143 of 2014. The reliefs granted to the applicant as highlighted hereinabove, were really in consonance with what the applicant had approached the court for.

The position regarding the executing court's powers to clarify, interpret or construe the trial or appellate court's decrees and orders as indicated hereinabove, should not be interpreted to mean that, the executing court is authorized to modify a decree or order to make it executable. When the decree or order is self-explanatory and self-contained, the executing court has no jurisdiction to modify it. It has to be executed as it is. In other words, save for rejection of a plaint and determination of any question within section 38 or 89 of the Civil Procedure Code, a decree cannot be implied in any other way. And when the decree or order to be executed is found deficient to the extent of being incapable of execution, a deficiency which cannot be rectified by the executing court, the parties have a remedy of applying for review or otherwise in accordance with the law. The said review of the decree or order has to be by a court which passed the decree or order and such a jurisdiction is not available to the executing court in execution proceedings.

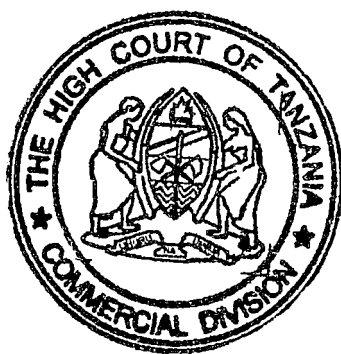
In the present application, the applicant seeks to execute an order which is completely lacking in the operative portion of the decision sought to be enforced as appearing hereinabove. That is not a deficiency capable of being rectified by the executing court, in the circumstances whereby the trial court appears to have granted to the applicant, all the reliefs sought in the Chamber Summons. The applicant is advised to revert to the trial court to obtain a specific order compelling the respondent to surrender the disputed Certificate of Title to her or any other person legally entitled to receive the same after the demise of the mortgagor. The executing court will no doubt be able to execute such a specific order of the trial court if obtained.

Regarding execution of the awarded and taxed costs, the respondent did not appear to challenge execution of the said part of the trial court's award. On the other hand, the applicant offered no reasons in her counter affidavit, why she was struggling to cause imprisonment, of a person who was not part to civil proceedings which resulted into the orders sought to be executed. In the absence of the said reasons, civil imprisonment cannot be ordered. **See: YUSUPH MANJI VS. EDWARD MASANJA & ANOTHER (2006) T.L.R, 127** and **THE GRAND ALLIANCE LIMITED**

**VS. MR. WILFRED LUCAS TARIMO & 4 OTHERS, CIVIL
APPLICATION NO. 187/16 OF 2019, CAT, AT DAR ES SALAAM.**

For the foregoing reasons, the respondent is held to have succeeded in showing cause to the extent shown hereinabove, why the execution orders sought, should not be granted at this stage.

DATED at DAR ES SALAAM this 26th day of JULY 2023.




C. P. MKEHA

JUDGE

26/07/2023

Court: Ruling is delivered in Chambers this 26th day of July 2023, in the presence of the applicant, Mr. Riwa learned advocate holding brief of Mr. Kainda learned advocate for the applicant and Mr. Makamba learned advocate for the respondent.




C. P. MKEHA

JUDGE

26/07/2023