

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPL. NO. 72 OF 2021

**JUSTIN MOSES SANGU t/a
ELLYALICE ENTERPRISES.....APPLICANT**

Vs

KCB BANK TANZANIA LTD.....1ST RESPONDENT

**M.M AUCTIONEERS &
DEBT COLLECTORS CO. LTD.....2ND RESPONDENT**

RULING

Date of Last Order 9/8/2021

Date of Ruling 7/10/2021

T.N. Mwenegoha, J

This is an application made under Section 95 of the Civil Procedure Code (Cap 33 of R.E 2019), herein under referred to CPC, where the applicant filed Chamber Summons and his sworn affidavit praying for the following orders:-

1. That, this Honourable Court be pleased to issue an order declaring that the procedure undertaken by the respondents to execute consent judgment of this Court in Land Case No. 361 of 2015 contravenes Section 42 and Order XXI of the CPC.
2. Costs of the application.
3. Any orders and relief(s) this honourable Court deems fit and just to grant.

Hearing of the suit was by way of written submissions whereby the applicant was represented by Mr Justins Moses Sangu, learned advocate while the 1st and 2nd respondents enjoyed the services of Mr Elisa Msuya, learned counsel.

Submitting on this application Mr Sangu stated that, the execution done by the respondents against the consent judgment of this Court in Land Case No. 361 of 2015 contravenes Section 42 and Order XXI Rule 9 of the CPC. The cited section reads as follows and I quote;

"Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree: -

(a)by delivery of any property specifically decreed;

(b)by attachment and sale or by sale without attachment of any property;

(c)by arrest and detention in prison;

(d)by appointing a receiver or

(e)in such other manner as the nature of the relief granted may require."

As well Order XXI Rule 9 of the CPC obliges a decree holder to make an application before the Court which passed the decree or to the officer appointed in that behalf to execute a decree in case he desires. However, he submitted that the 1st respondent being aware of the consent judgment still instructed the 2nd respondent to auction and sale the applicant's properties. He revisited clause 7 of the deed of settlement which read as follows;

*"That this Deed of Settlement shall constitute a Consent order and decree of the Court as between the plaintiff and the defendant in respect of the dispute between them and the parties hereto agree the Court to record as such and should either of the parties hereto default in the performance of the terms herein **it shall be enforced in the same manner and to the full extent as a decree of the Court.**"*

(emphasis provided)

He submitted that the respondent's conduct to auction the suit properties without order of the court is tainted with ulterior motive aimed at causing irreparable loss and damage to his properties and this Court being fountain of justice should invoke powers vested in it by Section 95 of the CPC to order respondent to honour consent judgment of the Court. Since no application for execution has been preferred by 1st respondent to execute consent judgment, hence their conducts are with no legal backing and therefore he prays this court to grant prayers sought in chamber application with costs.

In reply, Mr Elisa Msuya, counsel for the respondents submitted that, the legal issues arising from submissions by the applicant are; i) Whether execution of decree in Land Case No. 361 of 2015 violated Section 42 and Order XXI Rule 9 of CPC and ii) Who between the applicant and 1st respondent stands to suffer irreparably.

In the upshot his submission on the 1st issue whether the execution violated the law as per Section 42 and Order XXI Rule 9 of CPC, he started by citing the case of **SHELL AND BP TANZANIA LIMITED vs UNIVERSITY OF DSM [2002] TLR px. 225 at page 230-233** (sic) to wit the Court of Appeal held that *it is not necessary in all execution cases for a decree holder to resort to Court for assistance. Court assistance shall only be sought where peaceful execution is not forth coming.*

In the instant case Mr Msuya submitted that judgment was entered peacefully by the consent of parties and as recorded in Clause 3 of the deed of settlement that the decree holder was given option to realize the mortgage property to liquidate the outstanding debt.

Further he submitted that nowhere in that clause specified that the 1st respondent (decree holder) agreed with the applicant to resort to court for execution is a must.

On the 2nd issue on who is more likely to suffer irreparable loss, he referred this court to the decision in the case of **AGENCY CARGO INTERNATIONAL VS EURAFRICA BANK (T) LIMITED, HC DSM, CIVIL CASE NO. 44 OF 1998 (Unreported)** where it was held at pg 9 that;

".....The objection of security is to provide a source of satisfaction of the debt covered by it. The respondent to continue being in banking business must have funds to lend and which has to be repaid by its debtors. If a bank does not recover its loans it will seriously be an obvious candidate for bankruptcy.....It is only fair that banks and their customer should enforce their respective obligations under the banking system."

He submitted with reference to the above quoted holding that, in the present case it is the bank (1st respondent) to suffer irreparably than the applicant because first the suit property is mortgaged as security and upon default the charged security is sold. Secondly, that parties agreed upon default by applicant then the decree holder is now enforcing the terms of the consent decree. Thirdly, it is incomprehensible that the Court allows applicant to remain with both money loaned and security and therefore as it was held in **AGENCY CARGO INTERNATIONAL's** case that if the above is allowed to happen then 1st respondent will obviously be candidate of bankruptcy.

He further submitted that the consented decree is binding contract between parties as per Section 37(1) of the Law of Contract Act, Cap 345 R.E 2019. He cited also the case of **MBOJE JILALA VS NBC, CIVIL CASE NO. 3 OF 1993 at pg 4** to wit was held that;

"It must be remembered that transaction is contractual and the sanctity of such contract must be maintained and the bargain upheld. If the plaintiff in the course of such transaction gave the defendants the power to sell the house without the courts intervention he has himself to blame and consequently I cannot read any illegality therein."

Hence it was his submission that, Clause 3 of the decree, refers to mortgage deed where rights of the 1st respondent, the decree holder, to sale the mortgage property are dictated.

In rejoinder Mr Sangu submitted that on face of record it is clear that the respondents have admitted that Land Case No. 361 of 2015 between applicant versus 1st respondent ended amicably by deed of settlement. He re-joined further that the case of **SHELL AND BP TANZANIA LIMITED** (supra) as cited by the respondents' counsel is distinguishable from the present case as the applicant was challenging execution preferred vide Order XXI Rule 33 (1) of the Civil Procedure Code for recovery of immovable property while the present case the applicant is challenging the course used by the respondents to execute the consent judgment.

He quoted paragraph 2 of page 232 of the case of **SHELL AND BP TANZANIA LIMITED** (supra) which observed the following;

"The Civil Procedure Code 1966 provides for various modes of execution. Although Order XXI Rule 9 provides for

application to the court where it is desired to execute a decree, there are other provisions which evidently excuse the assistance of the court. Take Order XXI, Rule 1(1)(6), under this provision money payable under a decree, may be paid out of court to the decree holder. It is not required to move the court in order for judgment debtor to pay the decree holder. The decree holder will resort to an application to court only where the judgment debtor does not comply with the decree.....”

He submitted that it is necessary for the 1st respondent to ask assistance of the court to execute a decree. He contended that the course pursued by the respondents to execute decree offends the natural justice and that the applicant deserves right to be heard. He submitted the course preferred by respondents to enforce decree of the court is not peaceful in that the 1st respondent instructed the 2nd respondent to sale applicant's property in a public auction, the exercise that is impracticable without order of the court and without involving the applicant in the process.

Further, he submitted that Clause 3 should be read with Clause 7 of the deed of settlement since it empowers parties to enforce consent judgment in the same manner as decree of the court and since the respondents intend to use coercion to sale applicant's properties, there is likelihood that the applicant will suffer irreparable loss and damage to his property given the same might be sold at a throwing price.

He referred Clause 7 of the deed of settlement that the wording "*Shall*" means the *act must be done*. The case of **GOODLUCK KYANDO VS R [2006] TLR 363** at page 368 and 369 the Court of Appeal was of the view that;

".....this court in the case of Fortunatus Masha vs William Shija and 3 Others had occasion to construe the word "shall" as used in Rule 76 (3) of Court of Appeal Rules 1979 and stated as follows at page 43D;

We think that the use of "shall" does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstance of each case.

We would like to point out however, that since the coming into force of the Interpretation of Laws Act, Chapter 1 on the 1 September vide Proclamation Number 312 of 2004, the Law on this point may change in view of Section 53(2) which provides;

(2) "Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Hence, he concluded that with such reference the case of **GOODLUCK KYANDO** (supra) respondents herein are not relieved from asking assistance of the Court to enforce decree of this Court in Land Case No. 361 of 2015 and if allowed the applicant will suffer irreparable loss more than the 1st respondent given that the value of the suit premises exceeds the amount due to her.

After taking into consideration of the parties' pleadings and submissions I now have to determine whether this application has merit. However, before I do that and for better understanding I feel duty bound to define.

the term consent judgment However, I have to start by giving meaning to the term judgment. Section 3 of the CPC provides the term judgment to mean *statement given by a judge or a magistrate of the grounds for a decree or order.* According to Merriam – Webster Legal Dictionary consent judgment is a *judgment approved and entered by a Court by consent of the parties upon agreement or stipulation.* Deriving from this, *in my view a consent judgment therefore means "a statement approved by a judge or court of the grounds and terms of agreement between parties to a suit with their consent so as to settle the matter amicably.* Consent judgement therefore is a **judgment of the court per se**. It is therefore enforced by the same rules and procedures as any other judgment of the court.

Now, the question in this application is whether, the terms in the consent agreement can be construed to apply without Court's involvement as per the agreement between the parties? The answer in my opinion is in the negative. Where a term is agreed upon by the parties, if that agreement has been converted to a consent judgment then Court has to be involved. It respondent wanted to act on the said consent agreement and execute the agreed terms then the respondent had to apply to the Court for the execution.

I say so by being guided by the provisions of Order XXI Rule 9 of the CPC which states that:

*When the holder of a decree desires to execute it, he **shall** apply to the court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions herein before*

contained to another court then to such court or to the proper officer thereof.

It is therefore a mandatory requirement that the decree holder must apply for execution at the Court that passed the decree. I agree with the applicant that the case of **Shell and BP TANZANIA LIMITED** (supra) is distinguishable from the present case as in that case the applicant was challenging execution for recovery of immovable property. However, in the instant case execution of the consent judgment involved publicly auctioning the applicant's property by way of sale of the property.

Even if the consent judgement was entered amicably, execution without assistance of the Court cannot be said to be peaceful.

For execution of immovable property involves myriad of scenarios, it may, involve removing of judgment debtor from the suit property and this process may not always be peaceful and hence assistance of the Court is not only important for the safety of the judgment debtor but also a guarantee of smooth execution process and for the decree holder to realize his outstanding debt.

In this particular case while the 1st respondent executes the property to realize her interest in the said property to the extent of the outstanding amount owed, the applicant has also interest in the said property and as stated by the applicant, that the suit property has more value than the outstanding amount of debt owed and hence in no way this can be said to be a peaceful execution.

The purpose of referring to the Court for execution is to inform the Court that there is a default on payment or fulfilling the consent judgment and therefore the Court that participated in the parties' amicable agreement should give orders as to how the execution can be done. The Court will



therefore determine the outstanding debt and appoint an *independent and free auctioneer* to perform the execution only to the extent of amount owed. For this matter the execution will be free from more litigation which may occur if the Court is not involved.

As clearly stated by the applicant, Clause 3 cannot be read in isolation of Clause 7. That indeed upon default of the judgment debtor, the decree holder (1st respondent herein) shall realize the mortgaged property to liquidate the whole amount outstanding amounts and other necessary measures to recover the said settlement sum. Clause 3 does not give the manner to which the judgment debtor can use to realize the mortgaged property. This is why I agree that Clause 3 cannot be read in exclusion of clause 7. It is only the Court that entered the judgment or decree that can execute it.

I therefore declare the procedure taken by the respondents to execute consent judgment in Land Case No. 361 of 2015 contravenes Section 42 and Order XXI Rule 9 of the Civil Procedure Code [Cap 33 R.E 2019]. Application is granted and respondents are ordered to pay costs of this suit jointly.

It is so ordered.

Dated at Dar es salaam this 15th day of October, 2021

 
T. N. MWENEGOHA
JUDGE