

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

EXECUTION NO. 70 OF 2021

(Arising from Land Case No. 71 of 2014)

BENEDICT SUDIDECREE HOLDER

VERSUS

PASENCE PAUL KATABALWA..... 1ST JUDGMENT DEBTOR

MWITA MARWA KISIBOYE 2ND JUDGMENT DEBTOR

HOSEA WAMBURA 3RD JUDGMENT DEBTOR

MONICA MBALE4TH JUDGMENT DEBTOR

WILHEM SYLVESTER5TH JUDGMRNT DEBTOR

HEMED ABDALLAH KILINDO 6TH JUDGMENT DEBTOR

RULING

15th February & 2nd April, 2024

MWANGA, J.

The applicant brought the application for the execution of this court decree dated 28th May 2021 against the judgment debtors namely **Pasence Paul Katabalwa, Mwita Marwa Kisiboye, Hosea Wambura, Monica Mbale, Wilhem Sylvester, and Hemed Abdallah Kilindo**. In the Application, the applicant prays for this court to order the 1st Judgment Debtor to pay the Decree Holder a sum of

Tshs. 20,000,000/=, Payment of Tshs. 6,500,000/= by 2nd Judgment debtor to the Decree Holder, Eviction Order against 4th Judgment debtor, Order demolition of any structure on the suit property and costs of the execution and, in default thereof, the 1st and 2nd Judgment debtor namely **Pasence Paul Katabalwa and Mwita Marwa Kisiboye** be arrested and detained as a Civil Prisoner.

The application is brought under Order XXI Rule 9, 10(2) a, b, c, d, e, f, g, h, i & j (i), (iii) (v) and Rules 28, 35(1) and (2), 33(1) & (3) and Sections 42(a), (c) & (e), 44(1) of the Civil Procedure Code Act, Cap. 33 [R.E 2019]. When the matter came for hearing, parties argued the same by way of written submission on 29th September, 2023 where the application was granted and summons to show cause was issued to the Judgment debtors, failure of which the court would proceed with the necessary steps.

The 4th Judgment Debtor appeared and prayed to show cause by way of the affidavit which was granted. On 8th November, 2023 she filed her affidavit followed by a counter affidavit filed by the decree-holder on 18th November, 2023. The matter was scheduled for hearing on 28th November, 2023 and the same was heard orally. On the other hand, 1st

and 2nd Judgment Debtors were served with the notice to show cause, unfortunately, they failed to appear.

Before determining whether the judgment debtors have shown sufficient cause or not, this court sought it important to satisfy itself on the competence of the instant execution application. The court noted that the application contains two sets of prayers which are to be heard and determined by two different authorities hence it raises the question of jurisdiction. For instance, the applications relating to arrest and detention are only heard and determined by the Honourable Judge whereas the other modes of execution are heard and determined by the Honourable Deputy Registrar. As we know, the law is settled. The question relating to the jurisdiction of the court is so fundamental and can be raised at any time even on appeal. See the case of **Tanzania Revenue Authority Versus Kotracompany Limited**, Civil Appeal No. 12 of 2009 (CAT-un reported) where it is held that:

"It is now settled law that: "... the question of jurisdiction is fundamental in court proceedings and can be raised at any stage, even at the appeal stage. The court, suo motu, can raise it. In Baig and Butt Construction Ltd vsHasmat Ali Baig, (CAT) Civil Appeal No. 9 of 1992 this Court... raised suo motu in an appeal to it the question of

the High Court not having jurisdiction to hear a review case regarding an order made by the District Registrar. It said the judge of the High Court had no jurisdiction as only the District Registrar could review the order he had made earlier ...; in RICHARD JULIUS RUKAMBURA vs ISSACK NTWA MWAKAJILA AND ANOTHER (CAT) MZA Civil Application No 3 of 2004 (unreported). Before that, this Court in FANUEL MANTIRI NG'UNDA VS HERMAN MANTIRI NG'UNDA & 20 OTHERS, (CAT) Civil Appeal No. 8 of 1995 (unreported) had held thus: "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case." [Emphasis is ours]".

This issue was earlier raised by Counsel for the 4th Judgment Debtor on 28th November, 2023 and was reminded again on 6th February, 2023 and as such parties were invited to address it. It is only the decree

holder's Counsel who appeared on the date of the hearing and addressed the court.

The learned counsel, Mr. Mohamed Muya, a learned advocate for the decree-holder raised contentions that under the Civil Procedure Code, the judge has no limit on what was enacted by the law. He submitted that the use of the word "maybe" in Order XLIII of the CPC connotes that the powers conferred to the Registrar are not mandatory. The counsel submitted further that, the Registrar is the one whose powers are limited as per Order XLIII of the CPC and not the judge. He concluded that, under Section 95 of the Civil Procedure Code, a Judge has a mandate to determine the matter apart from detention and arrest.

I have considered the submissions of the learned counsel. The prayers which Decree holder seeks are two different prayers that are to be entertained by the two different forums. As is shown above, the arrest and detention are to be determined by the Honourable Judge. The law is clear that where there is no judge at the place of registry, the Deputy or District Registrar has the power to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35 and other modes of execution are to be determined by the Deputy Registrar.

In my view, the judge has no jurisdiction to issue a process for the execution of a decree under Order XXI, rule 22.

I borrow the leaf from the Indian case of **Ram Singh Vs. Gram Panchayat** (1986) 4 SCC364; AIR 1986 Sc 2197 where it was held that I quote;

"In cases where the civil court's jurisdiction is excluded, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint"

In other words, I do not agree with the counsel for the applicant that the use of the word "may" in Order XLIII does connote mandatory action. The law is settled. Not always that the use of the word "may" is necessarily discretionary but rather one has to look at the context in which the provision relates. See the case of **Chiriko Haruf David Vs Angi Alphaxa Lugora and Two Others** Civil Appeal No. 36 of 2012 where the court held that

"...words "shall" and "may" are not always the determinant factor. Regard must always be given to the context, subject matter, and object of the statutory provision in question, in determining whether the same is mandatory or directory/discretionary. In this context, we may also

*add this Court's decision of the Full Bench in Bahati Makejci v Republic, Criminal Appeal No. 118 of 2006 (unreported) that it is not always the case that where the word "shall" is used should mean that the function so conferred must be performed". (**Emphasis is mine**).*

For ease of reference, the contended Order XLIII of the CPC provides for the powers of the Deputy Registrar as follows:

*"Subject to any general or special direction of the Chief Justice, the following powers **may be** exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court —*

(a) N/A

(b) N/A

(c) N/A

(d) N/A

(e) N/A

(f) to issue a notice under Order XXI, rule 20;

(g) to order that a decree be executed under Order XXI, rule 21;

(h) to issue a process for execution of a decree under Order XXI, rule 22;

(i) to stay the execution, restore the property, discharge judgment-debtors, and require and take security under Order XXI, rule 24;

(j) if there is no judge at the place of registry, to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35;

(k) if there is no judge at the place of registry, to order attendance, examination, and production under Order XXI, rule 40;

(l) N/A

(m) N/A

It follows therefore that the Deputy Registrars of the High Court is conferred powers on the execution of decree proceedings passed in the High Court. However, if there is a judge in a registry, he/she does not have powers to entertain an application regarding the arrest and detention of the Judgment debtor such powers are reserved to the High Court Judge.

In the present application, Decree Holder prayed for the judgment debtors to show cause of the 1st and 2nd Judgment Debtor and in default thereof to issue arrest and detention whereas on the other prayers Decree Holder prayed the eviction of the 4th judgment debtor.

In the case of **Kija Redio Vs Tanzania Telecommunication Company Limited**, Civil Application No. 17/13 of 2022 the Court of Appeal of Tanzania held that:

"The instant application combined two prayers that are solely under the domain of the single justice together with one prayer which is entertained by full court thus rendering the application incompetent".

Given the above-quoted case law, by analogy in the case at hand, these two prayers are placed in two different domains/jurisdictions of this court. Therefore, finds it to be omnibus and hence incompetent. See also the case of **Mohamed Salimin v. Jumanne Omary Mapesa**, Civil Application No. 103 of 2014, the Court held:

"As this Court has held for time (s) without number an omnibus application renders the application incompetent and is liable to be struck out."

Also, the Counsel for Decree Holder argues that Section 95 of the Civil Procedure Code gives power to the Hon. Judge to entertain the application of this nature. I find this argument untannable since it cannot be invoked alone where there is a specific law to deal with an issue.

That being said and done, I hasten to state that the present application is incompetent for being omnibus. For the aforesaid reasons I hereby strike out the application. The applicant, if still interested in pursuing his claims is at liberty to bring a fresh application according to law. No order to costs.

Order accordingly.



H. R. MWANGA

JUDGE

02/04/2024.