

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CIVIL REFERENCE NO. 39 of 2023

ROBERT DAMIAN MUGISHAGWE APPLICANT

VERSUS

DAVID DICKSON MWAKAPANDA..... RESPONDENT.

RULING

Dated: 22nd & 29th April 2024

MKWIZU, J: -

The applicant in this case was a decree holder in execution No. 40 of 2021 at the Resident Magistrate court of Dar es salaam at Kisutu holding a decree for a total sum of USD 77,844 and Tsh 41,638,036.86/- originating from Civil Case No. 218 of 2010 . As the application was still pending, on 9th November 2022, the parties filed in court a settlement agreement executed by all parties in which they have agreed to adjust the decretal amount to 50,000,000 Tanzanian shillings payable in three instalments, 20,000,000 by 15th November 2022; 15,000,000 by 31st January 2023 and the last installment of 15,000,000 on 30th April 2023 with a defaulting clause reverting the parties to the original decree in case of any breach.

The executing court on 21/11/2022 was notified of the deed of settlement, it marked the matter as settled and proceeded to record the same as an order/decreed of the court. The respondent/

Judgment debtor did not pay as agreed in the deed of settlement. He on 27th April 2023 wrote a letter to the executing court seeking for two months extension of time to fulfil the entire amount. He could not again fulfil his promise. On 21st July 2023, the decree holder notified the executing court of the fundamental breach by the respondent/ judgment debtor with a prayer to resort to the default clause. Aroused by that prayer, the judgment debtor/ now respondent raised an issue of his mother's death as the reason for the delay in paying the agreed sum praying for time to fulfil his obligation under the deed of settlement. Sympathetic, the executing court gave a ruling allowing the judgment debtor's prayer extending time.

Irritated, the decree holder, now applicant came to this court under Order XLI Rule 1, Order XLIII Rule 2 and section 95 of the CPC, with this reference challenging the court's order extending time for the Judgment debtor to fulfil the stipulated obligation under the deed of settlement he himself called "consent decree" asserting that that an order is equal to departing from the parties' agreement contrary to the well standing position of the law.

On his part, the Respondent opposed the application by filing a notice of preliminary objection to the effect that :

1. The application is an abuse of the court process and incompetent as it has been overtaken by event.
2. The application is an abuse of the court process and incompetent as it contains wrong citation a case.

He however during the hearing withdrew the 2nd preliminary point.

Both the preliminary objection and the main application were heard together, and the main application was to be determined in case the preliminary point of objection is overruled.

Submitting on the preliminary objection Denis Kagashe counsel for the respondent said, since the applicant admits existence of the consent judgment, then the application then any challenge against it should have come by way of the suit and not by reference. The court was referred to the case of **Mohamed enterprises Tanzania Limited V Masoud Mohammed Nasser**, Civil Application No 33 of 2012 Cat – DSM (Unreported). Mr Nassoro advocated for the applicant on the other hand opposed the preliminary objection heightening that the applicant is not challenging the consent decree but rather a ruling of the executing court dated 24/8/2023 departing from the consent judgment.

Arguing in support of the main application, Mr. Nassoro advocate for the applicant after adopting the chamber summons and affidavit as part of his submission's he said parties had cordially agreed to settle the matter via their deed of settlement with a default clause. The respondent had defaulted payment even before 17th April 2023 when he wrote a letter seeking for extension of time to make payment. And he essentially challenged the executing court's order departing from the express terms by the parties on the reason that it was issued in August 2023, out of the time stipulated in the consent judgment and out of the asked period in the respondent's letter contending that the resident Magistrate court was supposed to enforce what was agreed and not to alter the decree.

He maintained that once the settlement agreement is recorded, the resident magistrate court became functional official; the only power it

had was to execute the decree. He on this relied on the case of **Eupheracies Mathew Rimisho t/a Emari Provision Store and Another V Tema Enterprises Limited and Another**, civil Appeal No. 270 of 2019 CAT DSM (Unreported) page 24 where courts are emphasized to enforce the party's agreement not rewriting the same. He implored the court to nullify the same with an order to revert to the original settlement as agreed.

Mr Rweyemamu 's submissions for the respondent were short but focused. Having adopted the counter affidavit as part of his submissions, he said, the essence of execution is to make the decree holder enjoy the fruit of the decree, that the respondent managed to pay the entire Tsh, 50,000,000/= agreed in the settlement deed and the explained delay was due his mother's sickness and the subsequent death communicated to the decree holder via a letter and the extension of time sought before the court under section 95 of the Civil Procedure code and section 3A (1) and (2) of the same Code granted on 24th August 2023 with a two months extensions within which he paid the last installment on 25th October 2023.

He was of the view that the executing court was right in extending the time, action taken to let the matter get to an end. He lastly argued with the, court to dismiss the application with costs.

While composing my ruling, and in the process of evaluation of the parties submissions, I came across an issue whether the executing court had powers to records the parties agreement as a courts' order/ decree in the execution proceedings. And since this was a new issue, I invited the parties to address the court on that point.

Addressing the court on the point Mr Nasson advocate for the applicant was affirmative that it wasn't proper for the executing court to record as a decree the deed of settlement on 21st November 2022 for doing so the executing court was creating a new decree apart from the original decree in Civil case No 218 of 2010. What was required was the court to certify any adjustment or payment made under Order XXI Rule 2 of the CPC. The attention of the court was drawn to the case of **the Registered Trustees of Bakwata V The Registered Trustee of Dodoma General Muslim Association**, Civil Appeal No 239 of 2020 CAT at Dodoma page 8. He invited the court to exercise its supervisory powers to quash the proceedings from 21/11/2022 for being void and proceed to strike out this application for being footed on a nullity without no order as to costs.

Mr Rweyemuma counsel for the respondent on the other hand was in support of the executing court's order. His contention was that the executing court has powers to record and enforce a deed of settlement dated 21/11/2022 under order 21 Rule 2(1) (2) of the CPC. He was of the view the executing court was enforcing the deed of settlement agreed by the parties out of court which did not in any way create a new decree. He banked on the book Of MP Jain The code of Civil Procedure, 5th Addition, 1908 at page 906 where the author was categorical that executing court has powers to record and enforce a compromise in execution of a decree. He implored the court to consider the word **Order** used in the court's order dated 21/11/2022 and ignore the word **decree** used therein with an invitation to construe the order dated 21/11/2022 as proper, and proceed to mark execution No 40 of 2021 as settled.

I have considered the rival submissions by the parties. The pressing issue to start with is whether the executing court had powers to record parties' agreement to settle the decreed amount as an order or decree of the court.

The powers of the executing court are prescribed under section 38 of the CPC, (Cap 33 RE 2019) giving the executing court power to deal with all questions relating to the execution, discharge or satisfaction of the decree while the procedure to be adopted are specified under Order XXI of the same code. The main duty of an executing Court is generally to aid the decree-holder to realize the amount due under his decree. Discussing similar provisions like section 38 above, Sir **Dinshaw Fardunji Mulla in his book titled Mulla, The code of Civil Procedure**, 19th Edition, Volume1 at pages 1605-606 said:

A court executing a decree cannot go behind the decree. It must take the decree as it stands.

And at page 609 the author observed that :

*"If the decree is free from ambiguity, the court of execution is bound to execute it whether it be right or wrong. But it cannot under the guise of interpretation, make new decree for the parties...**The court cannot make a new decree** which is neither intended nor passed by the court of competent jurisdiction. Executing court can provide clarity, interpret, or construe the decree, by keeping the decree as passed by the court of the competent jurisdiction intact and undisturbed." (emphasis added)*

See also: **Fortunata Edga Kaungua Vs. George Hassan Kambulu**, Misc. Civil Application No. 71 of 2019 and **Hassan Ngonyani vs Tanzania Pipeline Limited**, Civil Appeal No. 201 of 2018, CAT (All Unreported). The central concept in the cited authorities is that the main function of the execution court is to give effect to the terms of the decree.

Payments under decree, which is the case in our hand is governed by rule 1 and 2 of Order XX1 which is couched thus:

1.-(1) All money payable under a decree shall be paid as follows, namely-

(a) into the court whose duty it is to execute the decree.

(b) out of court to the decree-holder; or

(c) otherwise as the court which made the decree directs.

(2) Where any payment is made under paragraph (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

2.-(1) Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly

(2) The judgment debtor also may inform the court of such payment or adjustment and apply to the court to issue a notice

to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree"

Order XXI Rule 1 of the CPC above provides for the modes of paying the money decree while Rule two deals with the adjustment of the decree. It allows parties to settle a court decree in any manner provided it is to the satisfaction of the decree holder. And this has been interpreted to include compromises. Interpreting order XXI Rule 2 of the Indian Civil Procedure Code similar to the above provision , the Supreme Court of India in **Sultana Begum vs Prem Chand Jain,AIR1997 SC1006, JT1996(11)SC1** said:

*"The words **"or the decree of any kind is otherwise adjusted"** are of wide amplitude. It is open to the parties, namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may be pointed out that an agreement, contract or compromise which has the effect of*

extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of this Rule and the Court, if approached, will issue the certificate of adjustment..." (emphasis supplied)

And in **Moti Lal Bankers vs. Mohd. Hassan Khan** AIR 1968 SC 1087 was of the same opinion that:

*"It is open to the parties to enter into a compromise with reference to their rights and obligations under a decree. **There is nothing in the Code of Civil Procedure which prevents the parties from entering into such a compromise.** If the compromise amounts to an adjustment of the decree, it must be recorded under O.21, R.2 and if not so recorded, it cannot be recognized by any Court executing the decree. An uncertified payment of money or adjustment which is not recorded by the court under Order XXI Rule 2 cannot be recognized by the executing court "(emphasis added)*

The same position was discussed by the Court of Appeal of Tanzania in **The Registered Trustees of Bakwata V The Registered Trustee of Dodoma General Muslim Association**(supra) where it was observed that:

"...pursuant to rule 2 (1) and (2) of Order XXI of the CPC, as reproduced above, where upon an agreement made out of court, the parties, that is, a decree holder and a judgment debtor, agree to settle a court decree by payment of money or where the decree is otherwise or in any manner adjusted

in whole or in part to the satisfaction of the decree holder, the decree holder is required, under rule 2 (1) of Order XXI of the CPC, to certify the said payment or adjustment to the court and the court is required to record it accordingly. The object is to make it recorded by the court that, to the satisfaction of the decree holder, the court decree has been settled. The law, under that provision, allows the parties to settle a court decree in any manner or way provided it is to the satisfaction of the decree holder."

Meaning that parties to a decree are allowed to settle their obligations out of court, by an agreement or otherwise provided that the settlement is to the satisfaction of the decree holder and is recorded and certified by the executing court.

Learned from the above is that in giving effect to the decree brought to it by the parties, the executing court has powers to record and certify the parties agreement or payment made out of court. There is nothing like formulating another decree or recoding the agreement as a decree of the court.

I had the opportunity to examine the record of the proceedings in execution No 40 of 2021. It is evident that the parties were in court executing their original decree issued by the trial court in Civil Case No 218 of 2010. At the middle of the said proceedings, they agreed to settle. They entered into a deed of settlement dated 8th November 2022 and as usual presented it to the executing court on 9th November 2022 for recording purposes. The court instead of recording and certifying the adjustment, it went ahead to recording the settlement as an order/decre

of the court. I will let the proceedings and order of the court speak by themselves:

"21/11/022

Coram: Hon Kiwonde SRM

D/Holder: Mr Paschal Mshanga advocate

J/ Debtor:Mr. Denis Kagashe, advocate

Mr. Paschal Mshanga, advocate: *On 9^{11/2022} we filed deed of settlement, we pray the same be adopted by the court and the matter be marked settled. That is all.*

Mr. Denis Kagashe , advocate

That is the position.

Court: *The matter is hereby marked settled and **the deed of settlement shall be as good as the court order/deed***

Signature

F.H Kiwonde

Senior Resident Magistrate

21/11/2022" (Emphasis added)


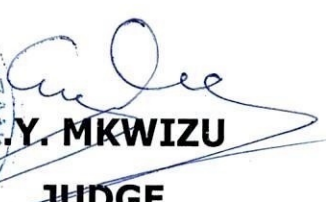
I have no doubts that the executing court committed an error in the exercise of powers conferred upon it by Order XX1 Rule 2 of the Civil Procedure Code. The executing court was only required under the circumstances to record the settlement and certify the adjustment and not otherwise. As it stands today, a decree cannot be altered anyhow during execution except by a superior court acting on appeal or in revision or by the court passing it on review. By registering the parties' agreement as an order/ decree of the court, it gave birth to a second decree not known in law. This is fatal, and the proceedings resulted therefrom are fatally defective as suggested by the applicant's counsel rendering this

application stemmed from the noticed nullity incompetent liable to be struck out.

Mr Rweyemum counsel for the respondent had invited the court to disregard the word **decree** used in the above order and accept the word **order** . I am not convinced. As it stands, the words order/ decree of the court were used intentionally by the executing court to give power to the settlement deed filed by the parties, thus any exclusion of a word must be with a genuine reason which are missing in the respondent's counsel submissions.

Given the nature of the proceedings ,I under the revision powers vested to this court , revise the execution proceedings in execution No 40 of 2021 , quash and set aside the executing court's order dated 21/11/2022 and all subsequent proceedings, with an order remitting the original record back to the executing court to give a proper order and proceed with the execution in accordance with the law . In any case, due consideration should be taken to the amount already paid to the decree holder. I make no order as to costs. Order accordingly.

Dated at Dar es salaam, this 29th day of April 2024

 
E.Y. MKWIZU
JUDGE
29/4/2024