

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM.**

MISC. COMMERCIAL APPLICATION NO. 381 OF 2017

(Arising from Commercial Case No. 16/2016)

SANASI CONSTRUCTION LTD.....1ST APPLICANT
SANASI PREIGHT EXPRESS LTD2ND APPLICANT
AHMED KHAN (Administrator of the estate
Of the late MASHAR HUSSEIN.....3RD APPLICANT
AHAMED KHAN 4TH APPLICANT

VERSUS

NATIONAL BANK COMMERCE LTD RESPONDENT

RULING:

MRUMA, J:

This is a ruling on application to set aside or vacate this court's orders dated 23rd November, 2017 which allowed execution of a decree to proceed against the Applicants.

Briefly the background of the matter which gave rise to this application is that on 26th November, 2015 Judgment on admission was entered for the Plaintiff and against the Defendants for payment of Tshs. 1,265,867,220.96. For over three (3) years, the Judgment debtors did not satisfy the decree (by paying the decretal sum within ten (10) months from the date of decree as ordered).

On 25/07/2017, the Decree Holder filed an application for execution of decree and the mode in which the assistance of the court was required was for issuance of an order for attachment and sale of the 1st Judgment debtor's property namely Asphalt Plant with some descriptions stated.

As the decree was over twelve (12) months an order was made to call upon the Judgment debtors to show cause as to why execution should not issue as prayed. The Judgment debtors were duly served and they filed an affidavit purportedly showing reasons against execution.

On 25/04/2018 when the matter was called on for hearing court was informed that there were negotiations going on between the parties with the view of enabling the Judgment debtors to settle the decretal amount in agreeable terms. The matter was adjourned to 23rd November, 2017 when the court was informed that counsel for Judgment debtor was bereaved and another adjournment was sought.

Taking into consideration that the decree is not disputed, the fact that it is yet to be satisfied is equally not disputed and that an out of court negotiations is parties own initiatives, I ordered execution order to issue as the order would not have the effect of stopping parties from negotiating or even reaching a compromise on how to settle the decree. This is a court of law where eventually all litigations must come to an end. It is not a depository room or registry where parties can deposit their disputes and feel free to decide when to complete them.

Apparently, the Judgment debtors were aggrieved by my order and they have brought this application to request the court to set it aside or vacate it.

The application is pegged under Rule 43 (2) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012. The said Rule provides:-

1) Where the court has entered an ex-parte Judgment or passed a dismissal order or any other order in accordance with order ix of the code, it shall be lawful for the Court to upon application being made by an aggrieved party within fourteen days from the date of Judgment or the order to set aside or vary such Judgment or order upon such terms as may be considered by the court to be just"

Order IX of the Civil Procedure Code deals with appearance of the parties and consequences of non – appearance. Rules 1 and 2 of that order suggest that appearance envisaged by the Rules are pursuant to summons for summons to appear or summons to file defence.

The first question one has to each himself is whether or not the impugned order (i.e an order for execution of the decree) was made in accordance with order IX of the Civil Procedure Code.

A stated hereinbefore, Order IX Rule 1 deals with the consequences of non-appearance on the date fixed in summons and Rule 2 deals with a situation where non-appearance is due to non service of the summons. The proceedings which culminated in the issuance of execution order

weren't ordinary proceedings. They were proceedings in which the Judgment debtors were required to show cause and they has actually showed their cause through an affidavit duly sworn by advocate Samwel Shadrack. This court before making the order considered the facts deposed in that affidavit and stated thus:-

"As no reason is for the coming as to why the decree should not be executed I now order....."

Which means that the court found that there was no sufficient reason shown against execution and it proceeded to order execution to issue.

Thus, the application to set aside or vacate its order on the ground that the Judgment debtors were not heard is misconceived. Accordingly Misc. Commercial Application No. 381 of 2010 is dismissed with cost.

Order accordingly.



A handwritten signature in blue ink, appearing to read "A. R. Mruma".

A. R. Mruma

Judge

03rd July, 2018