

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO 168 OF 2020

(Arising from Commercial Case No. 53 of 2015)

BETWEEN

INTERGRATED PROPERTY INVESTMENT (T)

LIMITED.....1stJUDGMENT DEBTOR/APPLICANT

OMARI ABDI ALI.....2ndJUDGMENT DEBTOR/APPLICANT

SULEIMAN ABDI DUALEH.....3rdJUDGMENT DEBTOR/APPLICANT

Versus

THE COMPANY FOR HABITAT AND

HOUSING IN AFRICA (SHELTER AFRIQUE)....DECREE HOLDER/RESPONDENT

Last Order: 14th April, 2021

Date of Ruling: 02nd June, 2021

RULING

FIKIRINI, J.

The genesis of this ruling is an objection made by the judgment debtors under section 38 (1), (2) and 95 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC), seeking for the following orders:

1. This Honourable Court be pleased to hold that the trial court had no jurisdiction to enter summary judgment in Commercial Case No. 53 of 2015 and thus the decree to be executed is null and void *ab initio*.
2. This Honourable Court be pleased to hold that the trial Court acted beyond its Limitation of power when entering summary judgment in Commercial Case No. 53 of 2015 and thus the decree to be executed is void *ab initio* and cannot be executed.
3. Costs of the application be provided for; and
4. Any other order (s) that the Honourable Court may deem fit.

The application was orally argued with Mr. James Theodory Moshi appearing for the judgment debtors and Mr. Jonathan Wang'ubo appearing for the decree holder.

In his short oral submission, and straight to the point, Mr. Moshi informed the Court that the following prayers were made in the Summary Suit Procedure against the 1st judgment debtor:

1. Recovery of Usd. 5, 326, 791.54
2. Interest on the principle sum at Usd. 2, 390. per day.

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3. Interest on decretal amount at the Court rate from the date of judgment to the date of full payment.
4. Vacant possession of the judgment debtors from the property that was used to secure the mortgage; and
5. An order appointing Receiver Manager Mr. Saddock Magai.

Also mentioned the following set of prayers to having been made against the 2nd and 3rd judgment debtors:

1. Recovery of Usd. 5, 326, 791.54 plus interest at the rate of Usd, 2, 390. 84 per day.
2. Interest on the decretal amount at the Court's rate from the date of judgment until date of full and final payment; and
3. Costs.

According to Mr. Moshi the decree about to be executed even though is shown to be germinating from the Summary Suit Procedure for recovery of money from mortgage cannot be executed as provided under Order XXXV Rule 2 (2) (a) of the CPC, particularly the prayer for vacant possession and appointment of a Receiver Manager. The counsel contended that this was due to the fact that firstly the reliefs being sought could not have been

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granted under the Summary Suit Procedure and thus such decree cannot be executed.

Reacting to the submission Mr. Wang'ubo started by addressing the query on jurisdiction of the trial Court, that it had no jurisdiction to enter summary judgment the way it has. On that he submitted that, the argument was misplaced to be raised before the executing Court, as the executing Court was the right Court since the present application has been preferred under section 38 of the Part II of CPC, which deals with the execution generally. It was his contention in that regard section 38 (2) cannot be read in isolation but together with section 38 (1) of the CPC, and thus find itself determining the issue of jurisdiction, pertaining to the executing Court and not the trial Court. The moment this Court embark on discussing the trial Court jurisdiction, he was of the opinion this Court will then be sitting as an appellate Court and not executing Court, which should not be the case. Specifically addressing this Court's jurisdiction and the execution before it, it was his argument that in accordance of section 33 of the CPC, this court has jurisdiction and powers to execute the decree issued in Commercial Case No. 53 of 2015, being the Court which passed the decree.

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He further submitted in alternative, challenging Mr. Moshi's assertion that this Court cannot execute the decree as the plaint contained other prayers such as vacant possession and appointment of a Receiver Manager, as lacking. Court's jurisdiction was as per his submission either territorial, pecuniary or on subject matter. And in the present application the applicant has not shown that the trial Court lacked jurisdiction be it territorial, pecuniary or on subject matter. He went on stating that if the issue was the correctness of the decree, then that was not jurisdictional issue. And that such objection cannot be raised at this stage of execution. To support his submission, Mr. Wang'ubo referred this Court to the book of **Mulla on Code of Civil Procedure, page 645**, when section 47 of the Code which was *pari matiria* with section 38 of the CPC, which remarked that such a decree was a nullity. However, that did not mean the Court lacked jurisdiction. Commenting on the cited case by the applicants' counsel, Mr. Wang'ubo treated the case as distinguishable as the decision was not made at the execution stage but early on.

Mr. Wang'ubo wound up his submission by urging the Court to dismiss the application with costs and order the execution to proceed as applied.

Briefly rebutting the submission of Mr. Wang'ubo, Mr. Moshi while admitting that jurisdiction issues were creature of the Statute on one hand, on the other he argued that those jurisdictions were with limits. In the present application the Court was limited in awarding the reliefs sought referring to Order XXXV Rule 2 (2) (a) of the CPC as a guiding provision.

Responding to the provisions cited to move this Court, it was his submission that the prayers as per the plaint were not tenable under the Summary Suit Procedure and hence citing of section 38 (1) and (2) of the CPC together with section 95 in moving this Court requesting it to declare that it could not execute the decree which was none-executable, as provided under Order XXXV Rule 2 (2) (a) of the CPC.

I have carefully considered the submissions by counsels for the parties. And in determining the merits of the application, I would wish to start by stating that the general rule is that the legality or correctness of a decree is not questionable. But there are few exceptions to this general rule. Where the decree sought to be executed is a nullity, such decree is thus void and its invalidity can be raised whenever the decree is sought to be enforced or is acted upon as a foundation for a right even at the execution stage, like

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the decree in the present application. **See: Urban Improvement Trust Jodhpur v Gokul Narain (Dead) by Lrs and Another, Supreme Court of India (1996)**. This however does not mean the Court lacked jurisdiction. Instead the jurisdiction to be exercised is with limitations.

Mr. Wang'ubo's submission and remarks from the book of **Mulla** (supra) acknowledging that a decree can be a nullity but that does not mean the Court lacked jurisdiction, is fully subscribed to. And that is exactly what the situation in the present application is. The Court is conferred with jurisdiction but the said jurisdiction is with limitation.

This Court cannot go into the details of the decision involved avoiding sitting as an appellate Court, but there are apparent irregularities identified in the Commercial Case No. 53 of 2015, Summary Judgment. The nature of the claim preferred under Order XXXV of the CPC, and the reliefs sought and granted were not in line what is provided under Order XXXV - Summary Suit Procedure and specifically under Rule 2 (2) (a) of the CPC, upon which the decision was predicated does not at all provide for the reliefs sought. The decree emanating from the said decision is therefore a nullity as it goes to the root of exercise of the Court's jurisdiction.

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Mr. Wang'ubo's submission that the application was misplaced to be raised before the executing Court and specifically under section 38 of Part II of the CPC which dealt with execution generally, is unsupported. *First and foremost*, he has not cited the would be proper provision or case law in that regard. *Second*, while it is not contested that section 38 (1) should not be read in isolation but together with section 38 (2), which invited this Court to deal with issue of jurisdiction, is not *per se* correct. Section 38 (2) has covered both issues of limitation and jurisdiction. The relief sought and granted touched on the issue of limitation and not jurisdiction. The fact the suit has been brought under Summary Procedure, it is obvious there are reliefs which are not grantable under the kind of the suit. The Summary Judgment entered under Order XXXV Rule 2 (2) (a) of CPC does not provide for some of the reliefs sought and granted.

Furthermore, there is no dispute at all that this Court as provided under section 33 of the CPC, would have jurisdiction to execute the decree issued in Commercial Case No. 53 of 2015, it being the Court which passed the decree, but as pointed out above, the reliefs granted were questionable. As submitted by Mr. Moshi that this Court cannot execute the decree as the plaint contained other prayers such as vacant possession and appointment

of a Receiver Manager. By submitting on jurisdiction be it territorial, pecuniary or on subject matter, Mr. Wang'ubo misdirected himself.

Since the applicant's concern is on limitation on the Court's jurisdiction, the provision of section 38 (1) and (2) of the CPC, read to me as correct provisions to move this Court. The provision of section 38 (1) provides as follows:

"All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

The provision of section 38 (2) has specifically provided for what issues can be determined by this Court. This Court is both the one which issued the decree and it was now being called upon to execute its decree which the applicant is contesting. By citing section 38 (1) and (2) of the CPC, I find this Court has been properly moved.

In addition to section 38 (1) and (2) of the CPC, the applicant has also cited section 95 of the CPC.

Section 95 of the CPC provides as follows:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The philosophy behind Court's inherent powers is to further the interests of justice and as well to prevent abuse of the process. And in advocating that viewpoint the Court is thus required and encouraged to use its common sense, justice, equity and good conscience whenever necessary. Although in the application before me there is specific provision cited to move the Court but considering the nature of the concern raised, I find it pertinent to bolster the Court's position by invoking section 95 of the CPC as well, and the decision in **Adonia v Mutekanga [1970] EA 429** and **Sarkar on Code of Civil Procedure Act, 1966, 10th Ed**, in which the principle was illustratively discussed.

I find the situation in the present application calls for such intervention, since the irregularity noted go to the root of the matter and if no intervention is made chances are there would be injustice occasioned.

Therefore, applying both sections 38 (1) (2) and 95 of the CPC, find that the decree in Commercial Case No. 53 of 2015 cannot be executed as it is. The decree is a nullity and void *ab initio* hence none-executable. The application is consequently granted with costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI", written over a horizontal line.

P. S. FIKIRINI
JUDGE
02nd JUNE, 2021