IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL REVISION NO. 11 OF 2020

1. **MJINI KATI VILLAGE COUNCIL**
   (Formerly was part of Nyangoto Village Council)....1ST APPLICANT
2. **DISTRICT EXECUTIVE DIRECTOR-**
   TARIME DISTRICT COUNCIL ..... 2ND APPLICANT

VERSUS

1. **JOSEPH WEGESA WANGUBO.....1ST RESPONDENT**
2. **NYANGOTO VILLAGE COUNCIL ..... 2ND RESPONDENT**
3. **FORTUNATUS ROBI WANGUBO**
   (ADMINISTRATOR OF THE ESTATE OF
   WANKYO WANGUBO) ..... 3RD RESPONDENT
4. **LUCAS SILAS ISANGI T/A ISANGI**
   COURT BROKERS ..... 4TH RESPONDENT

(Revision from the proceedings, decisions and orders of the District Court of Tarime at Tarime in Misc. Civil Application No. 16 of 2015 and Civil Application No. 13 of 2018)

JUDGMENT

14th June and 27th July, 2021

KISANYA, J.:

This Court is called upon to call for and examine the records of the District Court of Tarime in Misc. Civil Application No. 16 of 2015 and Civil Application No. 13 of 2018, with a view to satisfy itself as to the correctness, legality or propriety

of their proceedings, decisions and orders, and revise them accordingly. The application is made under section 79 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) and supported by affidavits of Livai Nkororo Matiko and Apoo Castro Tindwa principal officers for the 1st and 2nd applicants, respectively. It was vigorously contested through the counter affidavits of the 1st and 3rd respondents and supported by the 2nd respondent.

The background giving rise to this matter is deduced from the affidavits of both parties and the record. The same may be briefly recapped as follows: In 1996, Magaigwa Mroni, representing Nyangoto Village sued Wankyo Wangubo (now deceased but represented by the 3rd respondent) at the Nyamwaga Primary Court in Civil Case No. 32 of 1996. The said Magaigwa Mroni was a village executive officer of Nyangoto village. He claimed on behalf of the village, for 5 acre of land against the said Wankyo Wangubo. It was deposed that the suitland had been allocated to build the village health center. At the end of trial, the trial court ordered Wankyo Wangubo to vacate the suit land. However, he was informed of his right to claim for compensation on unexhausted improvement thereon.

In view of that decision, Wankyo Wangubo sued Magaigwa Mroni on behalf of Nyangoto Village at the same court (Nyamwaga Primary Court) in Civil Case No. 32 of 1997. His claim was for compensation to the tune of TZS 5,000,000 being

unexhausted improvement on the suit land. However, his case was dismissed for want of merit. The trial court ordered him not to use the suit land. It appears that the trial court's judgment and decree were executed by the 2nd respondent.

On 31st July, 2014, the 1st respondent, through Misc. Application No. 8 of 2014 moved the District Court of Tarime to be pleased to grant an order to set aside or stay execution of "Case Misc. Application No. 32 of 1996 pending investigation for objection and determination of Misc. Application No. 171 of 2013 before High Court Land division at Mwanza" and hearing of that application inter parties. He deposed that the execution order in respect of judgments and decree of the Nyamwaga Primary Court in Misc. Application No. 32 of 1996 had the effect of attaching his piece of land. The District Court dismissed the above named application on the ground that it was not meritorious and maintainable in the eyes of law.

Not amused with that decision, the 1st respondent appealed to the High Court of Tanzania, Mwanza Registry in Civil Appeal No. 12 of 2015. In its judgment dated 11th August, 2015, this Court (Gwae, J.) struck out the 1st respondent's application before the District Court for being incompetent. That decision was based on the reasons that the application had been lodged against Nyangoto Village Government in lieu of the Nyangoto Village Council. However, the 1st

respondent was ordered to file fresh application within 30 days from 11th August, 2015, if still interested to pursue the matter.

Thereafter, the 1st respondent filed an application which was preferred under Order XXI, Rule 57(1) of the CPC, in which he moved the District Court to "be pleased to investigate objection claim on the property attached in execution of Civil Case No. 32 of 1996" on the ground that the said property is not liable to attachment."

Upon hearing the parties, the District Court via the ruling dated 25th January, 2015 (instead of 2016) granted the application. The relevant part of the ruling reads:-

> *"Before proceedings further it is useful to pause and reflect whether relying on order XXI Rule 57(1) of the Civil Procedure Code Cap. 33 RE. (sic) The applicant has properly moved this court to investigate objection claim on the property attached in the execution of Civil Case No. 32 (sic)*
>
> *Following the above arguments from both parties the applicant has convinced the court.*
>
> *Therefore the application as (sic) hereby granted"*

Dissatisfied with that ruling, the second respondent unsuccessfully applied for review via Misc. Application No. 8 of 2016. It was the District Court's findings that the said application was incompetent for being accompanied by an affidavit

which had legal argument. The District Court went on to dismiss it. That was on 24th May, 2016.

About two years later, on 7th August, 2018, the 1st respondent applied for execution of decree against the 2nd and 3rd respondents. His application was made under O. XXI, Rule 10(2) (j) (v) and (3) of the CPC. He prayed for a decree that he is the lawful owner of the suitland. He also prayed to execute the decree by evicting and demolishing the mortuary on the suit property. Appended to that application was an Extract Order dated 25th January, 2016 extracted from Misc. Application No. 16 of 2015. In its ruling dated 23rd November, 2018, the District Court partly allowed the 1st respondent's application when it held as follows:

> *"After going through miscellaneous application number 16 of 2015 it is just found that the court decide the applicant/decree holder to be the lawful owner of the land which was subject of that application and no where the court decide for eviction or demolishing of mortuary.*
>
> *The applicant to execute from what the court decide and not otherwise. The Court cannot declare what is not decided, for such a matter the applicant/decree holder had to execute on what decided by this court on Misc. Civil Application No. 16 of 2015 and not otherwise."*

Thus, the learned Resident Magistrate went on to declare the applicant lawful owner of the suit land.

Three months later, on 15th January 2019, that application was re-assigned to Hon. R.S. Mushi. The succeeding magistrate summoned North Mara Gold Mine Limited (NMGML) to show cause as why the mortuary built on the suit land should not be demolished. Mr. Mwalongo, learned counsel for NMGML informed the District Court that his client was not a party to the case and that she had no objection to the execution. Eventually, in his ruling dated 2nd February, 2019, the learned Resident Magistrate ordered that the mortuary be demolished at the expense of the 2nd respondent. At the same time, the 4th respondent was ordered to execute the court's order.

In view of the above background, the applicants filed the present application for revision. The affidavits in support the application suggest that the gist of this matter is of two fold. *One*, that both applicants were not accorded the right to be heard in application for investigation of claim and the execution proceedings which led to an order for attachment of her property namely, mortuary of the Nyangoto Health Centre. *Two*, that the District Court had no jurisdiction to adjudicate the matter.

When this matter was called on for hearing on 20th May, 2021, the 1st and 3rd respondents, through Mr. Christopher Waikama, learned advocate prayed that this matter be disposed of by way of written submissions. That prayer was granted.

In addition to the issues raised by the applicants, I asked the parties to address the Court on the following issues:

1. Whether the District Court of Tarime had jurisdiction to determine Misc. Application No. 16 of 2015 and Civil Application No. 13 of 2018.
2. Whether Misc. Application No. 16 of 2015 was filed in time.
3. Whether the 1st applicant was accorded the right to be heard.
4. Whether the 1st respondent had locus stand to file the applications subject to this revision.
5. Whether there was a valid decree executed in Civil Application No. 13 of 2018.

Save for the 4th respondent, both parties filed their respective submissions in accordance which the Court's order.

Noteworthy, having gone through the records and the submissions by the parties, I am of the considered view that this matter can be disposed of by addressing one issue namely, whether the District Court had jurisdiction to hear and determine Misc. Civil Application No. 16 of 2015.

It is trite law that the question of jurisdiction of a court of law is fundamental. Therefore, it can be raised at any stage of the proceedings including appellate or revisional level. Further, the principle has always been that, a trial conducted by a court which has no jurisdiction to try the matter will be declared a

nullity, be on appeal or revision. This position was stated in the case of **Sospeter Kahindi vs Mbeshi Mashini,** Civil Appeal No. 56 of 2017 (unreported) when the Court of Appeal held as follows:

> *"Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision. We would also stress that parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction."*

The Court of Appeal went on to cite with approval the decision of the then East African Court of Appeal in the case of **Shyam Thanki and Others vs New Palace Hotel** [1971] 1 EA 199 at 202 that, jurisdiction of the court is created by the statute and not otherwise. As such, parties cannot by consent give a court jurisdiction which it does not possess

As hinted earlier, Misc. Civil Application No. 16 of 2015 was made under Order XXI, Rule 57(1) of the CPC. The 1st respondent prayed for the District Court to be pleased to investigate objection claim on the property attached in execution of Civil Case No. 32 of 1996 of the Nyamwaga Primary Court, on the reason that the said property was not liable to attachment. In that regard, the issue whether the District Court of Tarime had jurisdiction to determine that application for objection proceedings arises.

Mr. Maganiko Msabi, learned State Attorney for the applicants and Mr. Charles Temu, learned State Attorney for the 2nd respondent were at one. That,

the District Court had no jurisdiction to try the matter. They contended that the matter before the District Court was related land dispute. Referring the Court section 4 (1) of the Land Disputes Courts Act [Cap. 216, R.E. 2019], the learned State Attorneys argued that the District Court acted without jurisdiction to try Misc. Civil Application No. 16 of 2015 and Civil Application No. 13 of 2018.

Responding, the 1st respondent commenced his submission by telling the genesis of the matter. He pointed out that Misc. Civil Application No. 16 of 2015 stemmed from Civil Cases No. 32 of 1996 and 32 of 1997, in which the second respondent successfully sued the third respondent and was declared the lawful owner of the suit land. The learned counsel went on to submit that, the 2nd respondent had on, 25th July, 2014, filed an application for execution of the said decree in Civil Case No. 32 of 1996 and Civil Case No. 32 of 1997. He contended that in the course of executing its decree, the 2nd respondent wrongly attached his land measuring 1.5 hectors. Therefore, it was the respondent's argument that he was inclined to file Misc. Application No. 8 of 2014 seeking the same court (District Court) to investigate and release the attached land and that the said application was dismissed for lack of merit. As to the reason of filing that application in the District Court, the 1st respondent submitted as follows:

> *"**The Misc Application No. 08/2014 was filed in the district court for Tarime due to the fact that, application for execution was also filed in that court**, there was no way the*

first respondent could have filed the application in the District Land and Housing Tribunal which no application for execution existed. The District Land and Housing Tribunal has no mandate to execute a decree of the Primary Court. In the same footing, since the case commenced in the Primary Court before the existence of the land courts, there is no way execution could proceed in the District Land and Housing Tribunal, even though the same is executed at the time the land courts came into existence." [Empasize is mine].

In view of the above, the 1st respondent argued that the provision of section 4 of the LDCA relied upon by the applicants and 2nd respondent was of no significance in the case at hand.

The 1st respondent went on to submit that upon dismissal of Misc. Application No. 8 of 2014, he appealed to the High Court of Tanzania, Mwanza Registry in Civil Appeal No. 12 of 2015 whereby, some of the orders were granted and the 1st respondent allowed to file fresh application before the District Court of Tarime against the 2nd respondent within 30 days from 11th August, 2015.

Therefore, the 1st respondent was of the firm position that Misc. Application No. 16 of 2015 in the District Court of Tarime was properly filed and the court competently determined the same because it was lodged in accordance to the direction of the High Court of Tanzania, Mwanza Registry in Civil Appeal No. 12 of 2015.

On his part, the 3rd respondent submitted that the applicant's submission that the District Court had no jurisdiction to adjudicate land dispute was a total misconception and interpretation of the provision. Citing the provisions of Order XXI, rule 57 (1) of the CPC, the 3rd respondent argued that District Court had mandate to make investigation of the title against any property attached in execution. He argued further that the District Court was executing the decree in Civil Case No. 32 of 1997 and that the issue of jurisdiction was resolved by this Court (Mwanza Registry) in Civil Appeal No. 12 of 2015.

Rejoining, Mr. Maganiko contended that the 2nd respondent had not filed any application for execution of the decree of Civil Case No. 32 of 1997 of the Nyamwaga Primary Court, in the District Court of Tarime. He went on to submit that this Court (Mwanza Registry) did not determine the matter on merit in Civil Appeal No. 12 of 2015. He reiterated his submission that the District Court of Tarime had no jurisdiction over the matter at hand.

I have dispassionately considered the rival submissions by the parties on the issue whether the District Court of Tarime had jurisdiction to hear and determine Misc. Application No. 16 of 2015. It is common ground that the property subject to the application which gave rise to this matter was attached in the course of executing the decree awarded by the Nyamwaga Primary Court in Civil Cases No. 32 of 1996 and 32 of 1997. It is also not disputed that the parties to both Civil

Case No. 32 of 1996 and Civil Case No. 32 of 1997 were Magaigwa Morani who represented the 2nd respondent and Wankyo Wangubo (now the 3rd respondent). Therefore, since the 1st respondent was not a party to both cases, his remedy was to file an objection proceedings.

The issue on which court has jurisdiction to determine the objection proceedings depends on the court which issued the execution order or attachment order. If the execution or attachment order is made by the primary court, the court with mandate to hear and determine the objection proceedings is vested the in primary court which issued the attachment order. This is pursuant to rule 70 of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, 1964 which reads:

> *"70.-(1) Any person, other than the judgment debtor, who claims to be the owner of or to have some interest in property which has been attached by the court may apply to the court to release the property from the attachment, stating the grounds on which he bases his objection.*
>
> *(2) On receipt of an application under sub rule (1), the court shall fix a day and time for hearing the objection and shall cause notices thereof to be served upon the objector, the judgment-creditor and the judgment debtor.*
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> *(3) No order for the sale of such property shall be made until the application has been determined and if any such order has been made, it shall be postponed.*

(4) On the day fixed for the hearing, the court shall investigate the objection and shall receive such evidence as the objector, the judgment-creditor and the judgment debtor may adduce.

(5) If the court is satisfied that the property or any part of it does not belong to the judgment debtor, it shall make an order releasing it, or such part of it, from the attachment."

On the other hand, if the execution order is issued by the District Court or the Court of Resident Magistrates' Court in the exercise of its powers under the CPC, the respective court is mandated to hear and determine the objection proceedings under Order XXI, Rule 57 of the CPC.

As far as objection proceedings are concerned, I agree with the 1st applicant that the District Land and Housing Tribunal could not determine the application merely because the matter was related to land. Much as the land is attached in the course of executing the decree of the primary court or district court, the objection proceedings may be filed to the court executing the decree. It follows that the applicants and 2nd respondent's submission was misconceived.

Reverting to the issue under consideration, the 1st and 3rd respondents contended that the application was lodged before the District Court of Tarime because the 2nd respondent had lodged an application for execution in that court. I went through Misc. Application No. 8 of 2014 and Misc. Application No. 16 of

2015 with a view to satisfy myself on the 1st and 3rd respondents' contention. In both applications, the 1st respondent did not indicate or name the application for execution which was pending before the District Court, let alone attaching the attachment or execution order.

Starting with Misc. Application No. 8 of 2014, the 1st respondent moved the District Court of Tarime to grant the following order:

> *"That, this Court be pleased to grant an order to set aside/postpone execution of the Case Msc. Application No. 32 of 1996 pending investigation for objection and determination of Misc. Application No. 171 of 2013 before High Court Land division at Mwanza and hearing of this Application inter parties."*

The 1st respondent went on to depose as follows in paragraph 5 of the affidavit in support of Misc. Application No. 8 of 2014:

> *"4. That, I was currently informed of Misc. Application No. 32 of 1996 before the Nyamwaga Primary Court between the 1st and 2nd respondent which is in the final stage of execution and the subject matter of the said execution being land which I was granted here inabove without notice and being joined as the interested part of the said land.*
>
> *5. That, in the same land I am involved with the disputed the same with Barrick Gold Mining and Nyamongo Village currently I have lodged Misc. Application No. 171 of 2013 originating from Land Application No. 79 of 2011 which is pending for determination before the High Court Land Division at Mwanza for determination."*

With regard to Misc. Application No. 16 of 2015, the 1st respondent stated on oath that the 2nd respondent had commenced proceedings for execution in the District Court. However, there is nothing suggesting that the 2nd respondent had applied in the District Court of Tarime for execution of Civil Case No. 32 of 1996 of the Nyamwaga Primary Court and the attachment order issued, in order the objection proceedings to be lodged in that court (District Court).

Further to that, I have had an opportunity of going through the ruling of the District Court in Misc. Application No. 8 of 2014. The said application was dismissed on the reasons that it was based on the case which was not in existence. The ruling shows that the execution order had been issued by the trial court on 30th November, 2006 and not the District Court of Tarime. The relevant part of that ruling is reproduced hereunder:-

> *"After all these cases, the trial court issued an execution order on 30th November, 2006, ordering WANKYO WANGUBO to vacate the said land and be handled MAGAIGWA MRONI the village executive officer by then, the order was approved by the District Magistrate directing the District Commissioner to execute the said last order in the case No. 32 of 1997....*
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> *In this application, the applicant ought to know all these, the execution order issued by the trial court on 25/7/2014 is the continuation of the last execution order which failed to be implemented by the Government law enforcers, now the*

Respondent have decided to employ the court Broker to implement the said order of the trial court."

For the foresaid findings, I find the 1st and 3rd respondents' submission that the objection proceedings was filed in the District Court of Tarime where the 2nd respondent had filed the execution proceedings unfounded. That argument is not supported by the evidence on record. In my view, the fact that the District Court of Tarime had approved the execution order and forwarded the same to the District Commissioner could not imply that the attachment order was issued by it for the objection to be lodged in the District Court.

The 1st and 3rd respondents argued further that, the objection proceedings were filed in the District Court of Tarime in compliance with judgment of this Court (Mwanza Registry) in Civil Appeal No. 12 of 2015. Having read the said judgment, I am of the humble view that, this Court (Mwanza Registry) did not deal with the issue whether the objection proceedings ought to have been lodged in the District Court of Tarime or Nyamwaga Primary Court. Further, upon striking out Misc. Application No. 8 of 2014 of the Tarime District Court for being incompetent, my His Lorship Gwae, J did not direct the court within which the objection proceedings should be refiled. Therefore, the 1st respondent was required to file the objection proceedings before a court of competent jurisdiction to determine the matter. And if the execution or attachment order was issued by the trial court as observed by

the District Court of Tarime in Misc. Application No. 8 of 2014, the 1st respondent ought to have filed the objection proceedings in the Primary Court.

In the light of the foregoing discussion, the proceedings and orders of the District Court of Tarime in Misc. Application No. 16 of 2015 were a nullity for want of jurisdiction. The nullity in Misc. Application No. 16 of 2015 affected the proceedings and orders of the District Court of Tarime in Misc. Civil Application 13 of 2018. This is so because the said proceedings and orders were premised on the nullity proceedings. As the issue of jurisdiction is sufficient to dispose of this matter, I find it not necessary to address other issues pertaining to the application at hand.

That said and done, the Court finds merit in the application and grants it. In consequence, the following orders are made:-

1. The proceedings of the District Court of Tarime in Misc. Civil Application No. 16 of 2015 and Civil Application No. 13 of 2018 are hereby nullified.
2. The decisions and orders made by the District Court of Tarime in Misc. Civil Application No. 16 of 2015 and Civil Application No. 13 of 2018 are hereby quashed and set aside.
3. A party whose property was wrongly attached in the course of executing the judgment and decree of the Nyamwaga Primary Court

in Civil Case No. 32 of 1997 and/ or Civil Case No. 32 of 1996 is at liberty to file the objection proceedings before a court of competent jurisdiction.

4. Given the circumstance of this case, I order each party to bear its own costs.

It is so ordered.

DATED at MUSOMA this 27th day of July, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered this 27th day of July, 2021 in the presence of Mr. Alex Ifunya, Council Solicitor for the applicants and 2nd respondent, the 1st respondent in person and in the absence of the 3rd and 4th respondents.

Right of Appeal to the Court of Appeal is well explained.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
27/7/2021