

TANZANIA / JUDGMENT

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1 January 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
PAR ES SALAAM APPLICATION FOR EXECUTION NO. 14666 OF 2024 (Arising From Commercial
Case No. 57 of 2022) EVERWELL CABLE AND ENGINEERING COMPANY
LIMITED.....DECREE HOLDER VERSUS POMY ENGINEERING CO.
LTD..... 1st JUDGMENT DEBTOR OCTOPUS ENGINEERING LTD..... 2ND
JUDGMENT DEBTOR INTERCITY ENGINEERING LTD..... 3rd JUDGMENT DEBTOR

RULING

Date of Last Hearing:30/10/2024 Date of Ruling: 13/11/2024 MKEHA. J: On July 05th ,2024 the decree holder filed the present application seeking to attach the judgment debtors' funds held by the Rural Energy Agency. The application was preferred pursuant to Order XXI rule 45 (1) (a) (i) and (3) of the Civil Procedure Code. In terms of the application, as on the filing date, the unsatisfied part of the decree stood at TZS 3,582,193,168.23/=. Because of the mode of assistance sought, the first step taken by the executing court was to inquire from the Solicitor General's Office, whether indeed, the Rural Energy Agency was indebted to the judgment debtors as per the application for execution. On 12/09/2024, an appearance was made on behalf of the Solicitor General. It was through Ms. Frida Mollei, learned State Attorney. The learned State Attorney submitted that; indeed, the Rural Energy Agency had confirmed to the Office of the Solicitor General, being indebted to the Judgment Debtors. According to the learned State Attorney, the Rural Energy Agency was at that time indebted to the Judgment Debtors to the extent of TZS 1,557,447,065. 37 and USD 259,467.3. The learned State Attorney registered no objection for issuance of execution orders in the manner sought. Following admission of the learned State Attorney that the Rural Energy Agency was indebted to the Judgment Debtors and considering the fact that the decree was of two years of age when the application for execution was filed, the executing court proceeded to issue a summons to show cause to the Judgment Debtors. The summons was issued to satisfy the mandatory requirements of the law under Order XXI rule 20 (1) (a) of the Civil Procedure Code. In response to the summons, the Principal Officers of the Judgment Debtors filed affidavits in which they offered reasons why it would not be proper for execution orders to be issued. In addition, two points of preliminary objection were raised. During the hearing date, Messrs Yohana Ayall and Dickson Tugara learned advocates represented the Judgment Debtors. On the other hand, Mr. Dismas Mmbando learned advocate represented the Decree Holder. Arguments in support of the preliminary objections and those for

showing cause, were simultaneously made. It was submitted in support of the 1st preliminary point of objection that, the decree under execution had no agreement with the consent judgment as required by Order XX rule 6 (1) of the Civil Procedure Code. According to the learned advocate, the consent judgment from which the decree was extracted referred generally, to the deed of settlement. That, the contents of the deed of settlement were totally omitted in the consent judgment. And that, since the decree ought to be extracted from the judgment, the contents of the decree under execution could not be considered to reflect the said extraction there being no contents of the deed of settlement in the consent judgment. The learned advocate for the Judgment Debtors submitted further that, in terms of rule 3 of Order XX of the Civil Procedure Code, the consent judgment could no longer be altered after it had been signed, save as 3 | Page provided under section 96 of the Code. Referring to the decision of this court in HAREL MALLAC (TANZANIA) LTD V. JUNACO(T) LIMITED (Arising from Execution Proceedings in Respect of Commercial Case No. 159 of 2014), the learned advocate invited the executing court to hold that, the decree presented for execution was inexecutable. It was submitted in respect of the 2nd point of preliminary objection that, the application for execution had been prematurely filed. According to the learned advocate, the deed of settlement had provided for a manner in which the decree had to be satisfied. That, the parties had agreed that payments be made in four instalments. That, whereas the first three instalments had to be made by September 2022, the fourth and last instalment was to be paid by September 2023 but on a date when the Rural Energy Agency would have released 5% of the retention monies. The learned advocate submitted that, since the said retention monies were yet to be released, the application for execution was premature. According to the learned advocate for the Judgment Debtors, in terms of section 35 (2) of the Law of Contract Act, the Decree Holder was required to wait until performance of what the parties agreed in the deed of settlement becomes impossible. 4 | Page As for showing cause why execution orders ought to be refused, Mr. Yohana Ayall learned advocate commenced his submissions by adopting the contents of the affidavits deponed by the Principal Officers for the Judgment Debtors as part of his submissions. He then continued to submit that; the Judgment Debtors had already paid the first instalment of TZS 236,000,000/=. To support this argument, reference was made to Annexure JV1. The learned advocate asked the court to record the said partial satisfaction of the decree under Order XXI rule 2 (2) of the Civil Procedure Code. With regard to the rest of the decretal sum, the learned advocate reiterated his former argument that, the same was yet to be paid as it formed part of 5% of the retention monies which had not been released by the Rural Energy Agency to the Judgment Debtors. Mr. Dismas Mmbando learned advocate for the Decree Holder replied to the preliminary objections as follows. That, the decree was executable as it had been extracted from the consent judgment. According to the learned advocate, reading the consent judgment, nothing had been omitted from the deed of settlement. The learned advocate referred to the operative part of the consent judgment which was to the effect that, all the terms of the deed of settlement were to be read as part of the consent judgment. In view of the learned advocate therefore, the decree 5 | Page was executable. The learned advocate distinguished the facts in the cited case from those in the present application in which according to him, everything contained in the deed of settlement had been recorded as forming part of the consent judgment. These were the learned advocate's submissions in respect

of the 1st point of preliminary objection. Regarding the 2nd point of preliminary objection, it was submitted that, the application for execution had been timely filed. It was submitted that, whereas it was agreed that the last instalment be paid by September 2023, the present application for execution was filed in 2024 hence the argument regarding premature filing of the application could not arise. It was submitted further that, the fact that the retention monies were yet to be paid to the Judgment Debtors would not at any rate, lead to a conclusion that the obligation to satisfy the decree stood suspended. The learned advocate for the Decree Holder urged the executing court to overrule the objections. As to the substantive application, it was the learned advocate's submission that, the Decree Holder had not received any partial payment relating to the decree. In his view, there was nothing to be recorded as partial satisfaction of the decree. The learned advocate condemned the Judgment Debtors for having evaded saying why the second and third 6 | Page instalments had not been paid. The learned advocate for the Decree Holder remained emphatic that, his client had no obligation to continue waiting for performance of contractual terms between the Rural Energy Agency and the Judgment Debtors. In view of the learned advocate, the reasons offered in the Judgment Debtors' affidavits were insufficient to halt the executing court's powers for ordering execution of unsatisfied decree. When Mr. Ayall learned advocate rose to rejoin, he reiterated what had been submitted in chief in respect of the objections and the substantive application. He otherwise condemned the Decree Holder for her failure to notify the Rural Energy Agency, that she had received TZS 236,000,000/=as per the terms of the deed of settlement. The only determinative issue is whether the executing court is barred from construing a decree under execution by referring to a judgment from which it is extracted to ascertain its true meaning. It was submitted by the learned advocate for the judgment debtors that, the decree was inexecutable as it had been extracted from the deed of settlement and not from the judgment as required under Order XX rule 6 (1) of the Civil Procedure Code. The learned counsel urged the court to follow its previous decision in HAREL MALLAC (TANZANIA) 7 | Page LTD VS. JUNACO (T) LIMITED to hold that, the decree in the present application was inexecutable. The learned advocate for the decree holder pressed for dismissal of the objection as in the latter case, the trial court had adopted the contents of the deed of settlement as part of its consent decision. He considered the objection as unmerited. In the cited case the operative portion of the decree under execution was as hereunder: 'This civil suit Commercial Case No. 159 of 2014 dated 13th October, 2015 is marked settled as per the Deed of Settlement.' In the said case, the decree merely made reference to the deed of settlement without more. There was no consent judgment from which the consent decree would have been extracted. Neither was there any order recording the compromise of the parties as required under Order XXIII rule 3 of the Civil Procedure Code. When the said decree was presented for execution, the court held that, the decree ought to agree with the judgment and that, it ought to contain particulars regarding registration of the suit, parties and the claim, as well as clear specification of the reliefs granted or other determination of the suit. The court was insistent that, decrees ought to be drawn up in such a way as to make them self 8 | Page contained and capable of execution without referring to any other document. In arriving at the holding hereinabove, the court made reference to Mulla, The Code of Civil Procedure, 16th Edition at page 2372 as well as the decision of the Court of Appeal in MANTRAC TANZANIA LIMITED VS. RAYMOND COSTA, CIVIL APPEAL NO. 74 OF 2014,

CAT, AT MWANZA. I still subscribe to this position. Unlike in the case of HAREL MALLAC, in the present case, after the parties had executed a deed of settlement containing terms on how they agreed to put their dispute to an end, the court proceeded to enter consent judgment in favour of the decree holder. The operative portion of the said consent judgment clearly indicates at page 4, the way the trial court adopted all the contents of the deed of settlement as part of its consent judgment hence the judgment ought to be read as containing all the agreed terms of settlement. In this case therefore, the decree under execution was extracted from the consent judgment. The position that the executing court cannot go behind the decree under execution does not mean that it has no duty to find out the true effect of that decree. For construing a decree, the executing court can in appropriate cases take into account specific words employed by the trial court in the judgment from which the decree is extracted. In this case, 9 | Page when the trial court adopted the contents of the deed of settlement as part of its consent judgment, it necessarily meant that, the consent judgment could not be read in isolation of the deed of settlement. There was no allegation from the judgment debtors that, what had been extracted as part of the decree was not what the parties had agreed which the trial court adopted as part of its judgment. The position I have taken, seems to be the position in India where a statute in pari materia with our Civil Procedure Code, applies to regulate matters pertaining to execution of decrees and orders. In BHAVAN VAJA AND OTHERS VS. SOLANKIHANUJIKHODAJIMANSANG, AIR 1972 SC 1371, (1973)2 SCC 40,1972(4) UJ 689 SC the Supreme Court of India held that, in appropriate cases, the executing court ought to take into consideration the pleadings as well as the proceedings leading up to the decree. It went on to hold that, in order to find out the meaning of the words employed in a decree the court, often ought to ascertain the circumstances under which those words came to be used. That is the plain duty of the executing court and if it fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. I subscribe to this persuasive holding. And for the foregoing reasoning, I overrule the first objection for being unmeritorious. 10 | Page The learned advocate for the judgment debtors submitted in respect of the 2nd point of preliminary objection to the effect that, the application for execution had been prematurely filed. Whereas there was no denial to the fact that the 4th and last instalment ought to be paid by September 2023, it was maintained by the learned advocate that, the said final payment was conditional to receipt of 5% of the retention monies by the judgment debtors, from the Rural Energy Agency. According to the position taken by the learned advocate, since the judgment debtors had not received the said retention monies, it was premature for the decree holder to prefer the present application in July 2024. On his part, the learned advocate for the decree holder submitted that, the time for the judgment debtors to satisfy the decree as per the agreement of the parties expired on 30th September, 2023. It is true that the parties can agree on how to satisfy the decree between them whether by instalments or otherwise. In the present case, the parties had agreed, and made it as part of the decree that, the decretal sum would be paid by the judgment debtors in four instalments. Whereas the first three instalments had to be fully paid by September 2022, the fourth and last instalment had to be fully paid by September 2023. Unfortunately, it did not happen as agreed. In principle therefore, when 11 | Page the agreed time for voluntary satisfaction of decree expired i. e; after the 30th September, 2023, it became open for the decree holder to approach the executing court seeking its assistance to have her decree legally executed.

This is so because, in any case, the fact that the Rural Energy Agency was yet to release 5% of the retention monies to the judgment debtors did not at any rate, suspend the decree holder's right to execute her decree. Even after expiry of the grace period within which the decree had to be voluntarily satisfied, the 2nd and 3rd instalments remained unpaid without reasons for the said failure. The judgment debtors ought to remember that, a person alleging his own infamy cannot be heard at any forum. This goes in line with the legal maxim 'allegans suam turpitudinem non est audiendus'. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong. For this reasoning, I also overrule the 2nd point of preliminary objection for being unmerited. Regarding the substantive application, the learned advocate for the judgment debtors had two arguments. In the first argument, the learned advocate condemned the decree holder for having failed to acknowledge payment of the first instalment totalling TZS. 236,000,000/=. Reference was made to Annexure JV1. Regarding the second argument, the learned 12 1 P a g e advocate reiterated his former submission that, as for the rest of the instalments, it was premature for the decree holder to ask for the same as the judgment debtors were yet to receive the 5% of the retention monies from the Rural Energy Agency. Despite denial of the learned advocate for the decree holder that his client had not received any payment for purposes of satisfying the decree, there is glaring evidence that indeed, the first instalment of TZS 236,000,000/= was paid by the judgment debtors and was received by the decree holder through Bank Account No. 0150299724300 in the name of Everwell Cables and Engineering Company Ltd. It was on 3rd August 2022. I thus record the said partial satisfaction of decree. See Annexure JV1. This reduces the remaining unsatisfied part of the decree to TZS. 3,346,193,168.23/=. The order for partial satisfaction of decree is made pursuant to Order XXI rule 2 (2) of the Civil Procedure Code. Regarding the argument that the present application had been prematurely preferred, I reiterate my holding while overruling the 2nd point of preliminary objection. For the foregoing holdings and reasoning, I grant the decree holder's application in the following terms: Pursuant to Order XXI rule 45 (1)

- (a) (i) and (3) of the Civil Procedure Code, an order is hereby 13 | P a g e made prohibiting all the judgment debtors from recovering TZS 3,346,193,168.23 or whatever lesser sum and further, the Rural Energy Agency is prohibited from making any such payment in favour of the judgment debtors until further order of the court. It is so ordered. DATED at DAR ES SALAAM this 13th day of NOVEMBER 2024. JUDGE 13/11/2024 COURT: Ruling is delivered in the presence of Mr. Dismas Mmbando learned advocate for the Decree Holder, Mr. Dickson Tugara learned advocate for all the Judgment Debtors and Mr. Edmond Shikonyi, Principal Officer of the 3rd Judgmen^Deb^^^^ C.P. MKEHA JUDGE 13/11/2024 14] P a g e

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Prepared on 14 October 2026 · Esheria