

TANZANIA / JUDGMENT

harel malac tanzania limited vs junaco t limited another 2022 tzhccomd 15 16 february 2022

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TZHCCOMDDECIDED
16 February 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM (ARISING FROM EXECUTION PROCEEDINGS IN RESPECT OF COMMERCIAL CASE NO. 159 OF 2014)
HAREL MALLAC (TANZANIA)LTD..... D/HOLDER VERSUS JUNACO(T)
LIMITED.....J/DEBTOR DAR ES SALAAM WATER AND SEWAGE
CORPORATION LTD..... NECESSARY PARTY Date ofLast Order: 13/12/2021 Date
ofRuting: 16/02/2022

RULING

C. P. MKEHA, J When the decree holder in this case set execution proceedings in motion, Mr. Byamungu learned advocate for the Judgment Debtor, filed an affidavit in view of showing cause, why the application for execution ought not to be granted. The said affidavit was deposed by one Ferdinand Masoy, Legal i Services Manager of the Judgment Debtor. In reply thereto, the Decree Holder filed a counter affidavit deposed by one Fredrick Cosmas Kibuli, her Principal Officer. Mr. John Gamaya represented the Decree Holder. When the matter was called up for hearing, Mr. Byamungu learned advocate commenced his submissions by adopting the affidavit to show cause, as part of his submissions. He then submitted that, the decree sought to be executed was manifestly wrong on the face of it. According to the learned advocate, the operative portion of the purported decree merely provides that, the suit is marked settled as per deed of settlement, which makes the decree uncertain. The learned advocate submitted that, Order XX Rule 6 (1) explains the contents of a decree. According to the learned advocate, a decree should specify the reliefs granted or other determination. He also added that, a decree must arise from a judgment. In view of the learned advocate, a deed of settlement cannot be a judgment, that being the case, when a deed of settlement is signed, the court must enter a judgment from which a decree is to be drawn. Mr. Byamungu learned advocate submitted further that, the purported deed of settlement was not signed by the necessary party. 2 Despite all these anomalies, the learned advocate for the Judgment Debtor submitted that, his client had so far paid TZS. 60,000,000/=. It was finally submitted that, the Judgment Debtor was still committed to pay all the lawful dues. Mr. John Gamaya learned advocate commenced his reply submissions by adopting the contents

of the counter affidavit to be part of his submissions. He then went on to substantiate validity of the decree sought to be executed. The learned advocate submitted that, there were no issues for determination as the parties resolved their dispute amicably. The learned advocate insisted that, the counsel for the Judgment Debtor had not renounced the terms of settlement by the parties. As to the omission of the necessary party in signing the deed of settlement, it was submitted that, relevance of the necessary party became redundant when the defendant agreed to pay the whole amount. The learned advocate insisted that, there was no need of having a judgment so as to extract a decree. He concluded by submitting that, the Decree Holder had a valid and executable decree of this court. When the learned advocate for the Judgment Debtor rose to rejoin, he reiterated his former submission that, a judgment should always be there, 3 from which a decree can be extracted. He wound up by making an undertaking on behalf of the Judgment Debtor, to pay the debt out of court, there being no court's decree for execution. The only determinative issue is whether there is an executable decree in the circumstances of this case. To be able to respond to the said issue, it is necessary to reproduce relevant parts of the decree accompanying the application for execution under scrutiny. The relevant part of the decree reads as hereunder: "DECREE WHEREAS, the Plaintiff prays for judgment and decree against the Defendant and Necessary party as follows:-

- (i) Payment of Tanzania Shillings 2,476,406,485.00 being the total amount the Defendant owes the Plaintiff or (ii) The Necessary party pays the Plaintiff directly the amount which the Necessary party owes the Defendant. (Hi) Interest on the decretal amount from the date that the same is established to have become due to the Plaintiff to the date of Judgment at the current commercial bank rates per annum. 4 (iv) Interest on the decretal amount from the date of judgment to the date of final payment at the court rate of 12% per annum.
- (v) General damages. (vi) Costs of the suit. (vii) Any other reliefs as this Honourable Court deem (sic) fit and just to grant. This case coming for final disposal on day of October, 2015 before Hon....., Judge in the presence of Mr....., Learned Advocate for the Plaintiff and Mr....., Learned Advocate for the Defendant and In the absence of Third Party. THIS COURT DOTH HEREBY ORDER THA T:~ This Civil Suit Commercial Case No. 159 of 2014 dated 13h October, 2015 is marked settled as per the Deed of Settlement. Given under my hand and the seal of the Court this 15h day of October, 2015." 5 As it can be seen from the excerpt hereinabove, the operative portion of the decree presented for execution states: This Civil Suit Commercial Case No. 159 of 2014 dated 13th October, 2015 is marked settled as per the Deed of Settlement. The decree merely makes reference to the deed of settlement without more. Neither is there indication that compromise of the parties (if any) had been recorded as per the dictates of Order XXIII Rule 3 of the Civil Procedure Code, in which case, the obligation of clearly specifying the actual reliefs granted or other determination of the suit, would still be intact. I ask myself the following question: Do the words in bold hereinabove, specify clearly, the reliefs granted to the Decree Holder or other determination of the suit, capable of being executed? Regrettably, the answer is in the negative. The purported decree offends Order XX Rule 6 (1) of the Civil Procedure Code which insists that, the decree should agree with the judgment and that, it should also 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. In other words, decrees should be drawn up in such a way as to make them self-contained and capable of execution without referring to any other document. See: Mulla, The Code of Civil Procedure, 16th Edition at page 2372. See also: MANTRAC TANZANIA LIMITED VS. RAYMOND COSTA, CIVIL APPEAL NO. 74 OF 2014, CAT, AT MWANZA. It was Mr. Gamaya's stance that, there was no need of having a judgment in a dispute that was amicably settled by the parties. It is important to note that, as a result of the said settlement, the parties emerged with a deed of settlement, which is now being referred to be the source of decree subject of execution. Mr. Byamungu learned advocate did not deny the fact that, indeed, the parties' dispute was amicably settled. He however insisted that, after the signing of the deed of settlement, no judgment was entered from which, a decree would be extracted. In his view, it is always necessary to enter a judgment, whenever a compromise is reached at by the parties. From the parties' submissions, there is no dispute that what the Decree Holder seeks to execute is a consent decree resulting from the compromise of the parties. Order XXIII Rule 3 of the Civil Procedure Code is instructive on how a decree can be passed as a result of agreement or compromise of the parties to a suit. It provides: 7 "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." Under the provision quoted hereinabove, a consent decree can only be passed after there has been an order recording the compromise. The recording of compromise is a question of substance. The court has to find out if really there is any agreement between the parties for compromise. The terms of the settlement must be carefully examined to see that the parties understood the terms of the compromise and to see that, there is no fraud or misrepresentation. In practice, when the court satisfies itself of existence of an agreement resolving the dispute between the parties in relation to the suit before it, and when the parties appear to understand the terms of the compromise, which is not tainted with fraud or misrepresentation, a consent judgment is entered. It is from that judgment a consent decree is extracted for enforcement purposes. 8 While mindful that the executing court cannot go around the decree, I revisited the record for a sole purpose of satisfying myself that there was a consent decree for execution. Upon rereading the original record in this case, I was unable to trace evidence to the effect that, after the signing of the compromise between the parties, an order was made, recording the compromise before passing the decree. That is perhaps why the resultant decree makes reference to the deed of settlement without clearly specifying the reliefs granted or other determination of the suit, making it un-executable. If I were to agree with Mr. Gamaya learned advocate that the parties resolved their dispute amicably, whereupon a deed of settlement was signed, I would then proceed to hold that the consent decree extracted thereafter, is un-executable for not being in accord with Order XXIII Rule 3 of the Civil Procedure Code. The learned advocate for the Judgment Debtor was unable to renounce the signing of the Deed of Settlement by

the parties, which was afterwards filed in court. The learned advocate undertook to pay the debt out of court, there being no executable decree between the parties. However, the learned advocate for the Decree Holder would be pleased to have this court's assistance in executing what he referred to as a decree. 9 Following the court's findings hereinabove, the Decree Holder is advised to approach the trial court in view of obtaining executable decree in terms of the laws. The application is struck out for being incompetent. It is so held. Dated at DAR ES SALAAM this 16th day of February 2022. JUDGE 16/02/2022 Court: Ruling is delivered in the presence of the parties' advocates. C. P. JUDGE 16/02/2022 io

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