

TANZANIA / JUDGMENT

KALEBO NDABIJE JUDGEMENT

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© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA (CORAM: HON. AUGUSTINE RWIZILE) MISCELLANEOUS LAND APPEAL NO. 000027505 OF 2023 KALEBO NDABIJE COMPLAINANT / APPELLANT I APPLICANT I PLAINTIFF VERSUS AGNES NDABHIYEHU RESPONDENT I DEFENDANT

JUDGMENT

Fly Notes

Facts

Ratio Decidendi 25th of June 2024 Hon. RWIZILE.: This appeal arises from the execution proceedings of the District Land and Housing Tribunal of Kasulu District, in Misc. Application No. 77 of 2022. Facts that paved its way to this court, can be stated that the dispute arose from the award by Nyamugali Ward Tribunal in application No. 02 of 2021. The respondent filed an application in respect of this land and obtained the award in her favour. In the process to execute it, she filed the impugned application which was granted. An eviction order was issued on 14th March 2023. The appellant who was husband of the respondent was not satisfied with the eviction order, hence this appeal. He has advanced two grounds as hereunder;

1. That the chairman of the tribunal grossly erred in law and in fact by pronouncing an execution order on the land that was not properly identified and the order which did not pronounce the limit of the size of the land to be given to the respondent
2. That the chairman of tribunal grossly erred in law and fact by pronouncing execution order on the land that was not subject of the dispute in the judgement of the Ward Tribunal of Nyamugali Page. I Hon. AUGUSTINE RWIZILE · II . ~ r::,1 1:1 . - The appellant was under services of Ms Mary Peter, learned advocate, while the respondent was not represented. The appeal was heard by written submissions. The learned counsel for the appellant argued the 2nd ground of appeal first. She complained that, the Tribunal went over its powers by executing the judgement that was not issued by the trial tribunal. She said, the size of the land subject of eviction was not clearly stated. This, according to her led the tribunal to go beyond the decreed area. According to the learned counsel, powers of the executing court are limited to executing the decree brought before it, unless contested by the parties. For

that reason, she added, a decree cannot be altered anyhow during execution except by a superior court acting on appeal or in revision or by the court passing it on review. According to her, in the case of Maharaj Kumar Mahmud Hasan Khan vs Motilal Banker, 1961, ALL, it was held that; "I hold it to be a correct proposition of law that a Court executing a decree is bound by the terms of that decree and cannot go behind them, it is equally true as a general proposition that such court can neither add to such a decree nor vary its terms" According to her submission, the land that was subject of execution by the executing tribunal is the land where the house of the second wife of the appellant was built. This, she said, was not named as such in the award, and again its boundaries were not named. It is in that land, in her view, where the appellant's second wife's is built. The learned counsel submitted further that, it is the duty of the executing tribunal to execute what has been decided by the trial tribunal, and not to go beyond the decree, as held in the cases of Rachel Nankware Mgeni (as the lawful attorney of Sangiwa Amani Mgeni) vs Josephine Joseph Magelanga t/a Apex Care, Execution No 28 of 2022 (HC), Hassan Twaib Ngonyani vs Tanzania Pipeline Limited, Civil Appeal No.201 of 2018 (CAT), Ramswami vs T.N.V. Kailash Theyar reported in air 1951 S.C, 189 (192) and Fortunata Edga Kaungua vs George Hassan Kumburu, Misc.civil application No.70 OF 2019 (HC). The learned advocate further cited the case of the Board of Trustees of the F.P.T.C Church vs The Board of Trustees of Pentecostal Church (unreported) to emphasize the fact that in execution proceedings, it is proper to describe the property subject of execution in order to avoid chaos. Lastly, she argued that parties are bound by their pleadings and therefore failure to properly plead and describe the dispute area was contrary to the decisions in the cases of James Funke Gwagilo vs Attorney General [2004] T.L.R 161 and Cooper Motors Corporation (T) Ltd v Arusha International Conference Centre [1991] TLR 165. Arguing the first ground of appeal, in the similar way, the learned counsel was of the view that the trial tribunal did not properly indicate in the award full description of the land subject of execution and the executing tribunal fell in the same trap. She said, the same was not executable for lack of clarity as held in the case of Agast Green Mwamanda (suing as the Administrator of the Estate of the late Abel Mwamanda) vs Jena Martin, Misc. Land Appeal No.4 of 2019. The learned counsel, therefore, asked this court to allow this appeal with costs. In reply, the respondent submitted that the executing tribunal properly dealt with records and arrived at a proper conclusion. It was her view that since this is the first appeal, still, this court is entitled to re-evaluate the evidence - Page. 2 Hon. AUGUSTINE RWIZILE . . and arrive at its own conclusion. She asked this court to find no merit, in the first ground of appeal. Submitting on the second ground, it was stated that the executing tribunal properly dealt with the matter and applied its administrative jurisdiction in terms of section 16(3) of the Land Disputes Courts Act, [Cap 216 R, E 2019] and rule 23(3) of the Land Disputes Courts (The District and Housing Tribunal) Regulation, 2010, which enjoin the tribunal, where a party to the dispute fails to comply with the order of the Ward Tribunal, to refer the matter to the District Land and Housing Tribunal for enforcement. It was stated that the executing tribunal was right to examine the record which showed the land subject of the execution was in the ownership of the appellant and the respondent. The second wife of the appellant had no such share, and she was therefore properly evicted. According to her, full description of

the land was stated in the impugned award on page 3 and 4. It was, according to her, one acre of land. She argued further that, the house built in that land, for the second wife, should be demolished and eviction be done, since it belongs to the appellant and the respondent. She asked this court, to dismiss the appeal with costs. Having heard the submission of the parties, it is clear that the land was jointly owned by the appellant and the respondent. The Ward Tribunal held that the land disputed was property of the appellant and respondent as wife. It did not divide the same into parts or portions. The execution proceeding as well dealt with the land in question as a whole. It was directed that a house built for the second wife in the same premises be demolished and the same be evicted. As submitted by the appellant, it is of essence that the duty of the executing tribunal is similar to the executing court. It cannot be said, in my opinion, that the executing tribunal went behind the decree it was asked to execute. I do not find anything wrong with the decision of the tribunal in this aspect. There is nothing, in my view, suggesting that the land stated in the decree is different from what the execution proceeding was based. All said and done, the appellant and the respondent owned the land jointly. It was not proper therefore to erect structures for the people other than those designed by the two without any agreement. I find no merit in this ground of appeal. On the second ground, the records shows that the house of the appellant's 2nd wife was not part of the decision of the Ward Tribunal. But, on the other side, the record in execution shows how the house of the 2nd wife was included. It is clear that the appellant built a new house for his 2nd wife on the disputed plot as if it was her own property. Further, he invited his relatives to reside on the land in dispute as his own inheritance. It should be noted that, the land in dispute was one acre as shown hereunder; 'ushahidi uliotolewa ni pamoja na vielelezo vilivyomo ndani ya kiwanja cha mgogoro, mwanzi mkubwa na nyumba ya tofari ya mtoto wake na Kalebu Ndagije pamoja na ... mchikichi. It is from the above, the appellant said, the executing tribunal, ordered the execution on the land not stated in the decree. It is established that, the land subject of execution was one acre. The disputed land was in the award described by its size, not the appearance. It is therefore clear to me that, what was stated at the execution stage included structure that are in the same piece of land. I hold, nothing new was added. There is nothing that clearly identifies the disputed land differently as stated by the appellant. I therefore find no merit in this ground as well. Entirely, I find no merit in this appeal. It is dismissed with costs. Page.3 Hon. AUGUSTINE RWJZJLE - ~ Dated at KIGOMA ZONE this 25th of June 2024. AUGUSTINE RWIZILE JUDGE OF THE HIGH COURT Page.4 Hon. AUGUSTINE RWIZILE - ~

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