



# EXECUTION TRAIL: THE PROCEDURE AND PRACTICE WHEN THE GOVERNMENT IS INVOLVED: - A Quagmire In Tanzania Questing A Revisit

*By*

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## **Abstract**

Decrees as it is with other orders have been industrious and given on daily basis. However, they have been a clarion call to stakeholders, particularly when the government is involved. Execution of decrees among other orders is a pivotal part when it comes to dispensation and administration of justice. Thus its issuance and execution demands highest degree of integrity which surpasses an ordinary yardstick of discipline

that is demanded. Despite the execution process and procedures being envisaged in the Tanzanian jurisprudence, particularly under the Civil Procedure Code and Government Proceedings Act, the same has not been complacent. Its execution where the government is involved has been dicey, desirous or rather dubious, In other words, the execution process of the same has not been a walk in the park as the process has been bewildered by different shortcomings. The article confines itself to the concept of decrees, the nitty gritty of procedure and practice by looking at the law governing the same, types of decrees, execution of decrees, challenges envisaged in the process, remedies available and way forward.

**Keywords:** Decrees, Execution, Government

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## 1. Introduction

Tanzania as many other countries that fell under the British ambit of colonization is religious to the cardinal principles of the English jurisprudence. One of such principles is that, wherever there is a right, there is a remedy (*Ubi jus ibi remedium*). This principle has been adopted in its all fours by the Tanzanian Legal system also. In fact, right and remedy are two sides of the same coin and they cannot be separated from each other.<sup>2</sup>

It is in the same vein that a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impiedly barred by any statute.<sup>3</sup> In the exercise of the preceding bestowed duties, competent civil courts ordinarily render decrees among other orders.

## 2. Judgment and Decrees

At the very outset it should be made clear that, the court after the case has been heard, shall pronounce the judgement, and on the basis of such judgment a decree shall follow.<sup>4</sup> In other words, a decree cannot be divorced from a judgment,<sup>5</sup> as is (decree) a formal expression of the contents of a decision or judgment, thus, must be in consonance with the judgment.<sup>6</sup> The foregoing is imperative as per the wording of the law.<sup>7</sup>

Succinctly driving the point home, a decree is a summary of the contents of a judgment. A person in whose favour a decree has been passed is called a decree-holder, and he against whom it is passed is called a judgment-debtor.<sup>8</sup>

It should be taken on board that judgements and decrees despite their hegemony are both delivered and executed in difrent forms. In civil litigation, judgments may be (i) *in rem*;<sup>9</sup> or (ii) *in personam*.<sup>10</sup>

## 3. Meaning of Decree

Ordinarily, in most of the statutes there is a section that provides for definitions of the terms that are used in the body/statute (the Act). This definition clause is a kind of statutory dictionary. Statutes in Tanzania are not *alien* to this prevalent practice worldwide.

Section 3 of the *Tanzanian Civil Procedure Code*<sup>11</sup>, herein after to be referred to as a *Code, inter alia*, provides the following definition,

Section 3 of the *Code* defines the term “*decree*” in the following words:

“*Decree*”, means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controvesry in the suit and may be either *preliminary* or *final* and it shall be deemed to include the rejection of a **plaint and the determination of any question within section 38 or section 89, but shall not include**<sup>12</sup>:

- 8 This is as well envisaged under section 3 of the Civil Procedure Code
- 9 Means judgment against subject, property or thing
- 10 Means a judgment against a specific individual
- 11 Cap. 33 R.E: 2019
- 12 Relatively akin definition is accentuated in, Garner, B. A, *Blacks Law Dictionary, West Group, 7<sup>th</sup> Ed.1999,*

- (a) An adjudication from which an appeal lies as an appeal from an order, or
- (b) Any order of dismissal for default.

The section for purposes of clarity, goes a mile ahead by providing for explanation,

**Explanation** :A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit.<sup>13</sup>

It is point blank that, as per section 3 of the *Code*, a decree does not include an adjudication from which an appeal lies as an appeal from an order, or any other order of dismissal for default.<sup>14</sup> *From the afore tenet, one thing is connoted, for one to say that a decision of a court is a decree, then the following elements must contemporaneously ensue therefrom,*

- (i) *There must be an adjudication;*
- (ii) *Such adjudication must have been done in a suit;*
- (iii) *It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;*
- (iv) *Such determination must be of a conclusive nature, and*
- (v) *There must be a formal expression of such adjudication.*<sup>15</sup>

*From the above precept it is thus concluded that decrees form part of the adjudication of a court of law, the other one is orders.*

- 13 Akin definition to this effect may as well be extracted from the case of *Dr. Gabriel Michael Muhagama v. Salim Abass Salum and Two others* (2006) TLR 336
- 14 The position was well enunciated and aptly put in the case of *Mansion House Ltd v John Stansbury Wilkinson* (1954) 21 EACA 98, 102
- 15 This was expressed with opulence in the case of *Tang Gas Distributors Ltd v. Mohamed Slim Said, The Administrator General and MABUNDA Auction Mart Co. Ltd*, Civ. Appl. for Revision No. 68/2011, Court of Appeal of Tanzania, p. 38 & 39

## 4. Types of Decrees

*When one peruses the law governing execution of decrees, in particular the Code, there are about ten (10) categories of decrees as set out in Order XX of the Code as well the section 15 of the GPA that include the following,*

- (i) *A decree for the payment of money*<sup>16</sup>
- (ii) *A decree for the recovery of immovable property*<sup>17</sup>
- (iii) *A decree for delivery of movable property*<sup>18</sup>
- (iv) *A decree for delivery of movable property*<sup>19</sup>
- (v) *A decree may be passed for possession and rent/mesne profits*<sup>20</sup>
- (vi) *A decree passed in a situation where set-off has been allowed by the court*<sup>21</sup>
- (vii) *A decree passed in a suit for partition of property or separate possession of a share therein*<sup>22</sup>
- (viii) *A decree passed in suits relating to administration*<sup>23</sup>
- (ix) *A decree passed in pre-emption suit*<sup>24</sup>
- (x) *A decree in a suit for account between a principal and an agent*<sup>25</sup>

The afore mentioned with their corresponding provisions of the law are the types of decrees that are ordinarily issued by the courts of law whilst conducting their business where and when the government in one way or the other is involved.<sup>26</sup> It

2 Takwani C.K., 2013 *Civil Procedure with Limitation Act*, 1963, Eastern Book Company, Lucknow 7<sup>th</sup> Ed., p. 41

3 *Most Rev. P.M.A Metropolitan v Moran Mar Marthoma*, 1995 Supp (40 SCC 286 at p. 318

4 Judiciary of Tanzania: *A Benchbook for Judges in Tanzania*, Published by the Judiciary of Tanzania with the support of the World Bank, 2019, at p. 39

5 This is an evident truth as a decree ensues from a judgment as exemplified under Section 3 of the Civil Procedure Code, R.E: 2002

6 This is as a matter of law as a decree is drawn up after the judgment is delivered. See: *Unifrico and Two others v. Exim Bank (Ltd)*, Civil Appeal No. 300 of 2006, CAT (*Unreported*)

7 Order XX r 6, of the Code, *Ibid*

16 Section 15 (1) of Cap: 5 & O. XX, r. 11

17 O. XX, r. 9 of the Code

18 O. XX, r. 10, *ibid*

19 O. XX, r. 15, *ibid*

20 G.N. No. 376/1968 & O. XX, r. 12, *ibid*

21 O. XX, r. 19(1), *ibid*

22 O. XX, r. 18, *ibid*

23 O. XX, r. 13, *ibid*

24 O. XX, r. 14, *ibid*

25 O. XX, r. 16, *Ibid*

26 It is however not the intent of this paper to discuss in *extenso* the types of decrees mentioned save only for other avenue of academic discourse and deliberations, but at least the reader need be conversant of the types as mentioned.

suffices to say however that, in common parlance whatever type of decree, should be in consonance with the condition precedent provided in the *Code*.<sup>27</sup>

## 5. The Law Governing Decrees

The paper finds its confinement in Tanzania though some practical underpinnings in due course may be plucked from other jurisdictions. In Tanzania, there are mainly two laws governing execution of decrees in as far as the Government is a party or rather involved. These laws are the Government Proceedings Act<sup>28</sup>, herein after referred to as the GPA and the Civil Procedure Code, the *Code*<sup>29</sup>

When one takes a glance at the provisions found in the Government Proceedings Act, one thing is crystal clear. The GPA<sup>30</sup> does not provide for comprehensive procedure (s) for execution of decrees.<sup>31</sup> The *lacunae* is catered for by the *Code*, exemplary under Order XXI, which as the way coined is applicable or ought to be read in *tandem* with section 15 (1) of Cap: 5, which is hereby reproduced in *verbatim* ,

“The provision of any written law relating to the payment of interest where a decree is for the payment of money and to the payment of interest on costs shall apply in the case of Government as they do in the case of private person.”

27 O. XX r. 6, of the Code

28 Cap: 5 RE. 2002

29 Cap: 33 R.E. 2002

30 Despite the Government Proceedings Act being the epicenter of the government proceedings is lacking very important element when the government is involved. This is one of the *lacunae* under the Act as it does not cover the procedural aspect of decrees and their execution in *extenso* as how it was supposed to be canvassed.

31 See: *Execution of Decrees involving the Government, A Paper presented by the Solicitor General, Dr. C.J Mashmba at the 1st Meeting of DLS's & HLSUs*, held on 30th-31st October 2019 at Mipango Institute, Dodoma

The application of Order XXI under the *Code* as manifested under Section 15 of Cap.5 is, furtherly, qualified by Ss 12, 16 and 17 of the GPA.

By paraphrasing the applicability of Order XXI of the Code under the GPA as provided under section 15 as afore mentioned, it is extended under sections 12, 16 and 17 of the GPA. The extension is paraphrased in such a way that, in case of any civil proceedings by or against the government, the court subject to the provisions of the GPA , have powers to make all such orders as it has to make in proceedings between private persons and reliefs thereto.<sup>32</sup> By itself the foregoing is an anomaly that needs a panacea.

Order XXI of the Code as applicable under the GPA is further qualified by section 16 of the Act, which provides for satisfaction of orders against the government which calls for procedural aspects to be followed upon application involving cost among others against the government.<sup>33</sup>

The other provision that would like to be dealt with on this arena is on execution by the government. This is as qualified under the GPA, which calls upon such execution of an order made in favour of or against the government to be in the same way as an order made in an action between private persons.<sup>34</sup>

32 It means civil proceedings involving government is to be treated the same as to the nature of reliefs as it is with private persons.

33 One to be conversant to this may as well have a glance to O. XX of the *Code*

34 Section 17 of the GPA, and it is s a result of the section that most of the cases used will be between private persons.

## 6. The Nuts and Bolts of Execution

### 6.1 Execution of Decrees

When one takes a glance to the law governing execution of decrees in Tanzania, there is a recurring anomaly concerning lack of definition of the word “*execution*”. There is no definition of the word “*execution*” either in the current Court of Appeal Rules<sup>35</sup>, GPA , or in the Code. However case laws have filled the *lacunae*. Before embarking on the case laws, it is crucial to take a glance in other pieces of sources.

The Indian Code of Civil Procedure defines execution to mean the enforcement process by the court, of its own decrees.<sup>36</sup>

Apart from Mulla Code of Civil Procedure, in Tanzania Chipeta, B.D as well defines the execution as thus:

...*The process by which the decrees of successful parties are satisfied...*<sup>37</sup>

Case laws were not in the bay on defining what is execution.<sup>38</sup> Case laws have defined the term execution in several dimensions. One , to mean the process for enforcing or giving effect to the judgment of the court, and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment,<sup>39</sup> or, Execution as the final act, that is the satisfaction of the judgment.<sup>40</sup>

35 The Court of Appeal Rules, 2009

36 Solil, P 2001 *Mulla Code of Civil Procedure*, 2001, Butterworths, , p. 568

37 Chipeta, B.D, 2002 *Civil Procedure in Tanzania, A Student Manual, Law Africa*, p. 245.

38 One of the case is that of *East African Development Bank v. Blue Line Enterprises* , Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 57 of 2004 (Unreported)

39 *Shell and PB Ltd v UDSM* , Court of Appeal of Tanzania, Civil Application No. 68 of 1999 (Unreported)

40 One may take a look to the case of *Tanzania Motors Services Ltd. V. Tantract Agencies Ltd*, CA, Civil Application No. 86 of 2004 (Unreported)

### 6.2 Execution as a Process

As posited *supra*, execution of court decrees is one of the pivotal part of adjudication and generally the administration of justice, depicting that, the process ought to be done above the ordinary thresholds of integrity and without ado. It is trite position of the law that the process of execution should be done by the court which passed the decree,<sup>41</sup> contrary to this when proper procedure not alluded, it may consequently abuse the court process.

The execution process in Tanzania is currently bewildered with some myriads and whimsical processess that raise eyebrows from the stakeholders, it is thus apposite not to countenance the situation as it stands, the shorfalls in execution process are apparent, thus need to be addressed so that we may do away with the trajectory.

Generally, execution as a process is provided as a summarized procedure that ought to be followed as provided under Order XXI of the Code. The process is ordinarily two fold in as far as the court is concerned. As provided by the law, a decree may be executed either by the court which passed it or by the court to which it is sent for execution.<sup>42</sup>

The case law of *Tanzania Motors Services Ltd v Tantract Agencies Ltd (Supra)* envisages events to be taken on board before execution is deemed to be completed. Kaji, J.A (as he then was) provided for the following events,

41 A court which “passed a decree” as per section 32 of the *Code*, connotes , or words to that effect shall in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction , the court of first instance; and (b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

42 Section 33 of the *Code*

- i. *Application for execution in court;*
- ii. *Making a warrant of attachment ;*
- iii. *Issuing the attachment order by the court;*
- iv. *Attaching the property as ordered by the court;*
- v. *Making a proclamation for sale of the attached property*
- vi. *Selling the attached property , and*
- vii. *Payment of the sale proceeds to the decree-holder.*<sup>43</sup>

### 6.2.1 Execution Trail: The Practice

When one peruses different literature, statutes being among them, there are two situations of execution of decrees when the government is involved. This may be execution by the government or against the government.

#### 6.2.1.1 Execution against the Government.

Execution against the government is governed by section 16 of the GPA. For execution to be made to its fruition under the umbrella of the afore section the following should be heeded to.

First and foremost, there must be an application for certificate containing particulars of the order/decreed.<sup>44</sup> Secondly, the Permanent Secretary to the Treasury or such other government accounting officer shall pay to the person entitled to/his advocate the amount appearing in the certificate to be due to him together with any interest, lawfully due thereon.

<sup>43</sup> This process is as well canvassed under O. XXI of the *Code*  
<sup>44</sup> Should however be noted that, in other circumstances the court may also direct that a separate certificate be issued with respect to the costs ordered to be paid to the applicant.

#### 6.2.1.2 Execution by the Government

On the other hand, the government may be involved in those decrees where by it becomes the decree-holder out of which it is supposed to be executed. Despite the anomalies contained in the laws on execution, the same has been canvassed under the GPA. The provision is to the effect that;

*...any order made in favour of the government against any person in any civil proceedings to which the government is a party, may only be enforced in the same manner as an order made in an action between private persons...*<sup>45</sup>

When one goes through the nitty gritty of execution when the government is involved from the two precept, it is clear that the laws governing execution to private persons are to be applied in situations when the government is involved as provided in the GPA as read together with the *Code*. The foregoing is the *lacunae* depicted in the Tanzanian jurisprudence, suggestingly, the process is to a greater extent left in the hands and discretion of the court among other officers involved in the execution trail.

### 7. Modes of Execution of Decrees

There are several modes of execution of decrees which are at the disposal of a decree holder. However, the choice of a certain mode of execution, mostly depends on the nature of respective decree and property subject of execution. Thus, it is the decree holder who is at liberty to choose a suitable mode of execution. Despite such liberty, the court of law should satisfy itself on the proposed mode of execution and the application for

<sup>45</sup> Section 17 of the GPA

the same whether they are in conformity with the law to ensure that they are not intended to be an abuse of court process.<sup>46</sup>

Despite numerous modes of execution provided by the law, willy nilly a debtor is to follow a certain mode of execution. The most common modes are the following;

#### 7.1 Attachment and Sale

Ordinarily in the case of a decree for the payment of money, such decree may be executed by attachment and sale<sup>47</sup> of the judgment-debtor's property, or by garnishee order.

#### 7.2 Arrest, Seizure and Detention

A decree may as well be for a movable property. In case it is a decree for any specific movable property (e.g. a motor vehicle), it may be executed by seizure,<sup>48</sup> if practicable, of such movable property and by delivering it to the decree-holder, or by arrest and detention of the judgment debtor as a civil prisoner, or by attachment of his property.<sup>49</sup> or by all such means.<sup>50</sup> This ordinarily happens when a decree debtor fails to heed the judgment hence the creditor on application may wish to exercise his or her right to execute in such a mode he desires on failure to be paid the decretal sum as adjudged.<sup>51</sup>

It may as well happen that a decree is for specific performance of a contract or for an injunction, and the judgment-debtor has had time to obey it but has wilfully failed to

<sup>46</sup> Chipeta, B.D, *Ibid*, p.248

<sup>47</sup> For this mode to be exercised conditions stipulated under section 48 of the Code on the property liable to attachment and sale in execution ought to be met.

<sup>48</sup> This mode is however subject to the conditions set under section 49 of the Code

<sup>49</sup> This position is as well canvassed under section 42 (c), 44 and O. XXI, r. 28 of the Code

<sup>50</sup> See as well Chipeta, B.D, *Ibid*, p. 248

<sup>51</sup> *Princess Shabaha Company v. NIC Bank Tanzania Ltd* ,Case No. 94, HC of Tanzania at Dar es Salaam, (*Unreported*)

heed to. In such a circumstance, such decree may be executed by his detention as a civil prisoner<sup>52</sup>

### 8. Remedies Available Against Execution of a Decree

It is the cardinal rule that for every damage there must be a remedy available. Thus, it is common for a third party or judgment-debtor himself to object what was rendered by the court. It means he may decline a mode of execution, be it sale, attachment, detention or else. He may aver several grounds to that effect, common one being, that property or properties were not liable to attachment on some grounds or other.<sup>53</sup>

Common remedies available in *plethora* are discussed (though not in *extenso*) hereunder;

#### 8.1 Resistance to Execution

Resistance to execution is the remedy available on immovable property. This remedy may be employed when a purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or any other person on his behalf.<sup>54</sup> In such a circumstance, if there is no just cause for such obstruction, then the court may order for an arrest and detention of a judgment-debtor or any other person as the case may be<sup>55</sup> or order possession of the property to a rightful person.<sup>56</sup>

<sup>52</sup> Conditions provided under section 46 of the Code need to be followed

<sup>53</sup> This was evidenced in the case of *Kangaulu Mussa v Mounghati Mchodo* (1984) TLR 348

<sup>54</sup> Solil Paul p.888

<sup>55</sup> This position is well footed under section 55 of the Code.

<sup>56</sup> The position is as well canvassed under O. XXI, r 95,96,97 of the Code

## 8.2 Appeals, Revision and Review

Apart from the afore mentioned (i.e Resistance to execution), there are other Post-Judgment remedies which involve Appeal, Revision and Review. These are discussed hereunder.

### 8.2.1 Appeals

The expression “appeal” has not been defined in the Code. According to a dictionary meaning,

“ *appeal*” is the judicial examination of the decision by a higher court of the decision of an inferior court.<sup>57</sup>

However, appeal as a right is not a natural or inherent right.<sup>58</sup> It is well-settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute.<sup>59</sup>

It should be noted that appeals may lie from preliminary decree or final decree. However, it is the position of the law that, if a party agrieved by a preliminary decree does not appeal from such decree, he will be precluded from disputing its correctness in any appeal which may be preferred from final appeal.<sup>60</sup>

Under this remedy, it is a continuation of the proceedings. In effect, the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations.

### 8.2.2 Revision

The revisional jurisdiction of a court, in our case categorically the High Court, is a part and parcel of the appellate powers of the High Court. The power under the Code is as well

<sup>57</sup> Wharton's *Law Lexicon* at p.72

<sup>58</sup> Sometimes appeals are matters of discretion by the court, but conditions set for the same should not be onerous as it amount to unreasonable restrictions rendering the right almost illusory

<sup>59</sup> This position may be deduced from the wording of section 70 of the Code

<sup>60</sup> Section 71 of the Code

canvassed.<sup>61</sup> The powers are only exercised by the High Court when and where there is no appeal preferred. The powers may be so invoked as a remedy upon application, as the court is mandated with powers to interfere for the purpose of rectifying the error of the court below. However. the powers are not the same as appeal, whereas for appeal the High Court is having powers to rehear the case on points of law and fact unless the statute conferring the right of appeal limits the rehearing in one way or the other.

### 8.2.3 Review

Section 78 of the Code gives a substantive right of review in certain circumstances and provides for procedure thereof. The provision relating to review constitutes an exception to the general rule that once judgment is signed and pronounced by the court it becomes *functus officio* (ceases to have control over the matter) and has no jurisdiction to alter it.<sup>62</sup> In legal parlance, review simply is a judicial re-examination of the case by the same court and by the same judge. In review, a judge or magistrate who has disposed of the matter reviews an earlier order passed by him in certain circumstances.

### 8.3 Objection to Attachment/Proceedings

It often happens that a third party or the judgment-debtor himself objects to the attachment of a particular property or properties, usually on the ground that such property is not liable to attachment usually on some ground or other. So a party need not file a fresh suit, rather to file for objection out of which proceedings are to follow trail.<sup>63</sup> In Tanzania, the provisions of the Code that support filing in court objections to the attachment of property are provided

<sup>61</sup> Section 79 of the code

<sup>62</sup> O. XXI, r. 3

<sup>63</sup> *Kangaulu Mussa v Mpunghati Mchodo* (1984) TLR 348

under Order XXI of the Code.<sup>64</sup>

The application , should be supported with an affidavit, that must be filed in the court which passed the decree and be served to the parties.

In such a situation , it is the duty of the court to investigate such claim or objection. In doing so, the court will deal with the matter as if the objector (if a third party) was party to the suit. The objector will be asked to adduce evidence to show that the property is not subject to attachment, say on the ground that at the date of the attachment he had some interest in such property, or that, by operation of law, the property is not subject to attachment.<sup>65</sup>

After the objector or claimant has adduced evidence to that effect, the judgment-debtor and /or the decree-holder<sup>66</sup> may adduce evidence to refute the claimant's evidence.<sup>67</sup> Thereafter, the court will rule on the matter. It is the trite position of the law that, the magistrate who granted the order of attachment and sale ought to determine the objection proceedings.<sup>68</sup> The afore obligation was as well reiterated in the case of *Kwiga Masa v Samwel Mtubwata*.<sup>69</sup> The courts, however, may decline to entertain an objection or to investigate if its of the view that it was designedly or unnecessarily delayed.<sup>70</sup>

<sup>64</sup> Categorically O. XXI r. 57-62

<sup>65</sup> O. XXI, r. 57 and 58

<sup>66</sup> If the decree holder intends to challenge the objection the law requires to file a counter affidavit.

<sup>67</sup> *Nyanza Distributors Co. V Geita Generakl Stores* (1977) LRTn.2

<sup>68</sup> High Court Rulling in the case of *Mrs. Nuru Mbaraka v Awadhi Abeid and Bahati Abeid Hiyala* (2002) TLR 188

<sup>69</sup> (1989) TLR 103

<sup>70</sup> *Ibid*, section 57 (1)

## 8.4 Garnishee orders/Proceedings

The Code in its recurring anomaly neither defines the word garnishee nor garnishee proceedings. The same problem is under the GPA. However, Garnishee proceeding is a proceeding by which the decree-holder seeks to reach money or property of the judgment-debtor in the hands of a third party (debtor of judgment-debtor).<sup>71</sup> By this process, an executing court may order a third party to the judgment-creditor (decree-holder) the debt from him to the judgment-debtor. The payment made by the garnishee pursuant to the order passed by the executing court is a valid discharge to him against his decree-holder.

Takwani, C.K (*supra*) at page 673 defines what is a garnishee proceeding. What lingers is what is a Garnishee?. Garnishee has been defined to mean a third party who is a debtor of judgment debtor,<sup>72</sup> or is a person who is liable to pay a debt to a judgment-debtor to deliver any movable property to him. Under the circumstance is the “Garnisher” (Garnisher) who is a judgment-creditor the one who initiates garnishee proceedings to reach judgment-debtors money or property held or possessed by third party (garnishee). “Garnishment” is a proceeding by which the decree-holder seeks to get the property of judgment-debtor. To facilitate the foregoing, there must be a garnishee proceeding which is a judicial proceeding in which a judgment-creditor (decree-holder) prays to executing court to direct third party who is a debtor of the judgment-debtor to pay the amount to garnisher (decree-holder). Garnishee order is an order passed by a court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.<sup>73</sup>

<sup>71</sup> *Takwani, C.K* p. 673

<sup>72</sup> *Ibid* p. 673

<sup>73</sup> *Halsbury's Laws of England* (4<sup>th</sup> Edn.) Vol.17 at p.325

## 9.0 Challenges involved in Execution Trail

As it was introduced in the beginning, execution is one of the pivotal part when it comes to dispensation of justice touching the bedrock of administration of justice in Tanzania.

Execution as a process ought to be executed by professionals, having clear guidelines of procedures as a roadmap or benchmark when conducted. Failure to this may taint the image of the judiciary by abusing court process leading to judicial spat and conversely, when interests and rights of different stakeholders are involved.<sup>74</sup>

Thus, bad practice to the process may lead to loss of confidence in the country and ultimately paralyse the functioning of the economy during this particular time of the “*Uchumi wa Viwanda*”.<sup>75</sup>

As introduced in the beginning, this article *inter alia* provides for challenges and suggestions which would suggest the need to do away with a prevalent trajectory when it comes to execution. Here under is an epitome of challenges that are gradually creeping in the judiciary in as far as execution of decrees is concerned.

### Frivolous attachments or garnishee orders.

When it comes to execution, it is a trail that involves money, or valuable properties of million of shillings. Henceforth, without proper execution ethical standards, values and process may attract frivolous attachments. The foregoing has been a

<sup>74</sup> For example banking and finance industry among other investors.

<sup>75</sup> The ruling party Chama cha Mapinduzi (CCM) has demonstrated the fifth term government under the able Presidency of his excellency the President, Hon: John Pombe Joseph Magufuli as it is for the “Industrialized Economy”

clarion call of objections towards the said attachments or garnishee orders as evidenced in several cases as challenged.<sup>76</sup> Thus, execution process should not be there as a matter of business as usual but be in accordance with the law and of value that would fit the purpose of execution. to the contrary in some occasions, the process has been marred with with some shortcomings involving the properties attached which are not even of value to meet the purpose thereof, this is facetious. This does not only curtail the rights of a judgment holder/creditor but as well taints the image of the court.

### Unscrupulous undertakings

Due to prevalent and distinguishable position of the law under the Code, the Court of Appeal rules, Case laws and discretion that is left to the court towards execution process and applications that are available in abundance that are at courts’ discretion, issuing of orders and pendency of appeal or notice of appeal, leave lots desired.

For example, the position of the law as provided under the Code on notice of appeal. When appeal is properly lodged under rule 83 and the other position under the court of appeal rules, Rule 11 (2) (b) which is to the effect that, in law the pendency of a notice of appeal or of an appeal does not constitute a stay of execution of a decree in the trial court, save only there is an order for stay of execution. A trial court is estopped from issuing an execution order, thus an appeal cannot desist a court from issuing an order for execution. The above among others have led to unscrupulous undertakings. Here under the circumstances are deliberated, *albeit* briefly,

<sup>76</sup> *NBC Ltd v. Lake Oil Ltd*, HC (T), at Dar es Salaam, Commercial Appeal No. 5/2014

There was a trite position of the law as well articulated in the case of *Ahamed Mbaraka v. Mwananchi Engineering Contracting Company Ltd.*<sup>77</sup> as an *obiter* on how to control unscrupulous move in the execution process during the pendency of an application for stay. In this case the court made an *obiter dictum* that,

*The officer signing the order authorizing execution to be carried out must comply with the provisions of the law. He/she must ensure that before signing the documents authorising execution to be carried out, there is either no appeal pending or none of the parties has initiated the appeal process, there is negligence by the party in making a following*<sup>77,78</sup>

Despite the move (above) from the highest court in the hierarchy and the presence of the law providing for roadmap, sometimes things may always not look as they seem to be. It is all sometimes chalk and cheese particularly during the enforcement process through the registrar and/or other officers in the registry.<sup>79</sup>

The foregoing means to say, under the Code there are circumstances that the court may take notice as a stay by exercising its discretion, contrary to this court should not desist from issuing the order of execution this position contrary to that under the court of appeal rules may lead to unscrupulous move in execution process. This discretion

<sup>77</sup> CA (T) Civ. Appeal No. 229/2014

<sup>78</sup> This *dictum* though is directive, is not realistic and may as a result refrain the rightful decree creditor the right to enjoy the fruits of the judgment and the decretal sum, and furthermore the position of the case is not tantamount to appeal lodged under rule 83 of the Code. From the precept it is evident that the unscrupulous moves are rampant, and this may be as a result of lack of coordination, or not having proper data base or mechanism of having a judge or executing officer informed of a stage or stages of the case at hand, whether there is an appeal or not, etc.

<sup>79</sup> This entails for example appointment of court brokers and signing of various forms to enable the appointed court broker to carry execution process, of which this stage is essentially administrative which needs good supervision by the court and compliance with the law by the officers concerned.

vested to the court under the Code contrary to the Court of Appeal Rules, Rule 11 (2) may result to unscrupulous move, frivolous attachments or the discretion not to be wisely exercised that may result to a failure for decree creditor to enjoy his or her rights.

### Encouraging Abuse of court process and due process of the law in case management

As envisaged in the discussions *supra*, it is quite evident that there are occasions when and where there are numerous leeways for applications, as observed for example, applications to resistance, objection proceedings, appeals and many others of which may cause stay of execution process. This may lead to abusing the due process of the law and case management which conversely contravene with the one of the pillars as clearly provided in the *Five Year Strategic Plan (JSP 2016/17 -2019/20) of the Judiciary of Tanzania*.<sup>80</sup>

Despite the crystal position of the law that a notice of appeal neither an appeal doesn’t act as an automatic stay of execution<sup>81</sup>, there are circumstances that the court is having discretion whereas as may grant such applications.<sup>82</sup> The law allows appeal to act as stay of execution unless for sufficient cause shown. The question that may linger what are these sufficient causes? What is a yardstick measuring the weight of one sufficient cause or the other or from another? or does it depend on the the due

<sup>80</sup> One of the pillars of the Plan is Access to Justice and Expediency, which targets at creating systems and processes that accelerate disposal of cases and enhance access to justice, of which corollary to this, effective case management becomes central to the administration of justice.

<sup>81</sup> The position is aptly inked under O. XXXIX, r. 5(1), on the other hand when an appeal is properly lodged in accordance to rule 83

<sup>82</sup> Mruma, J in *Jawinga Co. Ltd v. Aristepro Investment Co. Ltd*, the HC of Tanzania at Dar es Salaam, pg. 4

indulgence of the chair or one seated?<sup>83</sup> all these questions need to be addressed for justice to be done among other far fetched applications.<sup>84</sup>

### Endless litigations/Multiplicity litigation

It is a public policy that *interest reipublicae ut sit finis litium* which is point blank and a cardinal principle in civil litigations. The latin *maxim* means, is in the interest of society /public as a whole, litigation must come to an end.<sup>85</sup> The execution process and the trajectory that it takes tend to contravene and cripple the whole process of administration of justice henceforth contravening the *maxim*. In execution trail, there are numerous applications that are given, a leeway of which failure to have a proper mechanism to their guidance lead to endless litigations. This is evident categorically on objection proceedings, if the anomaly or situation is not ameliorated, there will be evidenced an exponential rise of unnecessary applications.

Despite clear wording under the code, in particular O. XXI, rs. 57-62, the provisions have been a stagnant and an inroad towards a decree creditor to enjoy the fruits of the litigation. This is not an author's perspective, rather also the stand of other stakeholders involved, the government among others. Despite the jurisprudential spirit of the provisions in relation to objection proceedings is to expedite such proceedings and to prevent abuse of court process, which

may occur given the high-stakes, intense and faced-paced nature of proceedings. The leeways found in the provisions, for example, that any person who, on at the date of attachment, had some interest in, or was possessed of, the property attached, may file an application in court objecting to the attachment becomes an inroad towards achieving the spirit of the provisions. It is apparent that when there are multi million shillings properties involved numerous objection proceedings have been observed and the whole process taint and seen as acrimonious to decree creditors despite the jurisprudential value of the provisions, the same need be revisited.<sup>86</sup> As the properties whose sale has been halted by the proceedings may take time for the objections to be investigated and be determined.<sup>87</sup> And though the the objection orders are not appealable, yet the agrieved party, as stipulated under O, XXI, r. 62 of the code may sue for the title of the property he is objecting by instituting as suit to recover the wrongly seized property while bearing in mind that the winful objector is already having property objected while won at hand with or without costs. All these among other many applications under the Tanzanian laws ruin the cardinal principle.

### Corrupt practices

Execution process is two fold, first facet ends with a judge upon issuance of the execution order, and the other one (second limb) is the enforcement of the order issued, this is ordinarily done in the registry by the

registrar or any other designated officer in the registry.<sup>88</sup> This execution process is administrative in nature.<sup>89</sup> The second stage of execution if not exercised properly may tarnish the image of the judiciary or bring the same to disrepute, this stage among other things involves, appointment of court brokers and signing of different forms that are to facilitate execution process. The process has been lamented by stakeholders as the one fouls are played, involving frivolous attachments that may lead to unfounded, baseless and flimpys applications to the courts thus crippling the execution process. Is the same stage that the court of appeal of Tanzania echoed remarkable, plausible sentiments and cautioned those involved in the case of *Ahamed Mbaraka*<sup>90</sup> (*supra*), as ordinarily entails fouls, without mincing, corrupt practices.

### Incomprehensive legal framework governing execution

Deliberated by the submission above in almost each and every part, the laws governing execution of decrees when the government is involved, one thing is evident. There are two laws of great significance, the Civil Procedure Code and the Government Proceedings Act, but the two are not devoid of shortcomings when it comes to the government. We have seen the laws are lacking comprehensive procedures governing execution process by or against the government. The laws merely provide that the process as it is with private persons need to be followed. This *lacunae* is recurring in the laws, such an anomaly need be rectified towards having unwrinkled

execution process.

### 10. Conclusion and Recommendations

Vulgarized from the analysis and discussion above there are issues which are pertinent to the administration of justice if not dealt with squarely and without any ado, judicial spat and lack of confidence to the judiciary will remain to be prevalent. And conversely, the realisation of the Five-Year Strategic Plan (JSP 2016/17-2019/20) will remain to be a myth. Herein below are some of the recommendations that need be taken aboard to smoothen execution process when the government is involved.

### Training /Tailor made courses to personnel

It is quite evident that there are malpractices that are seen during execution process. This is a result of lack of sufficient knowledge on execution, negligence and intentional acts or omissions, for example, failure to follow 14 days notice as per Rule 4 of the Code. As envisaged, execution is a process that entails at least two steps, one step is of judicial function and the other one is administrative (enforcement of execution). In the latter stage, the judicial officers and executing officers (court brokers) need to be imparted with knowledge on execution process. Credit is to the the Institute of Judicial Administration Lushoto<sup>91</sup> that as of now conducts courses to court brokers and process servers on these aspects. It is noteworthy that, much education needs to be imparted to these stakeholders. Meanwhile, the Court Brokers and Process Servers (Appointment, Renumeration and

<sup>83</sup> The phenomenon leaves lots desired as once put in the case of *Ahamed Mbaraka vs Mwananchi Engineering Contracting Copmany Ltd* (*supra*)

<sup>84</sup> It is too bad when the court so exercises its discretion without proper guidelines, in many occasions there may not be an application for execution rather pendency of an appeal suit, and yet the court grants execution. The position as was envisaged in the case of *Jawinga Co. Ltd v. Aristepro Inv. Co. Ltd*, HC (T), Commercial Divison, Commercial case No. 103/2012

<sup>85</sup> Or on the other hand it may be said that, it is to the interest of the state that there be a limit to litigation.

<sup>86</sup> Despite the fact that court orders in objection proceedings are conclusive and are not appealable per *Thomas Joseph Kimaro v. Apaisaria Martin Carl Mkumbo and Oscar Mushi* (2002) TLR 369, the whole process is cumbersome involving numerous objectors that are called upon to tender evidence as to their claims in tandem with O. XXI, r. 58 of the Code

<sup>87</sup> See *The Citizen*, February 23, 2019

<sup>88</sup> See *Jawinga's case* at pg. 6 (*supra*)

<sup>89</sup> *Ibid*

<sup>90</sup> *Ibid*, p. 7

<sup>91</sup> The Institute now offers to the court brokers and process servers fundamental requirement of a certificate of competence in the duties of the brokers and process servers.

Disciplinary ) Rules, 2017<sup>92</sup> need to be more stringent as to the actions to be taken to those found indisciplined. This among other trainings or courses will forge and create common understanding amongst judicial officers and executing personnel.

### **Overhauling the laws governing execution**

From the discussions above, it is clear that the laws governing execution process are lacking, ranging from the Civil Procedure Code, to the Government Proceedings Act. Prime areas that need amendments or rather lacking have been identified. Is high time the Attorney General Office comes with a proposal to amend the laws so that they may be accomodative of the lacking situations and be in consonance to the changing times which have made execution process onerous amounting to the rights of the creditors seen illusory.

On this proposal if at all made one of the key areas to be looked into on execution is on unnecesary applications, and objections which ultimately prolong litigations negating the maxim *interest reipublicae ut sit finis litium*.

### **Database , networking and involvement**

The article outrightly re-qualify the statement found in the benchbook for judges which says, *...It is important that a judge should know fully and precisely how far his decree is satisfied...*<sup>93</sup> The foregoing statement need to be re-qualified so that the court process may not be abused, to avoid malpractices of executing officers as well to do away with cases or applications which purely arise out of negligence. Thus there is a need for this statement to go further to include not

only judges, but all stakeholders involved in execution trail. This may be achieved by having an established database of the decrees in execution, executed decrees and their enforcement as well as for the officers to have a network that would share pending cases<sup>94</sup>, this is to avoid unscrupulous moves as cautioned in the case of *Ahamed (supra)*.

93 A Bench book for Judges in Tanzania, at p. 42

94 This may be streamlined through improvements to be made to the Cases Information Management System (CIMS)