EXECUTION OF DECREE AND ORDERS AGAINST THE GOVERNMENT

PRESENTATION FOR STATE ATTOREYS' TRAINING ON ADVOICACY SKILLS AND CIVIL LITIGATION PRACTICE HELD AT DODOMA

HON. ISSA MAIGE, JUSTICE OF APPEAL,

1. Execution defined:

- Execution is the process of realizing or enforcing a court decree, order or decision.
- In general, when executing a decree, section 33 of the Civil Procedure Code applies according to which decree is executed by the court which passed it or by the court to which the decree is sent for execution.
- Execution of decrees of the HC and subordinate courts which is the scope of this presentation, is essentially governed by sections 31-55 of the CPC read together with order XXI thereof. The procedure for execution set out in the respective provisions are applicable in a decree in favour of the Government as well. This is in accordance with section 17 of the Government Proceedings Act.

- The above modes of execution are also applicable to the decrees of the High Court Land Division, High Court Commercial Division. It also applies to the DLHT in exercise of its original jurisdiction subject to the provision of the Regulations. Besides, it applies in execution of the awards of the CMA and High Court Labour Divisions subject to modifications set out in GN. No. 106 of 2007.

2. Modes of Execution of a Decree

- Modes of execution are determined by the nature of the decree passed. Common ways of executing a decree for payment of money are attachment and sale, garnishee order, arrest and dentation (Order XXI rules 35-39).appointment of a receiver etc. Attachment may be against a movable property or immovable.
- It may include as well salary, share and even a court decree. An immovable property is attached by an order prohibiting the judgment debtor from transferring or charging the property (Order XXI Rule 53).
- Movable property by actual seizure and keeping the property under the custody of the attaching officer (0rder XXI1 rule 43).
- For detailed reading Sale: rules 63-86. Sale of movable property. A decree for vacant possession is executed by delivery of possession or eviction order.

3. Stay of Execution:

- Execution of a decree can be stayed in three instances

  (i) Where there is a pending appeal Order XXXIX rule 5(1) where appeal to the HC

  (ii) Where there is a pending revision (Section 95 of the CPC)

  (ii) where there is a pending suit in another court against the decree holder (Order XX1 rule 27).

- Where the period for appeal is yet to expire and the judgment debtor is intending to appeal, he can apply for the same in the Court which passed the decree or the Court whereto the decree is sent for execution (Order XXI rule 26).

4. Objection Against Execution Orders

(**a) Against attachment:** objectional proceedings under order XXI rule 57 and 58. It applies where the is not liable for attachment or wrongly attached. Conditions: The order not appealable but an aggrieved party can institute a claim to establish his claim.

(b) **Against eviction order:** an application under order XXI rule 98(1) complaining for such a possession. An aggrieved person can prefer a fresh suit to establish his claim under rule 101.

- In **Dorice Rwakatare vs. Antony Tume Makani, Misc. Land Application No. 86 of 2021,** the High Court discussed the inapplicability of the provision of Order XXI Rule 57(1) of the CPC in the following words:-
- *Attachment of property and eviction order, I agree with Mr. Msemwa, are two different procedures of execution of a decree and are government by different provisions of law. They have, as well, different mechanisms of contesting. As I said above, rule 57 upon which the objection is preferred, is applicable where the property in question has been attached in execution of a decree. The attachment is normally made with a view to selling the property in realization of a money decree. Attachment of an immovable property is governed by rule 53. It is made by "an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge".*

(c) **Against an order for sale:** application for setting aside a sale by a person who has interest thereon before sale under rule 87(1) subject to depositing the sum equal to 5% of the purchase price for the purchase and the amount specified in the proclamation for the decree holder. The decree holder or any interested person may apply for the same under rule 88 and the purchaser under rule 89.

Where no application or the same is disallowed, confirmation order under rule 90. Where set aside, the purchase shall be entitled for repayment with or without interests. Where it becomes absolute, certificate of sale (92).

(d) **Against a reversed executed decree:** application for restitution under section 89 (1) of the CPC to the Court which passed the decree. Under subsection (2) institution of a fresh suit to obtain reliefs that would be obtained by restitution is prohibited.

5. Execution Against the Government.

- Where the Government is privy to such decrees, there are two separate procedure depending on whether the Government is a judgment debtor or decree holder. Where it is a judgment debtor, the provisions under the CPC apply as if the suit was between private persons. Where the same is a judgment debtor, Order rule 2A expressly exclude the application of rules 3-110 of order XXI of the CPC and subject it to the provisions of section 16 of the Government Proceedings Act.

- The procedure for enforcement of a judgment against the Government is set out under the provisions of the Government Proceedings Act. Initially, the word Government was narrowly defined to include the central Government and its departments and officers. The enforcement of judgments against local Government, public corporations, executive agencies and parastatal organizations were regulated by different mechanisms and the procedure for execution of judgments against them was more or less similar with that of private persons.

- While the prosecution of the proceedings by and against the Government was by the Hon. Attorney General, for the local government and other public institutions other than the central government and its departments, were by their legal officers. They would, with the exception of the AG make use of private advocates.

Execution Against the Government Cont....

- The exclusion of the central government and other public institutions in the scope of the provisions of the GPA rendered it possible for the properties of the local government and government institutions to be attached and sold in execution of the decree sometimes without even the knowledge of the Government which has the majority interests on the assets of the said institutions.

- Various legal measures were taken to address the problem. For instance, in 2018, under section 17(1) read together with sections 69a) and 8(1) (f) the Office of the Attorney General (Discharge of Duties) Act, Cap. 268 (the “OAGA”), the Attorney General was given power to intervene in any proceeding involving public institutions if it established that the Government has interest. The scope of the application of the provisions was considered by the CAT in Attorney General vs. Tanzania Port Authority and Another, Civil Application No. 87/2016 where it was held that; in each of the public corporation or parastatal organization wherein the Government has majority shares, the Government through the Attorney General has interest and, as a custodian of public property may, in terms of section 6(a) of the OAGA, institute an application or intervene in any proceedings to protect the Government interest.

Execution Against the Government Cont....

- In *the* ***A.G. vs. Board of Trustees of NSSF and Makara Hotel Limited*****, Misc. Civil Application No. 41 of 2018,** the issue was whether the Attorney General could make use of the provision to institute objection proceedings under order XXI rule 57 (1) of the CPC against attachment and sale of the account of NSSF in realization of a decree. The argument for the Attorney General was that, the attachment was illegal for NSSF being an institution under the sole ownership of the Government was the Government for the purpose of section 16(3) of the Government Proceedings Act. In the alternative, it was contended that, the fund, the subject of attachment belonged to the Government and not the judgment debtor. The Court, in the first place did not agree that NSSF was a Government
- In the alternative, it was contended that, the fund, the subject of attachment belonged to the Government and not the judgment debtor. The Court, in the first place did not agree that NSSF was a Government for the purpose of the GPA since the term Government is defined in section 6 to mean central government, its departments and officer.

Execution Against the Government Cont....

It observed as follows:-

- *My reading of the provision in line with section 53 of the National Social Security Fund Act No. 28 of 1997 ("the NSSFA") does not however suggest as such. There is nothing in the definition to suggest that a public corporation like the first respondent is a Government for the purpose of the Government Proceedings Act. Nevertheless, the wordings of section 16 (3) of the Government Proceedings Act would suggest that the phrase Government in the Government Proceedings Act was intended to mean "the Government, or any Government department or any officer of the Government". The first respondent is neither a department of the Government nor an officer of the Government. It is an independent body corporate with a separate legal personality from the Government.*

- The Court however allowed the application on ground that, the fund attached under a garnishee order did not belong to the judgment debtor.

Execution Against the Government Cont....

- In its own words, the Court observed as follows:-

Under the express provision of section 70 of the NSSFA, there is no doubt that the Fund and moneys held in the account in dispute does not belong to the first respondent. It is merely held by it in trust for the insured persons and the Government of the United Republic of Tanzania. The beneficiary owners of the account are therefore the Government of the United Republic of Tanzania and the insured persons. Since the insured persons are unincorporated members of the public, the Attorney General being the custodian of public interest, has not only locus but duty as well to protect their interests. It is certainly because of that reason that in the event of insolvency of the first respondent, it is the Government through its Consolidated Fund that shall liquidate the entitlements of the insured persons.

Execution Against the Government Cont....

- It is of interest to note that, the attachment involved in the respective garnishee order was absolute. There was an argument from the respondent that, the claim had been overtaken by events as the execution was complete. In rejecting the contention, the Court sought inspiration from the following statement of Lord Denning in ***Re Overseas Aviation Engineering (GB) Ltd. (1962) 3 All ER 12 :-***

The word “execution is not defined in the Act. It is, of course, a word similar to lawyers. “Execution”, means quite simply, 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

Execution Against the Government Cont....

- It then made the following pronouncements:-
- *It would follow from the foregoing therefore that, in as long as the bank does effect payment of the decretal amount, the garnishee order remains un-discharged. In this case, the garnishee order though absolute has not been complied with by the garnishee and the ordered amount has not been paid to the decree holder. Besides, the decree holder has not initiated any proceeding to compel the bank to discharge the garnishee order. Applying the principle in Re Overseas Aviation Engineering (GB) Ltd (supra) therefore, I hold that the execution proceeding had not come to an end when the instant application was being filed.*

Execution Against the Government Cont....

- So as to further address the issue, the Government Proceedings Act was amended in 2019 by Act No. 11 of 2019, by introducing the provision of section 6A (1) which provides as follows:-

- 6A(1) The Attorney General shall, through the Solicitor General, have the right to intervene in any suit or matter instituted by or against ministries, local government authorities, independent department and other government institutions.

- (2) Where the Attorney General intervenes in any matter in pursuance of subsection (1), the provisions of this Act, shall apply in relation to the proceedings of that suit or mater as if it had been instituted by or against the ministries, local government authorities, independent department and other government institutions.

Execution Against the Government Cont....

- Under the proviso to subsection (2) however, the notice requirement did not apply in the circumstance. Subsection 3 imposed a duty of the relevant government institutions to notify the Attorney General of any impending suit. The amendment did not sufficiently address the issue as the application of protection under section 16(3) was not automatic. It depended upon there being an intervention by the Attorney General.
- Therefore, in 2020, the Government Proceedings Act was further amended by Act No. 1 of 2020 which amended 6(3) by abrogating the provision and replacing it with a new provision to the effect that, any proceeding against the Government, local government authority, Executive Agencies, public corporations, parastatal organization or public corporation shall be preceded by the 90 days notice and the AG shall be impleaded as a necessary party.
- Section 16(3) was also amended to widen the definition of the terms government include the said government institutions.

6. Mode of Execution of a Decree Against the Government:

- Under section 16(1), where a person is possession of a decree or order against the Government, the executing Court may, upon application, issue a certificate containing particulars of the decree or order.
- Under the proviso to subsection (1), if the court so directs, a separate certificate shall be issued to with respects to the costs ordered to be paid to the applicant. Ordinarily therefore, a certificate has to combine the reliefs awarded in the judgment and costs.
- This would correspond with the provision of order XX rule 6(2) of the CPC which requires a decree or order to state the amount of costs incurred in the suit and by whom or out of what property and in what proportion such costs are to be paid.

Mode of Execution of a Decree Against the Government conti...

- It has to be noted however that, under section 49 (2) of the Advocates Act read together with the Advocates Remunerations Order, G.N. No. 264/2015, bill of costs has to be dealt with under the procedure set out therein. There would appear to be a conflict between the respective provision of the CPC and the Advocates Act. In **TRA vs. Prisca Kihengu, Civil Appeal No. 49 of 2015, (HC, Mwanza**, **Unreported) the High Court** was of the considered opinion that, the said conflict is reconcilable under section 5 of the CPC which provides as follows:-

" 5. *In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force.*

Mode of Execution of a Decree Against the Government conti...

- Under section 5(2), If the decree is for payment of money, the certificate shall state the amount so payable and the Permanent Secretary, the treasury or any accounting officer shall pay the person entitled or his advocate. In the case of ***Karata Ernest and Others vs. the Attorney General,*** **Civil Revision No.10 of 2010** (unreported) , the Court of Appeal held in relation to enforcement by certificate as follows:

- *"... under the mandatory provisions of sub-section (2), once a proper certificate has been issued and presented to the Permanent Secretary subject to the provisions therein, the latter has a duty to pay the amount appearing on the certificate. If any dispute arises... at any stage, then that dispute must be determined by the executing court under Sec. 38 of the [Civil Procedure Code]".*

7. Stay of Execution:

- If the decree is against the Government is not under CPC, It is under section 16 (2) the suspension may be inserted in the certificate if not issued or a separate order.

- **NOTES:** Is a certificate a decree or an execution order or a decree? Can a certificate be executed without there being an execution order? If not, what is that such other order?
- Under subsection 16 (3), such other order cannot be an order for personal attachment of the relevant Government officer. Can it by enforced way of prerogative order of mandamus as it is done in other jurisdictions? If so will that order not be equated with a decree subject to further order for execution ? Much can be said.

THANK YOU FOR YOUR ATTENTION