IN THE HIGH COURT OF TANZANIA

AT MOSHI

MISC. CIVIL REVISION NO. 2 OF 2005

C/F CIVIL CASE NO. 3 OF 2005

MISC. CIVIL APPL. NO. 2 OF 2005

(C/F CIVIL REVIEW NO. 1 OF 2005)

BALOZI A. IBRAHIM)

SOPHIA IBRAHIM) .... APPLICANTS

VERSUS

M/S BENANDY'S LIMITED ..... RESPONDENT

R U L I N G

JUNDU, J.

On 3rd March, 2005, Mr. Erie S. Ng'maryo, learned counsel for the Applicants had written a letter to the Judge Incharge of High Court of Tanzania, Moshi Registry complaining interalia about the interim orders made by the Moshi Resident Magistrate Court (Mugeta, RM) in Misc. Civil Application No. 2 of 2005. It is alleged in the said letter that on 25/2/2005, the said court had issued a Temporary Order to the Applicants ordering them to immediately open the premises on Plot 39 B ground Floor (known as The Kilimanjaro Coffee Bar) to give access to the Respondent who is alleged to be a tenant to the Applicants. It is further contended in the said letter that on 1/3/2005 the said court raised the said order and ordered breaking into the said premises as well as the immediate arrest of the Applicants. It is further contended in the said letter that the said court has refused to entertain an application for review of the said orders and that the said court has no jurisdiction in the matter as it involves a land matter and has no justification in refusing to entertain an application for review of the said orders.

In the said letter, Mr. Ng'maryo had prayed to the Judge In Charge to make intervention in the matter in the interest of justice and to prevent the abuse of court process. His Lordship, the Judge In Charge on

receiving the said letter ordered for Miscellaneous Civil Revision to be opened this giving rise to this Misc. Civil Revision No. 2 of 2005 which was assigned to me. In the interest of justice, I invited learned counsel for both parties to address this court and I had intended to be addressed in the following issues:-

(.) Whether the dispute in the lower court is or is not a housing/land matter.

(: .) Whether the trial court has or has no jurisdiction in terms of Section 167 (1) of the Land Act No. 4 of 1999 and Section 4 (1) of the Land Disputes Courts Act No. 2 of 2002.

(3) Whether interms of (1) and (2) above the interim orders issued by the trial court were valid and lawful.

(4) Whether in view of Act No. 25 of 2002 the interim orders given by the lower court can be revised by this court.

However, Prof. Msanga and Mr. Shayo, learned counsel for the Respondent raised a Preliminary Objection on competency of this court to entertain this application and in the interest of justice I allowed them to address this court on the said point and Mr. Ng'maryo who advocates for the Applicants had time to respond on the submission of the said learned counsel for the Respondent.

Prof. Msanga in his submission stated that they had been invited by this court to appear and respond to a letter written by Mr. Eric Ng'maryo dated 3rd March, 2005 which I have already mentioned above and that the said letter had led to this court to open a file which has been styled as Miscellaneous Civil Revision No. 2 of 2005 and as an application but it does not indicate under which provisions of the

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law it is based thus marking it difficult to ascertain the exact provision of the law is the said application for revision invoked. He further submitted that his understanding of the said letter is that Mr. Ng'maryo wanted the Judge In Charge to act administratively otherwise, if the Judge In Charge wanted the matter to be dealt with judicially he would have directed Mr. Ng'maryo to file a formal application to that effect as has always been the practise of this court. He cited one such incident being a letter dated 31st March, 2003 from this court to himself (Prof. Ikamba R.M. Msanga) written by the District Registrar one W. E. LEMA.

The contents of the said letter read by Prof. Msanga to this court were as follows:-

"Prof. Ikamba R & M. Msanga, Advocate,

P. O. Box 474,

MOSHI.

RE: MWANGA DISTRICT COURT
CIVIL APPEAL NO. 26/2002
ORIGINAL MWANGA URBAN
CIVIL CASE NO. 12 OF 2005
MUSSA MENGHUA ..... APPELLANT
VERSUS
NUHU SALEHE ..... RESPONDENT

Your letter Ref.No. IREM/GEN-MW1/2003 dated 12th March, 2003.

His Lordship has directed that I quote:-

"Henceforth, I hereby direct that a formal application to that effect be filed accordingly."

From that letter, the application is for review.

So please be informed and act accordingly.

(W. E. LEMA)
DISTRICT REGISTRAR
MOSHI."

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Prof. Msanga contended in his submission that the gist of the above mentioned letter is that where the Judge In Charge receives a letter which inquires a judicial action rather than an administrative one, the party who brought the same letter has to be directed to move the court by way of an application. He emphasized that this court ought to follow the procedures that it has laid and procedures which are according to law.

Prof. Msanga submitted further that reading the letter written by Mr. Ng'maryo to this court it is clear that he wanted to move the Judge In Charge to act administratively presumably under Section 79 of the Civil Procedure Code, 1966 which allows this court to call records of the lower courts and the court does so on its own accord so that the court will do so where the case has been decided by the lower court. The said section reads as follows as read by Prof. Msanga in this court;

"(1) The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto and if such subordinate court appears.

(a) To have exercised a jurisdiction not vested in it by law; or

(b) To have failed to exercise a jurisdiction so vested; or

(c) To have acted in the exercise of its jurisdiction illegally or with material irregularity the High Court may make such order in the case as it thinks fit.

(2) Nothing in this Section shall be construed as limiting the Court to exercise revisionary jurisdiction under the Magistrates' Courts Act, 1963".

Prof. Msanga submitted further that the complaint which Mr. Ng'maryo has stated in his letter is on an interlocutory matter and that according to the above cited provision of the law this court has power to revise orders or judgement from subordinate court where cases has been decided. He contended that this court has no powers to entertain and adjudicate the letter which has been written by Mr. Ng'maryo to this court.

Prof. Msanga contended further in his submission that it is not proper for the letter filed by Mr. Ng'maryo in this court to be regarded as a miscellaneous application because all applications to this court are brought by way of Chamber Summons supported by an affidavit in accordance with Order 43 rule 2 of the Civil Procedure Code, 1966 and if it is not an application but a suit then a Plaint would be filed and if it was an application for review then a memorandum for review would be filed and appropriate fees would have been paid. He submitted that in the present matter, there is no application and no appropriate fees have been paid hence the mentioned letter has not been able to move the court to act judicially.

Prof. Msanga cited to this court decided cases on powers of this court on revision under Section 79 of the Civil Procedure Code, 1966 and the powers of this court to revise an interlocutory order. He cited the decision of this court in the case of Evarist J. Shirima Vs. Wilbert P. Macha & Jaffer Moshi Misc.Civil Revision No. 4 of 1993, High Court of Tanzania,Moshi Registry (unreported), this court (Mushi,J) held that it cannot be moved to act under the provisions of Section 79 of the Civil Procedure Code 1966 and that it can properly be moved under Section 44 of the Magistrates' Courts Act, 1984. He also referred this court to another case of Hassam Karim & Co. Ltd. Vs. Africa Import & Export Central Corporation Ltd. (1960) EA 396 which originated from the then to

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Tanganyika to the then Eastern Africa Court of Appeal, it was held that:-

"The High Court has no power under Section 115 of the Indian Code of Civil Procedure to revise an interlocutory Order"

Section 115 of the Indian Code of Civil Procedure is equivalent to Section 79 of the Civil Procedure Code, 1966.

Based on the above decided cases, Prof. Msanga submitted that in the present application this court has not been properly moved by the letter of complaint written by Mr. Ng'maryo to interfere with the orders of the lower court. He contended that it would have been proper if this court was to act judicially to come up with a formal application. Otherwise, Prof. Msanga submitted that in this matter there is nothing to move this court to act judicially hence he prayed that the letter written by Mr. Ng'maryo and this Misc. Civil Revision No.2 of 2005 be struck out with costs. Mr. Shayo, learned counsel for the Respondent concurred with the submission of his learned friend Prof. Msanga.

Mr. Ng'maryo, learned counsel for the Applicant had an opportunity to make a reply to the submission of Prof. Msanga as regards the jurisdiction of this court under Section 79 of the Civil Procedure Code 1966 as regards its revisional powers stated therein. He was of the view that the issues which this court had directed all counsel to address it they will be so addressed after the Preliminary Objection raised by the learned counsel for the Respondent.

Mr. Ng'maryo submitted that just as Prof. Msanga had quite correctly submitted they were here at the invitation of this court to assist it to come to a decision after having called for and perused

the record of Civil Case No. 3 of 2005, Misc.Civil Application No. 2 of 2005 and Civil Review No. 1 of 2005 between Balozi A. Ibrahim and Sophia Ibrahim on the one hand and M/S Bonandy's Ltd, on the other hand before the Moshi Resident Magistrate. He contended that the matter before this court may be styled as revision but it has not been instituted by an application save that there was an administrative complaint which led to the calling for the record from the Resident Magistrates Court and an order by the Judge In Charge for a revision file to be opened.

Mr. Ng'maryo contended that section 5 of the Judicature and Application of Laws Ordinance, Cap 358 make it very clear that a Judge of the High Court may exercise the jurisdiction conferred on the High Court hence it was quite appropriate to the learned Judge In Charge to have moved from an administrative capacity to a judicial capacity without any breach of the law.

He submitted that the Written Laws (Miscellaneous Amendments) No. 3) Act.No. 25 of 2002 has made it necessary for any application for interalia revision to be made to the High Court for a matter in a subordinate court unless that order to be revised has the effect of determining the suit. He further submitted that Section 79 of the Civil Procedure Code, 1966 makes it mandatory for the court to act on a matter that has already been decided and not otherwise and that another requirement of the said section is tha it cannot be invoked by any party to a suit or any matter, the court has to act sua motu. He said that is exactly what Mushi, J. found in the case of Evarist Shirima Vs. Wilbert Macha & Another (supra) cited by Prof. Msanga in his submission. However, Mr. Ng'maryo referred to page 3 of the Ruling of Mushi, J. where the said learned Judge had observed

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"Here the court has to act on its own motion. I would think that there would be nothing wrong for any aggrieved party to bring to the attention administratively of the court of any irregularity in the lower court decision against which no appeal lie to the High Court".

He also referred to the other case cited by Prof. Msanga, that is the case of Hassam Karim & Co. Ltd. Vs. Africa Import and Export Central Corporation Ltd. (supra). He referred this court to page 397 Par.E of the Judgement in the said case where the court observed that:-

"This attituted to Section 115 of the Code of Civil Procedure suggest a misconception of its nature. No application could be brought under it, it confers power on the courts no rights on litigants. It provides no more that so far as the court may have its inherent powers, the code does not abrogate them".

Mr. Ng'maryo submitted that what the Court of Appeal of Eastern Africa stated in the above mentioned case is that no one can bring application under Section 79 of the Civil Procedure Code, 1966 and that the court cannot act unless the case or the suit has been decided. He stated that the aforesaid is the position of the law as stated and submitted by his learned friend Prof. Msanga.

Mr. Ng'maryo submitted that the lower court had no jurisdiction in respect of the dispute placed before it by the Respondent. He contended that Section 79 of the Civil Procedure Code, 1966 makes it clear that there should be no matter in the lower court when the High Court intervens by way of revision. He further contended that if this

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court finds that the lower court had no jurisdiction to entertain the suit and the application before it, then the entire situation is that of a nullity which is the same as if the case has come to an end by a court decision.

Mr. Ng'maryo continued further to respond to the submission of Prof. Msanga as regards how the court moves under Section 79 of the Civil Procedure Code, 1966. He submitted that the court (Mushi, J.) in the case of Evarist Shirima (supra) shows as a matter of fact that an application under the said section would be inherently wrong, the court is moving on its own motion (suo motu). He contends that a contrary position will be by application but he admits that a letter is not an application. He also submitted on further requirement under Section 79 of the Civil Procedure Code 1966 that no appeal may lie from the order under revision by the court. He contended that the dispute at the lower court is a land matter under the Rent Resriction Act justiciable by the District Land and Housing Tribunal appealable to the High Court (Land Division) strictly in exclusion of this division of the High Court hence in his view the interference of this court is on all fours under Section 79 (1) of the Civil Procedure Code, 1966. However, Mr. Ng'maryo argued further that if this court will find fault in his submission that there is a nullity in the order of the lower court warranting intervention by this court, still he was of the considered view that this court could invoke it powers to do justice "ex debito justiti" under Section 95 of the Civil Procedure Code, 1966, Section 2 (1) of the Judicature and Application of Laws Ordinance and under Article 108 (2) of the Katiba ya Jamhuri ya Muungano wa Tanzania 1977 which provisions of the law give the court fundamental and inherent powers to do justice and not to sit idle to see injustice being done.

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Thereafter, Prof. Msanga made a rejoinder submission in respect of the submission of Mr. Ng'maryo. He submitted that he was pleased that Mr. Ng'maryo in his submission had conceded that there is no application before this court and that the letter he had written to the Judge Incharge is not meant to be an application or a substitute thereof. With this position in mind, Prof. Msanga sub itted further that the file that this court has opened and styled Misc. Civil Revision No. 2 of 2005 should be struck out.

Prof. Msanga argued further that his learned friend Mr. Ng'maryo in his submission has been very thorough and clear on the procedure of moving this court and has conceded that the court acts on its own motion (suo motu). He contended that the only question might be when the court acts sua motu what happens to the parties, are they called to make submissions before the court. He referred this court to Section 5 of the Judicature and Application of Laws Ordinance referred to by Mr. Ng'maryo. He said that the said Section reads as follows:-

> "Subject to any written law to the contrary a Judge of the High Court may exercise all or any part of the jurisdiction of and all or any powers and authorities conferred on the High Court."

He referred to the marginal notes of the said provision of law which reads "Powers of a single Judge of the High Court." He stated that Mr. Ng'maryo in his submission had contended that the Judge Incharge had exercised his powers under the above mentioned section of the law and directed that a revisional file be opened. However, Prof. Msanga submitted that, though they have had no access to the direction

of the Judge In charge, he is of the firm view that the above named section of the law does not empower a judge to do away with mandatory provisions of the law say a section which requires filing of an application and that on this matter they are guided by the very wording of the above named provision of the law which states:-

"Subject to any written law to the contrary -----."

He further referred to Section 44 of the Magistrates' Courts Act, 1984 which empowers the High Court to make revisions and he submitted that it must be by way of an application as per order 43 rule 2 of the Civil Procedure Code, 1966.

Prof. Msanga also referred to the provisions of Act No. 25 and subsection 2 of Section 79 of the Civil Procedure Code, 1966 which were referred to by Mr. Ng'maryo. The said provision states as follows:-

"Notwithstanding the provision of subsection (1) no application for revision shall be made in respect of any preliminary or interlocutory decisions or order of the court unless such decision or order has the effect of finally determining the suit."

He stated that Mr. Ng'maryo in cementing his argument he invited this court to find that the proceedings and orders in the lower court are a nullity and therefore it can make intervantion. However, he submitted that contrary to the submission of Mr. Ng'maryo, this court has not been properly moved and in the circumstances it cannot say anything as regards the lower court proceedings and orders. He contended that learned counsel of both parties are put in a very awkward position of assisting this court of arriving at a just decision when they

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provisions under which this court is required to act and that the decisions which he has cited in this court and which Mr. Ng'maryo concurred with them are merely on the duties of the court under Section 79 of the Civil Procedure Code, 1966 which is similar to Section 115 of the Indian Code of Civil Procedure Code. Otherwise, he submitted that they would have no difficulties in making submission before this court if there was a proper application. He contended that he was disso associating himself with the submission of Mr. Ng'maryo that they were here to assist the court to reach a just decision because of the argument that the court is acting sua motu and is doing so administratively. He contended further that if the court had required their assistance as suggested by Mr. Ng'maryo in administrative manner then there would have been no need for submission.

Thereafter, Mr. Shayo, another learned counsel for the Respondent submitted thathe concurred with the submission of his learned friend Prof. Msanga but greatly differed or objected to the submission of Mr. Ng'maryo. He submitted further that this court is quided and governed by the law for the time being in force and that the law as quoted by this court (Mushi, J.) in the case of Evarist Shirima(supra) states clearly that a party who is aggrieved must file an application and the said application must be by chamber summons supported by an affidavit in support of the application and that even i was directed that the said application must be based under Section 44 of the Magistrates' Courts Act, 1984. He contended that Mr. Ng'maryo has not shown that the decision of this court in the said case of Evarist Shirima (supra) has been overruled or not, hence in his view, the decision is a precedent to this court by this court and now this court cannot say that what was stated in the said case is not the position.

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He contended further that Mr. Ng'maryo had tried to bring in his submission factual matters of the case in the lower court but he submitted that at this stage the facts and issues of the said case are not an issue before this court, the same will be determined when the case is being heard by the lower court. He contended that Mr. Ng'maryo was trying to make this court to make a finding that the lower court has no jurisdiction but he submitted that to do so is to pre-empt the case which the Respondents believes they had a good case in the lower court.

He contended further that the Respondents would not wait for the Applicant to refer to his affidavit to prove his case but he submitted that as for as he was concerned there is no application before this court and that this court has no power to entartain the so called Misc. Civil Revision No. 2 of 2005. He contended that Mr. Ng'maryo has failed to tell this court that it can use the Constitution to canvass the matter in this court but he submitted that the law which is applicable in this court is sanctioned by the Constitution and therefore Mr. Ng'maryo should follow the law as enacted in the Constitution. As regards Section 95 of the Civil Procedure Code, 1966 cited by Mr. Ng'maryo in his submission, Mr. Shayo contended that the said section can only be invoked or used where there is no another law to save the situation, therefore it cannot save the present matter in this court as it is inapplicable hence the purported application in this court should be struck out with costs.

Mr. Shayo submitted that this court should invoke the provisions of Act No. 25 of 2002 because the alleged revision is not allowed by the law as the orders made by the lower court and complained of in the letter written by Mr. Ng'maryo do not finally determine the case in the lower court. He further submitted that Section 79 (2) of the

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Civil Procedure Code, 1966 as amended by the said Act clearly states that notwithstanding the provisions of subsection (1) of the said provision, no applications for revision shall lie or be made in respect of any preliminary or interlocutory order of the court unless that decision or order has the effect of finally determining the suit. Based on the above mentioned provisions of law, Mr. Shayo prayed that this court should struck out the so called Misc.Civil Revision No. 2 of 2005 with costs. He contended that he was referring to the so called Misc.Civil Revision Application because the same was not moved suo motu and that had Mr. Ng'maryo not written to the Judge In Charge surely the matter would not have come to this court and further that Mr. Ng'maryo having known that there has been a direction to open a revision file he should have followed the proper law.

I have carefully considered the submissions of both learned counsel in this Preliminary Objection on whether this court has been moved properly. It is contended by Prof. Msanga, learned counsel for the Respondent that the letter written to the Judge In Charge by Mr. Ng'maryo, learned counsel for he Applicants is not an application and that it is not known under which provisions of law is this court being moved in this matter. Prof. Msanga has contended further in his submission that by the said letter, Mr. Ng'maryo had intended the Judge In Charge to act administratively on the complaint contained in the said letter, however, if the Judge Incharge wanted the matter to be acted judicially he should have directed Mr. Ng'maryo to file a formal application as has been the practise of this court to do so (referred to a letter dated 31st March, 2003 from the District Registrar to Prof. Ikamba R. E. M. Msanga above mentioned) instead of directing a file styled Misc.Civil Revision on No. 2 of 2005 to be opened

Mr. Ng'maryo in his reply submission conceded that a letter is not an application.

I have been asking myself whether an application should always be made by a Chamber summons supported by affidavit. What does Order 43 rule 2 of the Civil Procedure Code, 1966 state? It states as follows and I quote:-

> " 2. Every application to the court made under this court shall, unless otherwise provided be made by a chamber summons supported by affidavit.
>
> Provided that the court may where it considers, fit to do so, entertain an application made orally or where all the parties to a suit consent to the order applied for being mode, by a memorandum in writing signed by all the parties or their advocates or in such other made as may be appropriate having regard to all the circumstances under which the application is made."

My understanding of the above rule of Order 43 is that the main and mandatory mode of making an application to the court under the Code is by a chamber summons supported by affidavit. However, in the discretion of the court as provided in the proviso to rule 2 of Order 43, the court may entertain an application orally or by a memorandum in writing signed by the parties or their advocates in a consented order or in "in such other mode" as may be appropriate having regard to all the circumstances under which the application is made. In my considered view an application "in such other mode—" is left to the discretion of the court to determine. It can be

concluded that making an application to the court is mandatorily , by a Chamber summons supported by affidavit as stated in rule 2 of Order 43 of the Civil Procedure Code, 1966. However, in its discretion, the court may allow and entertain an application by any of the modes mentioned in the proviso to the said rule. Can a letter be inclusive "in such other mode" under the said proviso? My answer to this matter is that it all depends on the discretion of the court to allow and entertain the same having regard to all the circumstances under which the application is made.

In the course of rejoinder submission, Prof. Msanga had referred to Section 44 (1) (b) of the Magistrates' Courts Act, 1984 that an aggrieved party can apply to the court to invoke revisional powers. However, the Magistrates' Courts Act, 1984 does not state the mode of application to be used under the said Act whether it is by a chamber summons supported by affidavit or otherwise. Can a letter suffice as an application under the MCA, 1984? Again, my answer will be it depends on the discretion of the court to allow and entertain it having regard to all the circumstances under which an application is being made just as what the proviso to Order 43 rule 2 of the Civil Procedure Code, 1966 states in relation to application "in such other mode". The main question is should this court in its discretion allow and entertain the letter by Mr. Ng'maryo as an application for revision. In the case of Halima Hassan Mareale Vs. Parastatal Sectors Reform Commission and Tanzania Genstone Industries Limited, Civil Application No. 84 of 1999, Court of Appeal of Tanzania, Dar es Salaam (unreported), it appears that the High Court in Civil Revision No. 5 of 1999 had made a revision order exparte on the basis of particulars set out in a letter addressed to the Judge by the advocate of the Respondent.

On page 3 of the Ruling of the Court of Appeal (Kisanga, J.A), it stated as follows and I quote:-

"— Mr. Gomba submitted that the learned Judge made the revision order on the basis of the particulars of illegality set out in the letter addressed to the learned judge by the advocate for the respondents. However, Mr. Gomba was unable to say that the applicant would have nothing to say in response to the contents of the said letter if she was afforded the opportunity of being heard.

The High Court judge made the revision order clearly in error. The Applicant should have been given the opportunity of being heard before the order affecting her was made. It is no argument that there were grounds before the learned judge on which the order could be made. Rather the concern is whether the applicant whose rights and interest are affected is afforded the opportu of being heard before the order is made. The applicant must be afforded such opportunity even if it appears tha he or she would have nothing to say or that what he or she might say would have no substance."

So in the said case, the High Court had acted by a letter invoke its revisional powers and revised the order of the lower ex-parte. However, the Court of Appeal held that the High Cour doing so should have given an opportunity of being heard to the applicant before making the revisional order. It is difficult establish from the Ruling of the Court of Appeal as to whether High Court in the said case had entertained the lette under th

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Magistrates' Courts Act, 1984 or under the Civil Procedure Code, 1966. I am of the considered view that the High Court in the said case exercised its discretion having regard to the circumstances prevailing in the said matter. It is not stated in the said Ruling, whether the issue of moving the court by way of a letter was raised in the said application before the High Court. Where a letter is written to the court as in the present matter, is the court moved? In Fahari Bottlers (supra), the Court of Appeal had conducted revisional proceedings acting suo motu on the basis of information originating from Sinare and Shiyo Advocates and the information related to proceedings pending in the High Court. On page 9 of the Order of the said court, it is stated and I quote:-

> "As for competency, Mr. Ng'maryo has submitted to the effect that the matter is not properly before the court, On the ground that Sinare and Shiyo Advocates whose information apparently moved the court to intervene in the proceedings pending in the High Court, are excluded from moving the court other than by way of appeal."

However, the Court of Appeal held as follows as stated on page 10 of its typed Order and I quote:-

> "For reasons which will be apparent presently, we are satisfied that Sinare and Shiyo did not move this court to act, but merely drew our attention to a serious problem concerning the proceedings pending in the High Court."

Having so stated the Court of Appeal proceeded to revise the proceedings and the orders of the High Court suo motu. So in my considered view,

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with the above position stated by the Court of Appeal in the said case, it may be concluded in the present matter that the court is not moved as in an application, and that the letter from Mr. Ng'maryo only serves to bring to the attention of this court the complaint on the proceedings and orders of the lower court.

It has been cotended by Prof. Msanga in his submission that it is not known under which provisions of the law is the present matter being invoked in this court. Could the matter be dealt under Section 79 (1) of the Civil Procedure Code, 1966? In their submission both Prof. Msanga and Mr. Ng'maryo agree that no revisional powers can be invoked under Section 79 (1) of the Civil Procedure Code, 1966 because the said Section is meant for the court to invoke its revisional powers suo motu on its own motion and in respect of decided cases and not on interlocutory or interim orders. I quite agree on the said position. There is a chain of authorities supporting the said position some of them being Evarist Shirima (supra) and Hassam Karim (supra) cited by Prof. Msanga in his submission. Other authorities include Jayantilal Narbheram Gandesha Vs. Kilingi Coffee Ltd. & Panyiotis Preketes (1968) HCD n.399, Kassam V. The Regional Land Officer (1971) HCD n.15, Henry Lyimo V. Eliabu Matee (1991) TLR 93 and BP (Tanzania) Ltd. Vs. Patrick Ngiloi t/a BP Karanga Service Station and Another, Civil Revision No. 90 of 2005, High Court of Tanzania, Moshi Registry (unreported). It is very clear to me that the orders of the lower court complained of in the letter of Mr. Ng'maryo are mere interim orders hence in light of the above provision of the law and the mentioned authorities this court has no mandate to invoke its revisional powers to revise them.

In his reply submission, Mr. Ng'maryo submitted that this court could be moved and act under Section 95 of the Civil Procedure Code,

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1966, Section 2 (1) of the Judicature and Application of Laws Ordinance and under Article 108 (2) of the Katiba ya Jamhuri ya Muungano wa Tanzania 1977 which provisions of the law he alleged give the court fundamental and inherent powers to do justice and not to sit idle when injustice is being done. However, I quite agree with the submission of Prof. Msanga and Mr. Shayo that the said provisions of law are inapplicable in the present matter. First, Section 95 of the Civil Procedure Code, 1966 is only applicable where there is no specific provision of the law on the matter. It is known that there are provisions of law that can be applied to invoke revisional powers of the court in respect of the proceedings and orders of the lower court where appropriate. Secondly, Section 2 (1) of the Judicature and Application of Laws Ordinance is coached in a language that makes it applicable "subject to any written law to the contrary". As already shown, there are provisions of law that restrict revisional powers of the court on interim orders. Mr. Ng'maryo referred to Act No. 25 of 2002 in his submission but in their rejoinder submission Prof. Msanga and Mr. Shayo submitted and I quite agree that the said Act clearly provides that no application for revision shall be made in respect of any preliminary or interlocutory decisions or order of the court unless such decision or order of the court has the effect of finally determining the suit. The orders of the lower court complained of in the letter written by Mr. Ng'maryo are merely interim orders hence not subject of an application for revision under the said Act (Refer to BP (Tanzania) Limited (supra).

Further, this court was refarred, to the Magistrates' Courts Act, 1984, under Section 44 (1) (b) of the said Act that in an aggrieved party may apply to the court to invoke revisional powers of the court or the court may on its own do so. However, the letter of Mr. Ng'maryo did not state that the matter was stated under the said

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provision of law. In any event, with the passing of Act No. 25 of 2002 above mentioned, the orders of the lower court being merely interim orders having no effect of finally determining the suit, the said Section 44 (1) (b) of the Magistrates Courts Act cannot be invoked by the Applicant to revise the said orders. Mr. Ng'maryo tried to show that the orders were a nullity as the lower court had no jurisdiction to adjucate on land matters in view of the provisions of the Rent Restriction Act required to be adjucated by the District Land and Housing Tribunal and appealable to the High Court of Tanzania Land Division. However, Mr. Shayo in his rejoinder submission contends and I quite agree that the factual matters of the suit at the lower court are to be dealt and decided by the said court when the suit is heard. Indeed, in my considered view, it is open to the Applicant to take up the issue of jurisdiction at the lower court for determination, but as it stands at the moment, the orders passed by the law court are merely interim orders and in view of Act No. 25 of 2002, the same cannot be subject of revision unless they had the effect of finally determining the suit in the lower court, which is not the case here judging from the wording of the complained orders of the said court.

Mr. Ng'maryo had referred this court to Article 108 (2) of the Katiba ya Jamhuri ya Muungano wa Tanzania 1977. However, in his rejoinder submission, Mr. Shayo contended rightly in my view that Mr. Ng'maryo had failed to demonstrate whether this court could use the said provision of law to canvas this matter in this court. Can this court use the Constitution to revise the interim orders passed by the lower court? The answer is no in view of Act No. 25 of 2002 mentioned above. As I have stated the said Act provides clearly that no application to revise preliminary or interlocutory

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decision or orders of the court unless such decisions or orders have the effect of finally determining the suit, which is not the position in the present matter.

Was the direction of Judge Incharge to open a file and style it Misc. Civil Revision No. 2 of 2005 faulty? Prof. Msanga and Mr. Shayo in their submission have contended that as the court was not properly moved and since Mr. Ng'maryo only intended the Judge Incharge to act administatively, the opening of the file and styling it Misc. Civil Revision No. 2 of 2005 was improper so the same should be struck out. Mr. Ng'maryo in his submission contended that the Judge Incharge under Section 2 (1) of the Judicature and Application of Laws Ordinance has powers in the manner he had cited and that he could move administatively to judicially without breaking any provisi of law. In my considered view, there is nothing wrong in opening a file styling it Misc. Civil Revision No. 2 of 2005. In practise whether a court proceeds suo motu or by an application by an aggrieved or interested party, a file must always be opened to place all the necessary documents and record all arguments or submissions of the parties or the proceedings of the court. It is not the file or the title it has been given that vitiates it, it is the decision of the court that shall declare or vitiate the competency of the matter subject of the said file. The Court of Appeal in Fahari Bottlers case (supra) held that it was acting suo motu on the basis of information it had received from Sinare and Shiyo Advocates. In the said matter a file was opened and styled Civil Revision No. 1 of 1999 by the Court of Appeal. In the said revision, the Court of Appeal rivis the proceedings and the orders of the High Court suo motu but it invited the advocates of both parties to address it before making its determination.

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Was the Judge In charge duty bound to call upon Mr. Ng'maryo to make a formal application in pursuance of his letter dated 31rd March, 2005? Prof. Msanga had cited his own example in a letter dated 31st March, 2003 from the District Registrar of this court where the then Judge In charge directed Him to institute a formal application for review in pursuance of his letter he had written on behalf of his client. In my considered view such direction is merely administrative and is not based on any provision of law. Indeed, it may be good and sound practise depending on the circumstances of each case. To seasoned advocates such as Prof. Msanga, Mr. Shayo and Mr. Ng'maryo it may serve as a reminder to them that they were required to act in such manner in discharging their duties to their clients in such cases. However, since it is not a legal duty on the Judge In charge to do so, the failure on his part to act in such a manner or to give such direction to an advocate does not offend the alleged practise or anything. Any seasoned advocate such as Mr. Ng'maryo has a duty or is obliged or expected on his own without any direction from the Judge In charge to be able to move the court properly.

Was the invitation to the advocates of both parties to address the court or assist it improper in the circumstances of this matter? Prof. Msanga in his submission contended that it cannot be held that they were here to assist this court to arrive at a decision as alleged by Mr. Ng'maryo because in his view parties are not called to assist the court when the same is acting suo motu and that they cannot be said to assist this court to arrive at a decision when the provisions of law moving the court are unknown. In my considered view, it was not wrong for this court to invite learned counsel for each party to come and address the court in respect of the letter by Mr. Ng'maryo.

It is within the discretion of the court to do so whether it is acting suo motu or an application filed by one of the parties. Section 66 of the Advocates Ordinance Cap 341 provides as follows and I quote:-

"66. Any person duly admitted as an advocate shall be an Officer of the High Court and shall be subject to the jurisdiction thereof".

Advocates as officers of this court have a noble duty to aid the court in due administration of justice regardless whether the court in particular matter or case has been properly moved or not. In Fahari Bottlers' case (supra) the Court of Appeal acted suo motu on information from Sinare and Shiyo Advocates, it invited the Advocates of all the Parties to address it before determining the revision. Therefore, I find and hold that it was proper and perfect in this matter to invite the learned advocates to address and assist this court in due administration of justice in their capacity as the officers of this Court.

In the final result, from the aforesaid analysis of the provisio of law and decided cases in relation to preliminary or interlocutory orders, the present matter has no legal legs to stand on and this court cannot make the intervention to on called upon by Mr. Ng'maryo in his letter. The legal provisions that have been referred to in this matter do not allow revision of interim orders passed by the lower court by this Court. In actual fact, the door for revision of interi orders is perfectly by closed by Act No. 25 of 2002 across the board unless such interim orders have the effect of finally determining the suit which as we have seen is not the case in our present matter.

However, at the commencement of this matter, I had pointed out some four issues that I had intended the advocates of both parties to address this court. In my considered view the first two of the said issues still need to be addressed at in this matter in the interest of justice namely;

(1) Whether the dispute in the lower court is or is not a housing/land matter?

(2) Whether the trial court has or has no jurisdiction in terms of Section 167 (1) of the Land Act, 1999 and Section 4 (1) of the Land Disputes Courts Act, No. 2 of 2002.

Therefore, in exercise of the powers of this court vested under Section 44 (1) of the Magistrates' Courts Act, 1984, in the interest of justice, I direct the trial court under another magistrate immediately on return and receipt of its files from this court in respect of this matter to forthwith or at once call upon the advocates of the parties to address it on the above two issues and make necessary determination according to law.

Having held that no intervention on can be made by this court in respect of the interim orders passed by the lower court and subject to the direction this court has given to the trial court as above stated, this Misc.Civil Revision No. 2 of 2005 opened at the instance of this court is hereby struck out. Each party to bear its own costs.

It is so ordered.

F. A. R. JUNDU,

JUDGE,

12/5/2005

Right of Appeal explained.

F. A. R. JUNDU,

JUDGE,

12/5/2005

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12/5/2005

Coram: F. A. R. JUNDU, J.

For 1st Applicant: Mr. Ng'maryo, Advocate

For 2nd Applicant: Mr. Ng'maryo, Advocate

For Respondent: Mr. Shayo, Advocate &
Prof. Msanga, Advocate

Court: Ruling delivered in the presence of Mr. Ng'maryo, learned counsel for the Applicants and in the presence of Mr. Shayo, A., learned counsel for the Respondent and Prof. Msanga, learned counsel for the Respondent.

F. A. R. JUNDU,

JUDGE,

12/5/2005