

**IN THE HIGH COURT OF TANZANIA**

**AT MOSHI**

**CIVIL REVISION NO. 4 OF 2005**

**[C/F DC SAME CIVIL APPEAL NO. 57/2003 & 58/2003]**

**[ORG. KIHURIO P/C CIVIL CASE NO. 12/2001 & 13/2001]**

**1. FRANCIS DAVIES WILLIAM ]**

**2. ALLY MASHIKA ] ----- APPLICANTS**

**VERSUS**

**LEONARD WILLIAM ] ----- RESPONDENT**

**R U L I N G:**

**HON. JUNDU, J.**

On 13/1/2005, the 1<sup>st</sup> Applicant one Francis Davies William had written a complaint (letter) to his Lordship Jaji Kiongozi (“The Principal Judge”) titled “MALALAMIKO JUU YA WASHIKA DAU ZA SHERIA TAARIFA ZAKE KATIKA KISHAWISHI CHA RUSHWA ILIOJIFICHA.” Having received the said complaint, His Lordship Jaji Kiongozi forwarded the same to the Judge Incharge of this station (Moshi) vide his letter Ref. No. JY/C/20/16/58 dated 20<sup>th</sup> January, 2005 for necessary action.

First, in the said complaint, the 1<sup>st</sup> Applicant complains about the dismissal of Civil Appeal No. 57/2003 and Civil Appeal No.58/2003 by Mr.Lamtey, (DM i/c) of the Same District Court without notice. Civil Appeal No. 57/2003 arose from Civil Case No. 13 of 2001 of Kihurio Primary Court in which one Amina Kisaka had successfully sued the Applicants for trespass over a piece of land measuring ¼ an acre. Civil Appeal No. 58/2003 arose from Civil Case No. 12 of 2001 of Kihurio Primary Court in which the Respondent had successtanly sued the Applicants for recovery of a piece of land measuring 1 ¼ acres. Secondly, the 1<sup>st</sup>

Applicant, who is the brother of the Respondent from their late father one William Luhwa, complains that the appointment of the Respondent as the administrator of the estate of the said William Luhwa by Mr. Minja (PCM i/c) of Kihurio Primary Court vide Mirathi Na. 14 of 2000 was dubiously done under fake documents and became the source of the above mentioned civil cases and the several criminal cases against him initiated by the Respondent. Thirdly, the 1<sup>st</sup> Applicant in his complaint complains about alleged unethical conduct of the magistrates involved in the said cases and their alleged collusion with the 1<sup>st</sup> Respondent against him. Fourthly, which appears to be of paramount importance to the 1<sup>st</sup> Applicant is that the dispute in the above mentioned cases should have first been submitted and resolved by the clan, village and ward leaders as is the practice before resorting to courts of law. Therefore, the 1<sup>st</sup> Applicant in his complaint prays that the dispute be given a chance to start afresh before the Village Chairman and the Ward Executive Officer.

Upon receipt of the complaint (letter) from Jaji Kiongozi, the Judge Incharge called for the records of the Civil Appeal No. 57/2003 and Civil Appeal No. 58/2003 from the District Court of Same by powers provided for under Section 44(1)(a) of the Magistrates' Courts Act, 1984. He subsequently directed the opening of this Civil Revision No. 4 of 2005 under Section 44 (1)(b) of the same Act. The matter was subsequently assigned to me after the Judge Incharge had disqualified himself from the conduct of the application on 26/5/2006 following dissatisfaction shown by the 1<sup>st</sup> Applicant.

All the parties in this matter are laymen. When I ordered them to make their submissions, all what they managed to do was to bring long submissions in Kiswahili stating long details of the dispute between them and the cases which have been decided by Kihurio Primary Court and the appeals taken up with the Same District Court as above mentioned. The Respondent, had an opportunity to

respond to the complaint which the 1<sup>st</sup> Applicant had forwarded to the Jaji Kiongozi, and the subject of this Civil Revision No. 4 of 2005.

In short, the Respondent, in reply, refutes and denies all the allegations made by the Applicants in their complaint. He contends that Mirathi No. 14 of 2000 in which he was appointed the administrator of the estate of the late William Luhwa was properly adjudicated by Mr. Minja (PCM) of Kihurio Primary Court without any collusion or dubious involvement between him and the said magistrate. As to Civil Appeal No. 58 of 2003 of the District Court of Same which arose from Civil Case No. 12 of 2001 in which he had successfully sued the Applicants for recovery of a piece of land was dismissed by the said District Court on 7/1/2004 for non – appearance of the Applicants and that since the said date the Applicants have not challenged the said dismissal of the said appeal. In any event, he alleged that it was "Davies William" who was a party in Civil Case No. 12 of 2001 and not "Francis Davies William", the 1<sup>st</sup> Applicant before this court. However, the 1<sup>st</sup> Applicant replies that it was the Respondent who had referred him as "Davies William" in Civil Case No. 12 of 2001 in Kihurio Primary Court. I take it that "Davies William" and "Francis Davies William" are one and the same person, that is the 1<sup>st</sup> Applicant. Otherwise, the Respondent objects to the Applicants' wish that the dispute among them should be made to start afresh before the village and ward leaders.

I wish to point out that this court has had no advantage of hearing from one Amina Kisaka who was the Respondent in Civil Appeal No. 57 of 2003 at Same District Court which arose from Civil Case No. 13 of 2001 in which she had successfully sued the Applicants for trespass over a piece of land measuring  $\frac{1}{4}$  acre. However, the said point is not a bar for my decision in this matter as far as the powers of this court under Section 44 (1) (a) and (b) of the Magistrates' Courts Act No. 2 of 1984 are concerned.

Can this court exercise the powers vested to it under Section 44 (1 (b) of the Magistrates' Courts Act No. 2 of 1984 to revise the proceedings in Civil Appeal No. 57 of 2003 and Civil Appeal No. 58 of 2003 and thereby order the dispute the subject of the said appeals to start afresh before the village and ward leaders?

First, what is obvious in my mind is that the dismissal orders made by the District Court of Same in Civil Appeals No. 57 of 2003 and 58 of 2003 were judicial orders which cannot be overturned by administrative orders. What I mean is that though the 1<sup>st</sup> Applicant had written his complaint to His Lordship Jaji Kiongozi about the said appeals, neither Jaji Kiongozi, the Judge Incharge nor myself can overturn the said judicial orders administratively.

Secondly, Section 44(1) (b) of the Magistrates' Courts Act, 1984 provides as follows

“44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court –

(a) ---

(b) may in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it deems fit”.

I take it that the complainant by the 1<sup>st</sup> Applicant vide Jaji Kiongozi does not constitute an application by the Applicants to this court for revision of the

dismissal orders in Civil Appeal No. 57/2003 and Civil Appeal No. 58/2007 of the District Court of Same in terms of above mentioned provision of law. In any event, such application, if any, would still be strangled by time limitation under the Law of Limitation Act, 1971. Can this court on its own motion revise the above mentioned dismissal orders by the District Court of Same? According to the wording of Section 44(1)(A) of the Magistrates' Courts Act, 1984, proceedings of such court can be revised by this court

“if it appears that there has been an error material to the merits of the case involving injustice”

Was this the case in the above mentioned appeals?

The record of Civil Appeal No. 57/2007 and Civil Appeal No.58/2003 shows that the said appeals were not decided on merits, they were only dismissed for non-appearance of the Appellants, that is the Applicants, hence it cannot be said that there has been an error material to the merits of the case involving injustice. What can be said is that they were dismissed for non-appearance of the Applicants. Was there no remedy to the Applicants?

This point brings this court to Rules 13(2) and 17 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules under G.N. No. 312 of 1964 which in my considered view are relevant to this matter. Rule 13(2) above mentioned provides as follows

“13 – (2) Subject to the provisions of sub-rule (1) of this rule, where on the day fixed for hearing the appeal or any day to which it may be adjourned the

appellant does not appear in person or by agent, the appellate court may dismiss the appeal”

The record of Civil Appeal No. 57/2003 and Civil Appeal No. 58/2003 shows that on 7/1/2004 the appeals were dismissed for non-appearance of the Applicants who were the Appellants. It is therefore obvious that the then PDM i/c of the District Court of Same in dismissing the said appeals had acted under Rule 13(2) of G.N. No. 312 of 1984. Could the Applicants rescue the said appeals after the said dismissal orders?

This brings this court to Rule 17 of G.N. No. 312 of 1984 which provides as follows

“17. Where an appeal has been dismissed under sub-rule (2) of Rule 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing it may re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

In my considered view, the above provision of Rule 17 of G.N. No. 312 of 1964 is very clear, the above named appeals having been dismissed by the said court under Rule 13 (2) above mention for non-appearance on 7/1/2004, the Appellants that is the Applicants, were free under Rule 17 above mentioned to apply to the said court for re-admission of the said appeals by showing sufficient cause which prevented them from appearing in the said court on the date when the said appeals were called for hearing.

Did the Applicants do so? My thorough perusal of the record of Civil Appeal No. 57/2003 and Civil Appeal No. 58/2003 does not show me that the Applicants did apply for re-admission of the said appeals in the said court, the latter having dismissed them as above stated. In my considered view, the Applicants in law had an option to rescue their dismissed appeals by applying to the said court to re-admit the same, which they have not yet exercised todate. Therefore, the Applicants, in my considered view cannot pester this court to act on its own motion to order their long time dispute to start afresh before the village and ward leaders while in law they hand an option to rescue their appeals which they have not yet exercised todate. In any event, there is no power vested to this court which mandates this court to make such an order even if the court becomes sympathetic to the Applicants.

As regards Probate and Administration Cause No. 14/2000 or Mirathi No. 14/2000 in which the Respondent was appointed the administrator of the estate of the late William Luhwa who was the father of the 1<sup>st</sup> Applicant and the Respondent, this court cannot interfere by way of revision under Section 44(1)(b) of the Magistrates' Courts Act, 1964. First, the said provision of law can only be invoked by this court in respect of the cases of "a civil nature determined in a district court or a court of resident magistrate" and not in respect of cases determined by a primary court hence the appointment of the Respondent as the administrator of the estate of the late William Luhwa having been made by Kihurio Primary Court vide Mirathi No. 140 of 2000 cannot be interfered by this court under Section 44(1)(b) of the Magistrates' Courts Act, 1984. Secondly, the Applicants were aggrieved by the appointment of the Respondent as the administrator of the estate of the late William Luhwa as the same was allegedly made dubiously and by fake documents by Kihurio Primary Court in Mirathi No.

140 of 2000. Was there no way open to the Applicants which could led to revocation of the said appointment of the Respondent?

What I know is that the appointment of the Respondent as the administrator of the estate of the late William Luhwa in Mirathi No. 140 of 2000 by Kihurio Primary Court was certainly made under Section 2(a) of Part I in the Fifth Schedule to the Magistrates' Court Act No. 2 of 1984. However, Section 2(c) of Part 1 of the said Schedule provides as follows –

“2. A primary court upon which jurisdiction in the administration of deceased's estate has been conferred may

(c) revoke any appointment of an administrator for good and sufficient cause and require the surrender of any document evidencing his appointment”.

In my considered view, it is clear from the above provision of law, the primary court which had appointed the Respondent as the administrator of the estate of the late William Luhwa is also empowered to revoke the said appointment. Therefore, the Applicants could have applied or moved the said court to revoke the appointment of the Respondent if they thought they had good and sufficient cause for the said court to do so. The Applicants have not exercised the said option todate. This court cannot in the absence of enabling provisions of law order that the said matter should start afresh allegedly under the guidance of the village and ward leaders as envisaged by the Applicants in their complaint to Jaji Kiongozi.

In the upshot, having stated what I have stated above, I hold that this is not a fit case for this court to exercise its powers of revision vested to it under Section 44(1)(b) of the Magistrates' Courts Act, 1984. I so hold. As most of what has

been stated herein is on the initiative of the court itself, I make no order as to costs.  
It is so ordered.



**F.A.R. JUNDU**

**JUDGE**

**25/7/2007**

Right of Appeal Explained.



**F.A.R. JUNDU**

**JUDGE**

**25/7/2007**

25.7.2007

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

For the 1<sup>st</sup> Applicant: present

For the 2<sup>nd</sup> Applicant: present

For the Respondent: present

C/C: Muyungi

**Court:** Ruling delivered in the presence of the Applicants and in the presence of  
the Respondent.



**F.A.R. JUNDU**

**JUDGE**

**25/7/2007**

**AT MOSHI**