IN THE HIGH COURT OF TANZANIA Library

AT DAR ES SALAAM

CIVIL REVISION NO. 61 OF 2003

TIMA HAJI ..... **APPLICANT**

VERSUS

AMIRI MOHAMED MTOTO ..... **1ST RESPONDENT**

MAMBA AUCTION MART ..... **2ND RESPONDENT**

Date of last Order : *29/7/2009*

Date of Ruling : *13/8/2009*

RULING

MLAY, J.

TIMA HAJI through the services of K. MWITTA WAISSAKA ADVOCATE, has made an application by Chamber Summons under the Civil Procedure Code 1966 seeking from this court, the following orders:

1. *That this Honourable court be pleased to call for and examine the record in RM Civil Case No. 55 of 1998 at Kinondoni in order to satisfy itself of the propriety of the decision thereon.*
2. *Costs.*
3. *Any other order(s) the Honourable court may deem fit.*

The Respondents to the application are (1) AMIRI MOHAMED MTOTO and (2) MAMBA AUCTION MART. The said application has been supported by the affidavit of K. MWITTA WAISAKA, counsel for the Applicant in which it has been deponed as follows:

1. *That I am conversant with the facts I am deponing to being counsel for the Applicant.*
2. *That the 1st Respondent had filed a case against one FREDDY MASIKA way back in 1998 and obtained an Exparte judgment in respect of a disputed plot of land on* ***Plot No. 513 and 514 Block "B" MIKOCHENI****.*
3. *That while the said suit was still subjudice the Defendant FREDDY MASIKA had already sold the property situated thereon to one LIBERTY MOSHA way back in November 1997 and departed for parts unknown.*
4. *That in turn and unknown to the Applicant the said LIBERTY MOSHA sold his house situated on the said plot to the Applicant TIMA HAJI on the 10th May 1999.*
5. *That on the 13th May 2001 the Applicant was served with a Warrant of Execution including a proclamation for sale of the*

property while she had never been indebted to the Decree Holder.

6. *That despite making two applications to the executing court to have the illegal attachment lifted the same could not be upheld.*
7. *That the Applicant did however obtain a stay of Execution on 20th March 2003 and thereafter to file a revision to this Honourable Court.*
8. *That the hearing of this revision shall finally conclude the matter and render substantive justice to parties.*
9. *That the Applicant has been living in fear of unjust eviction and hence lose her property while the Respondent may wish to proceed to sue the party who is also unknown to the Applicant.*

The 1st Respondent through MKALI & CO. ADVOCATES filed a counter affidavit as well as a Notice of Preliminary Objection to the effect that:

(i) The Application is hopelessly time barred,

(ii) The Application is misconceived and bad in law.

The preliminary objections above, were ordered to be disposed of by way of written submissions, which have been filed by counsels of both parties to the application. This ruling is on the said preliminary objections.

The counsel of the 1st Respondent having set out the history leading to the application for revision has submitted on the first grounds, " **that the Application for revision filed by the**

Applicant on the 12th day of June 2003 to revise proceedings in Civil Case No. 55 of 1998, of Kinondoni District Court is hopelessly time barred." The Respondent advocate contended that, " **although the Applicant has not specifically stated which of the proceedings and / or orders of the Kinondoni District Court..... the Applicant seeks to revise, ... going by the record under the circumstances of this matter, the Applicant seeks to revise the execution and / or dismissal orders of his / her dismissed application reference being made on paragraphs 6, 7 and 8 of the affidavit supporting the application.**" Having reproduced in full the three paragraphs referred to, the Respondent advocate contended that, the application to restore the dismissed objection proceedings was dismissed on 2/7/2002 and it was the last decision which prompted the Applicant to file this application for revision. The Respondents advocate argued that the Applicant filed the application for revision under Section 79 and 95 of the Civil Procedure Code, 1966 on 12/6/2003 " **well after 11 months (about 345 days) from the date of the last dismissal order."** He submitted that, **"the Law of Limitation Act, 1971, restricts the time limit to file an application for revision such as this within any 60 day days from the date of the relevant decision or proceedings**". He quoted Item 21 of Part III of the Schedule to the Law of Limitation Act which provides:

> " *21. Application under Civil Procedure Code, 1966 the Magistrates Courts Act 1963 or other written law for which*

no period of limitation is provided in that Act or any other written law..... 60 days."

The Respondents further contended that, even if, for the sake of argument the proceedings ended on 20/3/2003 when the Applicant was granted an order of stay of execution and therefore when time started to run against her, which is denied, the application would still have been filed after 84 days which is 14 days after the prescribed limit. The Respondent further argued that, even if the Applicant alleges that she was not supplied with the court proceedings, rulings or orders in time, which is denied (a) " the law does not make it mandatory to annex such proceedings, Ruling and or **orders as the case may be (b) ..... the same were ready long time ago but the Applicant did not act diligently to either request / apply for them ..... (c) ..... he has not pleaded so in his affidavit**." Having quoted the provisions of Section 3 (1) of the Law of Limitation Act, the 1st Respondent's advocate submitted that " **the present application having been filed out of time ..... should be dismissed."**

On the second ground that the application for revision is misconceived and bad in law, the Respondent advocate submitted that "**the same is incompetent before the court and should be stricken out of the court's records"**.

Having quoted in full the provisions of Section 79 of the Civil Procedure Code under which the application has been made, the Respondent's advocate contended that, the High Court may only exercise its revisional jurisdiction under the Civil Procedure Code in the following circumstances:

> " (a) *The Subordinate Court has exercised a jurisdiction not rested in it by law; or*
>
> *(b) The subordinate Court have failed to exercise a jurisdiction rested in it, or*
>
> *(c) The Subordinate Court have acted in the exercise of its jurisdiction illegally or with material irregularity;*
>
> *(d) But of course with another condition that no appeal has thereto".*

The Respondents advocate submitted that, " going by the Applicant's affidavit ..... neither of the three circumstances above have been shown in the Applicant affidavit". He contended that, " the only reason stated by the applicant can be seen at paragraph 6 of the affidavit that:-

> " *That despite making two applications to the Executing Court to have the illegal attachment lifted the same could not be upheld."*

He contended that, the Applicant does not state that the Subordinate Court had **" exercised a jurisdiction not vested in it or " Have failed to exercise a jurisdiction vested in it or " " acted in the exercise of its jurisdiction illegally or with material irregularity**." He submitted further that " **the orders which the Applicant seeks to revise are appealable ..... and has deliberately decided not to appeal, as such he / she cannot reply on the provisions of Section 79 of the Civil Procedure Code ..... seeking revision of the proceedings as an alternative of appeal**." The Respondents advocate rounded up her submissions by referring to three decided cases on the exercise of the revisional powers of this court under Section 79 of the Court Procedure Code.

1. *ABDAL HASSAN VS MOHAMED AHMED [1989] TLR 181 (per Katiti J.)*

   " *The High Court revisional power under section 79 (1) of the Civil Procedure Code of 1966 are limited to cases where no appeal lies and issue such as whether the Subordinate Court has exercised jurisdiction not vested, if vested, whether it has failed to exercise the same or has acted illegally or with material irregularity."*

2. *MWANAHAWA MUYA VS MWANAIDI MARO [1992] TLR 78 (C.A)*

" *(ii) In the proper case, the High Court can invoke its powers of revision in a grant to letters of Administration by the District Court. Powers of Revision are however usually exercised by the High Court suo moto when exercising its supervisory powers over subordinate courts."*

(iii) It is wrong, indeed improper, for the High Court to resort to its revisional Powers where (as it was in this case) there are specific issues calling for determination by the court."

3. *ZABLON PANGALAMEZA VS JOACHIM KIWARAKA & ANOTHER [1987] TLR 140 [CA]*

"(iii) Unlike Section 79 (c) of the Civil Procedure Code, Section 44 (1)of the Magistrates Courts Act goes beyond jurisdictional issues and covers all situations where it appears that there has been an error material to the merit of the case involving injustice."

The Respondent's advocate submitted that the present application having been brought specifically under Section 79 of the Civil Procedure Code, 1966, the Applicant cannot seek to rely on the privilege provided under Section 44 (1) of the Magistrate Courts Act, 1984. He further submitted that even the court cannot suo moto invoke revisional powers vested in it where there is specific issues (sic) calling upon it to determine (sic) as under the

circumstances of this case." He prayed that the application be dismissed with costs.

In reply to the objection that the application is time barred, the Applicant's advocate contended that " **it is crystal clear from the record of the RM's Court of Kinondoni that the order granting the Applicant a stay of Execution was given on 20th March 2003..... that a copy of said order was only furnished to the Applicant on 3rd July 2003 hence delay in filing the Revisional Application in the High Court."** He further contended that....., "**it was only after the Applicant reached the end of his tether that he was supplied with the said copy of the Ruling on 3/7/2003. Meanwhile, he decided not to wait for the copy to be supplied and went ahead to file the Revision in Court on 12th June 2003."** He argued that, " **it is not true that the law does not make it mandatory for a copy of the ruling or proceedings to be annexed ..... In the same vein, the Respondent does not state which authority states that a party cannot annex copies of Rulings or orders".** The Applicant submitted that the Respondent was " **engaging in speculation and hear say by stating that the Ruling was ready but the Applicant made no effort to collect it from this court"** and also that, " **it is not necessary to plead every fact in the affidavit otherwise the same would run into hundreds of pages. Matters of fact and Law are, whenever necessary, handled during the hearing and not deponed in Affidavits**". He quoted the provisions of Order XXI Rule 3 of the Civil Procedure Code which states:-

> 3 (1) " *Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interdictory applications on which statements of has belief may be admitted.*"

The Applicant submitted that the Respondents reliance on Section 3 (1) of the Law of Limitation Act that the Application is time barred " **the said Section is inapplicable in our present case simply because the said section speaks of the 1st Column of the 1st Schedule to the Act". Upon perusal of the said Schedule and Column, one easily finds that it deals with commencement limitations in regard to institution of suits. We therefore state that his reliance on the said Section is completely misguided**."

The Applicants advocates submitted that " **the present Application is brought under Sections 79 and 95 ..... as such we wish also to invoke Section 14 (1) of the Law of Limitation Act**." He quoted the provisions in full which state:

> " *Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of Limitation for the institution of Appeal or Application for the institution of Appeal or an Application other than an application for the execution of a decree, and as such an Application for such extension may be made either before*

or after the expiry of the period of Limitation prescribed for such appeal or application."

The learned advocate went on to contend that, " **our application falls under the 1st Schedule Column 1 Part III No. 21 which given Limitation of 60 days which even if they are exceeded would by cured by Section 14 (1) above in the interests of justice**". As for the second limb of the preliminary objection, the Applicants advocate prayed that it be dismissed for reasons that:-

" (a) *The RMs Court at Kinondoni acted irregularly because it failed to investigate the mater in the proper manner and actually signed Execution notices against the Applicant who was never a party in the original Civil Case No. 55 of 1998.*

(b) The Applicant could not use the Appeal procedure because it is closed to her as she was not a party to the original ease .....

(c) The cases cited by the Respondent therefore are quite in favour of the Applicants position, because as stated in ABDUL HASSAN VS MOHAMED AHEMD (1989) TLR 81, the subordinate Court has failed to exercise, its jurisdiction to investigate the Applicants objection proceedings and hence our application to this High Court.

(d) ..... ZABRON PANGAMALEZA Vs. JOACHIM KIWARAKA [1987] 40 lays down the requirement of investigating all situations where it appears that there had been an error to the merit of the case involving injustice. This falls foursquare (sic) with the present case whereby the Subordinate Court ignored the Applicants (objector by then) legal rights by ordering sale of her property without giving her the opportunity of being heard."

For the above reasons he prayed that the preliminary objection be dismissed and the matter be heard in order to render substantive justice. He quoted MKWAWA J. in Jocab G. Mwandiko Vs Peter Feer Misc. Civil Appeal No. 57/2000 (HC Jaya) to have stated:

" The real purpose of litigation is to address the matter in issue in order to attain justice."

The Respondents advocate filed a rejoinder to the Applicants reply. In essence, the Respondent reiterated the earlier submissions that the application is time barred, be it whether the orders which are sought to be revised are the objection proceedings or the application for restoration of the dismissed application. On the time taken to obtain a copy of the ruling, the Respondent submitted that the argument is unfounded as this application was filed before the said copy was supplied. He further submitted that the Applicant can not seek the cover of Section 14 (1) of the Law of Limitation Act as the Applicant has nor filed an application to file his application (for

revision) out of time. The Respondent further submitted that the Applicant could have appealed and that rules of procedure are there to be followed not to be clearly evaded. He prayed that the application be dismissed.

The first issue for determination is whether, the application for revision which the Applicant filed on 12/6/2003, is time barred. According to paragraph 1 of the Chamber Summons the intended revision is by this court examining " **the record in RM Civil Case No. 55 of 1999 at Kinondoni in order to satisfy itself of the propriety of the decision thereon".** The record of Kinondoni District Court (not RMs Court as stated by the Applicant) Civil Case No. 55/98 relates to a suit filed by MOHAMED MTOTO (Plaintiff) against FREDDY F. MASIKA (Defendant)on 2/11/98. The suit was for, declaration that the plaintiff is a rightful owner over plot No. 513 block B. Mikocheni area; an order for vacant for possession against the defendant and for damages Tshs. 6,000,000/= and costs of the suit. Judgment was entered against the Defendant under Order 8 Rule 14 (1) of the Civil Procedure Code on 31/5/2000. The Decree Holder then applied for execution and while execution was in progress, the present Applicant instituted objection proceedings pursuant to Order XXI Rule 57 (1) of the Civil Procedure Code. The record of the District Court show that the application relating to the objection proceedings was set for hearing on 6/6/2001 but on the hearing date, " **the application was dismissed for want of prosecution."** The Applicant again filed an application to set aside the dismissal of the objection

proceedings. The record shows that this second application was dismissed on grounds of defective affidavit in a ruling delivered on 2/7/2002. The Applicant then applied for stay of Execution of the decree of the District Court pending the application for revision. The application for stay of Executive was granted on 20/3/2003 and the Applicant filed the application for revision on 12/6/2003.

As correctly pointed out by the Respondent's advocate, the Applicant has not indicated in the chamber summons or in the supporting affidavit, which order made by the District Court in the entire proceedings of Civil Case No. 55 of 1998 should be examined by this court " **to satisfy itself of the propriety of the decision."** Is the order or decision intended to be revised, the judgment entered under Order 8 Rule 14 (1) of the Civil Procedure Code on 31/5/2000? If this is the order or decision to be revised, the Respondent has submitted that the application would be time barred as per Item 21 of Part III of the Schedule to the Law of Limitation Act Cap 89 R.E. 2002. The Application for revision having been made under Section 79 and 95 of the Civil Procedure Code Cap 33 R.E. 2002, the period of limitation falls under this item, which period is 60 days. The application for revision having been filed on 12/6/2003, nearly three years after the judgment was entered, would be hopelessly out of time and in terms of Section 3 (1) of the Law of Limitation Act, it would be liable to dismissal. If however, the decision or order intended to be revised is the dismissal of the objection proceedings which took place on 6/6/2001, the application for revision filed on 12/6/2003 would

also be time barred for having been filed after two years of the decision. Again, if the intended decision or order is the dismissal of the application to restore the objection proceedings which was made on 2/7/2002, the application for revision which was filed on 12/6/2003 would still be time barred for having been filed 11 months after the decision.

The Applicants advocate has made a curious if not strange submission that even of the period of limitation has been exceeded, Section 14 (1) of the Law of Limitation comes to the aid of the Applicant. Section 14 (1) of the Law of Limitation Act Cap. 89 R.E. 2002 provides as follows:-

> " *14 – (1) Not with standing the provisions of this Act, the court may,* ***for any reasonable or sufficient cause****, extend the period of limitation for the institution of an appeal or an application, other than an application for such execution of a decree, and* ***an application for such extension may be made*** *either before on after the expiry of the period of limitation prescribed for such appeal or application (emphasis mine)".*

For the Applicant to benefit from the provisions of Section 14 (1) above, the applicant must have made an application for extension of time either before or after the expiry of the period of limitation and in that application, the applicant must show " **reasonable or sufficient cause**" for the court to extend the time. As the Respondent has correctly pointed out in the submissions, the

Applicant has not made any such application, or otherwise shown any reasonable or sufficient cause for extending the time. The Applicant cannot therefore avail herself the benefits under Section 14 (1) of the Law of Limitation Act. The quence quences of an application or proceeding which is time barred are clearly set out in Section 3 of the Law of Limitation Advocate states:

> " *3 –(1) Subject to the provisions of this Act, every proceedings described in the first column of the Schedule to this Act and* ***which is instituted after the period of limitation prescribe therefore opposite there to in the second column, shall be dismissed*** *whether or not limitation ha been set up as a defence."*

Again the Applicants advocate made a strange submission that the provisions of Section 3 above are inapplicable **" because the said Section speaks of the 1st Column of the 1st Schedule to the Act. Upon perusal of the said Schedule and Columns, one easily finds that it deals with commencement limitations in regard to institution of suits."** The learned counsel has completely confused himself by this submission. If one looks at the Schedule to the Law of Limitation Act, and by the way, there is no First or Second Schedule to the Act, there is only one Schedule, Part I deals with suits, Part II with Appeals and Part III with Applications, like the present one. The schedule also has two columns, Column one deals with **" description"** of the proceedings concerned and Column Two sets out the period of limitation for the proceeding described in

column one. In relation to the present application for revision which is made under Section 79 and 95 of the Civil Procedure Code, it falls squarely under Part III item 21, as the Applicants Counsel has conceded in the written submissions. Since the application was made after the expiry of the 60 days limitation set and in the second column of Item 21, the application is liable to be dismissed pursuant to the provisions of Section 3 of the Law of Limitation Act.

The Chamber Summons did not only not indicate which order or decision in Civil Case No. 55/98 was intended to be revised but it also was not accompanied by a copy of the proceeding intended to be revised. For this reasons, even if it is assumed that the Applicant needed a copy of the said proceedings before filing the application for revision, the time requisite to obtain the said copy cannot be excluded pursuant to Section 19 of the Law of Limitation Act, because no such copy was applied for. In fact the Applicant admitted in the submissions that the application for revision " **was filed on the 12th June 2003 before he was supplied with a copy of the said ruling**." What has been attached to the Chamber summons, is a copy o the ruling granting a stay of Execution pending the Application for Revision. The period necessary to apply for and obtain of a copy of an order for stay of execution, is not a period which is required to be excluded in computing the period of limitation under Section 19 of the Law of Limitation Act.

Since the application for revision was filed long after the expiry of sixty days which is the period of limitation, the first preliminary

objection is upheld and accordingly, the application for revision is dismissed.

The finding on the first objection is sufficient to dispose of the application. However, the Respondent has also raised to objection that, " **the Application is misconceived and bad in law**." The Respondent has argued that since the application for revision has been brought under Section 79 (1) of the Civil Procedure Code, the court can only exercise jurisdiction of the Applicant has alleged:-

(a) The trial court exercised, jurisdiction not vested in it, or
(b) The trial court failed to exercise a jurisdiction vested in it; or
(c) *The trial court acted in the exercise of its jurisdiction illegally or inter material irregularity.*

In addition to any of the above grounds, the Applicant has to show that no appeal lies on the subject matter. Three decided cases referred to earlier, were cited to show the scope of the revisional powers of this court under Section 79 of the Civil Procedure Code. The Respondent has argued that the Applicant has not shown that the application falls within the matters allowed under Section 79. On the other had, the Applicant has submitted that the District Court failed to investigate the matter before it properly and signed execution notices against the Applicant who was not a party to the signed Civil Case No. 55 of 1998. The Respondent further argued that the appellate procedure was closed to the applicant as she was not a party to the original suit.

As stated by Katiti J. in the case of ABDUL HASSAN VS MOHAMED AHMED 1989 TLR 181, The High Court revisional powers under Section 79 (1) of Civil Procedure Code are limited to cases where no appeal lies and issues such as whether the subordinate court has exercised jurisdiction not vested, if vested, whether it has failed to exercise the same or has acted illegally or with material irregularity. In the present application the Applicant claims she was not a party to the original suit in which judgment was entered favour of the respondent under Order 8 Rule 14 (1). Indeed she was not. She only became interested in the case during execution in order to resist the attachment of what she claims to be her property. She followed the court procedure of filing objection proceedings, which, unfortunately, were dismissed for want of prosecution. An attempt to have the dismissal set aside also failed after the dismissal of the second application on grounds of an invalid affidavit. Surely the two applications are appealable. The application for revision is brought under Section 79 of the Civil Procedure Code. In a matter which is appealable, it would be improperly before this court and liable to be struck out. However as the application has been found to be time barred, it is hereby dismissed, with costs.

J. I. Mlay

JUDGE

Delivered in the presence of the Applicant and in the absence of the Respondent with notice, this 13th day of August 2009. Right of Appeal is explained.

J. I. Mlay

JUDGE

13/8/2009