

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL REVISION NO. 32 OF 2003

SALMA ISSA.....APPLICANT

VERSUS

DR. YAHAYA MOHAMED KAPONA.....RESPONDENT

RULING

MLAY, T:

The Applicant SALMA ISSA has made an application by Chamber summons Under Section 44(10) of The Magistrates Court Act 1984. According to the Chamber Summons the Applicant seeks the following orders:-

- "a) *That the proceedings before the District Magistrates Court in Civil Case No.56 2005 conducted on 13th February 2003 proceedings which resulted to the issuance of Warrant of Arrest of the Applicant be revised.*
- b) That the Order of Warrant of Arrest granted on 13th February 2003 be set aside and the application.*
- c) That the Respondent be condemned to pay the costs of this application.*
- (d) Incidental orders as may be necessary be granted.*

The Application is supported by the affidavit of SALMA ISSA, the Applicant in which she has deposed as follows:

1.....

2. That the Respondent filed a case against the Applicant, Civil Case No.56 of 2002 in the District Court of Ilala Samora Avenue case which was decided ex parte against the Applicant. Subsequently to that, the applicant herein filed an application for setting aside the ex-parte judgment, which was dismissed by the same Court for non-appearance while the court knew that the applicant in this application was terribly.
3. That the non-appearance of the applicant in the above mentioned case was caused by the serious illness of the applicant which the Honourable District Court knew but instead issued a Warrant of arrest of the Applicant. Annexed herewith are copies of medical sheets showing the Applicants illness.
4. That the Applicant believes that justice will be done if the Application for Revision will be considered.
5.

At the hearing of this application, the Applicant was represented by Mr Magafu learned advocate, while the Respondent to the Application DR. YAHAYA MOHAMED KAPONA, was represented by Mr. Eustace, learned advocate.

In his submissions Mr. Magafu submitted that, the main ground for the application, is that the Applicant was denied the right to be heard. He contended that, the Respondent instituted a suit in the District Court of Ilala which was heard ex parte and a decree issued in favour of the Respondent. He contended further that the Respondent filed an application to set aside the ex parte judgment on 12/11/2002 which was dismissed for want of prosecution. Mr. Magafu further contended that on 13/2/03 an order was made that the applicant should be arrested and brought to court to show cause why he should not be imprisoned as a

civil prisoner for failure to pay the decretal amount. Mr. Magafu submitted that, it is the applicants contention that when the order was made, she was denied the right to be heard because she was sick. He submitted further that the applicant was entitled to be heard before issuing such an order. He stated that Medical Chits appended to the application, show that during that period the applicant was suffering from Severe hypertension and that the order of arrest was issued without there being a Summons issued to the applicant. For this reason Mr. Magafu prayed that the application for revision be granted.

Mr. Eustace advocate for the Respondent submitted that this application is misconceived because, after the application to set aside the exparte judgment was dismissed, the Applicant ought to have applied for its restoration. As for the order of arrest, Mr. Eustace submitted that that it was not a final order but a mere interlocutory order which is not subject to revision. He referred to Section 43 of the Magistrates Courts Act 1984 and Section 79 of the Civil Procefure Code 1966, as amended by Act No.25 of 2002 which bar revision of interlocutory decisions. He also cited the case of NDEGE COMMERCIAL SERVICE LTED vs OMARI IBRAHIM (H/C DSM Unreported) CIVIL REVISION NO.70/2002 and Ilala MUNICIPAL COUNCIL vs BUGURUNI/ DEVELOPMENT SERVICE COMPANY (H/C DSM Unreported) CIVIL REVISION NO.52 OF 2003, to support this submission. He further argued that the order of the Court was to appear and show cause, and it was therefore not a final order but an interlocutory order. He also contended that, the order was giving the applicant an opportunity to be heard. Mr. Eustace went on to contend that the Applicant had conceded in her affidavit in support of the Application to set aside the exparte judgment and for Stay of Execution, that she was served with 14 days Notice to pay TSh 11 900 000/=, which Notice was accompanied by the application to show cause why execution should not proceed against her. He argued that the adopted mode for execution was the arrest and detention of the judgment debtor

in case she defaulted. Mr. Eustace further argued that, since the application was intended to frustrate the execution Mr Eustace further argued that/ since the 1' ti n to set aside the exparte judgment was filed by Maregesi Chambers, the allegation that the applicant was sick has no merit because there was no need for her personal appearance on 12/2/2002, which was the hearing date and it was on that date the order complained of was made. He submitted that the Applicant could have appeared by Counsel. He further contended that the Medical Chits attached are dated 23/10/2002 and 24/10/2002 and are merely for diagnosis, while the order complained of was made on 13/10/03. He therefore submitted that the Medical Chits are not relevant to the matter. Finally, Mr. Eustace cited CIVIL APPLICATION NO.46/98 KASSIM MAGASSA VS WILY BUKUKU (CA) (Unreported) in which the Court of Appeal held that the party's inaction or negligence cannot be a good reason for revision. He contended that the record of the proceedings will show that the applicant and her advocate have been inactive or negligent in pursuing the matter. He therefore prayed that this application be dismissed, with costs.

In reply, Mr. Magafu submitted that the provisions of Act No.25/2002 do not apply to matters relating to execution of decrees but intended to bar interlocutory applications. He contended that the order complained of, was made during execution proceedings. He further submitted that the two cases cited by Mr. Eustace on revision being based in interlocutory decisions, are therefore irrelevant. He also argued that the decision of the Court of Appeal in Civil Application No 46/98 is equally irrelevant, because there is no evidence whatsoever that in the application to set aside the exparte judgment, the applicant's Counsel was summoned to appear. He therefore prayed that the application be granted.

In this Application, the Applicant has asked this court to exercise its powers of revision conferred by section 44(1) of the Magistrates Courts Act, 1984 to revise the proceedings of the District Court of Ilala in Civil Case No.56 of 2002. The particular proceedings targeted by this application, are those which were conducted on 13* February 2003 which resulted in the issuance of a Warrant of Arrest of the Applicant. This is in accordance with paragraph (a) of the Chamber Summons, the contents of which have been set out earlier on in this ruling. The said proceedings as they appear in the record of the District Court, are as follows:-

"13/2/2003

*Coram: B.M. Kisensi, DM For
plaintiff-For Defendant-
CO.Maunga*

Mr. Yustas for the decree holder, DR Yahya M. Kapona We pray for the dismissal of all applications made by the Judgment-debtor, for want of prosecution, and the Court to issue an order of arrest for the Judgment-debtor to come in Court to show cause why not committed to civil prisoner

That is all.

Court

Upon the application made by Mr. Yustas for the decree-holder to dismiss this case for want of prosecution and this Court to order a W/A for arrest of the Judgment-debtor to come in court to show cause why not be committed as a civil prisoner are granted.

Order

This application is dismissed for want of prosecution. An order of W/A be issued for the Judgment-debtor to come to show cause why not be sent imprisonment sentence as a

Civil prisoner.

(Signed)

13/2/03

Ruling Exparte passed today on the 13/2/02 in Chamber Court this in the presence of Mr. Yustas for the decree holder.

(Signed)

13/2/03"

The Applicant in her affidavit in support of this application has asked this court to revise the above quoted proceedings on grounds that, "*the none-appearance of the Applicant in the above mentioned case was caused by the serious illness of the Applicant which the Honourable District Court knew but instead issued the warrant of arrest of the Applicant...*" In arguing the Application, the Applicant's advocate has in effect, submitted that, in making the said order complained of, in the absence of the Applicant, the Applicant was denied the right to be heard. The Respondents advocate Mr. Eustace has on the other hand submitted that, the order to issue a warrant of arrest is an interlocutory order which, by reason of the provisions of Sections 43 of the Magistrates Courts Act, 1984 and 79 of the Civil Procedure Code 1966, all as amended by Act No.25/2002, are not subject to revision. Section 43 of the Magistrate's Courts act 1984, as amended by the Written Laws (Miscellaneous) Amendments) Act, No.25 of 2002 provides as follows:-

"43(1).....

*(2) Subject to the provisions of subsection (3), no appeal or **application for revision shall** lie against or be made in **respect of any preliminary or interlocutory decision or order** of the district court or court of the resident magistrate **unless such decision or order has the effect of finally determining the criminal charge or the suit.**"*

Act 25/2005 also amends section 79 of the Civil Procedure by adding a provision in **pari materia** to that made to section 43 of the Magistrate's Courts Act 1984, which is quoted above. Mr. Magafu advocate for the Applicant has argued that, the above provision barring revision to interlocutory orders or decisions, applies only to Interlocutory Applications and not to an order made in execution proceedings. Mr. Magafu did not cite any legal authority in support of his submission. With respect, I do not see any merit in Mr. Magafu's submission. The provisions of section 43(2) of the Magistrate's Courts Act, 1984 which have been reproduced in full earlier in this ruling, prohibits the revision of interlocutory orders. Clearly, this is a preliminary or interlocutory order. It is an order made in the course of the execution proceedings and which is not final. By its nature and its wording, it presumes that another order will be made after the applicant has appeared before the court and heard by the court as to why the order to commit the Applicant to prison as a civil prisoner, should not be made. The order is therefore clearly a "preliminary or interlocutory order" within the meaning of section 43(2) of the Magistrate's Courts Act 1984. An application for revision of the said order made on 13/2/03, which is an "preliminary or interlocutory order", is barred by the provisions of section 43(2) of the Magistrates' Courts Act, 1984 [Cap 11 R.E 2002]. That being the case, this application is incompetent and therefore improperly before this court. The Application is accordingly struck out, with Costs.

Delivered in the presence of Mr. Eustace advocate for the Respondent, also holding brief for Mr. Magafu, advocate for the Applicant, this 29th day of May, 2009.

J. I. Mlay
JUDGE

29/5/2009

