IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO 60 OF 2012

SIXBERTY HAULE ..... 1ST APPLICANT

AGATHA M. HAULE ..... 2ND APPLICANT

VERSUS

RAYMON M. HAULE..... 1ST RESPONDENT

STEVENE GISBERTY HAULE.....2ND RESPONDENT

RULING

Mwarija, J.

In this application, the applicants, Sixberty M. Haule and Agatha M. Haule have prayed for the following orders:

> *(a) That may this honourable court be pleased to restrain the Respondents from disposing of the properties of the estate in any manner pending final determination of this application.*
>
> *(b) That may this honourable court be pleased to call for the record of the District Court of*

Temeke in respect of Civil Revision No. 12 of 2012 for the purposes of examining, revising, satisfying itself as to the correctness, legality or propriety and quash the proceedings and set aside the ruling thereof dated 21st August, 2012.

(c) That may this honourable court be pleased to revoke the letters of administration granted to the 1st Respondent by the Primary Court of Mbagala and direct the said court to appoint the Applicants into the administration of the estate of the deceased, Gizberty Haule for the interest of the sole beneficiary, a minor (Elizabeth Gizberty Haule).

(d) That costs be provided for.

(e) Any other relief(s) this Honourable Court may deem fit and just to grant.

At the hearing of the application the applicants were represented by Mr. Ludovick, learned counsel while the respondent was represented by Mr. Mcamanga, learned counsel. The learned counsel for the parties were granted leave to argue the application by way of written submissions. When considering the application and the submissions filed on behalf of the parties I found that an important point of law arose out of the application. In their application, the applicants cited as an enabling provision only s. 30 (1) (a) and (b) (i) of the Magistrates' Courts Act, Cap.(II) [R.E. 2002]

(hereinafter referred to shortly as MCA). The court thus raised **suo motu** the issue whether or not the court has been properly moved to entertain the application. S. 30 (1) (a) and (b) (1) was intended to move the court to revise the proceedings and decision of the District Court as stated in prayer (b) of the chamber summons. As for prayer (a) in which an interlocutory order was sought and prayer (c) in which the applicants sought for revocation of appointment of the respondent as an administrator of the deceased's estate, apart from raising an issue whether or not the prayers could be merged, the enabling provisions were not cited.

In his submission on the point of law whether the court has been property moved to entertain the application for revision, although at first he argued that section 30 (1) (a) and (b) (i) of the MCA is an enabling section for the application, on a second thought, Mr. Ludovick contended that the powers vested to the court by that section are those of supervision not revisional powers. On that realization, the learned counsel prayed that the applicant be granted leave to institute an application for revision under proper provision of law.

On his part, Mr. Mcamanga submitted that the powers vested in the court by s. 30 of the MCA are merely administrative. He argued further that in order to exercise its revisional powers over decisions of District or Resident Magistrates court originating from Primary Court, the court ought to have been moved under s. 31 of the MCA. He went on to submit that as to the decisions of the

district or Resident magistrate's court made in their original jurisdiction, this court derives revisional powers from sections 43 and 44 of the MCA.

Citing the book, **The Law of Civil Appeals, Revision and Reviews** by S. K. Makherjee Dwevendi Law Agency, 2005 at page 66, the learned counsel submitted that the court's supervisory jurisdiction is different from revisional jurisdiction in that while under revisional jurisdiction the court may correct errors of law under supervisory jurisdiction the the duty of the court is to see that the subordinate courts act within their jurisdictions.

As to Mr. Ludovick's prayer that upon the application being found incompetent, the applicant be granted leave to file the application afresh, Mr. Mcamanga argued that such a prayer should not be entertained because it is a new matter and thus has been improperly raised.

From their submissions, the learned counsel for the parties agree that the application for revision has been brought under inapplicable provision of law. S.30 (1) (a) and (b) (i) cited by the applicants in the chamber summons provides a follows:

> *"30-(1) The High Court shall exercise general powers of supervision over all courts in the exercise of their jurisdiction under this part and may at any time:*

(a) Call for and inspect the record of any proceedings under this part in a District Court or Primary Court and may examine the record or register thereof; or

(b) Direct any District Court to call for and inspect the record of any proceedings of the Primary Court established in its District and to examine the records and registers thereof, in order to satisfy itself or to ensure that such District Court shall satisfy itself, as to the correctness, legality of any proceedings therein, and may:

(i) Itself revise any proceedings in a District Court..."

The Position as correctly submitted by Mr. Mcamanga is that the powers vested to the High Court by the above quoted section are merely administrative, not judicial. Revisional powers over decisions of District and Resident Magistrates' Court originating in Primary Court are vested to the court by s. 31 of the MCA. As to the decisions made by the District or Resident Magistrates' Courts in their original jurisdiction, the revisional powers are vested to the court by s. 44 (1) (b) of the MCA while powers of supervision are provided for under s. 44 (1) (a), Stating the scope of supervisory jurisdiction of the High Court under s. 44 (1) (a) of the MCA, the Court of Appeal stated as follows in the case of **Abdallah Hassani v. Juma Hamis Sekiboko**, Civil App. No. 22 of 2007:

"Under subsection 1 (a) the court acts ***suo motu****. Here the High court's powers are mainly administrative and not judicial as such. We are fortified in this view by the wording used. The court would give direction where necessary in the interest of justice and the courts shall comply with such directions without undue delay. This cannot be on merits of the case because the High Court cannot direct a lower Court what decision it should make and how .... Under this section in giving its orders, the High Court is not enjoined to contact any of the parties involved."*

The interpretation given to s. 44 (1) (a) of the MCA applies to s. 30 (1) (a) and (b) (1) of the MCA which has been cited by the applicants. There is no gain saying therefore that the applicants cited a wrong provision in moving the court to entertain the application for revision. The court cannot act under its supervisory jurisdiction to revise the decision of the District Court which finally determined the case because as succinctly stated above, the powers conferred by s. 30 of the MCA are mainly administrative.

It is trite law that wrong or non-citation of an enabling provision of law renders an application incompetent. The cases of **Citibank Tanzania Limited v. Tanzania Telecommunications Co. Ltd & 4 others** Civil Application No. 64 of 2003 (CA-Dsm)

(unreported) and **Chama cha Walimu Tanzania v. The Attorney General**, Civil Application No. 151 of 2008 (CA-Dsm) (unreported) are some of the authorities on that point. On the basis of the above reasons, the application is found to be incompetent and ought to be struck out.

Mr. Ludovick has prayed that the applicants be granted leave to file the application afresh. He did not however support his prayer with any authority. On his part Mr. Mcamanga argued that the prayer should not be granted because it has been raised as a view matter. I think, with respect, the prayer is based on procedural law and not a matter of fact. For that reason, the stage at which it was raised cannot be prejudicial to the opposite party.

The conditions under which a party may be allowed to re-file a suit when the same is discovered to have a formal defect are provided for under O. XXIII of the CPC. The basic condition is that an application for withdrawal should be made by the plaintiff. Applying that condition to the application at hand, the applicant ought to have applied for withdrawal of the application. Since however the prayer has come after the point of law has been raised **suo motu** by the court and because the application has been found to be incompetent, the prayer is not tenable. Granting leave may further prejudice an application for extension of time in case the applicants may wish to file a fresh application. In the case of **Fazal & co. Ltd. v. Barclays Bank (T) Ltd.** Civ. Application No. 112 of 2004 (CA-Dsm) (unreported), like in the case at hand, having

conceded that the application was incompetent, the learned counsel for the applicant prayed that if eventually the application is struck out, the applicant should be granted leave to re-file it. The Court of Appeal (Msoffe J.A.) had this to say:

> *"Their only point of departure lies on one major point: Whether or not the application should be struck out with liberty to refile. In my considered view, in the circumstances of this matter, it will not serve any useful purpose if I make a finding on that point. If I do so, there is a danger that I might end up prejudicing a future application (if any) for enlargement of time..."*

On the basis of the reasons stated above therefore, the prayer by the learned counsel for the applicants fails.

In the final analysis, the application is hereby struck out. Considering that the application arose from Probate and Administrator cause, I make no order as to costs.

A. G. Mwarija

JUDGE

27/8/2013

27/8/2013

Coram : A. G. Mwarija, J.

For the 1st Applicant } Mr. Ludovick

For the 2nd Appellant }

For the 1st Respondent } Mr. Mcamanga

For the 2nd Respondent }

CC: Butahe

Ruling delivered.

A. G. Mwarija

JUDGE

27/8/2013