

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

CIVIL REVISION NO. 2 OF 2013

PETER JOSEPHAT MULUMBA APPLICANT

VERSUS

**BAJI SHOMARI 1ST RESPONDENT
WINFRED MARO 2ND RESPONDENT**

Date of last order: 19/6/2015
Date of Ruling: 10.7.2015

R U L I N G

Feleshi, J.:

On 8th January, 2013, the applicant Peter Josephat Mulumba filed an application for revision of the judgment and decree of the District Court of Kinondoni (Hon. Mtarania – RM) in Matrimonial Cause No. 11 of 2006.

On 8th May, 2015, this Court ordered the application be argued and disposed of by way of written submissions to which, schedule for same was set. The parties complied with the requisite order by filing their respective written submissions as scheduled. However, in the course of submitting in reply to the applicant’s submission, Mr. Charles, Counsel for the respondent without the consent of the Court raised and argued a preliminary point of objection.

I would like to associate myself with the remarks made by Lord Templemen in **Ashmore v. Corp of Lloyds** [1992] 2 ALL ER 486 (HL) at page 493 that

“. . . It is the duty of the counsel to assist the Judge by simplification and concentration and not to advance Multitude of Ingenious arguments in the hope that out of ten bad points the Judge will be capable of fashioning a winner."

The counsel ought not to have raised and argued the preliminary objection not pleaded. His argument would have been in line with what he pleaded in his pleadings. Raising and arguing a new point not pleaded was improper approach, as doing so, was to try to make out the case on submission – This is an ambush against the adverse party. He will have no opportunity to attack the same. It is however, established law that a party should raise a preliminary objection by giving notice so as not to take the opposite party by surprise (See **Joseph Obeto V. Alli Suleman Khamis (HC)Commercial Case No. 16 of 2006** [unreported] where the court speaking through Massati, J. (as he then was) overruled a preliminary objection on the ground that it was not preceded by notice.

Basing on the reasons I have endeavoured to state and the preceding authorities cited, I will in composing my ruling ignore the argument on the preliminary objection and confine myself to the argument in respect of the application for revision filed.

Arguing in support of the application, Mr. Ibrahim Shineni, Counsel for the applicant submitted that there was material error on the Lower Court proceedings to which this court should invoke its revisionary power. He contended that as the trial court case record reflects, it appears that the case was scheduled for judgment on two different dates that is on 2/2/2011 and 4/2/2011. But the same was not delivered as scheduled. He submitted that the delivery of the said judgment was reserved and that the same was to be delivered on 22/2/2011. He either submitted that there is no proof of evidence showing that the judgment was delivered on 22/2/2011 as ordered.

With the differences in dates to which the judgment was to be delivered and in the absence of evidence showing the exactly date the judgment was delivered, the applicant is not certain and is in doubt as to whether the judgment was delivered. The Counsel either pointed out that the trial court proceedings were irregular and the judgment attached contravened the provision of Order XX rule 3 of the Civil Procedure Code, Cap 33 R.E 2002 which provides that;

"The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding Judge or Magistrate in the language of the Court and shall be dated and signed by such presiding Judge or Magistrate as of the date on which it is pronounced in open Court and, when once signed, shall not afterward be altered or added to, save as provided by Section 96 or on review".

To support further the counsel referred this to the case of **Ali Abdalla Amour and Abdalla Ali Abdalla v. Al-Hussein Sefudin (Safi Stores) [2004] LTR 316-a** Tanzania Zanzibar based case, in which it was stated inter alia that, judicial officers at all levels of the judiciary hierarchy are enjoined to adhere to Order XLVI Rule 31 of the Civil Procedure Decree and Order XX Rule 3 the Civil Procedure Code 1966 in Tanzania Mainland. The guidelines in those provisions are, with respect, too clear and unambiguous to require any further elucidation, all the more so at the High Court level.

In reply, the counsel for the respondent strongly resisted the application. He contended that the confusion of dates as alleged, cannot in any way form the basis of Court grant the application sought. He pointed out that the ground advanced ought to have been brought under appeal and not in revision.

I have carefully considered the argument advanced both in support and against the application. I also had an advantage of going through the trial Court proceedings dated 4/2/2011 and 22/2/2011. This is how is reflected;

4/2/2011

Coram:- Hon. Mtarania – RM

For the petitioner - Present in person

For the respondent – Absent

Mr. Charles (advocate) for respondent.

The matter is for judgment, we are ready to receive it.

Court

Since respondent is absent, lets the matter to be adjournment [sic].

Mr. Charles:

I proposed [sic] on 22/2/2011

Order: *Judgment be on 22/2/2011. Notice to the Respondent.*

*Sgd: Mtarania - RM
4/2/2011*

22/2/2011

Coram: - Hon. Mtarania – RM

Petitioner - Present (Mr. Charles Advocate)

Respondent – Present

Mr. Charles:

The matter is for judgment, I am ready to proceed with the judgment.

Court: *Judgment delivered in presence of petitioner and her advocate Mr. Charles and in presence of Respondent in personal.*

*Sgd.: Mtarania – RM
22/2/2011*

Right of Appeal explained.

*Sgd.: Mtarania – RM
22/2/2011*

It is clear from the trial Court proceedings that the composed judgment was signed on 2/2/2011 and set for delivery on 4/2/2011 but the same was not delivered on the due date as scheduled. The matter was then adjourned to 22/2/2011. It is on record and evident that the

judgment was delivered on 22/2/2011 in the presence of both parties and that the right of appeal was explained.

There is therefore no confusion as to the date the judgment was delivered as alleged by the applicant's counsel. With respect, I am unable to point out the material irregularity committed by the trial court to warrant the court exercise its revisionary power.

In the circumstance therefore, I will as hereby do, dismiss the application for lack of merit with costs.

DATED at Dar es Salaam this 10th July, 2015

A handwritten signature in black ink, appearing to read "E.M. Feleshi".

E.M. Feleshi
JUDGE

Ruling delivered on this 10th day of July, 2015 in the presence of Mr. Shineni, Advocate for the Applicant and Mr. Charles, Advocate for the Respondent.

A handwritten signature in black ink, appearing to read "E.M. Feleshi".

E.M. Feleshi
JUDGE
10.7.2015