IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 46 OF 2016

(From the Ruling and Order of the Resident Magistrate's Court of Dar es Salaam at Ilala dated 22.11.201 in Misc. Civil Application No. 32 of 2016)

ASHURA SAID MAKUKULA.....APPLICANT

VERSUS

HABIBU ABDALLAH SULTAN.....RESPONDENT

RULING

20 Dec. 2017 & 20 Feb. 2018

DYANSOBERA, J:

The applicant herein has filed this application praying for the following orders:

1. That this Honourable Court be pleased to call for the records and revise proceedings, ruling and orders of the Resident Magistrate Court of Ilala at Dar es Salaam (Hon. Hassan, SRM) dated 22nd of November, 2016 in Misc. Civil Application No. 230 of 2014 between the parties herein.
2. Costs of this application be provided for.
3. Any other relief(s) this court may deem fit and just to grant

The application has been made under sections 43 (2), 44 (1) (a) and (b) of the Magistrates' Courts Act, Cap. 11 R.E.2002 and

section 79 (1) and 95 of the Civil Procedure Code, Cap. 33 R.E.2002 and any other enabling provisions of the law.

The application is made by way of a chamber summons and supported by an affidavit sworn by the applicant.

The respondent in his counter affidavit, is resisting the application. He has also filed a notice of preliminary objection praying the application to be struck out with costs on the grounds that:

1. The application is incompetent as it does not fall within the provisions of sections 44 (1) (a) and (b) of the Magistrates' Courts Act, Cap. 11 R.E.2002 and section 79 (1) and 95 of the Civil Procedure Code, Cap. 33 R.E.2002
2. The application is incompetent as section 43 (2) of Magistrates' Courts Act, Cap. 11 R.E.2002 is not applicable to the matter.
3. The affidavit supporting the application is defective as it contains grounds of appeal instead of facts.

Briefly, the historical background of the matter is the following. The applicant herein and Amina Said Makukula, the deceased, had jointly filed a suit against the respondent on 22nd February, 1999 in the Ilala District Court vide Civil Case No. 11 of 1999 claiming that the purported transfer to the respondent of houses No. 35 Block 1, Kasulu Ilala and the other at Buguruni be declared null and void and an immediate vacant possession be given. On 28th November, 2012 a judgment was entered whereby the court declared that the purported transfer was null and void.

On 24th April, 2013 the respondent filed an application for extension of time within which to apply for review of the judgment in Civil Case No. 11 of 1999, the applicant was served but defaulted appearance and as a result, the extension of time was accordingly granted on 30.9.2013 and the respondent filed a memorandum of review on 3.10.2013 whereby the applicant was again served on 13.11.2013 but did not attend. The District Court proceeded ex parte on 26.1.2014 on 7.2.2014 the court reviewed the judgment and declared that the transfer of the properties was to the respondent was proper.

In April, 2014 the appellant filed an application for setting aside the ex parte ruling dated 7.2.2014 but the same application was dismissed on 22.11.2016 hence this application.

At the hearing of this preliminary hearing Mr. Ally Ismail, learned advocate stood for the applicant while the respondent was represented by Mr. Abraham Senguji, learned counsel. The preliminary hearing was argued in writing.

Supporting the first limb of the preliminary objection, Mr. Senguji told this court that there is nothing on record of the trial court calling this court to invoke the cited provisions of the Magistrates' Courts Act, namely section 44 (1) (a) and (b). He said that the applicant's right avenue is not to apply for revision but to appeal. According to him, there is no error material to the merits of the case involving injustice and that a revision is not an alternative to appeal.

Regarding the provisions of section 79 (1) of the Civil Procedure Code, learned counsel submitted that the High Court

can only exercise revisional powers under that section where the subordinate court appears to have exercised jurisdiction not vested in it by law, failed to exercise jurisdiction vested in it or acted in the exercise of its jurisdiction illegally or with material irregularity. It was learned counsel's contention that the record clearly shows that the Ilala District Court had jurisdiction to entertain the said application for extension of time and there was/ is not illegality or material irregularity surfaced in the process of entertaining the application for extension of time. On the application of section 44 (1) (b) of the Magistrates' Courts Act, this court was told that revision proceedings shall be initiated in situations where there has been an error material to the merits of the case involving justice. Referring to the decision in the case of **Kulwa Daud v. Rebcca Stephen [1987]** TLR, 116, where it was held that the revisional powers of the High Court may be invoked by any party to civil or on the motion of the High Court to correct an error resulting in injustice committed by a District Court or a Court of a Resident Magistrate.

On the application of sections 79 (1) (c) of the Civil Procedure Code and 44 (1) of the Magistrates' Courts Act, learned counsel reiterated that there is no such material error involving injustice committed by the District Court as the application was argued by both parties and the court delivered its ruling. No party was denied of his right of being heard. A case of **Halais Pro-Chemie v. Wella A.G** [1996] TLR, 29 was cited in support. This court was invited to find that there was no exceptional circumstances shown by the applicant warranting this court to invoke revisional jurisdiction.

Counsel for the respondent dropped the second limb of preliminary objection and proceeded with the third limb. On this point of point of preliminary objection, Mr. Senguji submitted that the applicant's affidavit in support of the chamber summons contravenes Order XIX (2) (I think learned counsel meant Order XIX Rule 3 (1)) of the Civil Procedure Code. He said that the grounds of appeal raised in the affidavit ask this Honourable Court to search and write a judgment. Also, that the affidavit contains arguments as shown in the paragraphs which state the grounds of appeal. In his view, the affidavit is defective. He relied on the case of **Salima Vuai Foum v. Registrar of Cooperatives Societies and three others** [1995] TLR 75 in which the Court of Appeal of Tanzania held that "as nowhere in the affidavit, either as a whole or in any particular paragraph, is it stated that the facts deposed to or any of them, and if so, which ones, are true to the deponent's knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice.....". learned counsel for the respondent was of the view that the affidavit of the applicant suffers such defects and should be rejected which means that there is no application before his Honourable Court to support the chamber summons. It is prayed for the respondent that the application be dismissed with costs for contravening the law.

In reply, counsel for the applicant contended that learned counsel for the respondent has gone off track by arguing the merits of the application for revision instead of the preliminary objection. He submitted that the preliminary objections are pure points of law. He relied on the case of **Mukisa Biscuits Manufacturing**

Company Ltd v. West Ends Distributors Ltd, (1969) EA 69. He asked the preliminary objection to be dismissed.

In response to the preliminary objections, learned counsel for the applicant stated that the argument that the application is incompetent while at the same time saying that it is proper is but confusing. Counsel for the applicant said that the application on hand is proper. He explained that section 44 (1) (a) and (b) of the Magistrates' Courts Act is a provision that confers power to the High Court of supervision and revision and that the respondent is, through the preliminary objection, intending to block access to justice. It is contended on part of the applicant that whether or not there is a material error or material irregularity under sections 44 (1) and 79 of the Magistrates' Courts Act and Civil Procedure Act, respectively will be determined upon the application for revision being heard. This court was told that the defects, if any, are curable. A number of authorities were cited to support this contention.

As to the affidavit being defective which is a third point of preliminary objection, counsel for the applicant stated that the affidavit is proper and has been filed in accordance with Order XLII Rule 2 of the Civil Procedure Code. It is submitted that the respondent has failed to show how the affidavit does not contain the statement of facts but contains grounds of appeal and that nowhere in the applicant's affidavit where the grounds of appeal are stated.

As to the argument that the applicant's proper course was to prefer an appeal instead of revision, Counsel for the applicant told

this court that the applicant had choice either to appeal or apply for revision depending on the circumstances which are determined on the merits of the application. Mr. Aly Ismail was of the view that the preliminary objections raised by the respondent is based not on a point of law but on the merits of the revision. Disputing the affidavit to have contravened the provisions of Order XIX Rule 2 of the Civil Procedure Code, learned counsel told this court that counsel for the respondent has failed to show which paragraph are offensive to the law and the case of **Uganda v. Commissioner of Prisons Ex-parte Matovu**. In fact, learned counsel for the applicant was of the view that the case of **Salima Vuai Foum v. Registrar of Cooperatives Societies and three others** (supra) is distinguishable from the present application in that the said case referred to the paragraph confirming the statements made to be true in his belief/knowledge, the source of the deponent's information, that in other words, verification clause which in the applicant's affidavit the source is stated hence rendering the affidavit competent.

As far as the first preliminary point of objection on the competence of this application is concerned, it is the respondent's argument that the application does not fall within the provisions of section 44 (1) (a) and (b) of the Magistrate's Courts Act [Cap 11 R.E.2002] and section 79 (1) of the Civil Procedure Code [Cap 33 R.E.2002]. The argument in support of this point is that there is no error material to the merits of the case involving injustice and that a revision is not an alternative to appeal. On the application of section 79 (1) of the Civil Procedure Code, it is contended on part of the respondent that the that the High Court can only exercise

revisional powers under that section where the subordinate court appears to have exercised jurisdiction not vested in it by law, failed to exercise jurisdiction vested in it or acted in the exercise of its jurisdiction illegally or with material irregularity.

In responding to this first preliminary objection, counsel for the applicant is arguing that counsel for the respondent has gone off track by arguing the merits of the application. In his view, this cannot be a preliminary point of law.

Section 44 (1) (a) and (b) of the Magistrate's Courts Act [Cap 11 R.E.2002] provides as hereunder:

> **44.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–**
>
> **(a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay;**
>
> **(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 sees fit:**

Provided that no decision nor order shall be made by the High Court in the exercise of the jurisdiction conferred by paragraph (b) of this subsection, increasing any sum awarded or altering the rights of any party to his detriment, unless the party adversely affected has been given an opportunity of being heard.

While section 79 (1) of the Civil Procedure Code run as follows:

79.-(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears–

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

Here, what the law says is that the High court under paragraph (a) sub-section (1) of section 44 of the Magistrates' Courts Act has, in its **supervisory** jurisdiction, the power to call and inspect the records of the mentioned subordinate courts and give directions as it may consider necessary in the interest of the case and the courts have to comply with those directions without

undue delay. This provision applies where the subordinate court concerned is yet to give its final decision.

Under paragraph (b) of sub-section (1) of the Act the High Court has power of **revision** in any proceedings of a civil nature determined, on application or of its own, if it appears that there is an error material on the merits of the case, involving injustice for the record of any case, to revise the proceedings and make such decision or order as it sees fit.

The power of the High court under section 79 (1) of the Civil Procedure Code to call for the record of any case which has been decided by any court subordinate thereto and such subordinate court appears either to have exercised jurisdiction not vested in it by law, or to have failed to exercise jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Although I have no doubt that what counsel for the respondent has submitted on the application of the said legal provisions is the proper position of law, I am, however inclined to agree with counsel for the appellant that such arguments advanced in the first preliminary objection are points of law worthy its name.

The reason is not far-fetched. A preliminary objection is a pure point of law whose determination could dispose of the whole application. It takes no account of the validity of the claims by the plaintiff, the applicant, for that matter. Preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence.

Whether or not the application falls within the provisions of sections section 44 (1) (a) and (b) of the Magistrate's Courts Act [Cap 11 R.E.2002] and section 79 (1) of the Civil Procedure Code [Cap 33 R.E.2002] hence meritorious or not is a substantive issue to be determined by the court upon hearing the parties/advocates. In other words, a preliminary objection is a pure point of law which does not require close scrutiny or examination of the affidavits or counter affidavits.

I now turn to the third point of objection. There is no dispute that this application for revision has been filed under, among others, section 79 (1) of the Civil Procedure Code. As provided for under Order XLIII rule 2 of the said Code, applications have to be made by chamber summons supported by affidavit. In the words of the Code, "Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

> Provided that the Court may where it considers fit to do so, entertain an application made orally or, where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates, or in such other mode as may be appropriate having regard to all the circumstances under which the application is made.

In the instant application, that is what the applicant has actually done. The affidavit supporting the chamber summons must, however, conform to the requirements stipulated under XIX rule 3 (1) of the Civil Procedure which requires:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory, on which statements of his belief may be admitted:
Provided that the grounds thereof are stated".

In this application, it is argued on part of the respondent that the affidavit supporting the application is defective as it contains grounds of appeal instead of statements of fact. With respect, I agree.

An affidavit is a formal legal document, sworn to be true and it is evidence that the facts it sets out are true and in the deponent's knowledge. It is trite that the contents of the affidavit must be statements of facts, which should be based on the personal knowledge of the deponent or from information which the deponent believes to be true. Besides, an affidavit should also not contain extraneous matters by way of objection, prayer, legal argument or conclusion. This requirement was emphasised in the case of **Uganda v. Commissioner of Prisons, ex parte Matovu** [1966] E.A.514 it was stated that:

"...as a general rule of practice and procedure and affidavit for use in court being a substitute for oral evidence should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

In the instant application, the averments in sub-paragraphs (a), (b), (c), (d), (e), (f) and (g) of paragraph 13 of the applicant's

affidavit are not only clear violative of section XIX rule 3 (1) of the Civil Procedure Code but also fit to be grounds of appeal in a memorandum of appeal rather than being a review. For instance, whether or not the Hon. Magistrate erred in law and in fact cannot be said to be the statement of facts in the applicant's own knowledge but the wording purely amounts to grounds of appeal. These are extraneous matters offending the principles set out in the **Commissioner of Prisons, ex parte Matovu's** case.

As paragraph 13 of the affidavit is the gist of this application and grounds upon the whole application for revision rests, severance of it from other paragraphs will cripple the whole application. This is explicit in the applicant's own where at paragraph 14 of his application states:

> "that in the light of what I have shown in paragraph 13 above, injustice has been occasioned to me by the ruling and order passed on the 22nd November, 2016 at the Resident Magistrate Court of Ilala at Dar es Salaam, Hon. Hassan, SRM."

The applicant's affidavit is incurably defective and cannot support this application. Since under the law every application must be brought by way chamber summons supported by an affidavit and this court having found that there is no affidavit supporting this application, the application is incompetent.

With those reasons, the first limb of preliminary objection is overruled. The third limb of the respondent's preliminary objection is upheld. The application which is incompetent before this court is struck out with costs.

Order accordingly.

W. P. Dyansobera

JUDGE

20.2.2018

Delivered at Dar es Salaam this 20th day of February, 2018 in the presence of Mr. Ally Ismail, learned counsel for the applicant and Mr. Abraham Senguji, learned advocate for the respondent.

W. P. Dyansobera

JUDGE