

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION NO. 35 OF 2017**

(Arising from the Ruling and order of the District Court of Ilala at Ilala by Hon. Luhwago, RM, delivered on September 9, 2016 in execution cause no. 5 of 2011 between Justin K. Moshi v. Toyota Tanzania Limited and 2 others)

BETWEEN

TOYOTA TANZANIA LIMITED.....APPLICANT

AND

JUSTIN JOEL K. MOSHI.....RESPONDENT

RULING

Date of last Order: 31/07/2019

Date of Ruling: 11/10/2019

MLYAMBINA, J.

The applicant herein had filed an application for extension of time to appeal out of time against the Ministerial Order Ref. No. KZ/U10/RF 7595/8 issued on 21st December, 1999. On 28th day of September, 2017 this Court granted such application. For reasons well known to the applicant the appeal applied was not filed within time.

Consequently, the Decree Holder lodged Execution Cause No. 5 of 2011 before the Ilala District Court successfully.

The applicant has therefore lodged this application under **Section 43 (2) and 44 (1) (b) of the RM'S Court Act Cap 11 (R.E 2002,) Section 79 (1) (a) and (c) of the Civil Procedure Code, Cap 33 (R.E 2002)** Seeking for:

1. The Hon. Court be pleased to call for the record and proceedings of the District Court of Ilala (Hon. Luhwago, RM) in execution Cause No. 5 of 2011 between Joel K. Moshi and Toyota Tanzania Limited and having done so, to satisfy itself to the legality and propriety of the order made and proceedings to satisfy itself in particular of;
 - a) Whether it was proper and correct for the District Court to hold and find that the Ministerial Order had not been fully implemented.
 - b) Whether it was proper and correct for the District Court to order execution of the Ministerial Order to proceed against the applicant who was not a party to the original proceedings.
 - c) Whether the District Court had jurisdiction to preside over the execution proceedings arising from the order of The Minister of Labour.
 - d) Whether it was proper for the District Court to extend time for execution of the Ministerial Order dated 21st December, 1999.
2. Upon finding that there is material irregularity and illegality in the proceedings leading to injustice, the Hon. Court be pleased to make the following orders:

- a) Quash and set aside the proceedings and order of the District Court in Execution Cause No. 5 of 2011.
- b) Costs for this application; and
- c) Any other relief (s) that the Honorable Court may deem fit and just to grant in favour of the applicant.

In reply, the respondent raised a plea in *limine litis* centre of this ruling on point that:

“This application is incompetent and devoid of merits and it need be dismissed with costs”

The main argument of the respondent was that the applicant upon been granted with leave to appeal by my brethren Madam Judge Mruke on 28/09/2017, they ought to have filed the appeal to challenge the order/decision subject of execution. Instead, the applicant never filed such appeal.

In view of the respondent, the act of the applicant of obtaining leave to appeal out of time but remaining silent is civil contempt.

The applicant in reply were of view that the objection is misplaced because *Section 38 (1) of the Civil Procedure Code* bars challenging any decision arising from execution proceedings by appeal. Thus, the available remedy for him is to apply for revision. The applicant went on to state that it is a settled principle of law that a party to

the proceedings in the Court may invoke the revisional jurisdiction of the Court in matters not appealable. In that regard, the applicant cited the case of **Halais Pro-Chemie v. Wella A.G (1996) TLR 269** where the court stated:

"A party to proceedings in the High Court could invoke the revisional jurisdiction of the Court in matters which were not appealable with or without leave"

I have carefully gone through the submissions and the pleadings of the parties, I'm of equal position with the respondent that the grounds of revision in this application ought to be brought by way of appeal, the right of which the applicant was accorded by this court through the Ruling in **Misc. Application No. 25 of 2017 dated 28th September, 2017.**

I have noted further that the applicant was aware when filing this application that he ought to have lodged his appeal after obtaining leave of the Court. I say so because under paragraph 8 of the affidavit in support of the instant application the deponent one Gaspar Nyika has sworn untrue facts by telling this Court that the applicant was granted two weeks within which to file its application for revision. To be precise, I will quote paragraph 8 of the affidavit of Gaspar Mnyika dated at Dar es Salaam on 12th October, 2017.

"That hearing of this application proceeded and ruling delivered on September 28th 2017 by Hon. Mruke Judge granting the applicant 2 weeks within which to file its application for revision..."

After going through the said decision of my brethren Madam Judge Mruke, I noted without flicker of any doubt, that the applicant was not given leave to file revision. The applicant was given leave to appeal out of time but opted not to use such right. The applicant waited for execution proceedings and then come by way of revision of the execution orders with the grounds muchly qualifying to have been brought by way of appeal against the original decision.

In the premises of the above, the *plea in limine litis* is hereby sustained with costs. It is so ordered.



Y. J. MLYAMBINA
JUDGE
11/10/2019

Ruling dated and delivered this 11th day of October, 2019 in the presence of Arwa Yusufali advocate for the applicant and the respondent in person. Right of Appeal explained.

A handwritten signature in black ink, appearing to read 'Y. J. Mlyambina', is written over the typed name and date. The signature is fluid and cursive, with a large loop at the end.

Y. J. MLYAMBINA
JUDGE
11/10/2019