

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL REVISION NO 36 OF 2018

(Arising from Misc. Civil Application No. 13 of 2018 at Kilombero District Court)

JESCA FRANCIS MTONYA.....APPELLANT

VERSUS

VICTOR NYONI.....1ST RESPONDENT

ISMAIL LIMBENGA.....2ND RESPONDENT

PROPERTY MASTERS LIMITED.....3RD RESPONDENT

RULING

Date of last Order: 09/10/2019

Date of Ruling: 27/12/2019

MLYAMBINA, J.

The application at hand has been originated under *Section 79 (1) of the Civil Procedure Code Cap 33 (R.E. 2002)*. The applicant has basically prayed for this court be pleased to call for and examine the records of the trial District Court in respect of Misc. Civil Application No. 13 of 2018 and satisfy itself as to whether the trial tribunal has properly exercised its powers. The other prayer is for this Court be pleased to revise the records of the trial District Court in Misc. Civil Application No. 13 of 2018, set aside orders and nullify all proceedings thereof on account of material irregularity.

The application has been supported with an affidavit of the applicant one Jesca Francis Mtonya. Paragraph 2-7 of the supporting affidavit runs as follows:

- 2. That, I filed Misc. Civil Application No. 13 of 2018 at Kilombero District Court seeking revision of the judgement of the trial court in respect of Civil Case No. 25 of 2017 which was decided in favour of the respondents herein.*
- 3. That, the said case Misc. Civil Application was decided in favour of the respondent herein rendering failure of justice.*
- 4. That, the orders arising from Misc. Civil Application No. 13 of 2018 at Kilombero District Court are materially irregular, incorrect, illegal and disgrace integrity of judicial proceedings.*
- 5. That, in giving its decision and orders, the trial court did not consider the fact that the attached house is a residential house that is, by law excluded from attachment and sale.*
- 6. That, the trial court materially erred at law for its failure to appreciate the fact that the third respondent was not appointed to execute the order of the court.*
- 7. That, the trial court improperly ordered attachment and sale of residential house contrary to the demand of laws of the land.*

In his counter affidavit, the 1st respondent noted paragraph 2 and 3 of the supporting affidavits to the extent that the applicant filed Misc. Civil Application No. 13 of 2018 at Kilombero District Court seeking revision of the judgement in Civil Case No. 25 of 2017.

The 1st respondent disputed that the matter was decided in favour of all respondents since it was decided in favour of the 2nd respondent only.

The 1st respondent went on to admit the contents of paragraph 4 of the supporting affidavit on account of six reasons;

One, the 2nd respondent filed a Civil Case No 25 of 2017 which was the origin of Misc. Civil Application No. 13 of 2018, after the 1st and 2nd respondents had made prior agreement in which the 1st respondent agreed to refund the 2nd respondent TZS 1000,0000/= which was being claimed by the 2nd respondent.

Two, the proceedings in Civil Case No. 25 of 2017 were conducted and ex-parte judgement was entered in the said civil case no. 25 of 2017 without the knowledge of the 1st respondent as no summons was served on the 1st respondent.

Three, no any evidence was tendered by the 2nd respondent to prove the case against the 1st respondent.

Four, the evidence which was used by the 2nd respondent was irrelevant as he showed the bank loan which was obtained by the 2nd respondent prior to contract with the 1st respondent. Yet, the trial Magistrate relied on such irrelevant evidence to determine the case in favour of the 2nd respondent.

Five, the judgement was illegal and irregular since the trial Magistrate ordered the 1st respondent to pay 31,000,000/= as contractual sum and general damages of 24,000,000/= without analyzing how TZs 8,000,000/= which was the amount claimed in plaint yielded TZs 31,000,000/= as contractual sum and gernal damages of 24,000,000/=.

Six, the trial Court erred in law and fact by relying on false testimony of the 2nd respondent which did not disclose the transaction which the 1st and 2nd respondents had entered of selling Irish potatoes in which the 2nd respondent contributed TZs 2,300,000/= and the 1st respondent contributed TZs 2,100,000/= the transaction which failed due to frustration .

Further the 1st respondent admitted that the house in issue is both the residential and matrimonial home for the applicant and the 1st respondent, which was acquired by their joint efforts, hence it is unfair for the same to be attached in a matter in which the applicant was not a party, and neither consented to.

It was deposed by the 1st respondent that the assertion by the 2nd respondent that, the house in issue was for business, the 1st respondent and the applicant have another house with 5 rooms; and the applicant is not a lawful wife of the 1st respondent are

nothing but lies, since the 1st respondent contracted lawful marriage with the applicant in the year 1990 and they have only the house in issue.

The 1st respondent deponed that, him and the applicant stand to suffer irreparable loss since they have no any other house and they have no other means to acquire another house since they started to build the house in issue since 1990 immediately after contracting their marriage and for now they have no good in come as whatever they get is used for the upkeep of their 3 children. The 2nd respondent has nothing to suffer if retrial shall be ordered for the matter.

On the part of the 2nd respondent, in his counter affidavit, disputed the claim that the impugned decision occasioned failure of justice. It was further averred by the 2nd respondent that the 3rd respondent were duly appointed to execute the matter. The 2nd respondent averred more that the applicant lacks locus stand and the attached house is semi-finished for the purpose of guest house.

From the afore records and submissions of all parties, I have noted this application for revision was improperly preferred before this court.

There is no dispute that the applicant was not a party in civil case no 25 of 2017. For that reason, the applicant would be entitled to file revisional proceedings against the decision in Civil Case No. 25 of 2017. But the applicant never did so in the *case Mgeni Seif v. Mohamed Yahaya Khalfani, Civil Application No. 104 of 2008 (unreported)* the applicant was not a party in the original suit, being unsuccessful in the objection proceedings when contesting ownership of the house, was granted extension of time to file the intended revision after the court observed that, since the applicant did not have a right of appeal, the only avenue open was for the applicant to file revision.

Again, there is no dispute that the applicant filed Misc. Application No. 13 of 2018 before the District Court of Kilombero her application was refused. Instead of filing an appeal, the applicant preferred this revisional proceedings.

At the hearing of this application, the applicant merely told this court that she preferred this application because of her weak financial ability. That, she could not file an appeal.

The applicant went further to tell the court that the lawyer told her that it is expensive to file an appeal in this court. Thus, she found it

was easy for her to file this application as it costed her less than 50,000/=.

It is the finding of this Court that the allegation on financial inability to file appeal lacks legal weight. The reasons are that there are legal aid facilities provided to such kind of people. Section 21 (1) of The Legal Aid Act of 2017 gives a room to people of the applicant type to access legal aid. For such reasons, there could be no any cost for filing the appeal section 21 (1) (supra) provides:

"An indigent person who intends to receive legal aid may approach any legal aid provide and apply for legal aid services."

The Court of Appeal and this Court has in a number of accessions maintained that when a person is aggrieved with a decision of the court in its original jurisdiction has as a matter of right to appeal to the next higher court. The court has further maintained that revisional jurisdiction can be exercised in appropriate circumstances. Revisional proceedings is allowed only when there is no right of appeal or where the right of appeal has been blocked by judicial process. (see the case of *Grand Regency Hotel Ltd v. Pazi Ally and 5 Others*, Civil Application No. 588/1 of 2017 Court of Appeal of Tanzania (unreported)

Before I pen off, I must observe that the 1st respondent, if aggrieved with the trial Court decision, he had the right to appeal after unsuccessful process of setting aside the ex-parte judgement.

In the circumstances, I hereby dismiss this application for being incompetent before the Court. Considering the entire facts of this case, let costs be shared. It is so ordered.



Y. J. MLYAMBINA
JUDGE
27/12/2019

Ruling delivered and dated this 27th December, 2019 in the presence of the Applicant, 1st Respondent and 2nd Respondent in person.



Y. J. MLYAMBINA
JUDGE
27/12/2019