

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA.

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISC. CIVIL APPLICATION NO.9 OF 2019

(Arising from Matrimonial Appeal No.01 of 2007 of Njombe District Court)

YOHANA SANGA APPLICANT

VERSUS

YOKOBETH SANGA RESPONDENT

30/4 & 19/5/2020

RULING.

MATOGOLO, J.

The applicant one Yohana Sanga filed an application for revision before this court. The application is by way of Chamber summons made under section 79(1)(a) of the Civil Procedure Code (Cap 33 R.E 2002). The same is supported by an Affidavit sworn by the applicant. The applicant is praying for the following orders;

- (i) *That, this honourable court be pleased to call for the record of the Njombe District Court in execution of Matrimonial Appeal No.1 of 2007 to revise the same and satisfy itself and give directives as to whether Njombe District Court had jurisdiction to hear and determine a petition for division of matrimonial*

properties subsequent to the grant of divorce decree by the Lupalilo Primary Court, in Makete District Court.

(ii) That, this honourable court be pleased to revise the said proceedings and give directives as to whether the Njombe District Court can execute a decree in relation to division of matrimonial assets subsequent to the divorce decree by the Lupalilo Primary Court in Makete District.

(iii) That, an order for costs be provided.

The brief background of the matter is that the parties contracted a marriage in Makete District under Christian rites and the same was dissolved by the Primary Court of Lupalilo on 14/01/2002. The primary court made no orders for division of matrimonial properties subsequent to the dissolution order since none was sought. Years later the respondent petitioned for division of matrimonial properties in the same Primary Court and later on upon request by the respondent the case was transferred to Njombe District Court, the case ended against the respondent who successfully appealed to this court where the division of 50 percent was ordered. The respondent applied before this court for an execution of decree, this court ruled that the application for execution of decree must be made in the District Court of Njombe which is the court of first instance. This application was argued by way of written submissions.

At the hearing of this application, the applicant was represented by Mr. Ngafumika the learned Advocate, while the respondent appeared herself (unrepresented).

Mr. Ngafumika submitted that the marriage between the parties hereto was contracted in Makete District in Christian rites, and the same was dissolved by a divorce decree of the Lupalilo Primary Court, which made no orders for division of matrimonial properties since none was sought.

Mr. Ngafumika submitted further that years later the respondent petitioned for the division of matrimonial properties in the same Lupalilo Primary court. The respondent upon closure of his evidence, requested for the transfer of the case to a District Court, but unfortunately instead of filing the matter in the District Court of Makete, she petitioned for division of matrimonial assets at the District Court of Njombe.

He submitted further that the District Court of Njombe decided against the respondent and on appeal the said decision was reversed and a division of 50 percent was ordered. The learned counsel went on stating that the respondent applied for execution in the High Court, the application which met with the preliminary objection to the effect that the High Court does not have jurisdiction to execute its decree passed while exercising appellate jurisdiction.

Mr. Ngafumika submitted further that the respondent filed an application for execution of decree at Njombe District Court but that court too had no jurisdiction to deal with division of matrimonial assets for a marriage which was contracted in Makete District and dissolved by the Primary Court of Lupalilo which is also situated in Makete District.

Mr. Ngafumika contended further that where a divorce is granted by one court, it is the same court which remains with jurisdiction to make orders regarding division of matrimonial assets. And even if the orders of division of matrimonial assets are not sought in the petition for divorce, a party may subsequent to the grant of divorce return to the same court and apply for the division of the assets. To support his argument he referred this court to a case of ***Fatuma Mohamed versus Said Chikamba [1988] TLR 129*** in which the court held;

"Where a petitioner seeks and obtains a decree of divorce without at the same time asking for an order of division of matrimonial assets, and lodges the claim for division later, the claim for division must be filed in the same court but need not to be heard by the same magistrate and certainly there must be a different file".

It is the argument by Mr. Ngafumika that the court with jurisdiction to entertain the question of division of matrimonial assets is the Primary Court of Lupalilo the one which granted the divorce decree and not any

other court as the said Primary Court is situated in Makete District and it does not fall within Njombe District.

Mr. Ngafumika prayed before this court that this honourable court may be pleased to find that the District Court of Njombe does not have jurisdiction to deal with division of matrimonial assets subsequent to a divorce decree issued by the Primary Court of Lupalilo situated in Makete District.

In reply the respondent submitted that it is hard to comprehend as to why the learned counsel for the applicant is now insisting that the proper court to execute the division of matrimonial property is the Primary Court of Lupalilo in Makete District which had issued a decree of divorce. The respondent submitted further that it is hard to comprehend because the learned counsel for the respondent while arguing in the application for execution No.7 of 2016 before the Deputy Registrar at Iringa on 16/09/2016 stated in very clear language as follows;

"Mr. Frank Ngafumika, Advocate:-

"We are not objecting the said decree that it was signed by High court, and the matter came to this court as an appeal. Njombe District Court discussed about division of matrimonial, so that the court of 1st instance is Njombe District Court, so I pray that the application before this court to be dismissed with costs".

The respondent submitted further that this court is *functus officio* to deal with this matter again and above all it will be unusual for one learned Judge of the High Court to overrule what has already been decided by a fellow judge. It is the submission of the respondent that the applicant is bringing this matter again although it has already been decided by Madam Justice Shangali that an application for execution must be made in the District Court of Njombe which is the court of first instance.

The respondent further submitted that the applicant had already sent this matter to the Court of Appeal of Tanzania Claiming about the same matters as in this application vide Application No.1 of 2011, the application which was struck out with costs. The respondent prays to this court to dismiss this application with costs.

In rejoinder Mr. Ngafumika reiterated what he submitted in submission in chief and he added that the High court did not discuss the point as to whether a District Court enjoys jurisdiction to order division of matrimonial properties for a marriage which was dissolved by a primary court located in another District. He submitted that the question is now before this court which is called upon to decide.

He argued that the District Court of Njombe does not have jurisdiction to deal with division of matrimonial assets subsequent to a divorce decree issued by the Primary Court of Lupalilo situated in Makete District.

Having read the respective submissions from the parties and upon perusal of court records, the crucial issue to be determined here is whether this application has merit.

Black's Law dictionary (9th Edition) defines the word revision as a re-examination or careful review for correction or improvement or altered revision of work.

Also in the case of ***Mabalanganya versus Sanga [2005] E.A 15*** the Court of Appeal of Tanzania held;

"in cases where it exercise its revision jurisdiction under section 4 of the Appellate Jurisdiction Act, its duty entails examination by the Court of the record of any proceedings before the High court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings before the High Court"

The above finding set by the Court of appeal of Tanzania would properly apply to this court in its revisional jurisdiction which is provided for under section 79(1) (a) of **the Civil Procedure Code** as follows;

"The High Court may call for the records 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 to have exercised jurisdiction not vested in it by law”.

The same position is provided under section 44 (1) (b) of the Magistrates Courts Act, Cap.11 R.E. 2002, as follows:-

"44(1) In addition to any other powers in that behalf, conferred upon the High Court, the High Court

(a).....

(b) May, in any proceeding of a civil nature determined in a District Court or 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 error material to the merit of the case, involving injustice, revise the proceedings and make such decision or order therein as it sees fit”.

The applicant in this application prays before this court to give directive whether that Court can execute the decree in relation to division of matrimonial assets subsequent to the divorce decree issued by the Primary Court of Lupalilo in Market District. While I agree with Mr. Ngafumika’s contention that an application for division of matrimonial assets subsequent to dissolution of the marriage ought to have been lodged in the same court that dissolved the marriage, the court record reveals that the respondent petitioned for division of matrimonial assets in the District court Njombe and an appeal therefrom lied to this court. The

successful respondent filed an application before this court, No.7 of 2016 for an execution of decree which was placed before Justice Shanghali J (as he then was), who ordered that the application for execution must be made in the District Court which is the court of first instance.

For that reason I subscribe to the position taken by the respondent that this court is *functus officio*, because the matter was already decided by this court, it cannot be brought before it again on the same question.

In my opinion if the applicant was aggrieved with the decision made by Hon Madam Shanghali, J. he was supposed to appeal to the Court of Appeal and the applicant ought to know that revision is not an alternative to appeal the same as it was held in the case of ***Transport equipment Ltd vesus Devram P.Valambhla***[1995]TLR 161,the court held;

"Except under exceptional circumstances, a party to a proceedings in the High Court Cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court".

Also in the case of ***Moses Mwakibete V. The Editor Uhuru and two others*** [1995] TLR 134, the Court held;

"The revisional powers conferred by section 2(3) were not meant to be used as an alternative to the appellate jurisdiction of this court, unless it is acting on its own motion ,

cannot properly be moved to use its revisional powers under section 2(3) of the Act in cases where the applicant has the right to appeal with or without leave and has not exercised such option”.

Although the above quoted decision is by the Court of Appeal for decisions made by this court, this equally applies to this court for matters decided by courts subordinate to it as demonstrated above. It is evident from the Court records that the applicant having been dissatisfied with the decision of the High Court in Miscellaneous Application No.7 of 2016 he intended to appeal to the Court of Appeal, but the application was struck out as the same was filed out of time. The applicant being represented by the learned counsel who is knowledgeable in court rules ought not to opt for this course of action. The proper channel was to appeal and not to challenge the decision by revision. Basing on the above reason I find the first complaint as baseless, the same ought to be disregarded.

With regard to the second complaint that the District Court of Njombe does not enjoy jurisdiction to deal with the question of division of matrimonial properties following the divorce decree granted by Lupalilo Primary Court. This complaint also is baseless, the applicant from the beginning he was represented by the learned Counsel, he was required to challenge and address the court regarding this issue through an appeal and not revision. But let us assume that Mr. Ngafumika would be right to

initiate the application, is it the opportune time to raise it now?. Fortunately that the applicant has always been represented by counsel from the beginning issue of division of matrimonial assets has started. Mr. Ngafumika has been in conduct of this case for quite a long time. If he had any observation regarding the jurisdiction of the District Court of Njombe to hear and determine the petition for division of matrimonial assets, he would have raised it earlier. But he did not do so until the matter reached this court on appeal. The present applicant further appealed to the Court of Appeal but he did not prosecute his appeal which was later struck out.


Again when it comes to the question of execution of the decree relating to division of matrimonial assets made, the matter reached this court again. This time Mr. Ngafumika was seeking direction as to which is the proper court for the purpose of execution of the decree passed by this court on appeal, the direction which was given. The learned counsel cannot come again with the same issue of jurisdiction which ought to have been raised at the beginning. Suppose this argument is entertained and this court decide otherwise, will that decision have the effect of nullifying its two previous decision as well as that of the Court of Appeal?. I am of the firm view that justice would not be triumphed by the courts of law engaging themselves in legal technicalities instead of dispensing substantial justice as encouraged in the wake of the principle of overriding objective brought in by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2018. The issue Mr. Ngafumika is raising now has not been raised by his predecessor advocates who represented the applicant before. There is no

doubt that no any party was prejudiced for the application to be filed in the District Court of Njombe such that there is no compelling reason for Mr. Ngafumika learned counsel to raise this issue now. It is trite law that litigations must come to an end, and more so taking into account the fact that from 14th January, 2002, the date the marriage of the parties was legally dissolved it is now 18 years they have been moving around court corridors, this cannot be more tolerated.

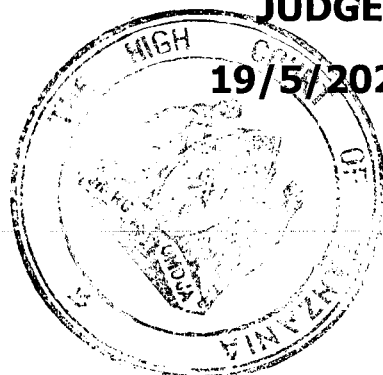
Apart from the fact that the point raised by the learned counsel in his application cannot assist the parties, it is my considered opinion that the applicant has not properly moved this court and has not brought exceptional circumstances that would legally justify for him to resort to the revisional powers of this court, instead of its appellate jurisdiction.

This application therefore is incompetent before this court for being preferred as an alternative to an appeal. The same is hereby dismissed with costs.

It is so ordered.


F.N. MATOGOLO
JUDGE

19/5/2020.



Date: 19/05/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Applicant: Absent
Respondent: Present
C/C: Grace

COURT:

Ruling delivered today the 19th day of May, 2020 in the absence of applicant and his advocate Mr. Ngafumika but in the presence of the respondent.


F.N. MATOGOLO
JUDGE
19/5/2020.

