**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**MISC. CIVIL APPLICATION No. 118 OF 2018**

*(Arising from Civil Case No. 46/2017 and Misc. Civil Application No. 32/2018)*

**THE DEPOSIT INSURANCE BORD**
**THE LIQUIDATOR OF FBME BANK**
**LIMITED UNDER LIQUIDATION..... APPLICANT**

**VERSUS**

**ANAMARY BRONKHORST.....RESPONDENT**

**RULING**

**13th May & 10th July, 2020**

**TIGANGA, J.**

In this Application the applicant, in the chamber summons filed under section 44 (1) (b) of the Magistrate's Court Act [Cap 11 RE 2019] and any other enabling provision of the Law applies for the following orders;-

i. That this court be pleased to call for the record of proceedings of the Resident Magistrate Court of Mwanza at Mwanza in Miscellaneous Civil Application No. 32 of 2018 for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings, the ruling and order dated 19th July 2018.
ii. Costs be provided for and.

iii. Any other orders or relief as the court may deem fit to grant.

The chamber summons was supported by the affidavit of one Rashid Mrutu, an Advocate of the High Court, and a principal officer of the Deposit Insurance Board (DIB), the liquidator of FBME Bank Limited under liquidation.

The facts in the affidavit, over and above narrating the background, of the dispute between the parties, it deposed that, in Civil Case No. 46 of 2017, the current applicant was the defendant while the Respondent was the plaintiff, and the claim was the payment of Tshs. 150,000,000/= arising from the alleged misallocation of the plaintiff's money by the defendant.

It is also deposed that after the pleadings were complete, the first pre trial conference and mediation were also conducted and completed, as well as the scheduling order, and while the case was at the stage of Final Pretrial conference, the applicant was served with the application for discoveries filed by the respondent there in which was registered as Misc. Civil Application No. 32 of 2018.

It is also deposed that the applicant in this application who was the respondent in that application filed the counter affidavit and the preliminary point of objection challenging the application which was questioning the competence of Misc. Civil Application No. 32/2018, without first seeking a departure from the scheduling conference order.

It is further deposed that after hearing of preliminary objection, the trial court held that, it was unfounded and baseless, consequent of which it was struck out. That was followed by the hearing of the said application in which the current applicant contested both the legality and merit of the application for discovering. Although, according to the deponent, the application did not specify in clear terms the documents sought to be produced and the said documents were irrelevant to the relief sought in Civil Case No. 46/2017 yet still the same was granted on 19/07/2018.

It is further more deposed that, the grant of the application placed the applicant at risk of having their written statement of defence struck out, and that since the applicant did not have the right to appeal against the said ruling and order of 19/07/2018, the only available legal remedy is to challenge the decision by an application for revision before the High court. By request of the parties and the leave of this court, the application was argued by way of written submissions. From the record, the submission in chief in support of the application was prepared by two State Attorneys namely Abubakari Mrisha, Senior State Attorney and Subira Mwandambo, State Attorney both from the office of the Solicitor General.

In their submissions, they pointed out this court's powers to supervise the subordinate court under section 44 (1) of the Magistrates Courts Act [Cap 11 RE 2019] and any other enabling provision of the law. They submitted that the order sought to be granted is not interlocutory. It is their submissions that, the application was supposed to be not admitted in the first place or should not have proceed for hearing before the said applicant had asked the court to depart from the scheduling orders in the

first and final pre trial conference as to per order VIIIA, Rule 4 of the Civil Procedure Code [Cap 33 RE 2019]. They submitted that non complying with this law amount to procedural irregularity as stated in the case of **Chintan Maganlal Kakkad Vs Magdallena A. Orwa and Another**, Land Case No. 381 of 2014, and **Nazir Kamru Vs MIC Tanzania Limited**, Civil Appeal No. 111 of 2015 CAT, in which it was held to the effect that after the scheduling order, it is necessary for a person seeking to file an application, to first apply to vacate the scheduling order.

The other issue raised in the submission is that the trial magistrate misdirected himself to hear an application, while the respondent had already issued a notice to produce in the main suit, which upon failure to produce as required under section 68 of the Evidence Act, would have entitled the respondent under section 67 (i) (iii) to use secondary evidence. For these reason, they asked the order made on 19th day of July 2018 to be struck out and the proceedings be declared as a nullity.

The other order challenged in the submission is the order by the trial magistrate that the suit be heard *ex parte*, on the date when the case was called for mention. To support that stand, they relied on two authorities of the Court of Appeal. With respect to the applicant's attorney's I will not deal with this issue, because the chamber summons has categorically confined itself on only one order which allowed the discovery that is the order dated on 19/07/2018.

It is the principle of law that parties are bound to confine themselves to the pleadings, and the Chamber Summons or any other document for

which the court is moved. For that reason, I find this last ground regarding the legality of the order to prove the suit *ex parte* misplaced. It is my considered view that the same was supposed to be used in the application to set aside the ex parte order, which is not this one.

In his reply Mr. Stephen Cleophace learned Advocate who was representing the respondent, submitted that the application of Order XI Rule 18 of the Civil Procedure Code [Cap 33 RE 2019] was due to the applicant's non compliance with the order for discovery. He submitted that the application at hand seeks to revise that order made in terms of order XI Rule 18 of the Civil Procedure Code (supra), that would have been challenged by appeal not revision, as revision is not an alternative to appeal. He submitted that for a person aggrieved by the order for discovery must first comply with certain procedures before challenging the order for discovery as provided under order XL Rule 1 (f) of the Civil Procedure Code (supra).

He submitted that the matter at hand has already been over taken by event as the judgment in the main case has already been delivered since 29th August 2019 by the trial Resident Magistrate Court. That marked the end of the submission, hence this Ruling.

Now, looking at the merits of the matter before me, it is important to start with the provision upon which this court has been moved, that is section 44 (1) (b) of the Magistrates Court Act (supra) which provides that;

*44 (1) (b)*

*"(1) in addition to any other powers in that behalf conferred upon the High court, the High Court;*

*(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 a decision or order therein as it sees fit".*

*Provided that no decision or 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 a party to his detriment, unless the party adversely affected has been given an opportunity of being heard".*

From this provision, it goes without saying that this court has powers to revise any order or decision made by either a District Court or Court of Resident Magistrate i.e subordinate courts. Those powers can be invoked either by the in its court's own motion or upon application made by any party to the proceedings before that subordinate court. The powers must be invoked if it appears that there has been an error material to the merit of the case involving injustice and the party likely to be adversely affected by the decision of the High Court on revision must be given an opportunity to be heard.

In this case, when the application was filed, the respondent was served and he filed a Counter Affidavit and the submission in opposition of the application, it means the respondent who is likely to be affected by the revision at hand was given an opportunity to be heard.

This means, the powers in this revision have been invoked by the applicant upon application made by him, challenging the decision of the Court of Resident Magistrate of Mwanza. The issue is whether there is an error material to the merit of the case which involves injustice?

It is the duty of the applicant to demonstrate the said error on record or order or decision he is seeking to be revised, and establish that the error is material to the merit and involves injustice.

In demonstrating that the applicant deposed in the affidavit and submitted in the submission that, it was not proper after the scheduling order has been made for a party to file an application without first moving the court to depart from that scheduling order. They cited the provision order VIIIA Rule 4 of the Civil Procedure Code [Cap 33 RE 2019], which provides that;

> *"where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary, in the interest of justice and the party infavour of who such departure or amendment is made shall bear the costs of such*

*departure or amendment unless the court directs otherwise".*

The record of Civil Case No. 46/2017 shows that up 25/01/2018 all preliminary objection, and applications were already finalised, a result of which, the matter was fixed for first pre trial conference, which was conducted on 02/02/2018 and a schedule of order was made setting a speed track and a period for mediation.

After the mediation had failed, on 25/04/2018 when the matter was called for final pretrial conference and hearing, while both parties appeared through their advocates, the record shows that, the Honourable trial magistrate, without even being informed by a party, and moved for that matter, he moved himself and recorded as follows;

***"Court:***

*I have noted the presence of an application. I therefore stay this main suit pending determination of the application.*

*Sgd; by Trial Magistrate".*

This means, there was no application made to depart from the order previously scheduled, in compliance with Order VIII A Rule 4 of the Civil Procedure Code (supra). The said order is couched in a mandatory term by the use of the word shall, it was supposed to be complied with. Section 53 of the Interpretation of the Laws Act [Cap 1 RE 2019] provide that; where in written law the word "shall" is used in conferring a function such word

will be interpreted to mean that the function so conferred must be performed.

Under this provision, an application to depart with the scheduling order was necessary before Misc. Civil Application No. 32/2018 was admitted and entertained; entertaining it without first departing from the scheduling order, was an error material to the merits of the case.

Since it was on the base of the order given in Misc. Civil Application No. 32/2018 the written statement of defence of the applicant was struck out under order XI Rule 18, of the Civil Procedure Code (supra), then such an error occasioned injustice to the applicant at hand. That being the case then the order is revisable as prayed.

It is thereby declared that entertaining Misc. Civil Application No. 32/2018 without departing the scheduling order was illegal and went contrary to Order VIIIA Rule 4, I thus nullify the proceedings in that application and an order made therein.

It is so ordered.

**DATED** at **MWANZA,** this 10th day of July 2020

**J. C. Tiganga**

**Judge**

**10/07/2020**

Ruling delivered in open chambers in the absence of the applicant and in the presence of Mr. Stehen Kitale, Advocate for the respondent.

**J. C. Tiganga**

**Judge**

**10/07/2020**