

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

MISCELLANEOUS CIVIL APPLICATION NO. 599 OF 2019

(Arising from decision of Kinondoni District Court in Probate Appeal
No. 26 of 2018 originating from Probate Cause No. 245/2015 at
Magomeni Primary Court)

SULEIMAN MAULID RAMADHANI APPLICANT

VERSUS

MAULID RAMADHANI RESPONDENT

RULING

Date of Last order: 18.06.2020

Date of Ruling: 23.10.2020

EBRAHIM, J.:

The Applicant herein has lodged the instant application praying for the following orders:

1. That, this honorable court be pleased to call for and examine the record of the proceedings of Kinondoni District Court in Probate Appeal No. 26 of 2018 and exercise its revisional powers for the purpose of satisfying itself as to the correctness, legality or propriety of the said decision.

The application has been preferred under the provisions of **section 79(1) (a) of the Civil Procedure Code Cap 33 RE 2002**; and it is supported by the affidavit of Suleiman Maulid Ramadhani, the applicant.

The Applicant in this application is represented by Legal and Human Rights Centre and the Respondent is represented by advocate Amon Rwiza.

Upon being served with a copy of the application, Counsel for the Respondent raised two points of preliminary objections that:

1. The application is bad in law for being made under wrong provision of the law.
2. The application is bad in law for being filed out of time as the lower court judgement intended to be revised was delivered on 28.05.2019 and the application was filed on 4th November, 2019 after the lapse of more than 60 days allowed by the law.

The points of objection were argued by way of written submission.

Submitting in support of the first limb of the preliminary objection, Counsel for the Respondent cited the provisions of **section 79(1) (a) of the CPC, Cap 33 RE 2019** as relied upon by the Applicant in moving

the court to perform its judicial function and stated that the Applicant has not shown anywhere in his affidavit the lack of jurisdiction of the District Court to hear appeal from Primary Court. He submitted further that even if what the Applicant intended for this court to revise the proceedings of the District Court, then the proper law is **Magistrate's Court Act, Cap 11 RE 2019**.

Arguing the second limb of objection, Counsel for the Respondent submitted that since the application is for revision it was supposed to be filed within 60 days from the date of the decision of the District Court in Probate Appeal No. 26 of 2018 as per **Part III item 21 of the Law of Limitation Act, Cap 89 RE 2019**. He explained that the decision was delivered on 28th May 2019 and application for revision was delivered on 4th November 2019; hence the application is time barred. He referred to the High Court case of **Wolfram B. Haule Vs Friginia Ole Mashale**, Land Appeal No. 81 of 2011 (Unreported).

Responding on the first point of objection, Counsel for the Applicant attributed the citing of **section 79(1)(a) of the CPC** as slip of the pen and human error. Further, they referred to **Article 107A(2)(e) of the Constitution** in urging the court to dispense with technicalities.

As for the application being time barred, Counsel for the Applicant stated that initially the application was filed on 2nd July 2019 – Misc. Civil Application No. 334 of 2019 which was within 36 days after the decision. However, it was withdrawn due to irregularities and refiled again. He prayed for the point of objection to be dismissed.

In rejoinder, Counsel for the Respondent commented on the admission of wrong citation by the Counsel for the Applicant and urged the court to dismiss the application straight away. He contended on the invocation of **Article 107A (2) of the Constitution** by the Applicant that the same cannot be used as bush to hide applicants who fails to move the court to perform its judicial function according to the law.

As for time limitation, he rejoined that the mentioned **Misc. Civil Application No. 334 of 2019** is a strange creature as it has not been mentioned anywhere in the affidavit. More so if a matter is withdrawn from the court, then there is nothing before the court unless the court extended time. Otherwise time start to run from the date of the decision.

Verily, the instant application before the court is time barred; brought under the wrong provision of the law; and that the applicant has filed a revision instead of appeal.

Beginning with the issue of time, outrightly I agree with the Counsel for the Respondent that the said **Misc. Civil Application No. 334 of 2019** purported to have been filed within 36 days from the date of the decision has not been pleaded anywhere in the affidavit nor has the Applicant shown that he was availed leave to refile the same after the withdrawal. Thus, without wasting much time, this application is time barred for having being filed after a lapse of about 160 days prescribed by law.

As for the issue of wrong citation. Again, this matter originates from Magomeni Primary Court. The District Court did not originally determine the suit but rather the appeal which originate from Probate Cause No. 26 of 2018 at Magomeni Primary Court. In essence in so far as the instant matter is concerned, the District Court was not the court of first instant.

The law i.e. **Part III (c) of the Magistrates' Court Act, Cap 11 RE** conspicuously caters for Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts.

From the above law, it is obvious that unless otherwise provided by any other written law, the powers of appeal/revision by the High Court on matters originated from the Primary Court is **Magistrates' Court Act**.

The said principle of the law is well interpreted in **Section 2 of the Civil Procedure Code, Cap 33 RE 2019** where it is stated that "***Subject to the express provisions of any written law, the provisions of this Code shall apply to all proceedings in the High Court***".

Again **Section 3 of the Cap 33** defines "**court**" to mean "the **High Court of the United Republic, a court of a resident magistrate or a district court** presided over by a civil magistrate and references to a district court are references to a district court presided over by a civil magistrate." (emphasis added).

It follows therefore that, the **Civil Procedure Code, Cap 33 RE 2019** is not applicable on matters originating in the Primary Court as there are specific laws governing its functions. Therefore, I associate myself with the holding of the case of **Rajabu A. Mchuma V Amina Hussein**

Kabesela, Miscellaneous Land Application No. 740/2016 (HC) where this court insisted on citing the relevant law which the court derives powers to determine the application that “...*the applicant must cite the relevant provision from which the court derives the power to hear and determine the application...*”.

Furthermore, the Constitution cannot be used to circumvent the mandatory requirement of the law that confers powers to the court to adjudicate the matter before it.

Again, I have thoroughly gone through the affidavit of the Applicant. As correctly argued by the Counsel for the Respondent, there is no any paragraph which shows that either there is impropriety, illegality or incorrectness of the procedure or proceedings that calls for the attention of this court. All that the Applicant is complaining about is his dissatisfaction with the decision reached by the District Court. Court of Appeal had in the case of **Halais Pro- Chemie Versus Wella A.G** [1996] clearly stated that revision is not an alternative to appeal. Where there is right of appeal, a party should not equate revision with an appeal. Besides revision rectifies irregularities, impropriety and illegalities; appeal confers rights. Thus, I subscribe to the holding of this

case in the case of **Abbas Juma Buge Vs. Maua A. Athumani**,
Miscellaneous Civil Application No. 327 of 2018 (HC DSM –
Unreported) where it was held that in the absence of right of appeal
being blocked by judicial process, the application for revision is being
made in total disregard of the procedural law.

For all purpose and intent, I find that not only that the application for
revision is misplaced, it has also been brought under the wrong law
and out of time. Accordingly, I dismiss it with costs.

Accordingly ordered




R.A. Ebrahim
Judge

Dar Es Salaam
23.10.2020