**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL REVISION No. 11 OF 2020**

**WALTER GEORGE MHINA..... APPLICANT**

**VERSUS**

**PHILEMON JACOB MHINA..... .....1st RESPONDENT**

**EVA JOHN MTILA.....2nd RESPONDENT**

(Appeal from the decision of the District Court of Ilala at Samora Avenue)

**(Rweikiza- Esq, RM.)**

Dated 16th January, 2020

in

Civil Appeal No. 39 of 2019

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**RULING**

19th October & 10th December 2020

**AK. Rwizile, J**

This application is filed under section 79(1) (c), (2) and (3) of the Civil Procedure Code and section 31(1) of the Magistrates Court Act. The applicant is applying for the following orders;

*i. This court be pleased to call for, examine and revise the decision of the Ilala District Court and Primary Court and make an order for trial denovo before another magistrate so that the applicant may be heard*

ii. *This court be pleased to call for, examine and revise the decision of the Ilala District Court and Primary Court at Samora made on 10th days of December 2019 in Civil appeal No. 39 of 2019*

iii. *This court be pleased to make an order joining the respondents to restore the house which has been wrongly divided as the matrimonial home and give an applicant an opportunity of being heard*

iv. *Any other relief which this court may deem fit and appropriate to grant*

The background information leading to this case is that the respondents were married. They lived as husband and wife for a good number of years. During subsistence of their marriage, they were blessed with two children. When their marriage was no longer bearable, the second respondent petitioned for divorce, division of matrimonial assets to wit a house at Tabata and one motor vehicle, as well as custody of their two children. At Ukonga Primary in Matrimonial Cause No 238 of 2019, upon hearing the cause, a decree of divorce was issued, the house equally divided between the spouses and the first respondent was given custody of the children. However, the 1st respondent was not satisfied with division of the house, which he had claimed before the trial court, belonged to his late mother, unsuccessfully appealed to the District Court of Ilala.

In its judgement, dated 16th January 2020, the District Court quashed an order for equal division of the house and reduced it to 30% on the 2nd respondent, while the 1st respondent got 70%. The 1st respondent did not appeal against that decision. The applicant who is a blood young brother of the 1st respondent, filed this application advancing four prayers as shown above.

Parties to this application were all not represented, but by agreement the application was happily argued by way of written submissions. The applicant filed his submission stating that the house subject of division, was not a matrimonial property within the meaning of the law as under section 114 of the Law of Marriage Act. It was not therefore subject of division between the respondents. It was his submission that the house belonged to his deceased mother. He pointed out with clarity that his mother died intestate. Because, she owned the house, when the respondents married, she allowed them in, when

preparing for their own resident. According to him, upon death of his mother, one Scot Binanga was appointed by the family members to be an administratrix of her estate which is yet to apply for letters of administration to date. As to why this application, the applicant was of the view that he asks this court to afford him a chance to be heard in respect of the property because he and other relatives have interest.

In reference, he asked this court to apply the case of **Halima Hassan Marealle vs PSRC and Tanzania Genstone Industials Limited**, Civil Appeal No. 84 of 1999, (unfortunate he did not supply the copy, even though the case is unreported). He submitted that being strange to the suit, he can only access the court by revision.

The applicant went on, and cited the case of **Attorney General vs Maalim Kidau and 16 others** [1997] TLR 69 CA, where it was held that natural justice requires that even a poor peasant at least be consulted before a decision affecting his life is made. In court, he deserves at least to be heard. In conclusion, he was of the view that the respondents had no house to equally share. Basing on the doctrine of *Nemo dat quod non habet*, he said, the court gave to the parties what they did not have.

The respondents filed separate submissions. As expected, the first respondent did not resist this application. His submission in support of the application was straight to the point that, the applicant is his young brother. He said, during the case, he was outside Dar es salaam in search for daily meal. He was later informed by the person who was appointed the administrator of the estate of their deceased mother about the decision of the District Court. That is why this application was preferred. He submitted that, he testified before the trial court that the house subject of division was not their matrimonial home, not even the land where the same was built. It is proper, he went on submitting, that the applicant be heard because he has interest. He said, that can be done through

revision as it was held in the case of **Halima Hassan Marealle** (supra). He therefore asked this court to grant this application and order a trial denovo.

The 2nd respondent resisted this application. Her submission was that, the applicant has no *locus standi* because, he was not party to Civil Appeal No. 39 of 2019 because it was between her and the 1st respondent.

It was pointed out that because there is not administrator of the estate of his late mother who would have pursued this litigation, then the applicant has not followed the law. She was of the considered view that the ratio in the case of **Halima Hassan Marealle** (supra) does not apply in matrimonial cases. She concluded as saying that the section 114(3) of The Law of Marriage Act [Cap 29. R.E 2019] recognizes assets acquired before marriage but substantially improved during marriage as matrimonial assets. He asked this court to dismiss this application with costs.

Having heard submissions of the parties and their conduct before this court, I have to admit that revision, as the applicant put, is the only way, a stranger to the suit like the applicant, can access the court. These powers are traced under section 79 of the Civil Procedure Code [Cap 33 R.E 2019] and as this application is pegged, section 31 of the Magistrates Court [Cap 6 R.E 2019], as well. Section 79 of the CPC states follows;

> *79.-(1) The High Court may call for the record 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-*
>
> *(a) to have exercised jurisdiction not vested in it by law;*
>
> *(b) to have failed to exercise jurisdiction so vested; or*
>
> *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.*
>
> *(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory*

*decision or order of the Court unless such decision or order has the effect of finally determining the suit.*

*(3) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act.*

It is therefore the law that for this application to issue, the applicant has to satisfy the following needs, that the subordinate court appears to have; **one** exercised jurisdiction not vested in it by law or **two**, to have failed to exercise jurisdiction so vested, *or* **three**, to have acted in the exercise of its jurisdiction illegally or with material irregularity. From the above, powers of the High Court under revision are supervisory and superintendent in nature, for the purposes of keeping courts subordinate to it, within bounds of their jurisdictions.

In Mulla, **The Code of Civil Procedure**, 18th Ed. the learned author had this to say in respect of revision;

*"… in exercise of its revisional power, it is not the province of the High Court to enter into the merits of the evidence. It has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. Where there is no error of law apparent on the face the record, the order shall not be interfered by the High Court in civil revision…"*

It is important now to turn to the application. Before the trial court, was a matrimonial matter. The respondents are alleged to have married and lived together for some years. When the case was heard, the trial court was of the view that the house was a matrimonial property subject of division. The appeal to the district court was not successful. The applicant came from where he came from and applied for this revision. In his application, he does not show the courts below exercised jurisdiction they did not have or exercised powers outside the law. There is no indication either that there are errors apparent on the face of the records of the courts below. According to his

submission, he is actually attacking the findings of the courts below and asks for a trial denovo. In law, matrimonial proceedings within which the application originates are and should be between the spouses. He cannot therefore seek to be joined in the same since to do so would be against the law.

Having considered the law and submissions of both sides, I do not think, this application has merit. It is bound to suffer a dismissal as I hereby do. This application is therefore dismissed with costs.

**AK.Rwizile**
**JUDGE**
**10.12.2020**

Delivered in the presence of the parties this 10th day of December 2020

**AK.Rwizile**
**JUDGE**
**10.12.2020**

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY