

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

HC CIVIL REVISION NO. 16 OF 2021

*(Originating from Civil Application No. 111 of 2020 which originated from Civil
Case No. 61 of 2015 at Mwanza Resident Magistrate Court)*

LAZARO SIMON MAGELAAPPLICANT

VERSUS

MWALONI FILLING STATION.....RESPONDENT

RULING

Last Order date: 03/10/2022

Ruling Date: 07/10/2022

R. B. MASSAM, J.

The Applicant herein moved this court under section 79(1) of the Civil Procedure Code Cap 33 R.E 2019, through a Chamber summons praying this court for the following orders:

1. *That this Honourable Court be pleased by the Applicant to file the revision against the Ruling of the R.M Civil Application No. 111 of 2020 delivered on 26th August. 2021 Before Hon. M.O Ndyekobora SRM, for the purpose of satisfying itself as to the*

correctness, legality and or propriety of the proceeding and order thereof basing in the following grounds:

- (a) That, the Court erred in law for denying the Applicant right to be heard deliberately in Civil Application No. 111 of 2020.*
 - (b) That, the trial Court erred in law and in fact for failure to observe that, the Application for restoration was out of Time.*
 - (c) That, the trial Magistrate erred in law for failure to observe that the Respondent had no sufficient Ground to warrant restoration of the Dismissed case.*
- 2. That the costs of the application be borne by the Respondent.*

The Chamber summons was accompanied with the affidavit sworn in by LAZARO SIMON MAGELA, the Applicant herein. Responding to the Application, the respondent filled his counter affidavit sworn in by ADOLF WILFRED KINYANGULI together with the notice of preliminary objection containing two points of preliminary objections as follows;

- 1. That, this matter has been brought before this Honourable Court prematurely, hence this Court lacks jurisdiction to entertain the matter.*
- 2. That, the application by the applicant is defective since the law does not allow an application for revision against preliminary or interlocutory order unless the same has the effect of finally disposing the suit.*

The Respondent prayed this court to dismiss this instant application with costs.

Now this Ruling is in accordance with the raised preliminary objection by the respondent. When the matter came for hearing the applicant enjoyed the services of Mr. John Edward, learned counsel and the respondent was represented by Mr. Bernard Msalaba also learned counsel and the preliminary objection was argued orally.

Breaking the ice, Mr. Bernard Msalaba started his submission by arguing that, the basis of their preliminary objection is section 79(2) of the Civil Procedure Code Cap 33 R.E 2019, whereas the law does not allow the application for revision in interlocutory orders unless the same

has an effect of finally determining the suit. That there is a pending case which is Civil Case No. 61/2015 before Resident Magistrate Court of Mwanza. That, an order which the applicant is seeking to be revised emanates from RM Civil Application No. 111/2020, which is just a part of an endless application.

He further argued that, an order by the magistrate to set aside the dismissal order and appoint date for the hearing of the main suit is an interlocutory order, and therefore no party can challenge it unless the order had the effect to determine the suit to its finality. He prayed for the application to be dismissed in order for the matter before Resident Magistrate Court to proceed.

Responding to the respondent's submission, Mr. John Edward started by praying the raised preliminary objection to be dismissed for it lacks merit. He went on that, Revision application before this court challenges the Ruling delivered by the Resident Magistrate Court, when it determined the issue of whether Civil Application No. 61/2015 has to be restored. That the case was dismissed on 2nd September 2020 and restored on 26/8/2021. That after the Applicant has filed a restoration Application, the respondent filed their counter affidavit to object the application for restoration. That the Ruling did not consider their counter

affidavit as the second page of the Ruling, the Magistrate said they did not file counter affidavit while they filed it. That the respondent was denied the right to be heard, as they also filed their written submission in which they raised an issue that the application was filed out of time but the same was not considered in the Ruling.

Mr. John Edward further succumbs that, they came into conclusion that the application was heard without adhering to the legal principles and so it was a result of confusion, irregularity and illegalities which renders the party to seek for revision. Mr. Edward agrees with Mr. Msalaba that, it is a general rule that a party cannot appeal or seek revision on an interlocutory order, however he submits that in case of illegality, irregularity and confusion a party is allowed to file revision. He cited the case of **Stanbic Bank Tanzania Ltd vs Kagera Sugar Ltd**, Civil Application No. 57 of 2007 in page 13 and 14, where he states that The Court of Appeal allowed a party to file revision in interlocutory order because of confusion, illegality and irregularity. He relates the same to our case at hand that, a Magistrate denied their right to be heard and refused to consider that application was time barred and therefore the remedy was to file revision in order for this court to see the subordinate

court at properly. He therefore prays the preliminary objection to be dismissed as it lacks merit.

Re-joining, Mr. Msalaba reiterate his submission in chief and went further to distinguish the case of Stanbic as cited by the Applicant, that it is different as seen on page 3-4 of the judgement, that parties agreed to stay the matter, but it was recorded as it is memorandum of settlement and therefore the circumstance was different.

He further submitted that, it is not true that the respondent's submission and counter affidavit was not considered as on 14/4/2021, both parties were present and they agreed the matter to be argued by way of written submission and the matter was fixed for mention on 20/5/2021. That the respondent was supposed to file their submission on 15/5/2021 but until on 20/05/2021 it was not filed and therefore the matter was fixed for Ruling. He further submits that, the non-filing was not the only reason that the magistrate considered and therefore he prays the matter to be dismissed as it is premature. That's marks the end of both parties' submissions.

After a careful consideration of the parties' submissions and the point of objection raised, the issue to be determined now is to whether the objection raised has merit.

From the parties' rival submission, it is my considered view that, the question that environs the objection raised is whether the Ruling in Misc. Civil Application No. 111 of 2020 which restored the Civil Case No. 61 of 2015 is an interlocutory order or not. From the Respondent's submission he persuades this court that, the order was an interlocutory order in which no revision or application lies unless it has an effect of finalising the matter, and it is his opinion that, the order did not finalise the matter as the main case which is Civil Case No. 61 of 2015 is still pending.

The Applicant, on his side he does not protest as to whether the order was an interlocutory one or not as his submissions centres on showing that the circumstance of the case requires this court to revise the proceedings and the ruling as there is illegality, irregularity as well as confusion as he was not given right to be heard.

My intention to deal with the question as to whether the ruling falls under the category of being an interlocutory order is to avoid the mistake of prejudicing the Revision application by the applicant as he has argued in this preliminary objection as the Revision Application is yet to be argued due to the raised objection.

The Applicant herein has moved this court under Section 79(1) of the Civil Procedure Code Cap 33 R.E 2019 in, praying this court to revise the Ruling in Misc. Civil Application No. 111 of 2020. In which the Ruling that is sought to be revised, restored the Civil Case No. 61 of 2015.

In order to entangle the question, I have raised above then it is important first to know what is an interlocutory order. The term has already been defined by number of case laws. In the case of Tanzania **Posts Corporation vs Jeremiah Mwandi**, Civil Appeal No. 474 of 2020, the Court of Appeal quoting with an authority the case of Seif Sharif **Hamad vs S.M.Z** [1992] TLR 43, in which the Court adopted the definition in Black Laws Dictionary (4th Edition), which defined the term Interlocutory Order as;

"An order which decides not the cause, but settles some intervening matter relating to it".

The Court of Appeal went further to borrow the definition of the term in the 9th Edition of the same diction which defined the term interlocutory order to mean;

"An order that relates to some intermediate matter in the case, any order than the final".

From the given definition above, an interlocutory order then, is that order that only settles the intermediate matters and does not decide on the rights of the parties which can dispose of the matter.

Section 79 (2) of the Civil Procedure Code Cap 33 R.E 2019, provides that no revision shall lie in respect of the preliminary or interlocutory decision or order of the court unless such decision or order has an effect of finally determining the suit. The Respondent submitted that the Ruling was an interlocutory order as had no effect of finalising the matter as it only restored the main case which is still pending.

It is my strong view that, the respondent has misconceived the effects of the Ruling in Misc. Application No. 111 of 2020 as he relates the same to Civil Case No. 61 of 2015. It is my opinion that, the Ruling in Misc. Civil Application is not an interlocutory order as the Ruling finalised Misc. Application No. 111 of 2020. The application for restoration of Civil Case No. 61 of 2015 which was Misc. Application No. 111 of 2020 was an independent application in which its orders had an effect to restore the Civil Case No. 61 of 2015.


I think the Respondent's learned counsel has confused himself to think that the Ruling in Misc. Application No. 111 of 2020, having an effect to revive the Civil case No. 61 of 2015 make it an interlocutory

order. However, as the Application was an independent one and being heard and determined to its finality then we cannot term it as an interlocutory order as it finalised the matter to its finality.


I agree with Mr. Msalaba that, the cited case of Stanbic Bank Tanzania Limited is distinguishable in our case as the circumstances of the case are different although the Court of Appeal had same stand that the application did not base on interlocutory orders but the confusion and illegalities found in the proceedings. In fine, the preliminary objection has no merit and it is hereby dismissed, and the matter has to re scheduled for hearing of the Revision Application by the Applicant. Costs to follow the event.

It is so ordered.




R.B. MASSAM.
JUDGE
07/10/2022

Court: Ruling delivered today this 7th day of October, 2022, in presence of parties learned counsels.


R.B. MASSAM
JUDGE
07/10/2022