

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

AT DAR ES SALAAM

(REVISIONAL JURISDICTION)

CIVIL REVISION NO.58 OF 2020

(Arising from Execution no.107/2020 of Temeke District Court before Hon. Kihawa, SRM, Original Matrimonial Cause No.26/2010 of Temeke District Court before Hon. Mkwawa, SRM)

HAMIDU SALEHE MFINANGA.....APPLICANT

VERSUS

SHAMIMU JOSEPH.....RESPONDENT

RULING – EX PARTE

26/10/2021 & 10/11/2021

I.C. MUGETA, J.

The applicant is seeking for orders that: -

- 1. This honourable court may be pleased to make revision from (sic) the execution proceedings and its decision of the Miscellaneous Application No.107/2020 of Temeke District Court ... and set aside ruling and order thereon (sic)*
- 2. Any other order(s) this court deems fit to grant in the circumstance of this application.*
- 3. Costs to be given.*

A brief background to the case is that the parties' marriage was dissolved in 2012. The applicant was ordered to pay maintenance at the tune of Tshs. 50,000/= monthly. His appeal to this court via Civil Appeal



No.45/2019 was dismissed for want of merit. After the dismissal of the appeal, the respondent herein filed execution proceedings no. 107/2020 claiming Tshs. 4,800,000/= as unpaid maintenance costs. An order that the said amount be paid failure of which the applicant to be detained as civil prisoner was issued. The applicant was aggrieved by this order, hence, this application.

At the hearing the appellant was represented by Catherine Lyasenga, learned advocate. The respondent never appeared even after service by publication. Consequently, the case was heard ex parte against her.

The counsel for the applicant adopted applicant's affidavit and submitted that an order by the court that the applicant should pay Tshs 4,800,000/= did not consider the fact that the applicant used to send the respondent money by deferent means including mobile money depending on how much he earned per day as he is a daily wage labourer. She further challenged the decision of the trial court on the ground that the children whom the applicant is paying maintenance for are at boarding schools and sometimes they live with the applicant.

I have read the trial court record and found that upon calculations on how much money was unpaid as maintenance cost, the trial court found that the amount due was Tshs. 2,300,000/= and not the claimed sum.



Unfortunately, the drawn order is at variance with the ruling as it states that the amount awarded is Tshs. 4,800,000/=. This variance, however, has not prejudiced any party, therefore, I shall proceed to determine the application on merits. Gone is the era when such errors were being held sufficient to hold that the application is incompetent for being supported by a defective drawn order.

The complaint that the trial court did not consider the evidence that the applicant used to send money to the respondent has merits. At the trial court, the applicant presented mobile money transactions evidence on how he used to send money to the respondent. The learned trial magistrate said nothing about this evidence in her ruling which justifies the complaint that such evidence was ignored. Failure to consider a party to the case's evidence is a fatal error which renders invalid the decision resulting from that failure. The decision of the trial court as to the unpaid arrears of maintenance costs is, therefore, invalid.

The complaint that the children are at boarding schools and sometimes they stay with the applicant, therefore, the respondent is not entitled to payment of maintenance for the children is unjustified. This is because the applicant has not applied to the trial court for change of the maintenance order to accommodate the current material change of

circumstances as per section 133 of the Law of Marriage Act [Cap. 29 R.E. 2019].

In the event, the order for payment of Tshs. 4,800,000/= is set aside. The trial court is ordered to consider the mobile money transaction payments evidence presented by the applicant and decide whether there are unpaid maintenance arrears. I allow the application without orders as to costs.



Mugeta
I.C MUGETA

JUDGE

10/11/2021

COURT: Ruling is delivered in chambers in the absence of all parties

Sgd: I.C. MUGETA

JUDGE

10/11/2021