

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION No. 33 OF 2020

ISMAIL ABDALLAH LIMBEGA.....APPLICANT

VERSUS

VICTOR NYONI.....RESPONDENT

(From decision of the District Court of Kilombero at Ifakara)

(Khamsini- Esq, RM)

dated 22nd July 2020

in

Civil Application No. 6 of 2020

RULING

25th March & 18th May 2021

Rwizile, J

This application is for revision. The same is filed under section 79(1) of the Civil Procedure Code. The applicant is asking this court to call for and examine the records of the proceedings in Application No. 6 of 2020, to satisfy itself as to its legality and thereby revise the same. It is supported by an affidavit of the applicant, stating grounds for which, this application should be granted. Factually, this application has its origins in Civil Case No. 25 of 2017. The applicant in between 2016 and 2017, had a business with the respondent based on contract. However, their business did not prosper. This led to a conflict that resulted in filing different cases.

One of them being Civil Case No. 25 of 2017, where the applicant claimed among others, the amount of 31,000,000/= from the respondent for breach of the contract. The same was heard *ex parte*. The judgment was obtained. The applicant applied for execution. The same was granted, whereby respondent's house was to be sold in execution of the decree. One Jesca Mtonya filed objection proceedings in Civil Case No. 13 of 2018. The same was dismissed. Dissatisfied, she filed Civil Revision No. 36 of 2018, before this court, which was also dismissed. Since that was not enough, he then filed Civil Application No. 6 of 2020 advancing the following reliefs;

- i. That the honourable court be pleased to extent/ enlarge the period for the applicant to seek leave of the court to set aside *ex parte* judgement and proceedings in Civil Case No.25 of 2017 delivered on 28th August 2017 before honorable Mashabara in order to be heard*
- ii. That costs to abide by the outcome of the application*
- iii. Any other order as the court may deem fit to grant*

Upon hearing the same, the trial court decided to set aside the *ex parte* judgement on grounds that the respondent so argued. The *ex parte* judgement delivered on 25th August 2017 was set aside. The applicant was not amused of the same, hence this application. The applicant though deaf, was not represented before this court, while the respondent was represented by Mr. Luguwa learned advocate at the hearing.

Submitting in support of the application, the applicant complained that there was no reason to retry the case that was previously heard by two magistrates and one judge.

According to him, this is a fit case for revision since the respondent was given sufficient notice to attend the main case but did not.

On his party, the respondent's advocate was of the view that this application should not be granted. He submitted that since this is an application for revision, the court has been asked to revise the decision where there is a right of appeal but not exercised. According to the learned advocate, the trial court heard the application on merit and based on the submission of the parties. Mr. Luguwa was of the view that the respondent upon being granted an order to set it aside, filed a written statement of defence and the matter is already set for hearing. He submitted that, granting this application will occasion failure of justice. Finally, he said, the decision of the trial court therefore was justified and the applicant ought to have appealed since the right of appeal was explained. He asked this court to dismiss this application with costs.

Having heard the submissions of the parties, I have to start by citing the relevant law and see if the same has been complied with before going to the determination of the same. Section 79(1) of CPC provides as follows;

- (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; or*
 - (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.

From the law, for the application for revision to issue as the law puts it, the following conditions must be fully met.

- (i) There must be a decision made by the subordinate court*
- (ii) The decision must be one in which no appeal lies to the High court by reason of the law itself or that the appeal process has been blocked by judicial process*
- (iii) The subordinate court must have appeared to exercise jurisdiction not vested in it by law; or has failed to exercise a jurisdiction vested in it by law; or -acted in the exercise of its jurisdiction illegally or with material irregularity.*

The Court of Appeal in the case of **DPP vs Salum Ali Juma**, Criminal Application No. 2 of 2005, held that revisional jurisdiction can be exercised *only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged an appeal.*

The respondent has critically argued that the applicant had the right of appeal but did not exercise it. That being the reason, this court was asked to dismiss this application. The applicant unfortunately was not able to respond to this crucial point. With or without his response, it is important to note, the law is clear and does not need interpretation.

I have shown before that the application before trial court was asking for one main prayer.

That is to enlarge or grant an extension of time within which the respondent was to file an application to set aside the *ex parte* judgement delivered on 25th August 2017. The same as the record clearly shows, the trial court heard it. The finding of the court before granting the application at page 7 of the ruling, stated as follows;

*"...In the course of digesting the points as contained in the submissions as made by the parties, I have come to learn right from the onset that the applicant is requesting for setting aside *ex parte* judgement and not requesting for extension of time to set aside *ex parte* judgement. I have learnt about this through his submissions which, all in all are geared at hearing of the suit interparties..."*

The above is what drove the decision of the court to allow the application. The application was explicitly praying for extension or enlargement of time to file the application to set aside the *ex parte* judgement. The trial magistrate came out with her own finding that the submissions argued a quite different thing. She trailed on it and granted the application. Can it be said that the trial court properly exercised her jurisdiction. The answer would appear definitely to be otherwise. I am saying so because, **first** parties are bound by their own pleadings, **second**, arguments and/or submissions are geared to support the pleadings and not vice versa. **Third**, cases are decided based on pleadings that are brought before the court and **fourth**, the, *nemo dat* rule coached in the Latin maxim *nemo dat quod non habet*, (*nobody can give what he does not have*) applies in all court proceedings.

It cannot be therefore concluded with certainty that the trial magistrate exercised her powers with any degree of legality.

This falls in the reasons that the application for revision may issue. She, in my considered view, acted in the exercise of her jurisdiction illegally and with material irregularity by deciding an application which was not brought before the court. That being the case, this application is allowed with costs. The decision of the trial court dated 22nd July 2020, is quashed and all orders therefrom set aside.

AK Rwizile
JUDGE
18.05.2021

Delivered this 18th day of May 2021

AK Rwizile
JUDGE
18.05.2021

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

