IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL REVISION APPLICATION No. 12 OF 2020

(Arising from DC. Misc. Application for execution No. 44 of 2019 of the Court of Resident Magistrate of Mwanza, at Mwanza)

THE BISHOP SEVENTH DAY ADVENTIST CHURCH

(SDA) SOUTH NYANZA CONFERENCE LTD..... APPLICANT

VERSUS

MPAZI ALBERT ELIAS BOAZ .....RESPONDENT

RULING

09th June – 21st July, 2021

TIGANGA, J

Under section 79(1)(a),(b) and section 95 of the Civil Procedure Code [Cap. 33 R.E 2019] as well as section 44(1)(b) of the Magistrates Courts Act, [Cap 11 R.E 2019] and any other enabling provision of the laws, the applicant moved this court seeking it to call for and revise the decision of the District Court of Nyamagana at Mwanza dated 17/08/2020 in execution proceedings, DC. Misc. Application for Execution No.44 of 2019 for it being illegal on the reasons that;

(a) The Honourable executing master illegally relied on the expert opinion which was based on documents (Bill of Quantity) not admitted in court as exhibit and thus not forming part of court's records.

(b) The honourable executing master illegally relied on the expert opinion which was based on documents (Bill of Quantity) which was not prepared by the authorized quantity surveyor

(c) The Resident Magistrates' Court being an executing court, illegally relied on expert opinion without availing the parties with a copy of the report.

(d) That the Honourable executing Master illegally awarded to the respondent an amount of Tshs. 34, 595,197.4/= without affording the parties with the right to be heard.

The prayers were preferred in the chamber summons which was supported by the affidavit sworn by one George Meyani, who introduced himself as a Principal Officer of the applicant, conversant to depose the facts in the affidavit. The said affidavit put forth the background information and the reasons for the application. It also informed this court

that, the entity sued by the respondent before the trial court does not exist. However, this issue in my considered view should not have been raised in first place in these proceedings and can not be entertained at the execution stage; it was supposed to be raised during the trial before the subordinate court, for that reason, I will not deal with it in these proceedings, for matters not raised during trial cannot be raised at appeal. According to the affidavit, the respondent sued the applicant before the Resident Magistrate Court of Mwanza in RM. Civil Case No. 08 of 2010. The suit was decided in the favour of the applicant.

Dissatisfied by the decision of the said court, the respondent appealed to the High Court, in HC Civil Appeal No. 79 of 2017 which appeal was partly allowed by this Court, Hon. Mgeyekwa, J, in which the High Court ordered the respondent to be compensated the costs he incurred to prepare the BOQ and sketch drawings.

Following that decision the respondent filed in the court of Resident Magistrates an application for execution, that is Execution No. 44 of 2019 and on the direction of the High Court by the order dated 09/10/2019 which required the executing court to employ the assistance of an expert to determine the costs which the respondent incurred to prepare the BOQ

and the sketch drawing, the executing court with the aid of expert awarded to the respondent a total of Tshs. 34,595, 197.4/= as the costs of preparation of the BOQ and sketch drawings.

According to the applicant, after consulting a lawyer, one Mr. Elias R. Hezron, they noted that the order for execution was tainted with irregularities as indicated herein above and was advised to file this application seeking the order to rectify the said irregularities.

Together with that affidavit, Mr. Elias R. Hezron did swear another affidavit and filed it in support of the application. In the said affidavit he deposed that, being the Advocate who was representing the applicant before the trial court, in Execution No. 44 of 2019, he noted after the ruling which granted execution especially the amount of Tshs. 34,595, 197.4/= awarded, was not in conformity with the decree of the High Court. He deposed that, he noted irregularities herein above and following that state of affairs, he advised the applicant to file the application at hand.

The application was countered by the counter affidavit sworn by the respondent who disputed the facts deposed in both affidavits, and opposed the whole application. He enumerated a number of documents which were tendered before the trial court. He said after the trial court had heard the

application for execution exparte, regarding the costs incurred in preparation of the BOQ and school sketch drawings, it awarded the respondent the amount of Tshs. 34,595,197.4/= but she erred in law to revise the order of 23% interest which her fellow Resident Magistrate Hon. Ngimilanga, RM had awarded the respondent in his ruling.

He also prayed the court to quash the ruling delivered by Hon. Ndyekobora, RM, which revised the order of her fellow magistrate of the same level Hon. Ngimilanga, RM, which awarded Tshs. 23% interest. The order of Hon. Ndyekobora, RM be revised on the ground that, it is *ultra vires* in the sense that, she had no power to do so for lack of jurisdiction to overrule her fellow Magistrate. He asked this court to quash and set the order aside while restoring the order which awarded 23% interest.

He deposed further that the expert opinion regarding the BOQ and school sketch building drawings had no connection with the court order awarding the respondent 23% interest, as interest was not part of the BOQ and sketch drawing ascertained by an expert opinion, but a legal order made a competent court.

He deposed that, the BOQ and sketch drawing were tendered without objection from the applicant before the trial court, and they are the

same document which were used by the applicant to build up a school, and it was not questioned that the same documents were prepared by the professional Architecture and Quantity Surveyors was not objected when the documents were tendered. He also deposed that in all issues parties were given right to be heard at the stage of execution of the decree.

Further to that, he deposed that, the executing master illegally reduced the amount from Tshs.59,118.192/=with 23% interest which was awarded to the respondent by Hon. Ngimilanga, RM to a lesser amount of Tshs. 34,595,197.4/= and worse still without 23% interest.

Last he said the counsel Mr. Hezron, gave frivoulous and vexatious advice to the applicant, as the entire application is not *bonafide* as it is being against the maxim that there should be an end of litigation, as it was 13 years since 2008 when the dispute between parties started.

At the hearing of the application, the applicant was represented by Mr. Deus Richard, learned counsel, while the respondent was represented by Mr. Anatory Nasimire also learned counsel.

In the submission in chief, Mr. Deus Richard first stared by adopting the affidavits, he reminded the court that the execution is in respect of the decision by Hon. Mgeyekwa, J, in High Court Civil Appeal No. 79 of 2019 in

which it was ordered that the applicant pay only the costs incurred in preparation of the BOQ and the sketch drawings as reflected at page 10 of the judgment of the High Court. However, after the decision was put before Hon. Ndyekobora, RM for execution, she invited the expert to ascertain the actual amount to be paid as the costs for preparation of the BOQ and sketch drawings; she did so because the decision of Hon. Mgeyekwa, J, did not mention the amount to be paid.

He submitted further that, in preparation of the said estimated costs to be paid by the applicant the said expert based on the BOQ which was never part of court record at any level. He said the document was tendered in execution to mislead the court consequence of which, the court reached to an incorrect decision.

He also submitted regarding the second ground of revision which raises the complaint that, the document was tendered and relied upon without affording the parties opportunity to be heard to discuss the contents of the said document. He said that, after the document has been submitted they expected to be supplied with a copy and to be given an opportunity to discuss it to satisfy themselves on the competence of the person who prepared it in terms of section 7 and 9 of the Architect and

Quantity Surveyors Act, of 1997 which requires the person to do the job to be registered.

That, according to him, brings in the question of the legality of the amount which was estimated. It is his opinion that what was done was against the principle of natural justice and the constitutionally guaranteed right (the right to be heard). He therefore prayed for the court to find that, the trial Resident Magistrate erred and reached to a wrong conclusion and consequently invoke its powers under section 79(1)(a) and (b) and section 95 all of the CPC [Cap 33 R.E 2019] to revise the proceedings and the decision of the trial Resident Magistrates' Court in Civil Case No. 44 of 2019 and nullify the same with costs.

In his reply, Mr. Nasimire, objected the application on the ground that, the decision to call the expert was not an initiative of the trial Magistrate, it was the directive of the High Court Hon. Mgeyekwa J, in HC. Civil Appeal No. 79 of 2017. When the expert was called, he gave an expert opinion that the costs for preparation of the BOQ and sketch drawing was Tshs. 34,595,197.4/= which the Hon. Magistrate used to award the respondent. Therefore, according to him, there is no ground upon which the executing master can be condemned as what she did was

according to the directive of the High Court, she could not do otherwise. He submitted further that if the applicant was not satisfied by the decision of Hon.Mgeyekwa,J. he was supposed to appeal against that order an action they did not take.

Submitting on the reliance of section 79(1)(b) of the CPC as used to move this court, he submitted that in **Blass Michael vs Said Selemani** [2000] TLR 260 the court held that, section 79(1) can be invoked only when the issue complained of is that of jurisdiction. That is to say, the irregularity or non exercise of jurisdiction or the illegal assumption of it.

According to him, in this case, the Hon. Resident Magistrate had jurisdiction to do what she did, therefore, in his opinion, it was not proper for the applicant to invoke the provision of section 79(1) to move the court. Regarding the provision of section 95 of the CPC, he submitted that that is out of context, because the issue of revision is governed by a specific law. While section 44(1)(c) of the Magistrates Courts Act (supra) was misapplied as there is nothing to revise, as the documents were not admitted in court. Therefore they are out of context. What was relied upon was the opinion, and that even Hon. Mgeyekwa, J, did not say that the documents must be admitted. The complaint that the documents were not

prepared by professionals is irrelevant and misconceived, he said the executing court was satisfied with what the expert opined, the applicant has not brought any evidence of register maintainable under the Quantity Surveyors Act, (supra) to prove that Mr. Mahenge was not authorized valuer and quantity surveyor.

Furthermore he submitted that, the complaint that the applicant was not given the report of expert opinion has no merits, as there is no law cited which mandate the court to give such a report to the parties, besides he has not asked a copy of the same and denied.

Last, when responding to the complaint that, the parties were not given opportunity to be heard on the said opinion has no merits. He submitted that the applicant would have approached this court by way of appeal instead of revision. He cited the case of **Allies Pro - Chemie vs Wella** [1996] TLR 269 in which it was held that, a person may file revision only where there is no appellate jurisdiction or the right of appeal has been blocked by judicial process. He also cited the case of the **Registered Trustee of Social Action Fund and Another vs Happy Sausages Ltd & Others** [2002] TLR 285 where it was held that, it is only in the exceptional circumstances revision can be justified. He submitted that this

case does not fall under exception; he prayed the application to be dismissed with cost as there is nothing to revise.

In rejoinder, the counsel for the applicant insisted that, the application before this court is competent. He insisted that the applicant has no any problem with the decision of Hon. Mgeyekwa, J, in HC. Civil Appeal No. 79 of 2017, their problem is on the granted execution order, but after the said expert has been engaged, and came up with his opinion which, is a corner stone of the assessment of what was to be paid, it was therefore important for the court to involve both parties in order to ascertain its legality and its credence.

He said that in his opinion the court would have gone further to allow the expert to be cross examined on the opinion, which he submitted in court or to show the parties the document containing the opinion so that they can know the base of the decision. He submitted that since the document was not shown to them, but was used to make the decision against them, then, he prayed the court to revise the decision reached as it is against the right to be heard, it could be challenged under the illegality.

Regarding the tenability of the application, as submitted by Mr. Nasimire, that section 79 of the CPC applies only when the issue is on jurisdiction, he submitted that the provision empowers the court to revise the proceedings or order of the district court while section 95 of the same law confer this court with inherent powers in administration of justice. He submitted that even if the two provisions do not provide directly, the law under the Magistrates Courts Act, section 44 empowers this court to revise the decision origination from the District Court. He submitted that, the application is in a proper court with competent jurisdiction.

In the alternative, he urged this court that, even if it finds that the application is not properly placed, he submitted that, under the principle of overriding objective the court can still revise the decision. Regarding the relevance of the cases cited by the respondent, he submitted that, he left it to the court to determine.

He submitted that if the documents were tendered and admitted as exhibit then the counter affidavit was supposed to mention the exhibit number. He submitted that the fact that the decision of Hon. Mgeyekwa, J did not direct what document was to be used did not warrant all or any document to be used. According to him, if a person who gave opinion was

qualified, then his opinion was supposed to be shown to the parties for them to satisfy themselves that a person was really qualified.

Lastly he submitted that, the court decided as if it was bound by the opinion of the expert, while in fact that the document was not binding. He lastly asked the court for an order that they be returned before the subordinate court so that parties can be heard on the document so that they can give their opinion.

That marks a summary of the contents of the chamber summons, an affidavits filed in support of the application, and the counter affidavit filed in opposition of the application as well as the submissions made by the counsel for the parties.

Before discussing the merit of the application, I have noted some concerns which in my opinion must be addressed first. One, the respondent raised a complaint in the counter affidavit that, the ruling by Hon. Ndyekobora, RM was given without authority, as it overruled the former ruling of her fellow magistrate of equal status that is Hon. Ngimilanga, RM, which awarded Tshs.59,118.192/=with 23% interest to the respondent, but Hon. Ndyekobora, RM reduced that amount, illegally to

a lesser amount, of Tshs. 34,595,197.4/= and worse still without 23% interest.

On perusal of the record, I have noted that there are indeed two rulings, the first was delivered by Hon. Ngimilanga, RM, on 09/07/2019, which ordered the execution to be carried out in respect of Tshs. Tshs.59,118.192/=with 23% interest, while the second being delivered by Hon. Ndyekobora, RM dated 17/08/2020, which ordered execution to be carried out in respect of Tshs. 34,595,197.4/= without the 23% interest.

It is worthy to note here that, executing court needs to execute the decree as passed by the trial court or the appellate court. In this case the decree which was to be executed was the one passed by Hon. Mgeyekwa, J, in HC Civil Appeal No. 79 of 2017. In that appeal, the following prayers were made,

(a) That the appeal be allowed with costs,

(b) Judgment of the trial Court be quashed and set aside,

(c) An order that the appellant be paid Tshs. 59,118,192/=with 23% interest being the agreed contractual amount.

(d) Payment of Tshs. 30,000,000/= general damages for breach of agreement/ order.

(e) Payment of 40% commercial interest with arrears

However, in that appeal the High Court among the prayers made allowed only the followings;

(i) That the appeal is partly allowed.

(ii) The appellant is entitled to be compensated the costs he incurred to prepare the BOQ and sketch drawings.

(iii) The other grounds of appeal are dismissed,

(iv) No order as to costs,

From a foregoing, two things are apparent, **one,** that the amount of Tshs. **59,118,192/=with 23% interest** was of the whole claim of the respondent before the subordinate court. It means the amount included the preparation of the BOQ, preparation of drawings, and the contractual amount of school buildings. **Two**, the High Court in HC Civil appeal No 79 of 2017 granted only, the costs incurred by the respondent to prepare the BOQ and sketch drawings. This means the rest of the prayers which included, the costs for building the school buildings, 23% interest, Tshs.

has powers to call for the record either after being moved or moving itself *suo motu*, from the subordinate court to satisfy itself as to the correctness, legality and propriety of the proceedings or order made by the subordinate court. What this court has been asked is to do what the law empowers it to do, whether the provision has been properly cited or not is immaterial. I hold so after relying on the provision of section 3A and 3B of the Civil Procedure Code [Cap. 33 R.E 2019] which introduced the importance of the court to be guided by the principle of overriding objective.

Faced with the similar situation, my senior brother, Hon. Magoiga J, in the case of **Dangote Cement Limited vs NSK Oil and Gas Ltd,** Misc. Commercial Application No. 08 of 2020, HC Commercial, Division. Where he insisted that, not withstanding the fact that, the applicant did not file specific provision moving the court, as long as the court has jurisdiction, it will still entertain the application, without being tied by the technicalities rather than focusing on the substantive justice. I am aware of the position in the cases cited above; however, the same holds an old position before the amendment of the law and the introduction of the principle of overriding objective. That said, the complaint raised by Mr. Nasimire is hereby found to be unmeritorious and dismissed.

Now going back to the merits of the application, especially the complaint that, the Hon. executing master illegally relied on the expert opinion which based on documents (Bill of Quantity) not admitted in court as exhibit, and thus not forming part of court's records. It should be noted that the criteria as to what should be the base of deciding the amount to be paid as the cost of preparation of the BOQ and drawings was directed by the High Court in HC Civil Appeal No. 79 of 2017, therefore any valid complaints regarding the criteria, if any, ought to have been against the decision of the High Court in the above cited appeal, by way of appeal to the Court of Appeal of Tanzania, not to raised at the execution stage. For that reason, I find the said two complaints in the first and second grounds to have no merit as it has been misplaced.

From there, let me go to the third and fourth grounds of complaints that the resident magistrates' court being an executing court, illegally relied on expert opinion and awarded the amount of Tshs. 34,595,197.4/= without availing the parties with a copy of the report/opinion and affording the parties the right to be heard on the said report. It is true that the High Court in HC. Civil Appeal No. 79 of 2017 did not specify the amount to be paid; it just directed that the payment was supposed to compensate the

costs incurred by the respondent in preparation of the BOQ and the drawings. It was directed by the said court that the expert be engaged to ascertain the costs. The executing court engaged an expert who gave his opinion as required. However, the applicant here complains that after the expert had submitted his opinion which was given in the form of report, which was to be a base, upon which the assessment of what should be paid was made, it was prudent for parties to be availed with the opportunity to see the report and demand probably the expert to be called for clarification of certain aspects.

Regarding that issue, the respondent submitted that there was no legal obligation the executing office to give the copy of the report of the expert opinion to the parties, therefore the executing magistrate can not be faulted for that failure to supply parties with copy.

Now, having passed through the submission and assessed the situation, I entirely agree with the argument by the counsel for the applicant that, since the expert came with opinion in the form report containing a base of ascertaining the amount to be paid, parties were as a matter of right entitled to be shown the report and given opportunity to examine it, and if need be, then it was equally important for the expert to

be called for cross examination especially on the criteria used to reach to that amount he opined.

I hold so because of the followings, **one,** I have already pointed out that the respondent contract was not only for preparation of the BOQ and the drawings, but also covered even the building of the school buildings. It was under estimation of the respondent himself that, for all these works, he was entitled to be paid Tshs. **59,118,192/=**with **23%** interest. Now one would ask oneself that if the whole work including building construction was costing Tshs. **59,118,192/=**with **23%** interest, then what was the costs of each component, what was the amount for drawing the preparation of the BOQ? These questions were seemingly resolved by report of the expert which contained his opinion on the costing of the said item, from the record, the expert seems to suggest that, out of Tshs. **59,118,192/** claimed by the respondent before the subordinate court, Tshs. **34, 595,197.4/=** was for drawings and preparation of the BOQ. That means by implication that the remaining Tshs. **24,522,994.6** being the costs for building construction. Looking at these figures, they in essence suggest that, the preparation of drawings the sketch and the BOQ which are preliminaries of the main works of building construction, were

costing over ten millions more than the main work of building construction, which fact leaves a number of nagging questions in the eyes and mind of the lay person in the building construction field.

These questions if not resolved, create doubt on the correctness of the figure presented by the expert, thus inviting the importance of informing the parties of these facts for them to opine or contribute or ask for clarification, which was to be given by non other than the expert who gave opinion to that effect.

It is generally a principle of law that Courts are not bound by expert opinion, as they are just an opinion as their names stands, the court needs not therefore rely on them as if they are holy bible or Koran. See **Hilda Abel vs Republic,** [1993] TLR 246, therefore the clarification of the said expert in the presence of the parties would have assisted the court to see the possibility of maintaining the figure in the opinion of the said expert.

It is a principle of law as held in a number of cases some of which are **Tenelec Limited vs Commissioner General for TRA,** Civil Appeal No.20 2018, CAT (Unreported) **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No. 161 of 2019 CAT Mwanza, in these

cases it was held that, whenever a right of an individual is being determined that individual must be given an opportunity to be heard on the issue forming the base of determination of the matter against him, failure to do so is a clear violation of the principle of natural justice and the decision so reached should be declared a nullity. Stressing on the importance of the right to be heard, the Court of Appeal held *inter alia* that;

> *"In this county natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13(6)(a) of the Constitution which includes the right to be heard among the attributes of equality before the law"*

In this case the amount of Tshs. **34, 595,197.4/=** was ordered basing on the opinion of the expert, but without affording parties opportunity to be heard on the said opinion where they would have asked questions for clarification. That taints the order and the award, the two grounds are therefore meritorious, and it is on that base the order is revised. The order awarding Tshs. **34, 595,197.4/=** is quashed and set aside, the matter is hereby returned to the Court of Resident Magistrates for summoning the parties, and the expert who gave the opinion, and

invite the parties to address the court, on the opinion contained in the report by expert, and the expert be given an opportunity to clarify before the executing court had finally given appropriate orders. As the fault which has resulted into re-hearing was not committed by any party, no order as to cost is made.

It is accordingly ordered

DATED at **MWANZA** this 22nd July, 2021

J. C. Tiganga

Judge

22/07/2021