

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA**

AT ARUSHA

MISC. CIVIL APPLICATION NO. 27 OF 2022

(C/F Civil Case No. 6 of 2019)

MOTICA EAST AFRICA LIMITED.....1ST APPLICANT

TITUS VICENT NGWATU.....2ND APPLICANT

VERSUS

I & M BANK TANZANIA LIMITED.....1ST RESPONDENT

YONO AUCTION MART & CO. LIMITED.....2ND RESPONDENT

RULING

14th & 30th June, 2022

N.R. MWASEBA, J.

The applicants herein preferred this application under Section 68 (e) and 95 of the Civil Procedure Code, Cap 33 R.E. 2019 praying for the following orders:

- (a) This honourable court be pleased to call the record of this court (Hon Massam DR) in execution application of the decree in Civil Case No.6 of 2019 wherein the applicants are judgment debtors and the 1st respondent herein is the decree holder, so as to*

examine the record, proceedings and decision so that this court should satisfy itself on the legality and propriety of the finding and decision of the learned Deputy Registrar in that:

i. The learned Deputy Registrar erred in law in allowing the application for execution by attachment of the mortgage property; namely Plot No. 39 at Olkerian area, Arumeru District in Arusha Region held under the certificate of Title No. 27169, Land Registry Moshi registered in the name of the 2nd applicant by omitting to consider an existing and valid order of the District and Housing Land Tribunal for Arusha in Misc. Land Application No. 130 of 2020 restraining the respondents from disposing of or dealing whatsoever with the mortgaged property pending determination of the main application; Application No. 95 of 2020, between the 2nd applicant herein and both respondents herein.

ii. There are new facts discovered aftermath to the decision in execution of the decree of Civil Case No. 6 of 2019, that the amount of the outstanding loan due to the 1st respondent is below the sum claimed of Tshs. 570,000,000/=excluding interest.

(b) any other order and or relief (s) this court may deem fit to grant

The application was supported by an affidavit sworn by Mr Titus Vicent Ngwatu, Managing Director and shareholder of the 1st applicant and opposed by a counter affidavit sworn by Mr Abdulkarim Lila Mkila, Manager of the 1st respondent.

On the 7th day of June 2022, the counsels for the parties were asked to address the court on the competence of the application, taking into consideration that they are challenging the attachment order made by Hon Deputy Registrar.

When the matter was called for hearing on the 14th day of June, 2022, Mr Ipanga Kimaay, learned advocate represented the applicants while Mr Edwin Lyaro, also learned advocate represented the respondents.

Submitting to the raised issue of competence of the application, Mr Kimaay told the court that the application is properly instituted before the court under **Section 68 (e) and 95 of the Civil Procedure Code**. He asserted that those provisions have been used because there is no other provision under the Civil Procedure Code specifically for revision applications brought by a party. He further averred that **Section 79 of the Civil Procedure Code** governs revision proceedings and matters called by this court *suo motto*. Likewise, this application could not have

been brought under **Section 77 of Civil Procedure Code** as it refers to applications for reference. Finally, he said he could not file an objection proceeding under **Order XXI Rule 57 (1) and (2) of the Civil Procedure Code** because under that provision it only allows a third party to bring objection proceedings to object the attachment of the property in which he has interest. He contended that the applicants herein were parties to the execution that is why the only remedy for them is by filing a revision against attachment order.

Mr Kimaay further submitted that the said section moved the court to render an order to the Deputy Registrar of retaking the evidence discovered regarding the outstanding amount of the loan. Furthermore, he said since there is a pending execution application for completion of attachment process then the application is proper before this court. Although Civil Case No. 6 of 2019 was already concluded, the current application arises from the execution application of the registrar.

He also added that even **Section 95 of the Civil Procedure Code** is applicable in our application since there is no clear provision for the application of this nature, that is why inherent powers of **Section 95 of the Civil Procedure Code** have to be used.

On his side, Mr Lyaro learned counsel for the respondents addressed this court that, the cited **Sections 68 (e) and 95 of the Civil Procedure Code** do not offer the prayers sought in chamber summons. He added that **Section 68 (e) of the Civil Procedure Code** allows the court to make interlocutory order to prevent irrepealable harm during the pendency of the suit. He cited the case of **Sherifu Hamadi Vs SMZ** (1992) TLR page 43 to substantiate the same.

It was his further submission that since Civil Case No. 6 of 2020 was already concluded and consent decree issued on 10.10.2019, thus, this application is a misconception and incompetent and ought to be struck out with costs.

He further challenged the application of Section 95 of the CPC and questioned as to whether this court has inherent powers to call and revise its own decision albeit of Deputy Registrar in application for execution. To support his assertion the counsel referred this court to the case of **Sharif Seif Hamad V. SMZ** (Supra) to substantiate that revisional jurisdiction springs only from status and there is no such thing as inherent revisional jurisdiction. He alerted this court that it has revisional powers over courts subordinate to it only as provided under **Section 44 (1) (a) and (b) of the Magistrates Court Act, Cap 11**

R.E 2019 read together with **Section 79 (1) of the CPC**. So, he said this honourable court has no statutory powers to call and revise its own decisions. Therefore, he prayed this application to be struck out for not being properly instituted before this court.

Re-joining the submission made by the counsel for the respondent, Mr Kimaay reiterated what he stated in his submission in chief and added that before the Deputy Registrar there is an application for execution pending for completion of attachment processes of the property in dispute that is why Section 68 of the CPC which refers to interlocutory order becomes applicable.

Having heard the rival submissions from both parties, the main issue for my determination is whether the application is properly instituted before this court.

It goes without saying that this application is for Revision whereby the applicant is seeking this court to revise the decision made by Hon Deputy Registrar on attachment of the mortgaged property to determine whether it was legally made or not. The same has been brought under **Section 68 (e) and 95 of the Civil Procedure Code**.

Section 68 (e) of the Civil Procedure Code reads as hereunder:

"In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf- make such other interlocutory orders as may appear to the court to be just and convenient."

Whereas Section 95 of the Civil Procedure Code states as hereunder:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Reading between lines of the above provisions of the law they basically move this court to issue an interlocutory order something which is contrary to the prayers sought in chamber summons whereby the applicants are seeking for revision. The same was well clarified by the counsel for respondent that **Section 68 (e) of CPC** allows the court to make an interlocutory order to prevent any irreparable harm during the pendency of the suit. However, looking at the proceedings of the matter at hand, there is no any suit pending before this court as Civil Case No 6 of 2019 was already finalized.

Coming to **Section 95 of the CPC** it refers to inherent powers given to the court to prevent the ends of justice. This provision can not by itself

support the applicant's prayers for revision or for interlocutory order as the court has been moved herein above.

The above provisions were well clarified by my Learned Sister Makani J. in the case of **Joseph Thomas Kleruu Vs CRDB Bank Plc and 2 Others**, Misc. Land Application No. 347 of 2021 [2022] TZHC LandD **62 (26 January 2022)** where it was held that:

*"It is also apparent that section 68 (e) of the Civil Procedure Code is applied to supplement another provision such as in Order XXXVII for temporary injunction, and section 95 of the Civil Procedure Code is inherent powers of the court applied where there is no specific provision of the law. In this case, these provisions are redundant. In the circumstances therefore, there is wrong citation of the law vis a viz the orders sought in the Chambers Summons hence the application is incompetent (see **Robert Leskar vs. Shibesh Abebe**, Civil Case No. 4 of 2006 (CAT-Arusha) (unreported))."*

I subscribe myself to the above cited authority that the provisions used by the applicant to move this court are without flickers of doubt that this court has not been properly moved hence the application before me is incompetent. This was also the position in the case **Hon. Zito Zuberi Kabwe (MP) V. The Board of Trustees, Chama Cha Demokrasia**

na Maendeleo and Another (2014) TLR No.290 in which it was held that:

i. A wrong or non-citation of the law in a chamber application renders the same incompetent. The omission is not a mere procedural irregularity; it goes to the root of the matter. It is also the law that the court's jurisdiction cannot be invoked by a wrong or non-citation of a proper law."

ii. N/A

iii. N/A

iv. As to the applicability of Section 68 of the Civil Procedure Code [Cap 33 R.E. 2002] it does not give any power to this court except summarising its powers under the first schedule of the Civil Procedure Code [Cap 33 R.E. 2002]. It is thus merely a supplementary provision of law. Section 68 could not thus apply in this matter if Order XXXVII rule 2 (1) was inapplicable.

That being the legal position, and this application being made under wrong provision that does not support the orders sought in the chamber summons, the same is rendered incompetent and ought to be struck out.

For the foregone reasons, the application is hereby struck out for being incompetent before this court. Considering that the issues of law were raised by this court *suo motu*, each party shall bear its own costs.

It is so ordered.

DATED at **ARUSHA** this 30th day of June 2022.



N.R. Mwaseba

N.R. MWASEBA

JUDGE

30.06.2022