

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION NO. 33 OF 2021**

(Arising from the decisions, orders and proceedings of Resident Magistrate Court of Dar es Salaam at Kisutu, in Misc. Civil Application No. 39 of 2020 before Hon G.N. Isaya)

JUDITH GEORGE NYEMBELA.....APPLICANT

VERSUS

EDGAR HERMAN BEGERE RESPONDENT

RULING

Date of last Order: 02/06/2022

Date of Ruling: 01/07/ 2022

E.E. KAKOLAKI J.

By way of Chamber summons supported by the affidavit deposed by the applicant, this Court has been moved for Revisional Order(s) against the whole proceedings and ruling of Resident Magistrate Court of Dar es Salaam at Kisutu in Misc. Civil Application No. 39 of 2020, and its order dated 20th July 2021. The application has been preferred under sections 79 (1) (a), (b), and (c), and 95 of the Civil Procedure Act, [Cap 33 R.E 2019] (the CPC), and section 44 of the Magistrate Courts Act, [Cap 11 R.E 2019] (the MCA).

The brief background giving birth to the present application as can be gathered from the Affidavit is straight forward. The applicant herein

successfully petitioned for divorce decree and division of matrimonial assets against her ex-husband one Timothy Edgar Berege in Matrimonial Cause No. 19 of 2018, before the Resident Magistrates Court for Dar es salaam Region at Kisutu. During the said matrimonial proceedings, the respondent being a biological father of the applicant's husband was called to testify as a witness and testified to have given the said couple a property described as a business premises and one floor in a flat at plot No. 08 Block 43, Kijitonyama at Mwenge area. In the end the court dissolved the marriage and ordered for division of matrimonial properties including the said business premises and one flat floor at Mwenge, in which applicant was awarded 20% the share of that particular property. In the course of executing the court decree, the applicant filed an application for execution No. 140 of 2019 before the same Court, seeking among other for orders that, evaluation of the properties be made and the Court be pleased to declare that, the applicant is entitled to 20% of the sale proceeds of Bunju House or in the alternative setoff of her 20% from the business premise and one floor in a flat at Mwenge building complex. As the respondent was not a party to that execution proceedings and having claim of interest in the business premised and a flat at Plot No. 08 Block 43, Kitonyama at Mwenge subject of execution proceedings, filed

an objection proceeding before the same Court vide Miscellaneous Civil Application No. 39 of 2021, seeking for executing court's intervention to investigate his claims and declare that, the objector is a true owner of the disputed landed property hence the same is incapable of being attached. On 20th July 2021, the court ruled in his favour. Discontented with the said decision, the applicant preferred the present application for revision on the reasons that there are errors apparent on the face of record.

The application was vigorously resisted by the respondent who through his advocate Mr. John Seka filed a counter affidavit together with notice of preliminary objection on the grounds that:

- (1) The applicant has an alternative and more efficacious remedy in law in terms of the provisions of Order XXI Rule 62 of the Civil Procedure Code by filing a fresh suit.
- (2) The present application more particularly in terms of the contents of paragraph 8(a), (b), (c), and (d) are grounds of appeal and consequently it is not maintainable as revision application on account of being an appeal in disguise and

- (3) Alternatively, to item 2, that, the applicant has an alternative and more efficacious remedy by way of appeal against the judgment and decree in Misc. Civil Application No 39 of 2020.

As per the Court's practice, the preliminary objection on point of law once raised has to be disposed first, in which in this matter by consensus parties agreed to argue the objections through written submission. Both parties had representation, as the Applicant was represented by Mr. Zuri'el Kirunde Kazungu while the respondent hired the legal services of Mr. John Seka, both learned advocates.

Mr. Seka's submission in chief was prefaced by the prayer for leave of the court to drop the 2nd and 3rd grounds and canvass the first ground only. It was his submission that, the application is incompetent before the Court as per the dictates of Order XXI Rule 62, of the CPC, the applicant has an alternative and more efficacious remedy to present her cause by filing a fresh suit instead of the preferred revision as neither appeal nor revision are viable remedies to her under the circumstances. He cited plethora of cases supporting that stance including the case of **Amour Habib Salum Vs. Hussein Bafagi**, Civil Application No. 76 of 2010 (CAT-Unreported), **Katibu Mkuu Amani Fresh Sports Club vs Dodo Umbwa Mamboya and**

Another [2004] TLR 326, **Sea Saigon Shipping Limited Vs Mohamed Enterprise Tanzania Limited**, 2005 TZCA reported in Tanzlii, in which in the Court of Appeal held and insisted that, an order from objection proceedings is conclusive and that, a party who is aggrieved by such order has no right to appeal rather filling a fresh suit to establish his right. As to issue whether the same restriction and the remedy for fresh suit applies to revisional proceedings seeking to challenge the decision or order arising from objection proceedings, he said, it does as it was the position of this Court in the case of **Sembuli Alli Ndagiwe Vs. Mwezi Ramadhan**, Land Revision No 1 of 2021 (HC-Unreported). He maintained that the application is wrongly before this court thus the same should be dismissed with cost.

In rebuttal, Mr. Kazungu resisting the respondent's submission contended that, the gist of this revision is none than to challenge the act of the trial magistrate during objection proceedings to remove the suit property from execution proceedings, which property constituted part of the decree of the same court in matrimonial proceedings and subject of division to the matrimonial cause. He said that, the execution by way of attachment and sale of the suit property is based on a decree of the court, which cannot be challenged by way of objection proceedings. Even though he argued, the

provision Order XXI Rule 62 is not couched in mandatory terms therefore the applicant remains with discretion to either file a fresh suit or seek for any other alternative remedy in which revision is one of them. To him, where there is judgment and decree declaring interest of the party in the property then filing a fresh suit where objection proceedings is successful is not the right option. That apart he contended, in this matter the trial court was functus officio to decide on the objection proceedings as the disputed property was already declared by itself as matrimonial property in the matrimonial cause. With regard to the cited cases he countered, all the cases referred by respondent's counsel are distinguishable to the present case as all were dealing with the preferred appeals against the decisions reached in objection proceedings and not revision applications against the ruling or order, where the learned magistrate in the objection proceedings had quashed the decision and decree of his fellow magistrate in matrimonial case like the situation in the present matter. He concluded that, since in this matter execution was based on the property mentioned in the decree in Matrimonial Cause No. 19 of 2018, revision was rightly preferred for this Court to satisfy itself as to the propriety of the impugned ruling or order in the objection proceedings disqualifying the decree of the same court. He

invited this the court to dismiss the objection with costs so as to cloth itself with an opportunity to address the issue as to whether it was proper for the learned magistrate to order the removal of the suit property from execution proceedings, which property is the subject of the court decree in execution proceedings. He argued that, the respondent counsel did not cite any authority which restrict a party to prefer revision when aggrieved by the decision from objection proceedings.

In a short rejoinder, Mr. Seka countered the applicant's submission on three points as raised by the applicant. Firstly, concerning the allegation that, it was wrong for executing court to detach the respondents building from attachment on the basis of being functus officio, Mr. Seka argued that, it is a gross misconception and misdirection for the applicant to try to persuade this court that, the execution court had no jurisdiction nor competence to determine the objection. In his view the executing court had the requisite competence to investigate and inquire on the ownership of the response before proceeding to issue the sought orders by the applicant. Secondly, regarding the allegation that, is not mandatory for the person aggrieved by the decision from objection proceedings to file a fresh suit under Rule 62 of Order XXI of CPC, Mr. Seka argued that, the learned counsel cited no any

authority to justify his contention which is a total misconception of the law. Regarding the allegations that, all the cases referred by the respondent are distinguishable to the facts of the present matter for referring to appeals only against decisions from objection proceedings, Mr. Seka argued that, the assertion is incorrect since in the case of **Sembuli Ally Ndagiwe**, cited earlier on, an application for revision was equally refused by this court. He went on reiterating his submission in chief. He rested his submission by requesting the court to dismiss this application for being misconceived, filed in the wrong court and under the wrong procedure which is unknown to the law.

Having saved ample time and energy to peruse the rival submission by the parties and researched on the applicable law the issue this Court called to answer is whether the application for revision is competently presented before this court. It is common that where a claim of right or interest is established through preferred the objection proceedings, the party against whom an order is made has **no right of appeal** but **may institute a fresh suit to establish the right which he claims against the property in dispute** as the ruling or order of the Court as regard to objection

proceedings is conclusive. This settled position of the law is dictated under Order XXI Rule 62 of the CPC. Order XXI Rule 62 of CPC reads thus:

*Where a claim or an objection is preferred, **the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.***

The above sound principle was emphatically laid down in the case of **AG Vs. Ali Athuman Kondo & Others**, Land Revision No. 22 of 2019 where the court cited with approval the case of **D.B Shapriya & Co. Ltd V.s Leighton Offshore PTE Limited (T) Branch and Others**, Civil Revision No. 8 of 2016, (CAT Unreported) where the Court of Appeal had this to say:

*Similar remarks were made in **Mohamed Enterprises (T) Ltd Vs Tanzania Investment Bank & others** (supra) and thus by a parity of reasoning, we refrain from invoking our revisional jurisdiction since the TPA has an alternative remedy by way of instituting a suit. That is to say this matter is left to lie where it was immediately before the opening of these proceedings.*

In the present application, Mr. Kazungu seeks to convince this Court that since in this application the applicant is seeking to challenge the execution court's act of removing the property already decreed on by the same court

then the provision of Order XXI Rule 62 of the CPC is inapplicable to the applicant. And further that even if it has to apply still the same offers discretion to the party aggrieved with the objection proceedings decision to either institute a fresh suit or to prefer other remedy of his choice such as revision preferred by the applicant hence this application is competently placed before the Court. With due respect to Mr. Kazungu I am not prepared to accept his proposition. I know no provision of the law under the CPC that restricts the executing court from entertaining the objection proceedings challenging attachment or sale of the property forming part of the decree and remove or release it from attachment as Mr. Kazungu would want this court to believe. Order XXI Rule 59 of the CPC, is very categorical that, once the executing Court hearing the objection proceedings is satisfied that the claimed property does not belong to the judgment debtor or is not in his possession, may proceed to release the same from attachment in whole or to the extent claimed. The said Order XXI Rule 59 of the CPC provides:

59. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being

in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

In this matter since the executing Court was clothed with jurisdiction to investigate and determine the dispute over business premises and a flat at Plot No. 08 Block 43, Kitonyama at Mwenge, I find was not functus officio as claimed by Mr. Kazungu. In the same bit since after hearing of both parties the Court held the property in dispute to be incapable of being attached upon establishment ownership by the respondent, I hold its decision was conclusive as stated under Order XXI Rule 62 of the CPC. Now what is the available remedy to the applicant in this matter who is aggrieved by the execution court's decision. Again on this question I do not agree with Mr. Kazungu's proposition that, the law gives discretion to the party to choose whether to file a fresh suit or seek another remedy such as revision as the provision of Order XXI Rule 62 of the CPC does not provide so. It is the finding of this Court that since the ruling or order arising out of execution proceedings is not appealable, the only available remedy under the

circumstances is to institute a fresh suit to establish her ownership or any other interest over the property and not to go for revision. I so find as it is a principle of law that revision is not applicable to the party challenging the decision in the objection proceedings where there is alternative remedy since the party has to exhaust that alternate remedy first. This settled principle was adumbrated by the Court of Appeal in the case of **Kezia Violet Mato Vs. National Bank of Commerce & Others**, Civil Application No. 127 of 2005, (CAT-unreported) where the provisions of Order XXI Rule 62 was under consideration, when it had the following to say:

*In the instant case it is common ground that the applicant has no right of appeal. But notwithstanding lack of right of appeal, she has an alternative remedy provided by law, that is, to institute a suit to establish the right she claims to the house in dispute as per Order XXI Rule 62 CPC. **It is our considered view that, where a party has no right of appeal but there is an alternative remedy provided by law, he cannot properly move the Court to use its revisional jurisdiction. He must first exhaust all remedies provided by law before invoking the revisional jurisdiction of the Court.** The applicant who has not yet exhausted all remedies provided by law cannot invoke the*

revisional jurisdiction of the Court. This application is incompetent. (Emphasis supplied)

In this matter since the decision in Misc. Civil Application No. 39 of 2020 was to the effect that, the disputed property was incapable of being attached, and since that decision was conclusive and given the fact that, the applicant had an alternative remedy to institute a fresh suit but failed to pursue it, instead preferred revisional proceedings which as per **Kezia Violet Mato** (supra) and **Sembuli Alli Ndagiwe** (supra), was not entitled to, I find the preliminary objection by the respondent to be meritorious and the same is upheld. Consequently, the application is struck out for being incompetent before the Court.

As regard to costs prayed by the respondent, I refrain from granting the same considering the fact that this matter involves disputes on matrimonial assets. Each party to bear its own costs.

It is so ordered

DATED at Dar es Salaam this 1st day of July, 2022.



E. E. KAKOLAKI

JUDGE

01/07/2022.

The Ruling has been delivered at Dar es Salaam today on 1st day of July, 2022 in the presence of Mr. Tazani Mwaiteleke advocate for the applicant, Ms. Sikujua Clement advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

01/07/2022.