IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

REVISION APPLICATION NO 9 OF 2021

(Arising from Civil Case NO 17 of 2021 of the Resident Magistrate's Court of Musoma at Musoma)

PIUS MANINI .....APPELLANT

VERSUS

DORIKA KITAMALA ..... RESPONDENT

RULING

1st April and 2nd May, 2022

F. H. MAHIMBALI, J.:

On 29th November, 2021 the Resident Magistrate Court of Musoma (the trial Court), via Civil Case No. 17 of 2021 struck out the applicant's case for being incompetent after it had been commenced by way of plaint instead of petition.

The borne of contention of the said matter traces its origin from the claim by the applicant against the respondent claiming a total of 35,000,000/= and 60,000,000/= being specific and general damages for the tort of defamation.

Upon being served by the applicant's plaint at the trial court, the

respondent in his reply amongst others raised a preliminary objection that the suit contravened the Media Services Act, 2016 and Media Services (Defamation Proceedings), Rules, 2019 which require such proceedings to be commenced by filing a petition and not plaint as done. This is because the libel defamatory words being in permanent forms, its legal cause is commenced by way of petition and not plaint.

Upon hearing the submission by both parties, the trial court ruled in favour of the respondent by upholding the preliminary objection. Aggrieved by that decision, the applicant has preferred this revision application challenging the decision of the trial court that the decision is procured with illegality and incorrectness. Thus, this Court is urged to revise the same.

Again, the respondent by way of preliminary objection has attacked the revision application for being incompetent in terms of section 79 (2) of the Civil Procedure Code and section 43(2) of the Magistrates' Court Act, Cap 11 R.E 2019. This ruling is thus the Court's response from what has been argued for and against by the parties in this application.

During the hearing of the application, Mr. Amos Wilson appeared for the applicant whereas the respondent was dully represented by Mr. Wambura learned advocate.

In consideration to the affidavit supporting the application and the enabling provision of the law, Mr.Wambura learned advocate sobjected the application on point of law that in view of what has been filed in Court, he is of the firm videw that section 79 (2) of the CPC, Cap 33 R. E. 2019 has been violated. He says so, because the ruling under revision emanates from preliminary objection which resulted in striking out the matter. Thus, as per section 79 (2) of CPC, what was ruled by the trial court has no effect of finalising the case. This is because a strike out order does not completely dispose of the matter. This is also in line with section 43 (2) of MCA. Therefore, revision application in this matter is misplaced. The cited provisions are so identical with section 5 (2) of the Appellate Jurisdiction Act, Cap 141. In the latter section, the CAT in the case of **Prime Catch (Exports) Limited and 5 others vs Diamond Trust Bank Tanzania Ltd,** Civil Application No 296/16 of 2017 CAT at Dar es Salaam at Page 13 and 18 ruled that striking out the matter with costs, is in itself not a ground of revision.

In the current matter, he is of the firm view that the current case is not fit for revision as the applicant had a room of refiling a proper case as per law. What matters are considered to determine the appeal, the following are to be apparent.

- Consideration relief by the Court, What is sought is not granted, Point of determination by the court.

It is his opinion that this revision application is incompetent before this court because there is nothing revisable which is called an illegality or incorrectness. On that stance, he is of the view that this application be struck out with costs for being incompetent before the court.

In his reply to the submission, Mr. Amos Wilson learned advocate first admitted with the legal principle set in the cited provisions that spell out well what is to be revised. However, considering what was has been ruled by the trial court, has left nothing at the trial court's registry. This means that there was a right cause to take as he has taken here. It is his legal mind that as there is nothing that has remained in the registry, as what was decided/ruled is not interlocutory or preliminary point.

In making sense of his argument, he clarified that this court (Sitting at Mwanza) in the case of **Registered Trustees of St. Augustine University of Tanzania vs Roberth Mhando and Another** (2017) TLS 157, the High Court held that, where there is an illegality in a striking out order, the remedy is revision. In the case of **Stanbic Bank Tanzania Ltd vs Kagera Sugar,** Civil Application No 47 of 2007, in exceptional circumstance, the court can make revision. In

bringing his point home, he submitted that in this case the illegality is that the matter falls within Media Services Act. The prevailing circumstances in the present case are distinguishable from the circumstances in the quoted case of Prima Catch (exports) Ltd. Furthermore, the cited interpretations of section 5 (2) of Cap 141 by Prima Catch case cannot apply in this case.

He clarified that, as per nature of this application, considering what the trial court has ruled entertains material irregularity thus, subject to the court's intervention to correct the error. The finality clause/meaning should be narrowly interpreted depending on the facts and circumstances of each case.

According to section 74 (1) and order XL, rule 1 of CPC, what was decided by the trial court does not fall into anyone of them. Thus, it was not an appealable order in his considered view.

He concluded his submission by urging this court which is fully mandated to make this revision application as prayed.

Re-joining, Mr. Wambura while reiterating his submission in-chief, he added that under section 79 (1) c is applicable where there is decision in the main case. As that decision does not bind him of refiling

the case, then the matter has not been finally determined as per law. He clarified further by making reference to section 5 (2) of the AJA, because its wording is similar/identical to what is provided under section 43 (2) of MCA and 79 (2). As this provision which is identical with section 5 (2) of the AJA, and the latter provision has been well interpreted by the Court of Appeal in the case of **Prime Catch (Experts) Ltd**, then this Court by way of analogy can fill that gap. Therefore, even if there is an illegality in the said decision, the decision is not appealable/revisable only because it is erroneous but only where it has the effect of finally determining the matter. That only when the matter is heard on merit and the relief is determined, then its decision is revisable and or appealable. Short of that, the decision is not appealable/revisable.

In appreciating the gist of this application and in digest to what has been argued by both parties, I have considered it important to revisit the said relevant provision of the law. As per the enabling provision of the law in support of this application, it is coached in the following manner:

> *79.-(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 by law;

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.

(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.

The central point for consideration in this ruling is whether the strike out order by the trial court determined the matter in its finality? A matter is said to be conclusively determined and thus revisable or appealable where the said ruling or order had the effect of finally determining the reliefs sought in the suit/application as the case may be. In the matter at hand as the reliefs sought by the applicant at the trial court were not dully/fully determined, then the matter as rightly argued by Mr. Wambura is not revisable as per law as opted by Mr. Amos learned advocate.

I get this stand by clearly reading the provisions of section 79 (2) of the CPC read together with the case of in the case of **Prime Catch (Exports) Limited and 5 others vs Diamond Trust Bank Tanzania Ltd, Civil Application No 296/16 of 2017 CAT** which interpreted the provisions of section 5 (2) d of the AJA which is identical to the provisions of section 43 (2) of the MCA. For clarity the provision of section 5(2) d of AJA provides:

> *"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court* ***unless such decision or order has the effect of finally determining the charge or suit****."[emphasis added].*
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> Whereas section 43(2) of MCA provides:
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> *"Subject to the provisions of subsection (3), no appeals or application for revision shall lie against or be made in respect of any preliminary or interlocutory decisions or order of the district court or a court of a resident magistrate* ***unless such decision or order has the effect of finally determining the criminal charge or the suit." [emphasis added].***

Similarly, section 79 (2) of the Civil Procedure Code, Cap 11 R.E 33 is coached in the following terms:

"Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit."

In essence, the semantic meaning of the said provisions is similar. Thus, the legal interpretation as provided in the case of **Prime Catch (Exports) Limited and 5 others vs Diamond Trust Bank Tanzania Ltd,** cuts across to the similar provisions happening in the subordinate court as discussed hereinabove. The doubts by Mr. Amos are more fears and not legally tenable.

In the circumstances of the present case where the reliefs sought by the applicant at the trial court are specific and general damages of 35,000,000/= and 60,000,000/=, the same being not fully or even partially determined, the knocking of the doors of this Court is premature.

That said, the application for revision before this Court is uncalled for. In view of the aforesaid, as the preliminary objection is merited, the present application is not tenable because it is barred by the provisions of section 79 (2) of MCA.

Finally, I proceed to dismiss the application. Each party to bear it's with costs.

DATED at MUSOMA this 2nd day of May, 2022.

F.H. Mahimbali

JUDGE

Court: Ruling delivered this 2nd day of May, 2022 in the present of the Mr. Amos Wilson, advocate for the appellant and Mr. Gidion Mugoa, RMA Respondent being absent.

F.H. Mahimbali

JUDGE

2/5/2022