IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 530 OF 2021

EDGAR EZEKIEL SANGA ..... APPELLANT

VERSUS

ESTHER ROBERT MBUA ..... RESPONDENT

RULING

13th July, & 3rd August, 2022

ISMAIL, J.

This an application for revision, taken at the instance of the applicant. It seeks to fault the decision of the District Court of Ilala in Misc. Civil Application No. 185 of 2021. In the impugned decision, the District Court granted the respondent's prayer for transfer of proceedings in Matrimonial Cause No. 174 of 2021, from the Primary Court of Ilala at Ukonga to the District Court of Kinondoni. The view taken by the court is that the Ukonga court was not seized of the matter, mainly because the applicant, the respondent then, is resident in Bunju, within Kinondoni District.

The court concluded that the decision to institute the case at Ukonga was not informed by section 47 (1) (c) (ii) of the Magistrates' Court's Act,

Cap. 11 R.E. 2019, which requires that proceedings be instituted where the cause of action arose or where the defendant resides or works for gain.

The application is supported by the affidavit of Edgar Ezekiel Sanga, the applicant, and it lays the basis for the prayer sought. Of most significance in the applicant's depositions are paragraphs 11, 12, 13, 14 and 15 which give the detailed account of what the applicant considers as instances of irregularities and/or illegalities. In summary, the applicant considers the following to be irregular:

(i) That transfer of the matter from Ukonga to Kinondoni was not craved by the respondent;

(ii) That whereas the respondent's prayer was for transfer of the matter from Ukonga Court to Ilala District Court, the court ordered that the matter be transferred to Kinondoni District Court; and

(iii) That the order for transfer of the matter failed to consider that the court to which the matter was transferred lacks jurisdiction because the cause of action arose iN Tabata Segerea; the marriage reconciliation was done in Ukonga Ward; and that some of the matrimonial properties are situated at Chanika, within Ilala District.

The respondent has valiantly opposed the applicant's contention. She has taken a consistent view that there was nothing wrong with the decision to transfer the matter, and that the same was unblemished, taking into account that the applicant's place of abode was established to be Bunju, in Kinondoni District.

The application was argued by way of written submissions whose filing abided by the scheduling order made on 16th June, 2022.

Kicking off the discussion was Ms. Amina Macha, learned counsel for the applicant. She began by citing section 103 (2) (a) of the Law of Marriage Act, Cap. 29 R.E. 2019 (LMA) which guides on the jurisdiction of the Conciliation Board. She argued that, considering that the applicant was resident at Kigogo Fresh, Pugu, within Ilala District, the Conciliation Board that had requisite powers was the Ukonga Board and that the court to which disputes would be preferred is the Primary Court of Ilala at Ukonga. Ms. Macha argued that, where transfer is necessary, the provisions of section 47 91) (b) of Cap. 11 are the guide on where such transfer should be directed to. She took the view that transferring of the matter to Kinondoni was an affront to the provisions of the law. On this, the learned advocate cited the cases of ***John Byombalorwa*** and ***Our Lady of Usambara***.

Regarding jurisdiction of the Primary Court of Ilala at Ukonga, Ms. Macha argued that section 76 of the LMA guides that primary courts have jurisdiction to entertain matrimonial proceedings. She saw no reason for transfer of the case and that the reason given for the transfer was weak and baseless. She maintained that the applicant was resident within Ilala District and that transfer of the matter ought not to have exceeded the territorial limits of the District Court of Ilala.

The applicant's other contention is that transfer of the matter to Kinondoni court is not what the respondent prayed. The argument is that the transfer to Kinondoni was the court's own creation, abhorred in numerous judicial proceedings, including the case of ***Wamirika Gama v. Action Aid TZ***, HC-Revision No. 619 of 2019 (unreported), in which it was held that the Court is powerless and cannot grant reliefs which were not sought.

Ms. Macha came up with yet another argument. This is to the effect that there is variance between what is in the ruling and the drawn order. She argued that the variance between the two could only be cured through revision as no appeal would lie against the decision.

She concluded that, since the transfer violated the provisions of section 47 (1) of the MCA, the recourse is to revise the order and direct that the matter be returned to Ukonga court.

The rebuttal submission was filed by Mr. John Seka, learned advocate. With respect to cause of action, the argument by the respondent is that the question of where the cause of action arose was raised and the court made a finding that the contention that the cause of action arose at Kigamboni was a submission from the bar, and that the court could not entertain it. Going by the current legal holdings, Mr. Seka contended, the course of action was to institute an appeal and not revision. On this, learned counsel cited the cases of ***Moses Mwakibete v. The Editor – Uhuru, Shirika la Magazeti ya Chama & Another*** [1995] TLR 134; ***Transport Equipment Ltd v. D.P. Valambhia*** [1995] TLR 161; and ***Halais Pro-Chemie v. Wella A.G.*** [1996] TLR 269.

Regarding the respondent's residence, the contention by Mr. Seka is that, upon conclusion by the court, that there was no clear evidence with respect to the place where the cause of action arose, the only recourse was to resort to the 4th Schedule to Cap. 11. He argued that the relevant provision is Rule 1 (b) which provides that jurisdiction may be determined based on where the defendant is ordinarily resident. In this case, learned counsel

contended, it was evident and uncontested that the respondent was resident in Bunju, Kinondoni and that such revelation informed the decision to order that the proceedings be transferred to Kinondoni District Court. He argued that, if the applicant was disgruntled by the decision, the proper remedy was to institute an appeal and not a revision which is, in all respects, an appeal in disguise.

Regarding the reasons for the transfer, the respondent's advocate was adamant that the court was within its right to order the transfer, and that the decision is vindicated by the powers conferred on it under section 47 (1) (b) of Cap. 11. He also argued that such need arose from the fact that the respondent intended that she be represented by an advocate.

On the errors in the drawn order against the ruling, the view held by Mr. Seka is that none existed as what appears in the drawn order is a statement that the application was granted as prayed. He argued that, in any case, this was an error (if any) which would be rectified upon request, and that there is nothing to suggest that any such effort was employed to rectify the error. Mr. Seka maintained that this was a demonstration of the fact that this was a matter which leans more on appeal than revision.

Mr. Seka went on to elaborate on his contention that this is a fit case for appeal, and cited the decision of this Court in ***Helen Mark Temu v. Mafia District Council***, HC-Civil Revision No. 12 of 2020 (unreported), in which it was held that revision is not an alternative to appeal. He maintained that the applicant's chosen path was nothing but an abuse of a legal process. He buttressed his contention by citing the decision of this Court in ***Consensa Bonaventula v. Abdallah Mlama***, HC-Land Revision No. 30 of 2019 (unreported), which quoted a few Court of Appeal of Tanzania's decisions that abhorred preference of review to appeal, terming it an appeal in disguise.

The respondent's advocate concluded by urging the Court to hold that there is no interest of justice to justify the propriety of the path taken by the applicant. He prayed that the application be dismissed.

The applicant's rejoinder punched holes in the respondent's submission, on the contention that this was fit case in respect of which an appeal is more appropriate than a revision. Ms. Macha argued that section 49 (3) of Cap. 11 bars preference of appeals against orders made under sections 47 or 48 of Cap. 11. She maintained that revision is the only proper remedy.

On the variance between the ruling and the drawn order, Ms. Macha maintained that such variance exists. She argued that the decision on the transfer went far overboard as the law only allows transfers to courts within the territorial limits and not otherwise.

Regarding the reasons for the transfer, Ms. Macha was less convinced that reasons were sufficient to justify the transfer. She argued that the established position is that, engagement of an advocate is not good enough a reason to justify the transfer. She maintained that the application be granted as prayed.

Before I delve into the substance of the application, it is fitting that the nagging question touching on the propriety or otherwise of the application be laid to rest. This issue arises from the respondent's contention that the application suits the mould of an appeal and that the right course of action is an appeal. The applicant's counsel takes the view that an appeal would not see the light of the day because the law expressly bars taking of appeals in cases where the disgruntlement emanates from exercise of the court's powers under sections 47 and 48 of Cap. 11.

I have scrupulously gone through the record of the lower court and got hold of the application that initiated the transfer that is now under the

cosh. It is an application which was instituted under the provisions of section 47 (1) (b) of Cap. 11, the substance of which is as reproduced hereunder:

> *(1) Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for-*
>
> *(a) N/A*
>
> *(b) The district court or a court of a resident magistrate* ***within any part of the local jurisdiction of which the primary court is established****, to order the transfer of the proceedings to itself or to another magistrates' court; or…"* [emphasis is added]

As stated by counsel, this application was granted to the applicant's chagrin. But of relevance here is whether the applicant, who was aggrieved by the decision emanating from the quoted provision, had the option of having it reversed by way of appeal. My unflustered position on this is as alluded to by Ms. Macha. It is simply that no appeal would lie in the circumstances of this case. This is in view of section 49 (3) of Cap. 11 which provides as hereunder:

> *"No appeal shall lie against the making of, or any refusal to make, an order under the provisions of section 47 or 48."*

With the window of appeal closed by statute, I am unable to agree with Mr. Seka that an appeal would serve the purpose. It is in view thereof, that I find the authorities cited by him on this aspect distinguishable. They would be relevant where no bar has been placed on the appeal. I take the view that revision was the only feasible and justiciable course of action, especially where a claim of illegality is made. In view thereof, I take the view that the contention by Mr. Seka is misconceived and I decline the temptation to subscribe to his view.

Moving on to the heart of the parties' contention, the main contention by the applicant is that the order that transferred the matter to Kinondoni went against what was prayed by the respondent.

Reading the applicant's submission, it comes out clearly that, while he would not have little or no qualms in having the matter transferred from the Ukonga court, it is the decision of consigning it to Kinondoni District Court that the applicant has become jittery about. Firstly, because the respondent never asked to have her matter consigned to a court in Kinondoni and, secondly, that the reasons cited were not weighty enough. I will 'pitch a tent' on the first reason.

As stated by the applicant, the court's powers under section 47 (1) of Cap. 11 were strictly in respect of what was prayed for in the application, nothing more. This is can be confirmed by having a glance at the application that bred the ruling whose legitimacy is on the line. It was commenced by a chamber summons which was preferred by the respondent, and it contained several *interpartes* prayers which are reproduced as follows:

> *"3. That civil proceedings being Madai No. 174 of 2021 currently ongoing at Ukonga at Primary Court be transferred to the District Court of Ilala for hearing and determination;*
>
> *4. That pending determination of this application, any proceedings in Madai No. 174 of 2021 currently ongoing at ukonga at primary Court be stayed.*
>
> *5. Costs and interests at the court rate be provided for and to follow the event.*
>
> *6. Grant any other order that this Honourable Court may deem fir and just to grant."*

It is clear that what the court was called upon to determine was whether the prayer for transfer of the case to Ilala District Court was meritorious. The moment the court formed an opinion that the application had what it takes to be granted, the decision was to grant it. The court did

not have any room of twisting the prayers and grant what was not craved by the applicant in the said application. In this case, the court's choice was to substitute the prayer with a new prayer.

This act was not only *ultra vires* the powers conferred on it under section 47 (1) (b) but also an act of converting itself into a party and choose the remedy to dispense to a party. It was tantamount to creating a case for one of the parties and, as stated in numerous decisions, this is an act that has disastrous consequences. It is a deviation from the court's sole responsibility of evaluating and making sense of what is presented before it, choosing, instead, to plug the gaps or stitch torn a case to a party's interest.

In ***Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi***, HC-Civil Case No. 25 of 2017 (unreported), the Court quoted with approval, the decision in the case of ***Haji v. New Building Society Bank*** [2008] MWHC 36, in which the High Court of Malawi held as follows:

> *"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case.* ***Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the***

case on the merit of the evidence available."

[Emphasis supplied]

The foregoing ***Nyehese Cheru v. Republic*** excerpt beds well with the decision of the Court of Appeal in [1988] TLR 140, in which grant of unsolicited orders was abhorred.

It is fair to state that what the District Court did in this matter is an intolerable act that overstepped its mandate and it justifies this Court's intervention through its revisional powers conferred on it by sections 43 (3) and 44 (1) of Cap. 11. It is not a trifling omission or error that can be cured by a mere application for review. It is a fundamental error that occasioned a miscarriage of justice in a profound way.

In consequence, I find the application meritorious and I sustain it. I quash the proceedings in Misc. Civil Application No. 185 of 2021, set aside the order that emanates from the said proceedings, and order that the said proceedings be heard afresh before another chairperson and in the attendance of both parties.

I make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 3rd day of August, 2022.

M.K. ISMAIL

JUDGE

03.08.2022