

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MISC. CIVIL REFERENCE NO. 08 OF 2022

(Arising from Civil Application No. 01/2021 of District Court of Tanga at Tanga, before
Hon. H.A. Majani RM)

HAMDUNI ALLY SHEHOZA.....1ST APPLICANT

REHEMA ALLY SHEHOZA.....2ND APPLICANT

ASMA ALLY SHEHOZA.....3RD APPLICANT

VERSUS

RAMADHANI RUTENGWE & CO. ADVCOATESRESPONDENT

RULING

Date of last order: 30/06/202

'Date of ruling: 01/07/2022

AGATHO, J.:

This application has been brought before this court by way of chamber summons and supported by an affidavit of the Applicants' counsel as it was made under Rule 7(1) of the Advocates Remuneration Order, 2015 GN. No 264 of 2015 for the purpose of revising the Decision of Resident Magistrate at the District Court of Tanga at Tanga in Civil Application No. 1 of 2021.

Reading the affidavit of the applicant specifically paragraph 5 and 6 he avers on the issue of the Resident Magistrate who was not in charge and not among court

officers appointed by the Chief Justice to entertain remuneration issues. Proceedings and ruling of Civil Application No. 1/2021 is void since was entertained by incompetent adjudicator.

Reading paragraph 3, 4, 5 and 6 of the counter affidavit Respondent was opposing the allegation of civil application to be entertained by incompetent adjudicator since civil application No.1/2021 was brought by chamber summons supported by an affidavit for that reason that application can be entertained by any magistrate and not necessary to be Magistrate in charge or officer of the court appointed by Chief Justice and the mentioned application differs from Bill of costs which requires taxing master to be involved as directed by the law.

The historical background of the application at hand is that, Ramadhan Rutengwe presented is chamber summons made under Order 5 (2) (3) (a) of the Advocates Remuneration Order, 2015 and Section 95 of the Civil Procedure Code [Cap 33 R.E. 2019] supported by his affidavit. In that application advocate Ramadhani Rutengwe prayed for the court to grant an order for TZS 30,000,000/= . 24,000,000/= as outstanding balance of instruction fees and 6,000,000/= 25% interest on the outstanding payment. Since the applicants (Respondents in the Civil Application No. 1/2021) enjoyed legal services of Ramadhani Rutengwe as the Advocate.

The Civil application No. 1 of 2021 was before Hon. Majani, R.M – R as it can be proved by his name and signature in the proceedings and ruling of District Court. Court ordered respondents to pay 24.000,000/= as outstanding balance to the Applicant (for the purpose of this matter Respondent). Being aggrieved by that decision they file an application at hand.

Parties agreed to dispose the application by way of written submission. On 25/5/2022 applicants filed their submission and on 9/6/2022 respondents filed theirs.

The Applicants' Counsel adopted the whole contents of an affidavit sworn by Massanja Ngofilo Mpanduji and to form part of his submission. In support of his application applicant's advocate submitted that it is apparent from the trial court records that the decision in Civil Application No.1/2021 before Tanga District Court at Tanga is tainted with illegalities apparent on face of it. The trial court misdirected itself to proceed to determine the Civil Application No.1 of 2021 without considering that Hon. Majani Resident Magistrate was not clothed with jurisdiction to entertain the matter since as merely the trial Magistrate she was not a taxing officer as provided by the law.

He submitted that, the trial Court record reveals that the trial magistrate one H. A. Majani, RM who entertained the matter was not clothed with jurisdiction to entertain it. This is because, it is settled law that any proceeding which is preferred under the Advocates Remuneration Order, 2015 must be tried by the Registrar, Deputy Registrar of the High Court, Resident Magistrate in-Charge of the Resident Magistrate Court or a District Court, other Officer of the Court as the Chief Justice may appoint or such other Officer as the law may provide.

Supporting his application he went on submitting that, a quick glance at the trial Court record does not need a telescopic eye to see that in challenged Civil Application No. 1 of 2021, the Respondent herein preferred the matter under Order 5(2)(3)(a) of the Advocates Remuneration Order, 2015; whereof, it is the applicants' Advocate view that the trial Magistrate was not clothed with jurisdiction to entertain the same as such she was not a Resident Magistrate Court in-Charge

of the Resident Magistrate Court or District Court, other Officer of the Court as the Chief Justice may appoint.

He cited Rule 3 of the Advocates Remuneration Order, 2015 provides for those who are responsible to determine disputes arising out of agreement on remuneration of Advocates are Taxing Officer. From the forgoing provision of the law, it was humble submission of the Applicants' Counsel that since Hon. H. A. Majani, RM was neither a Resident Magistrate in-Charge of a District Court nor an Officer of the Court appointed by Chief Justice therefore it is uncontested that the trial Magistrate (Hon. H. A. Majani, RM) does not fall under either of the categories as provided by the law. And thus, she could not have determined a dispute arising from Advocate remuneration agreements under the Advocates Remuneration Order, 2015.

The Applicants' counsel also submitted that, it is trite law that, jurisdiction is a creature of the statute and not the parties who made the issue, and therefore, whenever it arose shall be examined and determined because it is a fundamental requirement in the administration of justice. In cementing his position, he cited the case of **Juto Ally Vs Lucas Komba and Aloyce Msafiri Musika** Civil Application No. 484/17 of 2019 (Court of Appeal of Tanzania at Dar es Salaam – Unreported) and prayed for attention of this court in the Civil Application No.1 of 2021.

Before concluding his submission, he submitted on the issue of allegation of wrong citation of name of the trial Magistrate. As it is apparent under paragraph 5 of Respondent's Counter Affidavit deponed to the effect that the one who presided over the challenged matter in Civil Application No. 1 of 2021 was not Hon. H. A. Majani as deponed by the Applicants in their application. It is undisputed that in the Applicant's application for reference there is wrong description of the name of

the trial Magistrate who decided the matter. Thus instead of Hon. H. A. Majani it appears to be referred as Hon. H. A. Marijani. Wrong description of the name of the trial Magistrate was caused by typing error that can be cured by slip of pen rule, in the circumstance considering the fact that most of the important information in the application for reference relate to Civil Application No. 1 of 2021. To care his submission referred the case of **Mr. Julius Cleopa (As Administrator of the Estate of Cleopa Kirikengori) and 4 Others Vs. Josia Lengonya Sademaki**, Misc. Land Application No. 56 of 2018 (HCT at Arusha – Unreported).

The ending part of his submission contained prayers for this court to grant prayer sought in their chamber summons.

In reply to what has been submitted by the applicants' Counsel, the Respondent's counsel started by adopting the counter-affidavit deposed by Respondent to form part of his submission. Respondent explaining what has been submitted by Applicant's Counsel.

Respondent's Counsel argued that, the gone through the entire affidavit sworn by the Applicants' counsel but it is very unfortunate that they have could not find any proof of the said allegations. The allegations that Hon. H.A Majani was not clothed with jurisdiction remains unsubstantiated.

He submitted further that, one would ask, Hon. H.A Majani might not have been the District Resident Magistrate of Tanga District Court during the hearing of Civil Application No. 1/2021 as the said title would have been indicated in the impugned Ruling but what if she is/was an officer appointed by the Chief Justice.

He continued to state that, it was expected the Applicants would discharge their onus of proof by bringing to the attention of this Hon. Court any sort of proof to

substantiate their allegations. Some proof such as a letter from Hon. Deputy Registrar of the High Court, Tanga District Registry stating that Hon. H.A Majani is not District Resident Magistrate in Charge of Tanga District Court neither is she an officer appointed by the Chief Justice to determine taxation matters.

Respondent cited Section 110 (1) and Section 112 (b) of the Evidence Act [Cap 6 R.E 2019] which are all about the proof. Continued to state that, respondent did not manage to prove Hon. Majani had no jurisdiction and continued to argued to state that those are mere words from the Applicants' Counsel which lacked legal backup and insisted that mere words cannot acted upon.

He argued further that, Applicants did not discharge the duty to prove since this court does not have any material evidence to act upon and grant their prayers. He added that the Applicants Counsel has just pleaded facts and left this Honourable Court to separate the seeds from the chaff and its not the duty of this court to do so. He cemented his submission by citing the case of **Juma Hussein Vs. Republic, Misc Criminal Application No. 18/2021, CAT** Where the CAT held that

"In adversarial system, courts do not go around hunting, searching or probing for evidence but rather determine cases only on the existing strength of evidence adduced."

The learned counsel for the Respondent continued to state that, it was the strong conviction that this Hon Court should totally decline the invitation by the Applicants' counsel to search for evidence by itself in trying to prove that Hon H.A. Majani was not clothed with jurisdiction at the time of hearing of Civil Application No. 1/2021.

He argued that the Applicants failed to differentiate application brought by Chamber Summons and Bill of Costs. According to him the Civil Application No.

1/2021 brought by Chamber Summons, and it was legally correct to be entertained by the H.A Majani.

He proceeded to beef up his argument by citing **Mawalla Advocates Versus Fosunwood Tanzania Limited, Miscellaneous Commercial Application No. 79/2019, High Court of Tanzania at Dar Es Salaam** which was entertained by Fikirini, J., who was not judge in charge when dealing with matter on advocates remuneration. For that purpose, it was legally right for the H.A Majani to hear Civil Application No. 1/2021.

The Respondent's counsel pleaded that, if this honourable Court's view is that the trial Magistrate i.e., Hon. H.A. Majani had no jurisdiction to determine Civil Application No. 1/2021 it should order the application be remitted back to Tanga District Court and assigned to another Magistrate with jurisdiction to entertain the matter at hand. The parties be summoned, and hearing be conducted afresh as it was not the Respondent's fault. Since the issue of assignment of cases is purely an administrative matter which a party cannot be punished for.

The Respondent side emphasized its position by citing the case of **Indo Africa Estate Ltd Vs. District Commissioner for Lindi District & 3 others, Court of Appeal of Tanzania**. Where the CAT held inter alia that:

"A party should not be punished by the mistakes done by the Court itself."

And in conclusion, the Respondent's counsel prayed this application for revision be dismissed with costs since it is used by the Applicants to circumvent from paying the Respondent the fruits of his judgement in civil Application No. 1/2021.

Examining what has been argued by both parties there is no doubt that the thrust of contention is the power, authority, and limitation of the Resident Magistrate when it comes to remuneration in nature or dispute that may arise between

advocate and his client especially when enforcing his rights in case one party failed to honour agreement between them.

To set the records straight and before going into the crux of the matter it is important to be clear on the meaning of "Remuneration agreement", and who has power to deal with disputes arising from remuneration.

As per Order 3 of the Advocate Remuneration Order G.N 263, 2015

"remuneration agreement" simply means an agreement between an advocate and a client stipulating terms payment of charges in respect of services offered or to be offered by the advocate to his client."

From the foregoing meaning there is no doubt that there was remuneration agreement between Advocate Ramadhani Rutengwe as Respondent in this application and Hamduni Ally Shehoza together with other Applicants. Parties did not dispute about the existence of that agreement. And from the said agreement this dispute arose, and advocate Rutengwe wished to enforce it before the court of law.

Despite that zeal to realize his rights, I am of the settled view that what has been prescribed by the law must be complied with for the purpose of ensuring justice is done. Again, jurisdiction conferred upon the Court or judicial officer is a matter jealously protected by the law. Entertaining an application without jurisdiction renders the proceedings and decision nullity. It is clearly provided under Order 5(1) and Order 5 (3) of the Advocates Remuneration Order G.N No.263 of 2015 mentioned Taxing Master to possess authority of disposing issues arising from remuneration agreement.

Taxing officer defined as Registrar, deputy registrar of the High Court, Resident Magistrate in charge of a Resident Magistrate's Court or a District Court, other officer of the court as the Chief justice may appoint or such other officer as the law may provide.

After Advocate Rutengwe presented his Chamber Summons supported by an affidavit and that case assigned before Hon Majani who is not Magistrate in Charge. Unfortunately that Magistrate continued to deal with that matter without determining as to whether she has that authority to deal with that application before her or not. Since she was not a Resident Magistrate in charge and nowhere written or proved to be among of the Court officers who are appointed by the Chief Justice to deal with that matter, she acted ultra vires. The Respondent made lengthy submission on a need for evidence to prove that Hon. Majani RM lacked the authority. It is elementary that the Resident Magistrate when exercising administrative or judicial function such as execution s/he should indicate his or her qualification in the proceedings and decision s/he renders. The said Magistrate or judicial officer is duty bound to ensure that before entertain any matter before her, s/he is satisfied that she has the authority to do so. Analogy may be drawn in cases adjudicated by the RMs with extended jurisdiction, they are bound to show they are Resident Magistrates with extended jurisdiction.

At this juncture there is need to discuss about jurisdiction and its effect. Simply Jurisdiction means power, authority and limitation of entertaining and adjudicate different matter basing on what has been provided in the law. In the case of **Tanzania Revenue Authority V. Tango Transport Company Ltd. Civil Appeal no.84 of 2009, Court of Appeal of Tanzania at Arusha, (unreported)**. Court of Appeal applied **Halsbury's Laws of England, Vol.10 para 314** to define Jurisdiction *as:*

"the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended, or it may partake of both these characteristics".

Regarding authority, power, and limitation in entertaining remuneration agreement, it's the requirement of the law that remuneration agreements are enforceable before the court of law, as it has been stated under Order 5(1) of the Advocate Remuneration Order G.N 263, 2015. Also, the law directs such application to be made by way of Chamber Summons supported by an affidavit.

Jurisdiction is fashioned by statute be principle or substantive depending on what to be done and not on the wishes of the person sit on the position of adjudicating or entertaining the issue what is not conferred by the law. In the case of **Balthazary Kinasha vs. Paula Bernad Nind Misc. Land Appeal NO. 69 OF 2020 High Court of Tanzania at Dar es Salaam**, has been stated that:

"jurisdiction is therefore a creature of statute and not discretion of the court/tribunal to confer on itself."

Jurisdiction can be given to authority (board) or person, good example can be on the extended jurisdiction which is vested to the person specifically and not on the court as adjudicative body. It is prohibited for any person who do not have authority to deal with that matter. Speaking of this application for revision of Civil Application No. 1 of 2021 entertained by a Resident Magistrate with no authority to deal with that application for enforcement remuneration agreement

On the case of **Tanzania Revenue Authority** (supra), it was stated that,

"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide the matter rests"

The Matter was before Tanga District Court was required for that Matter to be entertained by the Resident Magistrate in charge of a Tanga District Court. The issue of that application to be entertained by Hon. Majani is maintainable to the effect that she was not in charge of Tanga District Court.

A consequence of entertaining the matter which is out of the jurisdiction vested by the law is that the proceedings have no effect as the same are nullity. This is cemented by the case of **Desai v. Warsama [1967] EA 351 at page 352 for instance, at page 352 Hamlyn, J.** stated that,

"The fundamental point which must have primary consideration in this appeal is the question whether the Primary Court had any jurisdiction to hear the case at all, for if that court lacked jurisdiction in the matter, then the whole proceedings were a nullity and there was, in law no decision against which appeal could be taken".

Regarding the issue of incorrect description of the adjudicator it's my take that the same is curable error in the premises of **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania** and provided as follows,

"...(2) In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say -- (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

Also the High Court of Tanzania at Dar es Salaam as per Maige, J, in **Mr. Julius Cleopa (As Administrator of the Estate of Cleopa Kirikengori) and 4 Others Vs. Josia Lengonya Sademaki**, Misc. Land Application No. 56 of 2018 it was held that:

"The omission in the instant case does not affect the substantial; validity of the application in as much as a copy of decision bearing the correct name of the Judge has been attached. The omission therefore can be tolerated under article 107A (2) of Constitution of the United Republic of Tanzania, 1977 without occasioning failure of justice."

In lieu of the foregoing, I find the Civil Application No. 1 of 2021 to have been entertained by a Resident Magistrate without jurisdiction to exercise powers of Taxing master in the meaning explained above. The proceedings and decision in Civil Application No. 1/2021 are consequently nullified for what has been done is not recognized in the sphere of law. The parties may if they so wish start afresh considering the proceedings in Civil Application No. 1/2021 are nullity. In so doing the law of limitation shall as well be taken into consideration. As the context of this case dictates each party shall bear its own costs.

It is so ordered.

DATED at **TANGA** this 1st Day of July 2022.




U. J. AGATHO
JUDGE
01/07/2022

Date: 01/07/2022

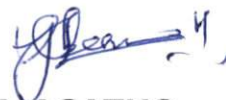
Coram: Hon. Agatho, J

Applicants: Mohamed Ally Mohamed (representative of the applicants)

Respondent: Absent

B/C: Zayumba

Court: Ruling delivered on this 1st day of July, 2022 in the presence of Mohamed Ally Mohamed (representative of the applicants).

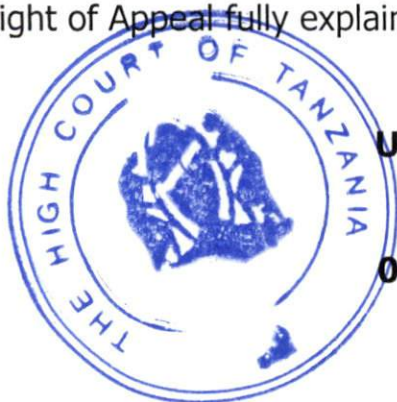


U. J. AGATHO

JUDGE

01/07/2022

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

01/07/2022