

**IN THE HIGH COURT OF TANZANIA  
AT TABORA**

**Civil Revision No. 2 of 2021**

*(Originating from Misc. Civil Application No. 5/2021 of Tabora  
District Court Civil case No. 7/2019 Misc. Civil Application No.  
4/2022 District Court Tabora and Execution No. 33/2019 Resident  
Magistrate Court)*

**IDD SEIF ----- 1<sup>ST</sup> APPLICANT**  
**MAIKO LUSAGANYA ----- 2<sup>ND</sup> APPLICANT**  
**JONAS MANYANYA ----- 3<sup>RD</sup> APPLICANT**  
**HAMISI LUMONDYA ----- 4<sup>TH</sup> APPLICANT**  
**PIUS ILINDILO ----- 5<sup>TH</sup> APPLICANT**  
**NIA RASHIDI ----- 6<sup>TH</sup> APPLICANT**

**VERSUS**

**SIMON WOLFGANG NDAUKA ----- RESPONDENT**

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**RULING**  
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*Date of Last Order: 22/7/2022*

*Date of Delivery: 5/08/2022*

**AMOUR S. KHAMIS, J:**

This revision application was initiated by this Court suo mottu pursuant to the complaint letter lodged before this Court by the 3<sup>rd</sup> applicant and received on 21/09/2021.

A brief history leading to this suo mottu application goes thus; the respondent Simon Wolfugang Ndauka filed a Civil Case No. 7 of 2019 at Tabora District Court against the six applicants

claiming a total of Tshs: 76,790,000/= being a compensation for sabotage caused to his investments by the applicants.

The matter was heard *ex parte* because the applicants did not appear in Court to defend the case. Upon delivery of judgment on 23/09/2019 the applicants were ordered to pay the respondent the claimed amount.

To execute his rights the respondent lodged Execution Case No. 33 of 2019 before the RMs Court whereby the Magistrate ordered attachment of judgment debtor's livestock, farms and houses valued Tshs: 76,790,000/=

Awakened by the execution processes, the applicants lodged Misc. Civil Application No. 5 of 2021 seeking extension of time to set aside *ex parte* judgment and Misc. Civil Application No. 4 of 2021 seeking restraint order against the respondent and their agents from executing the decree but upon hearing of all applications failed and the trial magistrate ordered the execution process to proceed.

It is from that history this Court was prompted to call the record of Civil Case No. 7/2019, Misc Civil Application No. 4/2021, Misc. Civil Application No. 5/2021 and Execution Case No. 33/2019 so that it could investigate the claims; the Court invited the parties to file their written submissions in respect of the application at hand. The applicants were represented by Mr. Frank Severine Kavishe learned advocate whereas the respondent enjoyed the service of Mr. L. M Ndanga also learned advocate.

Submitting in support of the application, Mr. Kavishe stated that, the applicants are contesting attachment and sale of their properties on illegal decree/order which does not exist in Court record. Mr. Kavishe alleged that, the respondent attached Cattle belonging to applicants with the help of Police without any Court Order and he is now in the process to sale applicant's farms and residential houses.

It is Mr. Kavishe's submission that, the applicants are complaining against execution Case No. 33 of 2019 which according to them caused miscarriage of justice. He contended that, execution case no. 33 of 2019 was initiated by the Court itself, no application was ever filed in the executing Court as per Order XXI rule 9 of the Civil Procedure Code, Cap 33 R.E 2019.

Mr. Kavishe contended further that, after the illegal attachment, the said properties were illegally sold without following the procedure enumerated under Order XXI rules 63 to 67 of the CPC which included an order to sale, manner of selling, proclamation order, to whom the same be done and finally the payment resulted from the sale in satisfaction of the execution order.

He stated further that, the respondent violated the mandatory requirement of law on execution and sale. To reinforce his argument, he cited the case of ***Ms. Sykes Insurance Consultants Co. Ltd versus Ms. Sam Construction Co. Ltd, Civil Revision No. 8 of 2010 CAT (unreported)***. He embraced that, the procedure adopted by the respondent renders the whole execution process void.

Further, Mr. Kavishe submitted that, Rule 29 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017, GN No. 363 of 2017 provides for special provisions regarding livestock, the provision which requires for special order arranging on the safe custody, feeding and payment incurred if any. He contended that, in the said execution case, nothing was done to satisfy the mandatory provision of law regarding attachment of livestock.

With regard to right to be heard, Mr. Kavishe submitted that, the right to be heard is one of the fundamental rights enshrined in Article 13(6) (a) of the Constitution of the United Republic of Tanzania which among other things it provides, he quoted: -

*“When the rights and duties of any person(s) are being determined by any Court or any agency, that person shall be entitled to a fair hearing...”*

Basing on the aforesaid, Mr. Kavishe prayed this court to grant the application and nullify the execution proceedings for being improper before the eyes of the law.

In reply, Mr. Ndanga faulted this Court for entertaining this application for the reason that, the same is time barred so it is supposed to be dismissed under Part III item 21 of the law of limitation Act Cap 89 R.E 2019 which provides sixty days limit for bringing applications which have not been provided in the law of limitation Act or any other law.

Mr. Ndanga Cited the case of ***Halais Prochemie vs Wella A.G [1996] TLR 269*** where the Court held that:

*“..... this application for revision was made 10 months after delivery of judgment out to be revised. In our considered opinion the application is hopelessly time barred...the application like this ought to have been instituted in 60 days”*

Mr. Ndanga contends that, this application was made through a letter of complaint on 21/09/2021 which in normal calculation is more than one year after the lapse of sixty days so the applicant's application is hopelessly time barred.

Regarding service of summons, Mr. Ndanga submitted that, in Civil Case No. 7 of 2019 the summons for hearing were served to the applicants on 12<sup>th</sup> July, 2019 but they refused to receive the summons therefore the required procedure of service of summons was followed.

To prove the service, Mr. Ndanga added that, on 30<sup>th</sup> August, 2019 the applicants were served with amended plaint and they received it. Further on 9<sup>th</sup> September, 2019 they were served with summons for judgment and they denied the service. The same procedure was repeated in Execution Case No. 33 of 2019 but still refused to appear.

As to the procedures of execution, Mr. Ndanga submitted that, there is no icon of truth at all that there were irregularities, illegalities and absence of court order in the execution of the decree, it is the applicants who refused to settle the amount withing 14 from the date they received notification from Court broker.

As to allegations of violation of Article 13(6) (a) of the constitution of the United Republic of Tanzania 1977, Mr. Ndanga submitted that it is the applicants who are to blame because they slept over their own right, he also disputed the allegations that the court initiated the matter suo mottu without adhering to the legal requirement, he stated that, there is a proof that the respondent followed all the steps in the execution and selling of the attached properties.

In rejoinder submission, Mr. Kavishe cited the case of ***Ilimgadi Lihimba vs Tito Christopher Njiba, Land Revision No. 3 of 2020 HC Mbeya(unreported)*** where in this Court stated that;

*“... but for the same of understanding, application for revision initiated by the applicant ought to be guided by laws of limitation as opposed to revisions raised suo mottu by Courts exercising supervisory and revisional powers”*

He added that, the court is not limited by anyway when exercising the powers of this like as it initiated the proceedings with aim to assess the proprieties and legality of execution proceedings as they are so much questionable.

Mr. Kavishe emphasised that, the Resident Magistrate Court for Tabora had no jurisdiction to hear Execution Case No. 33 of 2019 because it is neither the Court which passed the decree nor the Court which the Execution was sent for execution. For emphasis he cited section 33 of the CPC which provides;

*“a decree may be executed either by the court which passed it or by the Court to which it is sent for execution”*

As to the service of summons and amended plaint, Mr. Kavishe submitted that, our laws require the other party to a case mandatorily be made aware of the case against him or her by serving summons from initial stage of the case which was not done by the respondent and that is a procedural irregularity that the applicants are calling upon nullification by this court.

I have examined the record against the complaint letter and submissions made by the parties. At the outset I should say that, this suo mottu revision raises two issues for determination. One, is the propriety of service of summons and legality of execution case no. 33/2019 and two is on propriety of the service of summons which allegedly led to exparte judgment in Civil Case No. 7/2019.

Before I answer the two questions above, I find it pertinent to solve one important puzzle that was raised by the respondent’s counsel in the written submission.

Mr. Ndanga has faulted this Court for entertaining this application for reason that it is time barred. As rightly submitted by Mr. Kavishe. The High Court is not barred by any law in the country from exercising its revisional powers over the subordinate court’s decisions. Section 79 of the Civil Procedure Code Cap 33 R.E 2019 provides: -



**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 it 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.*

Basing on the letter of complaint filed to this Court by 3<sup>rd</sup> applicant it is my view that, this application fits under the above cited provision for the court to investigate his claims.

For that reason, I agree with Mr. Kavishe that the applications made by parties to a suit has limitations but the applications initiated by the Court on its own motion does not fall into that category.

Now back to the two questions for determination; the record in Execution Case No. 33/2019 reveals that, the matter was first tabled before the learned Magistrate Hon. S.B Nsana on 04/11/2019 and on the same day the matter was adjourned for Mention until 25/11/2019. On 25/11/2019 the advocate for the respondent prayed the Court to re-notify the judgment debtors then the matter was adjourned till 27/11/2019.



On 10/12/2019 Mr. Ndanga prayed for a hearing date. Nowhere in the proceedings did Mr. Ndanga inform the Court that the judgment debtors had refused to receive Court's summons. However, the Court went on to grant the prayer and set the matter for hearing on 11/12/2019.

Moreover on 12/12/2019 when the matter was called on for hearing, Mr. Ndanga submitted the following:-

*"Mr. Lucas Ndanga I am for the Decree holder, the respondents were properly served but they did not appear, the matter is coming for hearing we are ready"*

The submission by Mr. Ndanga that the respondents were properly served conflicts with the affidavits sworn by Court process server who informed the Court that, the respondents refused to receive the summonses.

The proceedings show that Mr. Ndanga never informed the Court that the respondents refused to sign the summonses. From that outset, the question pops that, why did the trial magistrate hurried to grant a prayer for exparte hearing on 10/12/2019 and set the case for hearing in the following day bearing in mind that she was informed by the learned counsel that the summonses were properly served?

On top of that, the main case which is Civil Case No. 07/2019 was registered and heard in the District Court. In other words, it is the District Court that passed the decree which was alleged to be executed by the respondents.

Mr. Kavishe alleged that, the proceedings and orders made in Execution Case No. 33 of 2019 were illegal in the sense that, they were heard by a different Court that did not pass the decree contrary to Section 33 of the Civil Procedure Code.

The law in our jurisdiction allows transfer of decrees for execution by the Court that receives the decree. I have perused the records of the case, but did not find any trace of order for the transfer of the decree from the District Court to the Resident Magistrate's Court for execution. The record does not explain how the execution of a District Court's case found its way to the Court of a Resident Magistrates. For that reasons, I agree with Mr. Kavishe that the Execution Case No. 33/2019 was void ab initial.

On the second question on propriety of the service of summons which allegedly led to exparte judgment in Civil Case No. 7/2019. I managed to go through the record of the case and I came to understanding that, the magistrate adopted the same speed as it was done in the execution case.

On 02/07/2019 when parties were to appear for the first time before the magistrate, the defendants were absent and the trial magistrate granted a prayer for exparte hearing on the same day without re-notifying the defendants on presence of a suit against them.

The record does not reveal why the magistrate engaged that fast gear. It is not clear as to why the learned magistrate in Misc. Civil Applications No. 5 did not notice this abnormality. Had this been noticed, it could be a reason for granting the applicants an

extension of time to file an application to set aside an exparte judgment.

Moreover, Mr. Ndanga stated that, the amended plaint was served to the applicants and they received it. However there is nothing in the record to shows that the Amended Plaint was ever served on the applicants. What is on record is a mere affidavit of one Jihad Kaloka which states that the applicant refused to sign the summonses.

According to the records, the applicants did not file an application for setting aside an exparte judgment because of failure to gather an extension of time to lodge the same.

Since Execution Case no. 33 of 2019 was void ab initio and thus illegal, the respondent is hereby ordered to return to the applicants the value of 315 cows and 21 goats which were illegally attached and sold.

For accurate value of the named animals, the Deputy Registrar is hereby ordered to inquire in writing from relevant Local Authority experts such value of the animals and immediately communicate the outcome thereof to parties not later than thirty (30) days from date of delivery of this ruling. Such findings by the Deputy Registrar shall be part of the decretal sum.

Upon further perusal of Civil Case No. 7/2019, I noticed that, among others, the respondent moved the trial District Court for payment of Tshs. 68,790,000/= arising among others from:



*“e) Causing the suspension of farming project which covered four crops and digging of three dams”.*

According to the evidence of PW2, the applicants allegedly closed down and destroyed the respondent’s properties including, cassava farm, fish ponds and cattle husbandry.

Section 167 of the **LAND ACT, CAP 113 R.E 2019** and Section 62 (2) of the **VILLAGE LAND ACT, CAP 114 R.E 2019** read together with Section 3 (2) of the **LAND DISPUTES COURTS ACT, CAP 216, R.E 2019**, provides that the Courts vested with jurisdiction to entertain any dispute or complaint concerning land are the Village Land Council, the Ward Tribunal, the District Land and Housing Tribunal, the High Court and the Court of Appeal of Tanzania.

Section 4(1) of the **LAND DISPUTES COURTS ACT** expressly bars courts established by the Magistrates Courts Act to entertain civil jurisdiction in any matter under the Land Act and Village Land Act.

Section 2 of the **LAND ACT** and Section 2 of the **VILLAGE LAND ACT** defines land to include the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to or under land and land covered by water.

From the above definition, it is clear that the respondent’s claim in Civil Case No. 7 of 2019, touched on land but was in the

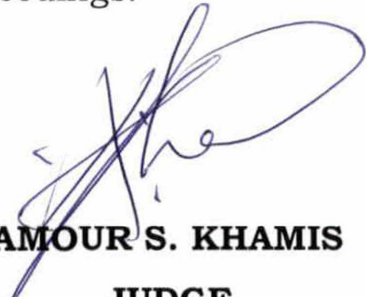
District Court of Tabora which did not have jurisdiction to entertain it.

On that ground, I am of a firm view that in terms of Section 79 (1) (c) and Section 95 of the **CIVIL PROCEDURE CODE CAP 33, R.E. 2019**, the trial court's proceedings should be revised.

Consequently, the entire proceedings, rulings, orders and exparte judgement of the District Court of Tabora in Civil Case No. 7 of 2019 are hereby quashed and set aside.

Parties are at liberty to institute fresh proceedings in a competent forum. The applicants are entitled to costs arising out of these revisional proceedings.

It is so ordered.



**AMOUR S. KHAMIS**

**JUDGE**

**05/08/2022**

**ORDER**

Ruling delivered in presence of Mr. Lucas Ndanga, advocate for the respondent and Mr. Frank Severine Kavishe, advocate for the applicants.

All applicants except the sixth are also present in person. Right of Appeal explained.



**AMOUR S. KHAMIS**

**JUDGE**

**05/08/2022**