

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

HC CIVIL REVISION NO. 03 OF 2022

(Originating from Civil Revision No. 2 of 2021 at Kwimba District Court)

RUTH JOHN MAKUNEAPPLICANT

VERSUS

MWAMBA FESTO MAKUNE & OTHERS.....RESPONDENTS

JUDGEMENT

Last Order date: 30/08/2022

Judgement Date: 19/09/2022

M. MNYUKWA, J.

This judgement emanates from the suo motto revision application by the court, after it was being moved through a letter of complaint by the applicant's counsel dated 01/03/2022 with a reference heading, *Unilateral Orders of stay of execution Civil Revision No. 2 of 2021*. The letter, mainly complained of the Ruling delivered by the District Court of Kwimba in Civil Revision No. 2 of 2021.

The court's records reveal that, the respondents were the applicants in Civil Revision No. 2 of 2021 before Kwimba District Court, in which they

moved the court under section 14(1) of the Law of Limitation Act (Cap. 89 R.E 2019, now 2022) together with sections 22(1), (2), and (3) of the Magistrate Courts Act Cap 11 R.E 2019, seeking for the following Inter-parties orders;

1. *That, this Honourable District Court be pleased to allow extension of time to file revision out of time concerning **Shauri la Mirathi No. 3 of 2019 in the Primary Court of Ngulla at Kwimba Disrtict.***

2. *That this honourable court be pleased to call for and examine the record of the proceedings in Shauri la Mirathi Na. 3 of 2019 in the Primary Court of Ngulla at Kwimba, (Ruth John Makune as an administratrix of the late Johana Makune Shilatu) for the purpose of satisfying itself as to the correctness, legality or propriety of the decision/order of the said primary court and as to the regularity of the proceedings therein.*

the ground that:

- (a) The primary court has no requisite jurisdiction to hear and determine a probate and administration cause involving the estate of the Christian deceased person Yohane Makune Shilatu, as the law applicable is neither customary nor Islamic.*
- (b) The Primary court has no jurisdiction to hear and determine a land dispute in respect of the landed property in the house No. 18 on plot No. 30 & 31, Block "L" Uhuru Street Mwanza*



township/City while the ownership of the said property is in dispute in the Court of Appeal of Tanzania.

- (c) *There is no public notice that was issued by the 1st respondent (the administratrixes) therein, notifying any interested person as regard the house No. 18 on plots No. 30 & 31 Block L, Uhuru Street Mwanza Township/City, thus depriving the applicants the right to be heard.*

3. That this the District Court be pleased to quash and set aside the ruling, order and proceedings of the primary Court of Ngulla in Shauri la Mirathi No. 3 of 2019 in the primary Court of Ngulla at Kwimba Ruth John Makune as Adminstratrix of the estate of the late Johana Makune Shilatu) for the lack of requisite jurisdiction; or

In Alternative

- 4. The District Court be pleased to stay the proceedings in Shauri la Mirathi No. 3 of 2019 in the Primary Court of Ngulla at Kwimba Ruth John Makune (as administratrix) of the late Johana Makune Shilatu pending the hearing and determination of the appeal to the Court of Appeal of Tanzania.*

After the finalization of the application which was argued by way of written submissions, the District Court ordered ***sine die***, pending determination of the appeal by the superior courts. In doing so, the District Court also invoked the provision of sections 95 and 68(e) of the Civil Procedure Code, Cap 33 R.E 2019 and ordered stay of the attachment



on the disputed properties, while waiting for the superior court's directives.

The applicant was not amused by the decision of the District Court and complained through a letter dated 01/03/2022 with a reference to *Unilateral Order of Stay of Execution Civil Revision No. 2 of 2021*, complaining of the order by the District Court. In their reply of the applicant's letter, through a letter dated 25/4/2022, the respondents hold the view that, it was right for the District Court of Kwimba to order stay of execution however the proper wording was to maintain status quo and not stay of execution.

Messrs Baraka Makoye and Francis Stolla, learned counsels appeared for the applicant and the respondents respectively. The matter was argued by way of written submissions. I thank both parties for complying with the filing schedule and for their deserving submissions.

In his submission to start with, the applicant's counsel outlined their complaint to be on the District Court's Magistrate's order of the stay of execution, to be unilateral.

He went on to quote on what was summarized by the magistrate on the respondents' submission as,



"... the learned counsel for the applicant fronted his entire submission on the issue of extension of time; ... Nevertheless, the applicant's counsel insisted extension of time be granted for a reason that illegalities on the Ruling of Primary Court tainted by law be eliminated"

The counsel further pointed out the summary of the court on respondents' submission on page 7 to be:

"...this court be pleased to call for and examine the records of the proceedings in Shauri la Mirathi No. 13/2019". That the court recorded that "The applicant learned counsel gave conclusion remarks invited this court to allow revision out of time and setting aside the ruling and proceedings of the trial court in Shauri la Mirathi no. 3/2019. In alternative to issue stay on the trial court proceeding pending determination of the appeal...."

The applicant's counsel submitted further that, the counsel's prayer was very specific and unambiguous. That, they are complaining on the Court's orders as the Counsel prayed for the stay of proceedings and not the orders on the judgement. He reminded that, by that time the revision proceedings were adjudicated, there was a judgement in place. He poses a question to be determined by this court, as to whether proceedings can be stayed while they have been disposed of and a judgement was already issued.



It is counsel's submission that, the orders of stay of attachment was wrongly made, as it stemmed from a law that is not applicable in Primary Court. The court ought to have proceeded under Civil Procedure (Appeals Originating From Primary Court) Rules GN 312/1964. He invites this court to revise an order that was given by the District Court of Kwimba which invoked the provisions of sections 95 and 68(e) of the Civil Procedure Code and stayed the attachment on the disputed properties while waiting for the Superior Court directives.

He ended his submission by submitting that, the issue of stay of execution was not argued in any way. That, there is nowhere in the submissions when the issue was discussed. That, the Magistrate found the same was made in alternative in which it could not support the respondent's case.

In response, the respondents' counsel started by introduction while commenting on the situation around this application, as to the trial court's attempt to proceed with the execution while there is a pending appeal on the superior court in respect of the same subject matter.

The respondent's counsel went on to give a brief background of the matter that, the subject of the dispute is the landed property No. 18 situated in Plot No. 30 & 31, Block "L", Uhuru Road/ Kwame Nkurumah Street, Nyamagana District within Mwanza City, which is in the name of



Festo Mabonesho Makune, previously registered in the name of Yohana Makune Shilatu until 22nd day of June 2008.

That, the disputed property is claimed to be in the estate of Yohana Makune Shilatu by his administrator Ruth Makune (herein the applicant), while on the other side, the respondents all together claim the property to be part of the Estate of Festo Mabonesho Makune who is also a deceased.

The respondents' counsel went on to give a brief account on how this revision application emanates from. He enlightens that; the applicant in this application was appointed as an Administratrix of the Estate of Yohana Makune Shilatu by the Primary Court of Kwimba District at Ngulla. Her appointment was revoked by the District Court of Kwimba after being challenged by William Festo Makune in Civil Application No. 7 of 2019 and later on restored in the High Court through an appeal in the High Court before Hon Tiganga, J, dated 27th day of November, 2020 that was between Ruth Makune against William Festo Makune. The applicant was ordered to proceed with the administration of the estate of late Yohana Makune Shilatu including the property that is in dispute now.

Dissatisfied with the verdict of the High Court, the said William Festo Makune initiated the appeal to the Court of Appeal. In line with the initiation of the appeal, he also sought certification on point of law, in



which the order was granted by the High Court by Hon. Mashauri J, dated 10th May 2021. The point of law certified was on the jurisdiction of the Primary Court to grant letters of administration of the deceased person's estate, who professed Christianity religion as observed on Annexure MKA-1 by the respondents.

That, the applicant proceeded with the administration of the Estate of late Yohana Makune Shilatu as she attached the disputed property for it to be sold and the proceeds to be distributed to the heirs. The 2nd and 3rd respondent who claims the disputed property to be part of the late Festo Mabonesho Makune, filed a Revision Application No. 2 of 2021 before Kwimba District Court together with the 1st respondent, in which the District Court ordered for the stay of proceedings (attachment), by invoking sections 95 and 68(e) of the Civil Procedure Code Cap. 33 R.E 2019 now R.E 2022. As the applicant was aggrieved and complained, hence this suo motto revision application.

In his submissions on the contentious matter, it is the respondent's averments that, the applicant had no right to access the revisional powers of the Court as she has a statutory right to appeal. To support his argument, he cited case laws; **Halais Pro Chemie v Wella A.G** [1996] TLR 269, **Moses Mwakibete vs Editor Uhuru News Paper** [1995] TLR 134. Since the applicant did not want to exercise her statutory right of



appeal and she did not demonstrate any exceptional circumstances to warrant the High Court to invoke its revisional powers then her complaint is legally improper and it should be dismissed.

The respondent's counsel further submitted that; the applicant has no locus stand to appear as the administrator of the late Yohana Makune Shilatu as her appointment has already expired in terms of Rule 10(1) of the Primary Court (Administration of Estate) Rules GN No. 49 of 1971. That the applicant was required to complete administration of the estate within 4 months or to apply for extension of time in which there is no proof that it was granted. Therefore, on this ground, this application deserves to be dismissed with cost.

It is the respondent's submission that, the applicant and his counsel Baraka Makowe from Makowe's Chambers-Advocate are not in the same wavelength for the existence of the complaint letter dated 28 January 2022, to the Deputy Registrar's office complaining about the execution of the decision of the High Court in Probate case No. 22/2015 which does not exist even before the verdict of the District Court of Kwimba. The respondents' counsel contends that it is not clear if the complaint letter that led to this instant appeal headed unilateral orders of stay of execution and not stay of attachment, needed by the applicant.



Respondent's counsel further attacked the applicant's submission on the issue raised by the applicants that, whether proceedings can be stayed while they have been disposed of and a judgement issued as seen on paragraph 2 on page 2 of the applicant's submission. It is the respondents' counsel submission that, the District Court had the power to order stay of the proceedings. That, the District Court ordered stay after it was satisfied that it was not regular and improper for the Primary Court to proceed to grant the order for the sale of the disputed property while the jurisdiction of the said Primary Court is in question before the Court of Appeal. The counsel cited sections 22(2), 21(1)(b) and 24(2) of The Magistrates' Courts Act, Cap 11 R.E 2022, to justify the District Court decision as it is within its revisionary and appellate jurisdiction as provided under cited sections. Respondent's counsel went on that, it was not proper for the Primary court to proceed with the sale while assuming that, it has jurisdiction in which it is a question for determination in the Court of Appeal. That, assumption of jurisdiction by the Primary Court was an irregularity, impropriety, incorrectness and illegality, that was noted by the District Court. To support his submission on the issue of assumption of jurisdiction, the counsel cited the case of **Fanuel Mantiri Ngúnda v Herman Mantiri Ngúnda & 2 Others** [1995] TLR 159.



It is further submitted by the respondent's counsel that, it is his firm position that, the order of stay of attachment was not wrongly made. However, he admitted that citing section 95 and section 68(e) of the Civil Procedure Code Cap 33 R.E 2019 was superfluous but still it does not oust the revisional jurisdiction of the District Court. He cited the case of **Duda Dungali v Republic**, Criminal Application No. 5 of 2014, CAT at Dar es Salaam and the case of **Advatech Office Supplies Ltd vs Ms Farhia Abdullah Noor & Another**, Civil Application No. 353/17 CAT at Dar es Salaam, to insist that despite citing superfluous provisions still, the District Court had Revisional Jurisdiction to make the order it did.

Respondent's counsel submitted that, this court has powers to revise the proceedings of the Primary Court and order the stay of execution pending the hearing and determination of the point of law by the Court of Appeal of Tanzania while guided by the case of **Fanuel Mantiri Ngúnda vs Herman Mantiri Ngúnda & 2 Others** (supra) which it is for the interest of justice to both parties.

In his conclusion, the respondents' counsel prays for this revision to be dismissed as the applicant's complaint to this court is devoid of merit. He further prays for this court to take judicial notice on the orders of the Court of Appeal of Tanzania at Dar es salaam (Hon. S.E Mugasha, J.A) dated 15th day of April, 2021 in Civil Application No. 169/08 of 2021, which



referred the matter to a full bench for the determination of a request for stay of execution of the verdict by Tiganga, J in PC (HC) Civil Appeal No. 61 of 2020. He prays for this court to order for ***status quo ante*** to be maintained pending the determination of the outlined matters of the law to avoid confusion and above all insubordination to the higher authorities by subordinate courts with costs.

Re-joining, the applicant's counsel discredits the reply by the respondents, on the reason that, the respondent's counsel failed to reply to what he had submitted. The applicant's counsel went on to retaliate what was submitted in his submission in chief. That, the order prayed was for a stay of proceedings and not otherwise, while the District Court stayed the execution of a judgement, which are two different things in meaning. That a stay of decree, order and judgement suggests that a matter is finalised. That the counsel for the respondents prayed for stay of proceeding in alternative. That, he never submitted on stay of execution, and so he abandoned his cause and took a new one. That's why it is his submission that an order for stay of execution was made unilateral, thus it has to be quashed and set aside.

On the issue of the provisions cited by the District Court, it is the applicant's submission that, their point is not that the court is being moved by a wrong provision, but the issue is for the court to exercise its powers



under the wrong provision of the law. That, when a court applies a wrong law to the legal issue then that is illegality which should not be condoned by the court, since the Civil Procedure Code Cap. 33 R.E 2022, does not apply to the Primary Court. That, despite the fact that using a wrong law does not affect the jurisdiction of the court still, the court cannot decide what is not before it. That, a law that is not anyhow related to proceedings, cannot confer jurisdiction to a court and mandate it to give an order. He prayed for the order made by the District Court be set aside and quashed.

After the submission of both parties, the issue to be determined now is to whether this revision application has merit.

As I have stated above, this revision application emanates from the letter of complaint filed by the applicant who complained of the Orders given by the District Court of Kwimba in Civil Revision No. 2/2021. The main contention of the applicant is that, the District Court had made unilateral orders as the order given was not the one prayed for by the respondents in their application. From the records of the District Court, the chamber summons filed by the respondents contained prayers for the extension of time to file revision out of time, revision of the trial courts orders in looking at its correctness, legality propriety of the decision of the Ngulla Primary Court and the regularity of the proceedings thereto. In



the alternative, there was a prayer for a stay of proceedings in *Shauri la Mirathi* Na. 03 of 2019, pending hearing and determination of the appeal to the Court of Appeal of Tanzania.

It is applicant's counsel submission that, orders given by the District Court were not from what was submitted by the parties before the court. I agree that the District Court of Kwimba did not go into length to analyse as to what was argued by the parties. However, I do not see the faults of the District Court on that complaint, as the Ruling made it known to the parties as to why it did not go into length to determine what was argued by the parties.

This can be seen in page 13 of the typed Ruling in the last paragraph when the court had said;

"Indeed, I have decided to re-produce the Hon Judge decision for the interest of this matter as to whether this court need to determine any merit of the application or otherwise, I have followed the submission of Mr. Makoye, learned counsel for the applicant who conceded the averment that there are point of determination of the court of appeal which are put forward, reference to paragraph 1 page of the reply in the applicant submissions in chief.

Bearing in such circumstance, this court is bound its own hands cannot determine any merit or otherwise on this application while the same issue in the main case is to be



discussed under fallow under section 18(1)(a)(i) of the MCA to whether the Primary Court has jurisdiction to determine estate of Christian deceased person, similar matter is an intended point of determination for the appeal.”

Therefore, it's true that the court did not actually determine the matter on the contentious issues that were tabled and argued before the court. But the court had given reasons as to why it did not go into merit of the application. It is my firm opinion that, the court was right not to entertain the application as argued by the parties, for the reasons that, the same matter that was presented by the respondents as grounds to move the court to extend time and revise the Primary Courts orders are subject matter of two appeals presented before the Court of Appeal by William Festo Makune and John Festo Makune regarding the same disputed property in this application. Taking into consideration that, the pending appeals are before the superior court, the District Court could not be in a position to determine the same.

The applicant also faults the District Court's decision to order a stay of execution while invoking sections 95 and 68(e) of the Civil Procedure Code, while the same does not apply to the Primary Court. Under paragraph 4 of the chamber summons, one among the prayers of the respondents which was in the alternative was for stay of proceeding in *Shauri la Mirathi No. 3 of 2019*, pending hearing and determination of the



appeal to the Court of Appeal. The District Court in its ruling invoked sections 95 and 68(e) of the Civil Procedure Code, Cap 33 R.E 2019 and ordered a stay of attachment of the properties pending directives of the superior court. I agree with the applicant's advocate that, the law applied by the District Court was not proper as the Court invoked the law which does not apply in Primary court.

The respondents also admitted that it wasn't proper for the District Court to invoke the wrong provisions but, argue that the use of such provisions does not oust the jurisdiction of the court as the District Court had revisionary powers over the primary court. I join hands with the respondents' learned counsel that since the District Court has revisionary powers then the wrong citation was not a fatal mistake as originally the court had jurisdiction to revise the Primary Court orders. It has been decided by the Court of Appeal that, a wrong citation does not render the application incompetent. I relate the same here, that the wrong provision could not render the decision of the District Court to be a nullity. And therefore, this ground is dismissed.

Apart from that, the applicant, argued that the issue of stay of execution was not argued while the Magistrate found that the same was made in alternative. From the respondents' prayers in alternative, the respondents prayed for the stay of proceeding, while the court ordered



for the stay of attachment. I agree with the Applicant's counsel that those are two different things, however, it is my understanding that the two aims at keeping the disputed property in a position for it not to be affected while waiting for the determination of the appeals before the Court of Appeal. Taking into consideration that, there were two issues to be determined by the Court of Appeal, one concerning the ownership of the disputed properties, and the second was concerning the jurisdiction of the primary court. And therefore, stay of the whole proceeding would be proper because anything that could be done on the trial court would not be proper as there is still a question of jurisdiction which goes to the root of the matter. Therefore, this ground is allowed.

I would also like to comment on the issues argued by the respondent concerning the right of the applicant to access the revisionary power of this court and on the issue of the applicant's legal authority to appear before the court taking into consideration that four months expired and she has not sought for extension of the same. I will not make any findings on the same as it was not a subject of the applicant's complaints and therefore not properly argued by the parties in the District Court and therefore not worth being subject of this revision application.

Consequently, this application is allowed to the extent explained above, and in the event, I find the reason to fault the orders of the District



Court of Kwimba in Revision No. 2 of 2021 and I proceed to quash the orders of attachment of disputed property of the trial court in *Shauri la Mirathi No. 3 of 2019* and I further order stay of proceedings of the trial court pending determination of appeal before the Court of Appeal. I make no orders as to costs after considering the relationship of the parties in this Revision.

It is so ordered.

Right of appeal explained to the parties.




M.MNYUKWA
JUDGE
19/9/2022

Court: Judgement delivered today this 19th day of September, 2022, in presence of parties.


M.MNYUKWA
JUDGE
19/9/2022