

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA**

CIVIL REVISION NO.14 OF 2021

*(Arising from Decree and Order of the Resident Magistrate Court of Mwanza
at Mwanza dated 31st August 2021 issued in RM Civil Case No. 1 of 2010)*

DR. DEUS MALULU.....APPLICANT

Versus

PHARES BULUGU.....1ST RESPONDENT

SP EMENTINA OLOMI.....2ND RESPONDENT

RULING

Oct. 3rd and 7th, 2022

Morris, J

Dr. Deus Malulu, the applicant, having lost in Civil Case No. 1 of 2010 which proceeded *ex parte* against him and the 2nd respondent at the District Court of Nyamagana, is determined to have this Court revise proceedings for both the main suit and execution thereof dated 31st August 2021. The chamber summons supported with his affidavit is brought under section 79(1)(b) & (c) of the **Civil Procedure Code**, Cap.33 R.E. 2019 (CPC) and sections 43 and 44 (1)(b) of the **Magistrates Courts Act**, Cap.11 R.E. 2019 (MCA).

From the records, the applicant and the 2nd respondent were at one time, employees of Bukumbi Hospital. Around June 2009, the applicant

wrote a letter to the 1st respondent on behalf of the employer notifying the latter about termination of his employment on medical grounds. Aggrieved by the said letter, the 1st respondent filed a defamation suit at the trial court against the applicant and the 2nd respondent. The suit proceeded on *ex-parte* basis and the 1st respondent was awarded general damages at Tshs. 50m/-

The decree-holder's efforts to have the decree realized has repeatedly been meeting the applicant's unsuccessful interventions. Finally, on 30th August 2021, the executing court ordered execution processes to continue via attachment and sale of the applicant's property No. 201 Plot 'D' at Misungwi District. The applicant aggrieved by such order has applied for the present revision.

During the hearing, both the applicant and 1st respondent appeared in person. However, the court observed that the application had been preferred out of time in respect of civil case no.1 of 2010. Being a crucial preliminary point of law, parties were ordered to address the court on this aspect simultaneously with the submissions for or against the application respectively. This ruling, therefore, covers both the preliminary matter and the main application.

Submitting in favour of the application, the applicant reiterated contents of his affidavit and argued that the application is within time

because he was never served with the court summons. Further, he argued that main suit not only proceeded against him instead of the employer (Bukumbi Hospital) but also, he was not given the right to be heard. In addition, the applicant submitted that on the same footing, execution proceedings which resulted from the illegally obtained decree were unlawful. To him, it was not proper in law for his personal property to be attached and sold for the mistakes, if any, of his employer. On such basis he prayed to this court to allow the application.

The respondent resisted the application. He submitted that the applicant is employing delaying tactics so as to deny him his rightful interests from the valid court order. Countering the submissions of the applicant in regard of service of summons, the respondent argued that all due processes of service were complied with, only that the applicant and the 2nd respondent did not heed.

The respondent also argued that the present matter is time-barred because it was decided over ten years ago (since 2010). He thus maintained that all efforts of the applicant to frustrate the execution processes have not been helpful but just steps which are costly on him in terms of time and money. He prayed for outright dismissal of the application so that execution takes its course.

Having summarized the submissions of parties above, this court finds it imperative to be guided by two issues in discharging this matter. Firstly, whether or not the application has been brought in time per the law. Secondly, whether or not the applicant discloses sufficient grounds to warrant a revision of the subordinate court's proceedings and/or order. I will discuss one issue at a time.

The first is in regard to appropriateness the time-line. As hinted before, this should have otherwise been raised as a preliminary objection by the respondent. But this was not raised or delt with until when the court discovered it immediately before hearing. All the same, parties were accorded an opportunity to address the court on such point. In this connection, the applicant submitted that the application was in time.

I have taken interest in the documents presented to the court. The applicant is seeking to revise two distinct proceedings of the trial court; one dated November, 9th 2010 and another one 30th August 2021. This application was filed on September, 30th 2021. That is about twelve years for the former and about 30 days for the latter.

The law governing time-lines for revisions states that the same may be preferred within sixty days. Hence, one limb of the application (in respect of execution) is within time but the other one (for the main suit) is hopelessly time barred. Before I state the court's consequence in

respect of the time-barred proceedings, I feel inclined to discharge the aspect of the appropriateness of the revision in respect of execution proceedings. Though the submission of the applicant has not discussed on what exact legal basis he seeks revision against the execution proceedings; paragraph 8 of his affidavit outlines the points under which he bases his application. Under the said paragraph, the applicant is advancing two reasons. That is, the copy of the decree being executed bears no date; and that the application for execution was filed in a wrong court.

After perusing the court records, I find that the subject decree is dated 9th November 2010 (with express alterations by the handwriting). Also, the application for execution, though titled District court, it was received and admitted at the Resident Magistrates Court of Mwanza. The applicant has not been able to demonstrate how such anomaly is occasioning injustice to him, All the same, as the two grounds are posing a question in execution, the court with mandate to determine them is the executing court under section 38 of the **CPC**. The said section reads as follows:

38.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree,



shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

It is very important to underscore at this moment that a matter brought out of time, touches on jurisdiction of the court. It cannot be condoned. It is not a mere procedural irregularity. The question of jurisdiction is so fundamental and deserves adequate attention. In **Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda** (1995) TLR 155; **M/S Tanzania – China Friendship Textile Co. Ltd v Our Lay of Usambara Sisters**; Civ. Appeal No.84/2002; and **Desai v Varsama** [1967] E.A. 351 this aspect was discussed at length.

Hence, the applicant should first secure enlargement of time before inviting the appropriate court to deal with issues of non-issuance or service of summonses, *ex-parte* proceedings and appropriateness of the execution proceedings thereof. Further, if he has questions relating to the

execution processes, he is at liberty to invoke section 38 of the **CPC** as elaborated above.

In view of the above discussion the application is found to lack any merit and is hereby dismissed. Each party to bear own costs.

It is accordingly ordered.



C.K.K. Morris
Judge
October, 7th 2022

Ruling delivered in the presence of Dr. Deus Malulu, the applicant and Mr. Phares Bulugu, 1st respondent and in the absence of the 2nd respondent.

C.K.K. Morris
Judge
October, 7th 2022