

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL REVISION NO. 28 OF 2021**

*(Originating from Execution No. 77 of 2019 before the Resident  
Magistrate Court of Dar es Salaam at Kisutu)*

**HASSAN ALLY SHABAN..... APPLICANT**

**VERSUS**

**DELILA PATRICK MWAFONGO..... RESPONDENT**

*Date of Last Order :24<sup>th</sup> August, 2022  
Date of Ruling :18<sup>st</sup> October, 2022*

**RULING**

**MGONYA, J**

This is a ruling in respect of the points of preliminary objection raised by the Respondent against the Applicant's application for review filed before this court. The Respondent's Preliminary Point of objection premised on two points going thus:

- 1. That this Honourable Court is precluded from entertaining execution matters by virtue of section 38 (1) of the Civil Procedure Code, Cap. 33. [R. E. 2019]; and**

**2. That this Honourable Court does not have jurisdiction to entertain revision proceedings against matters arising from the execution.**

Briefly, the Applicant before this court is seeking for an order that, this court may call for record and examine proceedings in respect of the decision of the Resident Magistrate Court of Dar es salaam at Kisutu, dated 07/06/2021 before Isaya SRM in **Execution No. 77 of 2019**, for the purpose of satisfying itself as to the correctness, legality and propriety of the aforesaid decision and revise, reverse, quash and set aside the same. The application has been vehemently disputed by the Respondent who apart from filing a Counter Affidavit she also filed a preliminary point of objection as alluded to herein above.

As both parties are represented it was agreed that hearing proceed by way of written submissions in which both parties complied with the filing schedule. The Applicant is represented by Mr. Deogratus Ogunde learned Advocate while the Respondent enjoying the legal services of Mr. Clemence Venela, learned Counsel.

Submitting in support of the first ground of objection Mr. Clemence contended that, according to **Section 79(1) of the Civil Procedure Code, Cap. 33 [R. E. 2019]**, revision stands only when the court acts within its jurisdiction illegally or with

material irregularity. Therefore, it's upon the Applicant to show the said illegality or irregularity. The Counsel averred that, the Applicant did not show the same, instead he is raising matters purely arising in execution proceeding. Therefore, this court has no jurisdiction to deal with those matters. He went on to state that **Section 38(1) of the Civil Procedure Code, Cap. 33 [R. E. 2019]** does not vest this Honourable Court with the power to entertain revision on matters arising from the execution proceeding. In his view this court is not an executing court, hence it lacks jurisdiction to entertain any question that arose from execution proceeding. He invited this court to read the book of *Mulla on the Civil Procedure (Abridged, 2005), page 274 and the case of TANZANIA PORTS AUTHORITY versus LEIGHTON OFFSHORE PTE LTD AND ANOTHER*, Miscellaneous Commercial Review No.5 of 2016, High Court of Tanzania at Dar es Salaam, page 16 and 17 and the case of *IGNASIO IGNAS V. FREDY BASLEY MREMA*, Civil Appeal No. 65 of 2017, High Court of Tanzania at Dar es Salaam (Unreported).

Mr. Clemence went further to state that, even though this Honourable Court has been conferred with revision power of cases in Subordinate Court through **Section 44(1)(a) and (b) of The Magistrate Court Act, Cap. 11 [R. E. 2019]**, still the said power is limited towards irregularity and illegality or lack of

jurisdiction. He said, the said, power cannot be exercised over matters purely arising in execution proceedings.

In regard to the second point of objection, Counsel Clemence submitted that, it is a trite law that the court should exercise revisional powers only when there is no other remedy provided by the law. In the case at hand, Section **38 of the Civil Procedure Code**, provides for remedy in case of any matter arising out of execution proceedings. That the Applicant ought to have sought that remedy and not to bring an application. Moreover, it is said that the applicant did not state if there are any exceptional circumstances warranting the court to invoke its provisional jurisdiction. In his view, this kind of revision application should be dismissed. To bolster his stance, the learned Advocate cited the case **of HAMOUD MOHAMED SUMRY V. MUSA SHAIBU MSANGI AND TWO OTHERS, Civil application No. 255 of 2015, Court of Appeal of Tanzania, at Dar es Salaam (Unreported)** and the case of **CRDB BANK LIMITED versus GEORGE M.KILINDU AND ANOTHER, Civil Application No. 74 of 2010**, where the court dismissed the application for lack of jurisdiction of the court of appeal to revise the execution proceedings and stated that there was another remedy the applicant could have sought.

On the strength of what he submitted Mr. Clemence prayed this court to dismiss the application with costs and order the file

to be returned to the Resident Magistrate Court of Dar es salaam at Kisutu for execution proceedings.

In reply, learned Advocate Mr. Deogratus opted to argue all the two points jointly as they all revolve the issue of jurisdiction of this court. He submitted that, the Respondent view that **Section 38(1) of the Civil Procedure Code Cap. 33 [R. E 2019]**, precluded this court from entertaining execution matters is misconceived. In his view the Applicant did not invite this court to entertain execution matter but rather to exercise its revisionary powers, as this court's powers of revision are conferred by **Section 79 of the Civil Procedure Code and section 44(1) of the Magistrate Act, Cap. 11 [R. E 2019]**. It was further submitted that the question as to whether they have successfully demonstrated irregularity or illegality as **Section 79(1) of the CPC** has to must await hearing of the application on merits; thus the same cannot be a preliminary objection.

Counsel Deogratus went on to state that, the execution power has been stipulated under **Section 38 of the Civil Procedure Code**. The court is said to have already exercised its powers and the applicant is aggrieved with hence the proper remedy is to apply the revision. The contention that the revision has to be exercised when there is no any available remedy is misconceived. It is settled that revision is exercised when there

is no right to appeal or that right of appeal is blocked by judicial process. He distinguished the case of ***HAMOUD MOHAMED SUMRY*** (supra) by stating that, in that case there was a right to appeal while in the case at hand there is no such right as no appeal lies from execution order and specifically those issued by the subordinate courts hence revision is the proper recourse. To bolster his stance the case of ***KELVIN RODNEY ZAMBO vs. UAP INSURANCE TANZANIA LTD (Formerly known as Century Insurance Company), Civil Revision No. 39 of 2019, High Court of Tanzania at Dar es salaam (Unreported)*** which cited with approval ,the case of ***GENERAL TYRE (E.A) LTD vs. AMENYISA MACHA AND OTHERS***, Civil Appeal No.21 of 2003, HC at Arusha (Unreported) and another case of ***CHACHA NYIKONGORO vs. NDEGE KISEKE, Misc. Land Appeal No.145 of 2020, High Court of Tanzania at Musoma (Unreported)*** were referred to.

Basing on what he submitted Mr. Deogratus argued the court to dismiss both points of objection with costs for being misconceived.

In his brief rejoinder Mr. Clemence contended that it is a trite law that anything arising from the execution proceedings has to be dealt by the executing court. **Section 38(1) of the Civil Procedure Code**, is straight forward and it exclude this court from dealing with anything which arises in execution

proceeding as this matter. He went on to state that the Applicant did not submit what was an exceptional circumstance warranting this court to invoke its revisional jurisdiction as provided under **Section 79 (1) (a) (b) and (c) (supra)**. He reiterates his prayer that this court finds pertinent to dismiss this application with costs.

Having carefully considered the submission of the parties, the issue for determination is whether the raised preliminary points of objection which rooted on the jurisdiction of this court in execution matter are meritorious or not.

As alluded above, the Applicant filed his application under **Section 44 (1) (a) (b)** of the **Magistrate Court Act Cap. 11 [R. E. 2019]** and **Section 79 (1) (c) and 95 of the Civil Procedure Code , Cap. 33 [R. E. 2019]**, seeking this court to call for record and examine proceedings in respect to the decision of the Resident Magistrate's at Kisutu in **Execution No. 77 of 2019** to satisfy itself to the **correctness, legality** and **propriety** of the aforesaid decision and revise, reverse, quash and set aside the same.

It is garnered from his affidavit that following the Matrimonial **Cause No. 14 of 2016** which proceeded exparte against him, he received documents relating to **Execution No. 77 of 2019**. From those documents he got to know about the

Exparte Judgment entered in Respondent's favour on **17/07/2018** where among other things there was a division of a house in equal shares and maintenance of issues of marriage at a monthly rate of Tshs. 150,000/= and costs of the suit. He further learnt that the Respondent sought for Exparte Decree by sale of a plot 120 Block "W" Magomeni Mikumi and the order to arrest and detain him as a Civil Prisoner as he failed to pay maintenance arrear as calculated at Tshs. 150,000/=. The reasons for applying for revision order as deposed in paragraph 9 to 10 of his affidavit are: **One**, decision of executing court is tainted with illegality being contrary to public policy as the policy requires that the house at plot 120 Block "W" Magomeni Mikumi not be sold until expiry of 25 years from the date of purchase; **Two**, committing him to civil prison should he fail to pay maintenance within 60 days is contrary to interest of the child because, all along he is the one who has been taking care of the child in all necessities and that the execution is not intended to punish or embarrass the judgment debtor but to allow the decree holder to have the fruits of the decree.

It is not in dispute that, in addition to any other powers conferred upon the High Court, Section 44 of The Magistrate Court Act **Cap. 11 [R. E 2019]** empowers the High Court with the power to exercise supervision over all District Courts and Courts of a Resident Magistrate and at any time may call for and



inspect or direct the inspection of the records of such courts and give directions as it may be necessary in the interest of justice. It is further not in dispute that **Section 79 of the Civil Procedure Code Cap .33 [R. E. 2019]**, empowers the High Court to call for the records of any case which has been decided by any court subordinate in which no appeal lies thereto if such subordinate court appears to have acted in the exercise of its jurisdiction illegally or without material irregularity.

Being guided with the above provisions of the law, the follow up question now is whether in the issue of jurisdiction of this court to entertain the Execution matter as raised by the Respondent qualify to be a preliminary point of objection? To answer this pertinent question, I find this Court is enjoined to revisit the law on what amounts to preliminary objection on point of law. The Court of Appeal when deciding the case of ***ALPHONCE BUHATWA VS. JULIETH RHODA ALPHONCE***, Civil reference No. 9/01 of 2016 (Unreported) referred to the case of ***AYUBU BENDERA AND 10 OTHERS VS. AICC***, Civil Application No. 9 of 2014 (Unreported), which quoted the case of **Mukisa Biscuit Manufacturing Company** (supra) and the case of ***Hezron Nyachiya Vs. Tanzania Union of Industrial and Commercial workers 11 and others***, Civil Application No. 79 of 2001 (Unreported), on the issue of

what is to be considered as preliminary objection, had this to say:

***"...to be considered as a preliminary point of objection, the point concerned must raise a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact is to be ascertained or in what entails the exercise of judicial discretion."***

The above position of the law was expounded by the Court in the case of ***TANZANIA TELECOMMUNICATIONS CO. LTD VS. VEDASTO NGASHWA AND FOUR OTHERS, Civil Application No. 67 of 2009 (CAT-Unreported)*** where the Court established three conditions to be satisfied before the ground is considered as the preliminary point of objection. These are: **One**, the point of law raised must either be pleaded or arise as a clear implication from the proceedings. **Second**, it must be a pure point of law which does not require close examination or scrutiny of the affidavits and counter affidavits, and **third**, the determination of such point of law in issue must not depend on the exercise of the Court's discretion.

Going through the Respondent's submission one of the reasons to raise this preliminary objection is that the Applicant

did not show the said illegality or irregularity. To see whether the said illegality or irregularity has been deponed is the matter of facts and not law. The proof of that requires this court to go through the facts in the affidavit and annexures. Therefore, applying the tests established in ***MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD [1969] E. A 696*** at page 701 to the facts in the present matter, I find the raised preliminary points of objection lacks the test to qualify as the pure point of law.

Also looking at the provision of section 44 of the **Magistrate Court Act and Section 79 of the Civil Procedure Code**, the High Court has unlimited power to call for records and inspect the records from the subordinate court ***suo motto or*** upon application made by a part, to the suit. Am aware of **Section 38(1) of the Civil Procedure Code** which requires any questions arising between the parties to the suit in which the decree was passed to be determined by the court executing the Decree and not by a separate suit. Reading the words of **Section 38(1) of the Civil Procedure Code**, I distant myself from the Respondent assertion that the High Court has limited power in Execution matters. In my view the said section does not make the power of the High Court provided under **Section 44 of the Magistrate Court Act and Section 79 of the Civil Procedure Code** nugatory. Therefore, provided

that this Application is for the court to exercise Revision and not to entertain execution matter, **I find the raised preliminary objection has no merit** and I proceed to **dismiss the same with costs as I hereby do.**

It is so ordered.



**L. E. MGONYA**

**JUDGE**

**18/10/2022**