

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

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 115 OF 2022

(Originating from Economic Case No 48 of 2022 and Misc. Criminal Application No. 33 of 2022 pending before the Resident Magistrate's Dar es Salaam at Kisutu)

FORTUNATUS BENARD BUNDALA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Date of last Order: 31/10/2022

Date of Ruling: 02/12/2022

E.E. KAKOLAKI, J.

The applicant Fortunatus Benard Bundala under certificate of urgency and by way of chamber summons preferred this application for revision, under the provisions of section 372 (1) of the Criminal Procedure Act [Cap. 20 R.E 2022] and sections 2, 44 (1) (a) and 44(3) of Magistrate Court Act [Cap. 11 R.E 2019], seeking for the following orders:

- 1) *That this honourable court be pleased to call for and examine the records of the economic Case No. 48 of 2022 and Miscellaneous criminal application No 33 of 2022 which are*

pending in the Magistrate Court of Dar es Salaam at Kisutu for the purposes of satisfying itself as to the correctness, legality, propriety of any finding or order recorded or passed and regularity of the said proceedings.

- 2) *That this Honourable court be pleased to call and inspect or direct the inspection of the record of the economic case No. 48 of 2022 and Misc. Criminal Application No. 33 of 2022 which are pending in the Resident magistrate Court of Dar es Salaam at Kisutu and give such directions as it considers may be necessary in the interest of justice.*

The application was strenuously opposed by the respondent who filed the counter affidavit to that effect. Simultaneous to that, the respondent filed a notice of preliminary objection raising two grounds to the effect that, **one**, *the court has no jurisdiction to revise the matter which is pending at subordinate court for pre-committal stage*, **two**, *the court was not properly moved under the provisions of section 372 of the criminal Procedure Act, [Cap. 20 R.E 2022].*

On that note the respondent prayed this Court to strike out the application. As per the court's practice, where a preliminary objection is raised before it,

the same has to be determined first before embarking into the subject matter of the case. It is from that practice parties were ordered to submit first on the said objections orally, in which both appeared represented on the hearing date. Applicant appeared represented by Mr. Peter Madeleka, learned advocate while the respondent enjoyed the legal services of Mr. Paul Kimweri, learned Senior State Attorney.

It was Mr. Kimweri who took the floor first and sought leave of the court to combine the two points and argue them co-jointly as both touches the jurisdiction of this court to entertain the application at hand. It was his submission that, the two matters in which the applicant seeks this Court to revise are all pending before the Resident Magistrates Court of Dar es Salaam at Kisutu while one of them Economic Case No. 48 of 2022 is at the Preliminary Inquiry stage (PI). He argued that, in both matters there is no single order or decision issued by the lower court which determining parties' rights nor does so to the finality of the matter in contest to entitle this Court exercise its revisional powers over the same. In his view, all orders made by the lower court therein are interlocutory orders which under the law cannot be appealed against or be revised. He fortified his argument with the case of **Simon Michael and 5 Others Vs. R**, Criminal Appeal No. 313 of

2018 (CAT-unreported) at page 10, where the Court of Appeal held that, revision against orders not finally determining the matter are untenable.

With regard to Economic Case No. 48 of 2022 which is pending for Preliminary Inquiry (PI) before the RM's Court at Kisumu Mr. Kimweri argued, it is the position of the law that, where the matter is pending for preliminary inquiry before a subordinate court for committal, the High Court is not seized with jurisdiction to make any order in respect of that matter until when the subject therein is committed before it. To buttress his position the case of **DPP Vs. Bookem Mohamed Ally and 7 Others**, Criminal Appeal No. 217 of 2019 (CAT-unreported) was referred to the Court, in which the Court of Appeal faulted the High court for making orders on the files of the lower court in which its subjects were yet to be committed before it. He added that, in this matter since Economic Case No. 48 of 2022 is still pending before the subordinate court pending committal procedure, this court is barred from making any order regarding the same as it was stated in the above cited case.

As to Misc. Criminal Application No. 33 of 2022, it was his submission that there is no final orders made by the trial court therein warranting this Court invoke its revisional powers. He was of the view that, what applicant is

inviting this court to revise are pre mature matters which under the law is restricted to do. Basing on what is submitted above, the learned Senior State Attorney prayed this Court to dismiss the application.

In response, Mr. Madereka prefaced his submission by challenging competence of the raised preliminary objections claiming that, the same do not qualify in terms of the standards set by the case of **James Buchard Rugemalira Vs. R**, Criminal Application No 59/19 of 2017 (CAT-Unreported) where the Court of Appeal specifically stated at pages 9-10 that, preliminary objections should be able to disclose the contravened law. He contended that, in the two raised points of objections by the respondent none of them cited the provision of the law alleged to have been contravened. It was his further submission that, in **Rugemalira's case** at page 11, the Court went ahead to state that, it is necessary for the preliminary objection to contain necessary particulars to enable the court and the applicant grasp its nature and scope.

In his view, since ground No. 1 of the preliminary objection did not cite the violated law, the same is incompetent for want of citation of the provision of the law. Concerning the second objection it was his submission that, the cited law of section 372 of the CPA is not clearly understood as according to

him, the said section has two subsections (1) and (2) which address different things, thus the applicant failed to prepare his defence. He clarified that, this application is brought under section 372 (1) of the CPA which is very specific. Concerning Mr. Kimweri's submission that this Court has no jurisdiction to entertain the application on matters which are pending before the subordinate court, he contended, the same is a misconception of the law, as section 372 (1) of the CPA aims at letting the Court satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as well as satisfying itself as to the regularity of any proceedings of any subordinate court. In view of that he stressed, this court is seized with jurisdiction to entertain this application. He added that, there is nowhere it is stated that this Court is barred from determining the application for revision where the matter is pending before the subordinate court.

Mr. Madeleka went on submitting that, in the chamber summons the court has been moved under two laws, Criminal Procedure Act (CPA) and section 44 (1) of the Magistrates Courts Act (MCA) but the respondent is only bothered with the sections of the CPA and not MCA as the law under section 44 (1) of MCA empowers this Court to call and examine the records of the

subordinate court for the purposes of inspecting and giving direction if any as it deems fit. Hence the Court is clothed with jurisdiction to entertain the matter, the learned counsel submitted. To buttress this point, he referred the Court to its decision in the case of **Dinna Pantaleo Moshi V.s R**, Misc. Criminal Application No. 11 of 2022 at page 12-13 where it was observed that, this Court has powers to revise the matter regarding illegality, correctness and propriety of the findings, sentence, order recorded or passed or satisfy itself as to the regularity of the proceedings so complained off. It was his position that while he is at one with respondents' submissions that, interlocutory orders are not appealable or revisable, he was quick to add the spirit of this application does not confine itself to orders of the lower courts only but also the regularity of the proceedings therein. Mr. Madeleka went forward to set up an example of Misc. Criminal Application No. 33 of 2022, in which the court order's to bring the applicant before the Court within 16 hours was not complied with, in which the said fact forms part of the applicant's affidavit. On that note he submitted, it is not true that the said application is still pending in court as the same has been determined to its finality. He then referred the Court to section 2 of MCA, where the word order is defined to mean writ, warrant, summons, or other process and a

decree, revisional or confirmatory order and/or any other formal expression of the decision of the court. He invited the court to consider the meaning of the word order and find that the orders or proceedings sought to be revised in this matter are wide enough to cover the jurisdiction of this Court. In winding up he submitted that, the intention of the court is to dispense justice and implored it to dismiss the preliminary objection as under Article 107 A (20 (e) of the Constitution of the United Republic of Tanzania (URT), courts are enjoined not to entertain technicalities but rather render substantive justice. He added, the preliminary objections raised by the respondent have no merit rather intend to delay dispensation of justice on the applicant's side.

In rejoinder, Mr. Kimweri attacked Mr. Madeleka's submission on the competence of the preliminary objections clarifying that, respondent's points of objection are based on point of law in that, this court has no jurisdiction to entertain the application and second that, the court under section 372 of CPA has no jurisdiction to entertain the present application. He was of the view that, the two points have passed the test of being Preliminary Objection as stated in **Rugemalira's case**. According to him, the **Rugemalira's case**, is distinguishable to fact of the present application on the following two points, **one**, the contention on that case was to the effect that, the

preliminary objection was not clear while in the present case the objections are clearly seeking to question this court's jurisdiction to entertain the application, **second**, the respondent in **Rugemalira's case** did not cite any provisions of the law while in this matter the respondent did. Given the above reasoning, he was of the view that, the contention that the respondent did not cite the provision of the law is very wrong and misplaced as the respondent also cited the case law to support the preliminary objection instead of the provisions of the law. In further view of Mr. Kimweri, the **Rugemalira's case** was to the effect that, the respondent ought to have specifically clarified his point of objection by citing the provisions of the law, but it did not mean that every preliminary point of objection raised should contain the provision of the law.

Concerning the issue of wrong citation of section 372 of the CPA, Mr. Kimweri clarified, the section is all about revisionary powers of this Court by setting out the criteria under which revision application can be preferred and entertained by the Court. He added, for this Court to entertain revision application under section 372 (1), there has to be findings, sentence or orders sought to be revised and not otherwise. He maintained that, in respect of Economic Case No. 48 of 2022, there is no any finding, sentence

or order in which the applicant is seeking to be revised, that is why the respondent submitted in support of the second point of objection that, the court was not properly moved to entertain the prayers sought.

Regarding the application of the case of **Dinna Pantaleo Mushi** (supra) cited by the applicant it was his submission that, the same was giving direction on how to deal with revision application. In the premise he contended, the same does not support the contention by the applicant that respondent wrongly cited section 372 of the CPA.

Concerning Misc. Criminal Application No. 33 of 2022, he maintained that the order issued therein is an interlocutory order as the same does not determine the matter to its finality for being interim order, that is why the case of **Simon Michael and 5 Others** (supra) was referred to support the submission that an interlocutory matter cannot be entertained by way of revision. In view of the fore stated, it was his prayer that the court lacks jurisdiction to entertain the application hence the same be dismissed.

I have dispassionately considered the rival submissions by the parties concerning the raised preliminary points of objection as well as perused the records in both Misc. Criminal Application No. 33 of 2022 and Economic Case

No. 48 of 2022, in search of disentangle parties' point of controversy, as to whether this Court is seized with jurisdiction to entertain the present application. I wish to firstly respond to Mr. Madeleka's contention concerning competence of the raised preliminary objections in which he laments that, the same are not clear for not citing the contravened provisions of the law, the contention which in Mr Kimweri's view is baseless as the preliminary objections are clear, seeking to challenge the jurisdiction of this Court. I am of the considered view that, this point need not detain much this Court. The reasons I am so holding is not far-fetched as I will soon demonstrate. While agreeing with Mr. Madeleka that any raised preliminary objection raised must be clear to enable the adverse part comprehend its nature to enable him prepare and render his defence successfully, I disagree with him that all points raised must cite the contravened provision of the law as mentioning the same depends on the nature of the objection raised. I so opine as the **Rugemalira's case** in which Mr. Madeleka banked his argument on, was dealing with the preliminary objection by the respondent where it was asserted by the respondent that, the application was defective for non-compliance with the law without citing the provision of the said law hence a need for necessary particulars including the alleged non-complied provision

of the law. The Court of Appeal reasoned that it was necessary for the respondent to cite the provision of the law to enable the adversary party be aware in advance of the nature of the point of objection and prepare his defence. In my opinion under the circumstances of that case where the objection was specifically referring to non-compliance of the law it was necessary for the respondent to cite the alleged infringed provision of the law. Unlike in **Rugemalira's case** where the alleged non-complied law was not clarified in the present matter the raised preliminary objections are very clear and straight questioning jurisdiction of this court to entertain the application. The same read, **one**, *the court has no jurisdiction to revise the matter which is pending at subordinate court for pre-committal stage*, **two**, *the court was not properly moved under the provisions of section 372 of the criminal Procedure Act, [Cap 20 R.E 2022]*.

A glance of an eye to the same reveals no ambiguity as they all question the jurisdiction of this Court to entertain the present application, hence hold a view that they are elaborate enough to enable the applicant comprehend their nature. Thus, the contention by Mr. Madeleka that the two points do not qualify to be preliminary objections on points of law under

Rugemalira's case test is unfounded hence disregarded it and proceed to determine their merit or otherwise.

Now reverting to the merit or demerit of the raised preliminary objections, as alluded to above the same seek to question the jurisdiction of this Court in determining the application before it. Notably, establishment of court's jurisdiction is so basic as it goes to the very root of the authority of the court to adjudicate upon cases of different nature. As a matter of practice, courts must be certain and assured of their jurisdiction at the commencement of the trial. It is very risky and unsafe for court to proceed with hearing of the matter on merit on assumption that it is crowned with jurisdiction to adjudicate that particular case which in fact it does not have. See the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995 (CAT-unreported). To stress on this point of jurisdiction, the Court of Appeal in the case of **Republic Vs. Farid Hadi Ahmed & Others**, Criminal Appeal No. 59 of 2015 CAT -Unreported) had the following to say:

"It should be underscored that the jurisdiction of any court must be expressly given; it cannot be implied and/or assumed. Also note-worthy is the point that invariably such jurisdiction is limited. Where a decision of any court may be found to have

been reached without jurisdiction, such a decision risks the danger of being declared invalid by a higher court.”

With the above legal position in mind, it is a fact that the present application was brought under section 44 (1) of MCA and section 372 (1) of the CPA in which both sections confer this court with revisional and supervisory powers to call and examine records of any criminal proceedings before the subordinate court for the purposes of satisfying itself as to the regularity, correctness, legality or propriety of any finding, sentence or order recorded or passed, or of any proceedings of subordinate court. For clarity the sections provides that:

***44.-(1)** In addition to any other powers in that behalf conferred upon the High Court, the High Court-*

*(a) shall exercise **general powers of supervision over all district courts and courts of a resident magistrate** and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay;*

372.-(1)

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the

purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

With that understanding, the next question is whether this Court can invoke those powers under circumstances of this application for calling for records of the Economic Case No. 48 of 2022, which is pending for committal before Resident Magistrates Court of Dar es Salaam at Kisutu, and Misc. Criminal Application No. 33 of 2022, allegedly disposed of. Mr. Kimweri is of the view that, this court has no jurisdiction to do so as the first matter is at pre-committal stage, and that any order given in both matters if any is an interlocutory order which is not revisable, while Mr. Madereka holds a contrary view that, apart from orders or finding the above sections extends to empower this court to revise even the regularity or otherwise of the lower court proceedings, thus the Court has jurisdiction to so do.

To start with Misc. Criminal Application No. 33 of 2022, I do agree with Mr. Kimweri that the order given on 09/08/2022 in which the applicant seeks this court to revise or give directives on is an interlocutory order, as it was made in pendency of the main application which was set to come up for mention on 25/08/2022. However, I differ with him on the submission that,

the said matter is still pending before the RM's Court of Dar es salaam at Kisutu. Glancing at the record of Misc. Criminal application No.33 of 2022, the same suggests that, apart from the interlocutory order of 09/08/2022, the application was dismissed for want of prosecution on 25/08/2022 when it was set to come for mention at the request of the respondent on the ground that it was overtaken by event. The fact that the said application is no longer pending before the trial Court was confirmed by Mr. Madeleka in his reply submission. It is the law that, the dismissal order determines the matter conclusive thus rendering the dismissal order appealable. It is however learnt from both the record and Mr. Madeleka's submission that no appeal was preferred by the applicant in respect of the said dismissal order nor is there any indication that the applicant was prevented from so doing by any reason. In view of that stance, I am at one with Mr. Kimweri's propositions, there is no order qualifying for revision in Misc. Criminal Application No. 33 of 2022, as the order pronounced by the court on 09/08/2022 sought to be revised is already held to be interlocutory one hence not revisable under both section 372(2) of the CPA and section 43(2) of the MCA. Worse enough the application is no longer pending before the

Resident Magistrates Court of Dar es salaam at Kisutu as the applicant's prayers suggest in chamber summons.

Moving to Economic case No. 48 of 2022, it is submitted by Mr. Kimweri and of course not disputed by Mr. Madeleka that, the same is in the pre committal stages at the RM's Court of Dar es Salaam at Kisutu. It is now a well settled principle of law that, this Court is clothed with jurisdiction to deal with a matter which is in subordinate court only upon committal order entered by the subordinate court committing the accused for trial before it. In absence of such committal order this Court cannot in anyway chip in and make some orders in the matter pending before the subordinate court for committal proceedings under the umbrella of supervisory powers clothed with by section 44(1) of the MCA as Mr. Madeleka would like this court to believe. I find solace on that stance from decisions of the apex court of this land including the case of **Republic Vs. Farid Hadi Ahmed & Others**, Criminal Appeal No. 59 of 2015, **Republic Vs. Dodofi Kapufi & Another**, Criminal Revisions No. 1 & 2 of 2008 (all CAT-Unreported) and **Bookeem Mohamed @ Ally and Others** (supra) to mention few. For instance, in the case of **Farid Hadi Ahmed & Others** (supra) the Court when deliberating on

matters which are reserved for this Court to deal with or address and when can so exercise its powers, had this to say:

*"When sections 245(3) and 246(2) of this Act are read together, it becomes clear that in committal proceedings the magistrate has no other role to perform in this regard beyond the mere requirement to cause the statements to be read to the accused, before it may commit such person for trial to the High Court. In that vein, we hold the view that those matters to which were raised before the RM's court on 3.9.2014 were legal matters to which the RM's court had no jurisdiction to decide. Those matters ought to **have been reserved with a view of raising them in the High Court upon being committed to that court for trial.**" (Emphasis added)*

In another case of **Dodofi Kapufi & Another**, (supra) the Court of Appeal overturned an order of this Court granting bail to the respondent therein during revision while the applicants' matter still pending before the subordinate court awaiting for committal procedure. The Court had this to say:

*"...it is difficult to appreciate how the High Court in the instant revision could have the power to grant bail to the applicants, **pre committal and in the absence of any committal order under section 246(1) of the CPA, which would have***

submitted them to its jurisdiction. Not only that. Save for exhibit to the High Court of an information by the D.P.P. under section 93 (1) of the CPA, section 178 creates a bar against the taking of cognizance by the High Court, of a criminal case, unless the same has been properly investigated by a subordinate court and the **accused person has been duly committed to it for trial.** (Emphasis supplied)

In reaching the above cited position, the Court of Appeal at page 24 made reference to the case of **R Vs. Asafu Tumwine**, Criminal Revision No. 1 of 2006 (CAT -Unreported) where it was held that,

It is only a **specific order of committal** at the end of this exercise [i.e committal proceedings] **which formally and properly submits an accused to the jurisdiction of High Court.**

Lastly, is the case cited by Mr. Kimweri, in **DPP Vs. Bookeem Mohamed @ Ally and Others** (supra) where the Court of Appeal referred the case of **Dodoli Kapufi** (supra) and reached to a finding that, this court has no jurisdiction to revise the matter which is in subordinate court at pre committal stage. Given the position of the law as alluded to above, I find that, Mr. Madeleka's contention that this court is not barred from determining

the application for revision on matters pending for committal before the subordinate court is not only misplaced but also unfounded.

In the upshot as already found herein above, the order of the RM's Court of Dar es salaam at Kisutu dated 09/08/2022 in Misc. Criminal Application No. 33 of 2022 is an interlocutory hence not revisable. The same effect goes to the dismissal order of 25/08/2022 which was not appealed against as revision is not an alternative to appeal. This is so as where there is a right of appeal, the revisional powers of this Court cannot be invoked. See the case of **Augustino Lyatonga Mrema Vs. R**, Criminal Appeal No. 91 of 1999, **Kezia Violet Mato Vs. National Bank of Commerce & 3 Others**, Civil Application No. 127 of 2005 and **Felix Lendita Vs. Michael Long'utu**, Civil Application No. 312/17 of 2017 (both CAT unreported) (CAT-unreported). In the case of **Felix Lendita** (supra), the Court of Appeal remarked thus:

"According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked."

Similarly in respected of Economic Case No. 48 of 2022, as it is stated in the cases of **Farid Hadi Ahmed & Others**, (supra), **Dodofi Kapufi & Another**, (supra) and **Bookeem Mohamed @ Ally and Others** (supra),

the legal stance is now settled that, where the matter is pending before the subordinate Court awaiting for committal procedure this Court is restricted from invoking its revisional powers thereto. Basing on the above cited authorities and legal position, it is apparent that this Court lacks jurisdiction to determine the intended to be revised orders, or findings if any passed by the RM's Court of Dar es salaam at Kisutu at pre- committal stages as doing so will be disobeying the well-established principles by the apex court of the land in which the principle of stare decisis enjoins this Court to respect. In view of that position, I am inclined to hold that, the preliminary points of objections raised by the respondent are meritorious and accordingly I hereby uphold them. In the premises I do not buy Mr. Madeleka's invitation not to dwell on technicalities when cited the provision of the Article 107A(2)(e) of the Constitution of the URT urging the court to dismiss the objection, as the incompetent application cannot be saved under that provision. I therefore sustain the preliminary objections raised and proceed to strike out the application for want of jurisdiction to entertain it. For avoidance of doubt I order Economic Case No. 48 of 2022, which is pending before the Resident Magistrates Court of Dar es salaam at Kisutu, to proceed with the necessary stages.

It is so ordered.

Dated at Dar es Salaam this 2nd December, 2022.



E. E. KAKOLAKI

JUDGE

02/12/2022.

The Ruling has been delivered at Dar es Salaam today 02nd day of December, 2022 in the presence of the applicant in person and Ms. Monica Msuya, Court clerk and in the absence of the Respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

02/12/2022.

