

**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

R U L I N G

Date of last Order:24/11/2022

Date of Ruling:16/12/2022

MGONYA, J.

By way of Chamber summons, the Applicant is in this Court seeking for Revisional Order against the Ruling of Resident Magistrate Court of Dar es Salaam at Kisutu in **Execution No.77 of 2019**, dated **07/06/2021** with a view to satisfying itself as to its correctness, legality and/or propriety and make orders as may be appropriate.

The application is made under the provisions of **Sections 44(1)(a) and (b) of the Magistrate Courts Act, Cap. 11 [R. E 2019], Section 79(1)(c) and 95 of the Civil Procedure Code, Cap. 33 [R. E. 2019]**. Supporting the application is an affidavit of Hassan Ally Shaban, the Applicant.

The application was vigorously resisted by the Respondent who filled a counter affidavit to that effect.

Both parties in this application were represented by Advocates. Mr. Deogratius Ogunde, who represented the Applicant whilst the Respondent was represented by Ms. Velana Clemence Advocate. With leave of this court, hearing of this application proceeded by way of written submissions.

Submitting in support of the Application Mr. Ogunde commenced by narrating a brief facts material to this application that; there was Matrimonial Cause No.14 of 2016 at Kisumu Resident Magistrate's court which proceeded *Exparte* against the Respondent due to his non -appearance. *Exparte* judgment was delivered by granting a decree of divorce, an order for division of house at Plot No.120 Block W Magomeni Mikumi in equal shares and maintenance of the 2nd issue of marriage at a monthly rate of **Tshs. 150,000/=** There after, the Respondent sought to execute the decree vide **Execution No. 77 of 2019**, the prayer was granted and the court ordered the house at Mikumi be sold and divided into equal shares as well as the arrest and detention of the Applicant if he failed to pay maintenance arrears.

It is the said decision which irritated the Applicant. He thus lodged this application for revision proceedings to assail the said

decision. According to what he submitted, the payment of maintenance arrears is no longer a complain as the Applicant already paid it, therefore the only complaint is on the sale of house at Plot No.120 Block W Magomeni Mikumi and the proceeds to be divided into equal shares. The grounds for revision are:

Firstly, according to Annexure HAS-3 of the Affidavit in support of the application (sale agreement), **the house is situated at Plot No.T.120 block "W" Magomeni Mikumi Dar es Salaam** while the house which purported to be matrimonial one is located on **Plot 120 Block "W" Magomeni Mikumi**. In his view Plot No.T.120 Block "W" Magomeni Mikumi, Dar es Salaam Region and Plot No.120 Block "W" Magomeni Mikumi are two distinct Plots hence they cannot be associated or confused as one place. According to the Applicant this constitute material illegalities and irregularities of highest order as the Decree is not in relation to **Plot No.T.120 Block "W" Magomeni Mikumi, Dar es salaam Region**.

He contended further that, since the executing court is only limited to the decree it has to implement what the decree has ordered. The decree never ordered his house to be sold in public auction hence the order by Hon. Isaya in **Execution No. 77 of 2019**, that Applicant's house be sold in public is an illegality. The

Applicant referred this court to the decision made in ***MIHAYO MAZIKU MISANA (Administrator of the Estate of the Late MAZIKU MISANA) vs ABDALLAH MASHIMBA NZINGULA, LAND REVISION No.3 of 2021***, High court of Tanzania at Shinyanga (unreported).

Secondly according to the Sale Agreement between the Applicant and the Government, the house cannot be sold until the lapse of twenty-five years from the date of the Agreement which is **1st November, 2004**. The court must uphold, respect and oversee implementation of the policies and their agreement. Hence even if it is his house which is subject to the decree a sale could not be possible until **1st November, 2029**.

To finalise his submission, the Applicant prayed this court to quash all the proceedings in relation to **Execution No. 77 of 2019**.

In reply, the Respondent counsel submitted that; the Applicant filed this application as a disguised appeal of **Matrimonial Cause No. 14 of 2016** and not against **Execution No. 77 of 2019**. The reasons for this assertion is that, the decision for division and sale of the matrimonial house was made in Matrimonial Cause No. 14 of 2016 and not in an execution. Therefore, if the Applicant intends to challenge the said decision, he was supposed to file an application to set aside

the said Matrimonial Cause No. 14 of 2016 which is not the subject of this Revision. In his view, the Applicant decided to use every way to prolong and deny the Respondent's right toward their matrimonial house. To support his stance, he cited the case of **NYANDA MOLA V. HASSAN MSIGOTE, MISC.LAND APPLICATION No.17 of 2021**, High court of **Tanzania at Mwanza** (Unreported).

Ms. Clemence went on to submit that, revisionary powers are limited hence the court cannot exercise revisionary powers over two or more distinct matters. He contended that; this court cannot use the application for Revision against Execution No. 77 of 2019 to revise Matrimonial Cause No. 14 of 2016. By referring to **Section 44(1) (a) and (b) of The Magistrate Court Act, Cap. 11 [R.E 2019]**, the counsel said, there is no irregularity, illegality or lack of jurisdiction that has been pointed out by the Applicant.

Concerning the assertion that the house subject to sale and division is distinct from the Applicant's house, Mr. Clemence submitted that it is only one house acquired by the Applicant and the Respondent in which they were used to live and it is that house which is subject to execution. He submitted, the house which was referred to Matrimonial cause No. 14 of 2016 and Execution No. 77 of 2019 is the one located at Plot No. 120 Block

“W” Magomeni Mikumi Dar es Salaam. He contended that, the Applicant calls this court to find there are two different house because of the absence of alphabet “T”, as his house is located at Plot No. 120 Block “W” Magomeni Mikumi Dar es Salaam.

It is Ms. Clemence is submission that the absence of alphabet “T” is a typing error which began from Matrimonial Cause No. 14 of 2016. In his view the said omission has no adverse implication to the parties as both the Applicant and the Respondent were living in the same house. Hence there can never be any prejudice in absence of alphabet “T” on the plot number. Further Ms. Clemence argued this court to invoke the principle of overriding objective which looks at substantive justice and just determination of the proceedings as provided under ***Section 3A and 3B (1) and (2) of the Civil Procedure Code, Cap. 33 [R. E. 2019]***.

On the strength of what he submitted, Ms. Clemence implored this court to dismiss this application with costs and order for the execution file to be returned to the executing Court to proceed with execution.

In his rejoinder Mr. Ogunde for the Applicant reiterated what he submitted in his submission in chief. He insisted that the Applicant cannot pay 50% of the value of the house at Plot No. T. 120 Block “W” Magomeni Mikumi, Dar es Salaam Region

because the Decree is in respect of a different property. It is his stance that, overriding objective is not a cure for all evil as the executing court has no powers to alter or substitute the decree.

I have given due consideration to the affidavit and counter affidavit, as well as the submission in support and against the application made by the learned counsel of the parties. It is a settled position that, revision powers of the Court are not an alternative to its appellate jurisdiction. However, there are circumstances in which an applicant aggrieved by the decision of the lower court may seek revision instead of appealing. Those circumstances are; where the court on its own motion calls for the record of the lower court for revision; where there are exceptional circumstances; where matters complained of are not appealable with or without leave and; where the process of appeal has been blocked by judicial process. See the case of **HARITH RASHID SHOMVI VERSUS AZIZA JUMA ZOMBOKO, CIVIL APPLICATION NO. 496/01 OF 2020** (unreported) quoted with approval the case of **HALAIS PROCHEMICAL V. WELLA A. G [1996] T.L.R. 269**

I have had time to travel through the pleadings as well as consider the submissions as advanced by both parties. From the Applicant's affidavit the deponed grounds for revision is that, the impugned ruling is tainted with illegality for being contrary to

public policy which restricts the house under dispute not be sold until expiry of 25 years from the date of purchase. To prove his assertion, the Sale Agreement (Annexure HAS-3) was attached to form part of the affidavit. However, when submitting in support of this application, the Applicant's counsel submitted on two grounds where he added another ground that, the Plot named in the **Execution No. 77 of 2019** is distinct from the Plot named in the Sale Agreement which involved the Applicant and the Government.

It is settled law that, an act or decision subject to the revision proceedings must clearly be stated in the Affidavit to support the application. Applicants' submission is not evidence but a mere summary of arguments and cannot be used to introduce evidence. This position is well stipulated in the case of **TUICO AT MBEYA CEMENT COMPANY LTD VS. MBEYA CEMENT COMPANY LTD AND ANOTHER (2005) TLR** where the Court of Appeal had this to say:

"It is now settled that submissions is a summary of arguments. It is not evidence and cannot be used to introduce evidence."

That being the position, this court will focus on the ground of illegality as deponed in the affidavit only. It is undisputed fact that, among the orders made by the trial court in Matrimonial

Cause No.14 of 2016 was division of matrimonial house which is also subject matter in to Execution No. 77 of 2019, in which the Applicant alleges that the sale of the said house amounts to illegality as the Sale Contract prohibits the same until expiry of 25 years from the date of purchase.

I had enough time to peruse the impugned ruling where it is revealed that the executing court blessed the order of sale of the said house and proceeds to rule out that, the Sale Contract should not be used to deny the Respondent's rights. I also perused the said contract in order to find whether there is such restrictions. A glance of an eye into the said contract especially clause 16 of Annexure HAS-3, reveals that the contract prohibits the transfer of title or interest on the property by way of sale or any other form except after the expiry of twenty-five years from the date appearing on the Deed of Transfer of the property from the Seller to the Purchaser.

Notably, it is the duty of the Court to respect what the parties had agreed in a contract which do not offend the law and Public Policy. This principle was adumbrated in case of ***IBRAHIM SAID MSABAHA VS. LUTHER SYMPHORIAN NELSON AND ATTORNEY GENERAL, CIVIL APPEAL NO.4 OF 1997, COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM.*** Going by the facts on record, the house subject to

division was sold by the Government to the Applicant, with the condition that the same should not be transferred in any way, until expiry of 25 years. Though the sale contract involved the Applicant and the Government only, the same house which is the subject of the said contract was used as matrimonial house as a result it is subject to division. Under the guidance of the case of ***IBRAHIM SAID MSABAHA (SUPRA)***, it is my finding that the said house cannot be sold at this moment as it was ordered by the executing court due to the binding contract entered between the Government and the Applicant. Since the house was sold in 2004 and twenty-five years lapse on 2019 justice necessitates that, the Applicant should compensate the Respondent half of the estimated value of the property any time before 2029. Failure to do that upon expiry of 25 years the order to sale will be executed.

In the event and for the fore stated reasons, I have endeavoured to provide, I find that the application has merit to the extent explained above. Given the nature of this application I give no order as to costs.

It is so ordered.



L. E. MGONYA

JUDGE

16/12/2022

ORIGINAL