

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

AT DAR ES SALAAM

CIVIL REVISION NO. 9 OF 2021

(Arising from the Ruling of the Resident Magistrates Court of Kinondoni in Misc. Civil
Application No. 131 of 2020, F.S. Kiswaga, SRM, dated 03/12/2021)

HELEN CHANUA SEWERE..... APPLICANT

VERSUS

DAVID JOHN ADAMS..... RESPONDENT

RULING

Date of last Order: 15/12/2021.

Date of Ruling: 28/02/2022.

E.E. KAKOLAKI, J

In this application for revision preferred under sections 79(1)(c) of the Civil Procedure Code, [Cap. 33 R.E 2019] referred as CPC and supported by affidavit of Jamhuri Johnson, applicant's advocate, the applicant invited this court to call for records of the Resident Magistrates Court Kinondoni in Misc. Civil Application No. 131 of 2020 before Hon. F.S. Kiswaga, SRM and ascertain as to the correctness of its decision dated 03/12/2020. The application is strenuously resisted by the respondent who filed her counter

affidavit to that effect through her advocate one Florence Aloyce Tesha. Hearing of the matter proceeded orally as both parties were represented by their respective advocates who sworn both affidavit and counter affidavit in support and against the application.

The facts giving rise to this application can be briefly stated as hereunder. Both parties were once united as husband and wife before their marriage was officially dissolved by the order of the District Court of Kinondoni in Matrimonial Cause No. 103 of 2014, in its decision handed down on 16/08/2017. Further to that, the trial court inter-alia ordered for sale of the house and its servant quarter jointly acquired by the parties and that, its proceeds be divided equally amongst them. Discontented, the applicant preferred an appeal to this court by filing her memorandum of appeal in the District Court of Kinondoni on 15/09/2017 and kept on waiting for transmission of the records of appeal to this court to date. At the same time, the respondent on 12/11/2017, before the trial court (District Court of Kinondoni) applied for execution of the court decree in Matrimonial Case No. 103 of 2014, the application which remained unheard until April 2020 when the respondent inquired of its status by letter and court issued summons to the applicant to show cause as to why execution application should not be

granted. Subsequent to that on 06/07/2020, the applicant filed in the Resident Magistrates Court of Kinondoni, an application for stay of hearing of the application for execution pending determination of her appeal filed by her on 15/09/2020. The main ground advanced by the applicant in that application for stay of execution was that, the applicant had not received any notice concerning his appeal till the date of filing the said application. Upon hearing the court was not moved with the grounds advanced by the applicant hence dismissed the application in its ruling dated 03/12/2020, for want of evidence to prove a properly filed memorandum of appeal, as the purported filed one in court and annexed to the applicant's affidavit contained no receiving stamp of the court and exchequer receipt to prove the filing fees were paid. It is from that decision this application has been preferred by the applicant.

I have had time to travel through the pleadings as well as consider the submissions as advanced by both parties in the preparations of composing this ruling. However, in the course of so doing, I noted the glaring legal issue touching competence of the said. Having considered the fact that this is the revisional proceedings, I decided to stop composing the ruling basing on the grounds of revision as raised by the applicant and submitted on by both

parties, instead decided to summon them so as to address the court on the competence of the application for stay of execution by the applicant before the Resident Magistrates Court of Kinondoni, subject of this revision. The court therefore wanted to hear parties on the issue as to whether the application for stay of execution in Misc. Application No. 131 of 2020, was properly filed in the Resident Magistrates Court of Kinondoni at Kinondoni basing on the fact that, Application for Execution No. 103 of 2014 by the respondent was made in the District Court of Kinondoni at Kinondoni, the court which passed the decree in Matrimonial Cause No. 103 of 2014. In response to the Court's call on the 16/02/2022, Mr. Jamhuri Johnson and Mr. Florence Tesha, both learned advocates appeared for the applicant and respondent respectively and addressed the court on the issue raised by the court suo motu.

It was Mr. Johnson who kicked the ball and conceded that, as rightly raised by the Court suo motu, the applicant when seeking to stay execution of Matrimonial Case No. 103 of 2014 duly filed in the District Court of Kinondoni vide Execution Application No. 103 of 2014, wrongly filed the application in the Resident Magistrates Court of Kinondoni in Misc. Application No. 131 of 2020 instead of filing it in the executing court which is the District Court of

Kinondoni. He therefore opined that, due to that anomaly the whole proceedings before the Resident Magistrates Court of Kinondoni and its ruling were a nullity. Thus invited the court to invoke its revisional powers under section 44(1)(a) of the Magistrates Courts Act, [Cap. 11 R.E 2019] herein referred to as MCA and proceed to quash the whole proceedings thereat and set aside the ruling thereof. On his side Mr. Tesha was at one with Mr. Johnson that the proceedings and ruling of the trial court sought to be challenged in this revision were a nullity for being filed in the wrong court hence deserve to be quashed and the ruling thereof set aside. He however noted with concern that, since the applicant filed it willingly and intentionally knowing the Resident Magistrates Court of Kinondoni was not an executing court, the respondent who innocently resisted it cannot be condemned for the applicant's sins as he incurred costs in fending it. He therefore prayed for the costs despite of noting that, the issue was raised by the Court suo motu. Further to that he invited the court to dismiss the matter basing on the same reasons. In his brief rejoinder Mr. Johnson argued, the respondent having noted the application by the applicant was wrongly filed in the Resident Magistrates Court of Kinondoni ought to have noted and raised preliminary objection on jurisdictional point but failed to do so. According to

him the mistake of law was contributed by both parties who failed to note the anomaly and address the trial court before proceeding with full hearing of the application. That aside, he reiterated his earlier prayer made under section 44(1)(a) of the MCA.

Having considered both parties submission on the issue raised, I am in agree with both parties that the application for stay of execution by the applicant in Misc. Application No. 131 of 2020 before the Resident Magistrate Court of Kinondoni was filed in a wrong court. It is the law under section 33 of the Civil Procedure Act, [Cap. 33 R.E 2019] that, the execution of the decree be done by the court which passed it or the court in which is sent for execution. The said section 33 of the CPC reads:

33. A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

In this matter, since the decree which its execution sought to be stayed by the applicant was properly filed by the Respondent in the District Court of Kinondoni that passed it in Matrimonial Cause No. 103 of 2014, I hold the Resident Magistrates Court of Kinondoni had no jurisdiction to entertain the application for stay of execution on the decree it did not pass. It follows therefore that, the entire proceedings before it and the ruling thereof were

tainted with nullity for want of competence of the trial court as rightly submitted by both parties.

The above being the position, this court is enjoined to invoke its revisionary powers under section 44(1)(a) of the MCA and proceed to quash the whole proceedings in Misc. Civil Application No. 131 of 2020 and set aside the ruling thereof. As regard to the prayer of costs raised by Mr. Tesha, I refrain from entertaining it for two reasons; **one**, the issue that led to disposal of this matter was raised suo motu by this court. Second, both parties have a part to blame on their failure to note and raise the jurisdiction of the trial court at the earliest possible time, the consequent result which was to let the Resident Magistrates Court of Kinondoni inadvertently proceed to determine the application something which could have reduced costs of prosecuting the application before it. I therefore find to condemn any party to bear costs of this application will not only be unreasonable but also not in the interest of justice, given the fact that this matter originates from matrimonial cause.

Before I pen off, I wish also to consider Mr. Tesha's prayer to this court for dismissing the application on the ground that the applicant with fully knowledge that it's the District Court of Kinondoni which issued the Decree sought to be executed by the Respondent, willingly and intentionally filed

the application for stay of execution of the said decree in the wrong court of the Resident Magistrates Court of Kinondoni which neither issued it nor received it for execution. With due respect I am not prepared to heed to his prayer for only one strong reason that, the matter has not been determined on merit for originating from null proceedings and decision which ended up being quashed and set aside.

In the circumstances, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 28th day of February, 2022.



E. E. KAKOLAKI

JUDGE

28/02/2022.

The Ruling has been delivered at Dar es Salaam today on 28th day of February, 2022 in the presence of the Mr. Benson Florence advocate who is holding brief for Mr. Jamhuri Johnson, advocate for the applicant, Mr. Florence Tesha, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
28/02/2022

