

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. CRIMINAL REVISION NO. 02 OF 2021

(Arising from Misc. Criminal Application No. 6/2021 Original Criminal Case No. 222/2019 District Court of Bukoba)

SEVERIAN WILBARD----- APPLICANT

VERSUS

1. REPUBLIC } -----RESPONDENTS

2. BENARD MWESIGA }

RULING

Date of Ruling: 30.03.2022

A.Y. Mwenda, J

In the present application, the applicant through the legal services of Mr. Assey, learned counsel is seeking this court to call, inspect and revise the decision and orders in Misc. Criminal application No. 06 of 2021, Original Rm Criminal Case No. 222 of 2019 before the Resident Magistrates Court of Bukoba. The applicant's application is supported by his sworn affidavit. For the 1st respondent, Mr. Juma Mahona Ngassa, learned State Attorney filed a counter affidavit accompanied with a notice of preliminary objection with two points to wit:

- 1. That the court is not properly moved by proper provision and law to enable to the court Exercise his revision Power. [sic]*
- 2. That affidavit is incurable defective as it contains opinion, legal argument, prayers and conclusion. [sic]*

It is trite law that when the preliminary objection is raised, it must be determined first before the hearing of the main case. See KHAJI ABUBAKAR ATHMAN V.DAUD LYAKUGILE TA D.C ALUMINIUM & MWANZA CITY COUNCIL, CIVIL APPEAL NO. 86 OF 2018, CA (unreported).

During the hearing of the Preliminary objection, the applicant was represented by Mr. Assey, learned Counsel while Mr. Emanuel Kahigi, learned State Attorney and Mr. Mathias Rweyemamu learned counsel appeared for the 1st and 2nd respondents respectively.

During submission in chief in support of the preliminary points of objections Mr. Kahigi, learned State Attorney stated that this court is not properly moved. He said the present Application originates from Criminal Case No. 222/2019 before Bukoba District Court. He said, the applicant cited S.30, 31 and 32 (1) of the Magistrates Court Act [Cap 11 RE 2019] as enabling provisions and to him these sections would apply if this matter emanated from Primary Court. He said the applicant ought to have cited S.372 of CPA and for that matter the court is not properly moved.

With regard to the second preliminary objection the learned State Attorney submitted that the affidavit accompanying the Application is defective as it contains opinion, legal arguments and prayers. He said paragraphs 5, 6th 8th and 9th of the applicant's affidavit contain arguments, opinion and prayers. In support to his argument the learned State Attorney cited the case of JAMAL S. MKUMBA AND ANOTHER VS. AG, CIVIL APPLICATION NO. 240/01 OF 2019. He then

concluded his submission by stating that the affidavit is bad in law and he thus prayed this Application to be dismissed.

On his part, Mr. Mathias Rweyemamu, learned Advocate for 2nd respondent conceded with the two preliminary objections raised by the learned State Attorney in that the sections cited do apply on matters originating from Primary Court and added that the proper section ought to be Section 372 of Criminal Procedure Act. He however said that revisional Powers are also covered under S. 44 (1) (a) of The Magistrates Court Act [Cap 11 RE 2019] which confers additional powers of supervision and revision to this Court. He said by virtue of this Section the parties are not required to file application. He said, since this matter is before this court, then let it be pleased to the court to call for, inspect and revise the records of Misc. Application No. 6/2021 on its correctness. In support to his submission he cited the case of FRED KAMIKOLA AND ANTHONY KAMIKOLA VS. DEOCLES LUGALAMA CIVIL REVISION 9/2010 CAT, where the court called the records, revised and cured the irregularity. The learned advocate also cited the case of TRYPHONE ELIAS @ LYPHON ELIAS AND PRISCA ELIAS VS. MAJALIWA DAUD MAYAYA, CIVIL APPLICATION NO. 196/2017 CAT, where although the appeal before the court was incompetent, the court being seized with original records, inspected and revised the decision of the lower court. He added that on the ground of illegality on the face of records the superior court should not hesitate to intervene and revise and quash the order.

With regard to second preliminary objection the learned advocate for the 2nd respondent conceded and prayed the defective paragraphs to be expunged.

Responding to submissions in support of preliminary points of objection Mr. Assey, learned counsel for the applicant submitted as follows. With regard to the first preliminary objection that this court is not properly moved he submitted that the enabling sections cited i.e. Section 30, 31 and 32 of Magistrate Court Act [Cap 8 RE 2019] apply in the circumstances of this case.

With regard to submission by the State Attorney that this application ought to be brought under S. 372 of the Criminal Procedure Act [Cap 20 RE 2019] he conceded but said the more appropriate sections are those under the Magistrates Courts Act, [Cap 11 RE 2019] because S.372 applies when the court (High court) acts suo motu. He added that as it was correctly submitted by Mr. Rweyemamu, learned Advocate for the 2nd respondent, S.44 (1) (a) of the Magistrate Courts Act [Cap 11 RE 2019] can be invoked under these circumstances and thus, this court has jurisdictions to call for and revise the judgments and orders of District Court as this do not oust jurisdiction of this court. To support his argument cited the case of DG LAPF PENSION FUND VS. PASCAL NGALLO, CIVIL APPLICATION NO. 76/2018, CAT. The learned advocate went further to submit that during execution the procedures under S. 170 (1) (2) (c) of the Criminal Procedure Act [Cap 20 RE 2019] were not followed. He said, the court ought to have, before execution, forwarded the file before the High Court to be confirmed. He said that they are not comfortable with the way execution was conducted. He said the said execution

was brought by a wrong person which is the republic. He was of the view that, the proper person who was required to apply for execution was PW1 one Pascal Nyoisa and to him this irregularity is what justifies this application. He added that even the applicant was condemned to pay compensation unheard.

With regard to 2nd preliminary objection that the applicant's affidavit is defective he submitted that such defects do not exist. He said paragraph 6 of the affidavit is just a statement and paragraph 8 of the affidavit is their assertion while paragraph 9 is a normal statement.

In alternative, he said, if the court finds the affidavit defective, then this court may expunge the defective parts and proceed with the hearing of this application.

In rejoinder, the learned State Attorney submitted that the defects are not curable and as such the present application should be dismissed. He said S. 170 (1) and (2)(c) of the Criminal Procedure Act [Cap 20 RE 2019] should not pre-empt this court because the present hearing is on two preliminary objections only. He stated that section S. 170 (1) and (2)(c) of the Criminal Procedure Act [Cap 20 RE 2019] is misinterpreted because the words "*other than compensation*" appearing in the bracket entail compensation is excluded. The learned State attorney concluded by repeating to his previous prayer that this application be dismissed.

Having summarized the submissions by the learned counsels for both parties, the issue is whether the Preliminary Objections are maintainable.

To deal with this issue this court found it pertinent to begin with the Second Preliminary point of objection that the applicant's affidavit is incurably defective as

it contains opinion, legal argument, prayers and conclusion. Submitting in support of this ground, the learned State Attorney stated that paragraphs 5th, 6th 8th and 9th of the applicant's affidavit contain argument, opinion and prayers. On this point Mr. Rweyemamu, learned Counsel for the 2nd respondent conceded and prayed the defective paragraphs to be expunged and proceed with the hearing of this application. On his part, Mr. Assey, learned advocate for the applicant submitted that the argument by the learned State Attorney is not correct. He said paragraph 6 is just a statement, paragraph 8 is their assertion and paragraph 9 is a normal statement. He however said that if this court finds that the affidavit is defective then the court may expunge the defective parts and proceed with the hearing of this application. This court went through the applicant's affidavit and noted that paragraphs 6, 7, 8 and 9 are defective as they contain extraneous matters. Going through paragraph 6 the words *"this money was supposed to be claimed in civil suit as per the law and not to proceed with execution in criminal case as was done in misc. application no.6 of 2021"* is a legal argument containing a conclusion. In paragraph 7 the use of words *"...arising from the same cause of action is likely to cause miscarriage of justice"* is a conclusion. In paragraph 8, the use of words *"...because the decision was arrived at concealment of very crucial and material facts concerning the case..."* and the use of *"the revision has high chances of success ..."* attract argument and conclusion respectively.

Regarding the consequence, the learned counsel for both sides were of the view that the defective paragraphs should be expunged and proceed with the remaining

paragraphs in hearing of the application. I agree with the submissions by the learned counsels that the defective paragraphs should be expunged. In the case of JAMAL S. MKUMBA AND 1 ANOTHER V. ATTORNEY GENERAL, CIVIL APPEAL NO. 240/01 OF 2019, CA, *(Unreported) the court while dealing with a similar situation held inter alia that:*

"Regarding the consequence, we are in total agreement with Mr. Rumisha that the paragraphs with extraneous matters ought to be expunged from the record..."

That being said I hereby expunge paragraphs 6, 7, 8 and 9 of the applicant's affidavit. These paragraphs being expunged, it pertinent to see if, with the remaining paragraphs this court can proceed to determine this application. In the case of JAMAL S. MKUMBA AND 1 ANOTHER V. ATTORNEY GENERAL (SUPRA), while citing the case of CHADHA & COMPANY ADVOCATES V. ARUNA BEN CHAGGAN CHHITA MISTRY & 2 OTHERS, CIVIL APPLICATION NO. 25 OF 2013 cited in the case of PHANTOMMODERN TRANSPORT (1985) LIMITED (SUPRA) the court held inter alia that:

"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the court can proceed to act on it."

In our present application having expunged paragraphs 6, 7, 8 and 9, the remaining paragraphs are incapable of supporting the applicant's application. That being said I hereby sustain the second preliminary point of objection.

With regard to the 1st preliminary point of objection, since this court have expunged paragraphs 6, 7, 8 and 9 of the applicant's affidavit, it is thus evident that there is no remaining paragraph which can be supported by the chamber application and as such, I find no reason to deliberate on the 1st preliminary objection. This is so because, whether the said preliminary objection is upheld or not, it won't affect the outcome of the matter because the affidavit which they ought to support is as good as nothing.


On his part, Mr. Rweyemamu was of view that this court may still invoke supervisory powers under S. 44 (1) (a) of the Magistrates Courts Act, [Cap 8 RE 2019] which confers additional powers to this court. He said by virtue of this Section the parties are not required to file application. In considering this argument, since this court is aware that the applicant filed Application No. 56 of 2021 seeking leave for extension of time to file notice appeal and appeal out of time, this court finds no reason to invoke the proposed powers as by doing so it will be a double exercise as in deciding Criminal Application No. 06/2021 originating from Criminal Case No. 222 of 2019, the results will definitely affect the consequential orders.

Again Mr. Assey was of the view that the execution done by the Hon. Magistrate was illegal for failure to forward the respective file to the High Court to be

confirmed as the fine exceeded six thousand Shillings. He said this alone justifies calling for records and a review of the trial courts records. This court went through the said section and noted that under S.170 (2)(c) of Criminal Procedure Act, [Cap 20 RE 2019] payment of compensation is excluded and for that matter this section cannot apply.

That being said this court finds this application incompetent and it is hereby struck out.





A.Y. Mwenda
Judge

30.03.2022

This Ruling is delivered in chamber under the seal of this court in the presence of Mr. Assey learned advocate for the applicant and in the presence of Emmanuel Kahigi State Attorney for the 1st respondent and Mr. Rweyemamu learned counsel for 2nd respondent.




A.Y. Mwenda
Judge

30.03.2022

