

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 323 OF 2021

MUGISHA ENTERPRISES LIMITED..... APPLICANT

VERSUS

CONSOLIDATED INVESTMENT (T) LTD RESPONDENT

***(Application for Revision from the decision of the Resident Magistrate
Court of Dar es Salaam at Kisutu in Civil Case No. 121 of 2008)***

RULING

5th & 25th May, 2022

KISANYA, J.:

By way of chamber summons made under sections 79(1)(c) and 95 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) and section 44 (1)(b) of the Magistrates Courts Act, Cap. 11, R.E. 2019, the applicant, Mugisha Enterprises Limited has moved this Court seeking the following reliefs: -

- 1. That this Honorable Court may be pleased to call for and inspect the records of proceedings of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case No. 121 of 2008 (Hon. L.M. Chamshama, Hon. I.C. Mugeta and Hon. I. Arufani) to satisfy itself as to its correctness, legality and propriety, and thereafter revise the said proceedings on the ground that:*
 - i. the Honorable resident magistrate acted in exercise of its jurisdiction illegally with material irregularities*

- ii. the said judgment and subsequent orders thereto were procured by forgery.*
 - iii. there has been an error material to the merits of the case involving injustice.”*
- 2. Costs of this application to be borne by the Respondent.*
 - 3. Any relief which the Honourable Court deems just to grant in the circumstances of this case.*

Supporting the application is an affidavit sworn by Abiah Charles Basasingohe who introduced himself as the applicant’s director.

The factual background giving rise to this matter may briefly be stated as follows: The respondent, Consolidated Investment (T) Ltd, was the plaintiff in Civil Case 121 of 2008 filed in the Resident Magistrate Court of Dar es Salaam at Kisutu. He sued the applicant seeking recovery of a sum of money to the tune of USD 31,614, being the outstanding loan advanced to the latter and interest accrued thereon. In its judgment dated 21st October, 2010, the trial court (Hon. L.M. Chamshama-RM) decided the suit in favour of the respondent.

Basing on the said judgment, the respondent applied for execution of the decree extracted thereon. It turned out that, in the course of executing the decree, a house on Plot No. 170, Block F, Mbezi Beach (henceforth “house in dispute”) in the name of Mugisha Basasingohe (as Guardian of Mugisha Basasingohe) was attached and sold to Zamzam Abdallah Hamza.

It is alleged by the applicant that the execution order was procured by fraud on the reason that, the loan advanced to her was not secured by the said house as indicated in the loan agreement which was presented by the respondent during the execution stage. From the foregoing background facts, the applicant lodged this application for revision.

Against the application, the respondent filed a notice of preliminary objection on the following points of law: -

- 1. The application is incompetent for being res-subjudice as the applicant has sought the same remedy in Land Case No. 183 of 2020 which is yet to be determined.*
- 2. The application is time barred.*
- 3. The application is incompetent for offending provisions of Order IX, Rule 9 of the Civil Procedure Code.*
- 4. Application is incompetent for offending Order XXI Rule 87 or 88 of the Civil Procedure Code.*

With leave of the Court, the preliminary objection was argued by way of written submissions. While Mr. Fikiri Liganga, learned advocate filed the written submission on behalf of the applicant, the respondent's written submission was filed by Mr. Costantine Kakula, learned advocate.

Having dutifully considered the written submissions for and against the preliminary objections, I will proceed to determine the issues of controversies.

Starting with the first point of objection that this application is incompetent for being *res-subjudice*, Mr. Kakula prayed to withdraw the same. He expounded that the case which was the basis of the objection had been determined. In that regard, this Court will not determine the said objection.

Second for consideration is the second point of objection, on whether this application is time barred. It is common ground that, in its ruling dated 4th June, 2021, this Court extended the time within which to file the application for revision. Pursuant to the said ruling, the applicant was ordered to file the application for revision within 14 days from the date of receiving the copy of ruling.

Both parties are in agreement that this application was filed on 6th July, 2021. However, referring to paragraph 19 of the supporting affidavit in which the applicant deposed that the copy of judgment was availed to her on 22nd June, 2021, Mr. Kakula contended that the application was filed on the 15th day and thus, time barred.

On his part, Mr. Liganga argued that the application was filed within 14 days. Making reference to section 60(1)(b) of the Interpretation of Laws Act, Cap. 1, R.E. 2019 and the case of **KFC International Limited vs Azania Bank Limited**, Commercial Case No. 152 of 2015, HCT Commercial Division at DSM (unreported), the learned counsel for the applicant argued

that the date of receiving the copy of ruling is excluded when computing the time limitation.

I agree with Mr. Kakula that the provisions of section 60(1)(b) of the Interpretation of Laws Act (supra) refer to the time limitation prescribed under the written laws. However, it is my considered view that this Court is enjoined to borrow a leaf from the said provisions in computing the time limitation of its orders. Therefore, since this Court ordered the applicant to file the application for revision "within 14 days from" the date of receiving the copy of ruling, the date on which the copy was supplied to the applicant is excluded in computing the time limitation. This is pursuant to section 60(1)(b) of the Interpretation of Laws Act (supra). Now that the applicant received the copy of ruling on 22nd June, 2021, I agree with Mr. Liganga that, the application filed on 6th July, 2021 is not time barred. It was filed within the time ordered by this Court. This marks the second limb of objection devoid of merits.

Next for consideration is the third ground of objection. It raises the issue whether the application is incompetent for contravening Order IX, Rule 9 of the CPC. Submitting in support of this objection, Mr. Kakula started by referring me to paragraph 16 of the supporting affidavit in which the applicant's director deposed that she was not aware of the proceedings before the trial court. He went on to argue that the proper recourse was for

the applicant to file an application to set aside the *ex-parte* judgment under Order IX, Rule 9 of the CPC. The learned counsel further referred to me paragraph 19 of the supporting affidavit where it was averred that the application to set aside the sale of the house in dispute was struck out for being filed out of time. He then argued that the remedy available to the applicant was to apply for extension of time to file application to set aside the *ex-parte* judgement.

Countering the third limb of objection, Mr. Liganga submitted that the applicant was not challenging the *ex-parte* judgment and/or order but the illegalities and irregularities of Civil Case No. 121 of 2008 from the moment it started to the execution stage. He was of the view that the only remedy where the proceedings were procured by forgery is to file revision under section 79(1)(c) of the CPC. Although Mr. Liganga conceded that the applicant had filed an application to set aside the sale of house, he argued that the applicant was not barred from filing the application for revision of the whole case.

As indicated in the reliefs reproduced herein, this Court is being moved to revise the proceedings of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case No. 121 of 2008 (Hon. L.M. Chamshama, Hon. I.C. Mugeta and Hon. I. Arufani) to satisfy itself as to its correctness, legality and propriety, and thereafter, revise the same. This implies that the proceedings

and decisions subject to this application were before and/or made by Hon. L. M. Chamshama, Hon. I.C. Mugeta and Hon. Arufani. However, the applicant attached the judgment of Hon. L. M. Chamshama only. Furthermore, paragraphs 10 to 15 and 17 to 22 of the supporting affidavit suggest the forgery was committed during execution stage. The applicant's sole ground for revision in respect of the proceedings which gave rise to the judgement of Hon. Chamshama is to the effect that she was not served. This is reflected in paragraph 16 of the supporting affidavit quoted below:-

"That when the case was going at Kisutu, I was never served with any summons although the Court records shows that the summons were received and signed by my sister on my behalf."

In the light of the above facts and the copy of judgment appended to the supporting affidavit, it is apparent that the judgment executed by the respondent was passed *ex-parte*. That being the case, I agree with Mr. Kakula that the applicant was required to make use of the provisions of Order XIX, Rule 9 of the CPC by applying to set aside the *ex-parte* judgment. The law is settled that revision is not an alternative of appeal. It is also my considered view that revision cannot be employed if a party to the case has an alternative remedy before the trial court or superior court.

In the circumstances of this case, I am of the view that the trial court was in a position of considering whether or not the applicant's non-

appearance was attributed by non-service of summons. It is also my considered view that, such ground would have been a sufficient reason to set aside the *ex-parte* judgment or order. Since this was not done, the application for revision of proceedings and judgment of Hon. Chamshama is misconceived.

With regard to the proceedings and or judgment, ruling or decision made by Hon. Mugeta and Hon. I. Arufani, the applicant did not append the same to the supporting affidavit. However, the supporting affidavit suggests that the said Hon. Mugeta and Hon. Arufani were involved in the execution proceedings which resulted to a sale of the house in dispute to Zamzam. For instance, paragraph 14 of the supporting affidavit shows that Hon. I. C. Mugeta wrote a letter to Kenya Commercial Bank (KCB) informing the latter about the court's orders as to sale of the house in dispute. It is my humble view, much as the supporting affidavit displays the fraud and irregularities in the execution proceedings, the application for revision ought to have been limited to execution proceedings and decision made therefrom.

Last for consideration is the fourth point of objection. Two issues are noticed in the submissions for and against this objection. These are; *one*, whether the application is incompetent for offending Order XXI Rule 87 or 88 of the CPC; and *two*, whether the application is incompetent for non-joinder of other parties.

With regard to contravention of Order XXI, Rule 87 or 88 of the CPC, Mr. Kakula referred me to paragraph 20 of the supporting affidavit. In that paragraph, the applicant deposed that the trial court's decision during execution was based on a forged loan agreement. Therefore, referring further to Order XXI rule 87 or 88 of the CPC, Mr. Kakula argued that the available remedy to the applicant was to file an application to set aside the sale. Countering, Mr. Liganga contended that the applicant was not challenging the sale. He urged me to consider that the applicant is praying for revision of the whole proceedings of the trial court under section 79(1) (c) of the CPC.

In the light of the forgoing rival arguments, I was inclined to go through Order XXI, Rule 87 and 88 of the CPC which is the basis of the discussion at hand. It is my considered view that the said provisions apply where a person intends to set aside sale of an immovable property. The said provisions have nothing to do with the proceedings of the main case or other stages of the execution proceedings. As rightly argued by Mr. Liganga, the applicant's complaint is not limited to the sale process, but the orders or proceedings which resulted into the sale. In that regard, the respondent's contention that the provisions of Order XXI, Rule 87 and 88 of the CPC were contravened lacks merit.

Moving to the second issue of the fourth ground of objection, Mr. Kikula's contended that the affidavit in support of the application shows that the house in dispute was sold to the said Zamzam Abdallah Hamza and the proceeds therefrom used to pay the applicant's loan with Kenya Commercial Bank (KCB). In that regard, Mr. Kikula was of the view that, that this application is untenable for non-joinder of the duo. He contended that any order which affecting the right of the said Zamzam Abdallah Hamza and KCB would be illegal for contravening their right to be heard.

Reacting on this issue, Mr. Liganga reiterated his earlier position that the applicant is asking this Court to revise the whole proceedings of Civil Case No. 121 of 2008. In that premises, he was of the view that it is improper to join parties who did not feature in the proceedings sought to be revised.

This issue should not detain this Court. I have observed that Mr. Liganga concedes that this application is against the whole proceedings of the trial court. Since the house in dispute was sold in the process of executing the judgment and decree, this Court will have to revise and quash the proceedings and orders which resulted to sale of the house in dispute.

Now, having considered the facts adduced in the supporting affidavit, I agree with Mr. Kakula that, Zamzam Abdallah Hamza to whom the house in dispute was sold and KCB who received the sale proceeds to settle the applicant's loan with that bank would be affected in the event the application

for revision is granted. In terms of the settled law, any decision made against the person who is not a party to the case is a nullity for infringing the latter's right to be heard enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). I hold so basing on the case of **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza Iboy**, Civil Application No. 33 of 2002 (unreported) which is akin to the facts of this case. The Court of Appeal observed that:

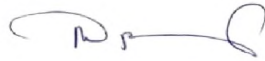
*"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that **a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard**, because the violation is considered to be a breach of natural justice."*(Emphasize supplied).

In the light of the above position, I find merit on the objection raised by the respondent. The applicant ought to have joined the said parties because they are likely to be effected by the outcome of the application at hand.

For the reasons, I have endeavoured to highlight, the third and fourth limbs of objection are sustained to the extent shown herein. Consequently, the application is hereby struck out. In the interest of justice and having considered the circumstances of this case, I find it just to order the applicant

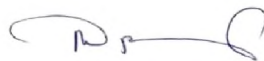
to file a fresh application, if she is still interested to pursue the matter. Therefore, the fresh application, if any, should be filed within thirty days from the date of hereof. Costs to follow the event.

DATED at DAR ES SALAAM this 25th day of May, 2022.



S. E. Kisanya
JUDGE

Court: Ruling delivered this 25th day of May, 2022 in the presence of Mr. Elisha Kiula, learned advocate for the applicant and holding brief of Mr. Constantine Kakula, learned advocate for the respondent. B/C Bahati present.



S.E. Kisanya
JUDGE
25/05/2022