

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 375 OF 2022

(Originating from Miscellaneous Civil Application No.53 of 2016 in the District Court of
Ilala at Kinyerezi)

TANZANIA INTERNATIONAL CONTAINER

TERMINAL SERVICES LIMITED APPLICANT

VERSUS

JOHN LEMOMO.....1ST RESPONDENT

GODWIN STEVEN.....2NDRESPONDENT

CHARLES CYPRIAN.....3RD RESPONDENT

SALUM KUNU.....4TH RESPONDENT

ROGERS KESSY.....5TH RESPONDENT

CHARLES MASAGA.....6TH RESPONDENT

CLETI MARO.....7TH RESPONDENT

DENIS SIMBA.....8TH RESPONDENT

JANET MFURUKI.....9TH RESPONDENT

RULING

22nd February, 2023 & 10th March 2023

E.E. KAKOLAKI, J.

This ruling is seeking to address the preliminary objections raised by the respondent to the effect that, *firstly*, this Court has no jurisdiction to entertain this application as there is pending appeal at the Court of Appeal, Civil Appeal No. 33 of 2022 in which Misc. Civil application No. 53 of 2016 of the District Court of Ilala is the subject matter therein. *Secondly*, that this application is misconceived and bad in law as it is not the proper remedy available in law, *Thirdly*, that, the application is incompetent before the court for want of attachment of the court's orders and/or proceedings alleged to have been delivered by the District Court of Ilala on 18th July, 2022 and 24th August 2022, which are subject of the revision. *Fourthly*, that, the application is prematurely filed as there is no any court order or decision which was delivered by the District Court of Ilala on 18th July, 2022 and 24th July 2022. The fact which gave rise to this application are easy to comprehend. The applicant was the employer of the respondents before she prematurely terminated their contracts of services 4 months and 13 days before. Aggrieved, the respondents successfully referred the matter to Temeke Conciliation Board with an order for reinstatement. Displeased, the applicant referred the matter to the minister for Labour, in which the CMA decision was upheld and in addition the Minister ordered the respondents to be paid

wages. Disgruntled the applicant applied for judicial review of the Minister's decision to this Court, in which the Minister's decision for payment of wages was reversed while upholding the reinstatement order. Executing this Court's decision the applicant opted to pay the respondents their terminal benefits. It is alleged out of will and with full knowledge of the High Court's decision on non-payment of wages, the respondents successfully applied for execution of Minister's decision in the District Court of Ilala through Misc. Civil Application No. 53 of 2016, for payment of unpaid wages in contravention of this Court's decision that reversed the order for payment of wages. It appears the applicant unsuccessfully attempted to challenge that District court's decision including in its application before this Court for extension of time to file Revision application to same Court, as the same was struck out for being incompetent in which that decision is now challenged in the Court of Appeal in Civil Appeal No. 331 of 2022. While the said appeal is pending before the Court of Appeal, on 22/08/2022 the applicant was served with the order date 18/07/2022 for her to show cause on 24/08/2022 as to why the Minister's decision should not be executed against her. It is the alleged order that irritated the applicant and moved her to prefer the present application under section 79(1)(a) and (c) and section 95 of the Civil

Procedure Code, [Cap. 33 R.E 2019] (the CPC) as well as section 44(1)(b) of the Magistrate Courts Act, [Cap. 11 R.E 2019] (the MCA).

Hearing of the raised objections took the form of orally submission. The appellant hired the services of Mr. Jeremiah Tarimo learned counsel against Mr. Emmanuel Kessy learned advocate whose services were enlisted by the respondents.

In his submission in support of the preliminary objections, Mr. Kessy prefaced his arguments by seeking leave of the Court to drop the 2nd ground of objection and consolidate the 3rd and the 4th points. Starting with the 1st ground it was Mr. Kessy's submission that, this Court is not vested with jurisdiction to entertain this application in the pendency of Civil Appeal No. 33 of 2022 before the Court of Appeal in which Misc. Civil Application No. 53 of 2022 of the District Court of Ilala is the subject matter. He contended, that fact is supported by paragraph 18 of the affidavit in support of the application annexed with the memorandum of appeal showing in ground No. 1, that the intended appeal is challenging the decision for extension of time to file revision in Misc. Civil Application No. 53 of 2016 before Ilala District Court. He argued that, where there is pending appeal in the higher court concerning any order(s) or ruling over the same matter then a lower Court

is barred to entertain any other application unless the same is otherwise provided by the law such as the application for leave to appeal or certificate on point of law. To buttress his stance, he referred the Court to the case of **Prosper Petro Munisi (Legal administrator of Peter Munisi) Vs. Yunus Bakari Mshana and Another**, Misc. Civil Application No. 151 of 2019 (HC) which also quoted the case of **Aero Helicopter (T) Ltd Vs. F.N. Jansen** (1990) TLR 142 at page 145. Basing on the above authority it was his submission that, this court lacks jurisdiction to entertain this application, thus, he invited the Court to strike it out.

Regarding the 3rd and 4th points of objection, it was his contention that the application is premature and incompetent as there is no order or decision by the lower court to be subjected to revision as on 18/07/2022 and 24/08/2022 no revisable orders were issued. Mr. Kessy contended that, as per section 79 (1) of the Civil Procedure Code, for the revision application to stand there must be decision made by the subordinate court. He maintained that, in the present application there were no orders or decision made rather notice to show cause which was issued requiring the applicant to appear before the court and show cause. He argued further that, the record reveals that on 24/08/2022, there was no any order issued by the court apart from hearing

parties on the said notice to show cause issued to the applicant in which its decision is yet to be issued. On that basis it was his submission that, the application is incompetent and was brought prematurely. To bolster his position, he referred the Court to its decision in the case of **Henry Lyimo Vs. Eliabu E. Mazee** (1991) TLR 93 (HC) where the Court held that, an interlocutory order is not one of the decisions within the meaning of the provisions of section 79 (1) of the CPC, hence the court had no jurisdiction to entertain the application and proceeded to dismiss the matter. He argued that, in this matter the order of notice to show cause was not the decision within the meaning of section 79 (1) of the CPC and thus the said orders are not revisable. It was therefore his prayer that, the preliminary objections be upheld and this court be pleased to strike out this application as the order sought to be revised is an interlocutory order. He cemented the position by citing a plethora of authorities.

In his rebuttal submission, Mr. Tarimo admitted the fact that there is a pending appeal before the Court of Appeal arising from an application for execution No. 53 of 2016. He however took the view that, the appeal before the Court of Appeal does not relate to the prayers sought in this revision as what is being sought to be revised is the decision of this Court denying the

applicant extension of time to revise court's decision in Misc. Civil Application No. 53 of 2016, in which the applicant contends the District Court does not have powers to entertain the orders it issued. According to him, the referred appeal in the court of appeal does not bar lower courts from entertaining this application because, the orders sought in this application do not relate to the prayers sought in referred appeal. He maintained that, the issue as to whether the same relates or not it is the fact to be determined during hearing of this application.

Regarding the 3rd and 4th point of objection it was his submission that, this court has revisional powers to call for records and revise lower court proceedings pursuant to section 44 (1) (b) of the MCA. He was of the view that, applicant's prayer is supported by the prayers in the chamber summons, in which the revisional jurisdiction of this court to subordinate court accommodates in three (3) limbs. One, to revise an order or decision issued by a subordinate court not in interlocutory nature as per section 79 (1) of the CPC, two, on court's own motion under section 44 (1) (a) of the MCA and third, revising of proceedings of the Civil nature determined by the subordinate court upon an application by a party as provided under section 44 (1) (b) of the Magistrates Courts Act, in which this application is premised.

He urged this Court to dismiss both 1st and the 3rd and 4th preliminary objections for want of merit and proceed to determine the application on merit.

In rejoinder submission Mr. Kessy reiterated his submission in chief. He stressed that, since the applicant admits that there is pending appeal in the Court of Appeal, then the proper course for her could be to apply for stay of proceedings in the said Court pending the said appeal. Regarding the 3rd and 4th points he contended that, in all revisional proceedings there must be proceedings determined by the court, thus the submission by Mr. Tarimo that this court can revise any proceedings regardless whether there is any determined matter or not is misplaced. He prayed the court to disregard the same and proceed to strike out this application with cost.

I have keenly considered the rival submissions for the two legal minds and taken time to peruse the pleadings and lower court record in a bid to appreciate the nature of this application and determine the raised grounds of objection. And for reasons to be apparent soon I am proposing to start with the 3rd and 4th points of objection as conjunctively argued, where the issue is whether this application is incompetent for being preferred prematurely for want of revisable orders or decision.

It is uncontroverted fact that, the present application was brought under section 44 (1) (b) of MCA and section 79(1) (a) of the CPC in which both sections confer this Court with revisional and supervisory powers to call and examine records of any Civil proceedings before the subordinate court for the purposes of satisfying itself as to the regularity, correctness, legality or propriety of any finding or order of any proceedings of subordinate court. During his submission Mr. Tarimo insisted that the application is by large premised on the provisions of section 44(1)(b) of the MCA. I will however consider both provisions of the law. For clarity section 44 (1) of MCA reads:

44 (1) In addition to those powers in that behalf conferred upon the High Court, the High Court-

(a) NA

*(b) may, in any proceedings of a civil nature **determined in a district court** or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit: (Emphasis supplied)*

Section 79(1) of the CPC provides:

*79.-(1) The High Court may call for the record of any case which has **been decided** by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-*

(a) to have exercised jurisdiction not vested in it by law;

(b) NA

(c) NA

The High Court may make such order in the case as it think fit.

(Emphasis supplied)

To my understanding there is no ambiguity in interpretation of above exposition of the law. The law is very clear in both provisions that, for this Court to exercise its discretion when exercising its revisional jurisdiction, there must be a decision or order issued or made by the subordinate court capable of being revised as the words used are "**determined proceedings in a district court...**" under section 44(1)(b) of the MCA and "**...decided case by any court subordinate...**" under section 79(1) of the CPC.

With that understanding, the next question is whether this Court can invoke those powers under circumstances of this application for calling for records of Misc. Application No. 53 of 2016 which are pending for execution before the District Court of Ilala at Samora avenue and revise them. Mr. Kessy is of the view that, this court cannot do so since there is no revisable order or

decision by the subordinate court and that, if any exists, is an interlocutory order which is not revisable, while Mr. Tarimo holds a contrary view that, the sections empower this Court to revise even the proceedings of the subordinate court.

Notably, the applicant sought this court to revise orders of the Ilala District Court in Misc. Civil Application No. 53 of 2016 dated 18th July 2022, and 24th August 2022, respective. Having scrupulously gone through the proceedings in said application in search of the said orders sought to be revised. What is noted in that court proceedings of 18 July 2022, the record is barren of any order issued by the Court on that day save for 06/07/2022 when the court issued summons for the parties to appear in court for necessary order, the court order which is not subject of this application. To paint the court's colour on 06/07/2022, I find it pleased to quote excerpt of the said court order.

COURT: *Following a letter of the decree holders' advocate on continuing with execution, dated 31/05/2022, let summons be issued to parties to appear for necessary orders.*

Order: *1. Mention on*

2. Summons to issue

Sgd:

06/02/2022 .

Concerning the proceedings of 24/08/2022, it is noted without a grain of doubt that, the Judgment debtor (applicant) was supposed to show cause as to why execution should not proceed against her and both parties were heard on that on 24/08/2022, and the ruling date reserved to 07/10/2022. It is further noted that, before the said ruling could be delivered, on 31/08/2022 the applicant filed this application, hence no any decision capable of being subjected to revision, and contrary to what Mr. Tarimo would want this court to believe.

In view of that stance, I am at one with Mr. Kessy's propositions that, there is no order or decision by the court in Misc. Civil Application No. 53 of 2016, in both complained of dates capable of being revised by this Court under both section 44 (1) (b) of the MCA or section 79 (1) (a) of the CPA as allegedly put by the applicant. I therefore make a finding that, this application is misconceived and prematurely preferred by the applicant hence incompetent before the Court as this Court cannot entertain it.

It is worth noting that, supervisory powers of this court as envisaged in section 44(1) (b) of MCA and section 79 (1) (a) of the CPC, do not give room for this Court to revise the lower court proceedings in a manner suggested by Mr. Tarimo in his submission, as doing so is tantamount to subjecting

administration of justice into chaotic state for denying the lower courts with an opportunity to determine matters within their jurisdiction to their finality. The issue is therefore answered in affirmative that the application is incompetent for being preferred prematurely as there is not decision or orders by the subordinate court capable of being revised.

In view of that position, and with only the 3rd and 4th points of objection, I am inclined to hold that, the preliminary points of objection raised by the respondent is meritorious and I accordingly sustain it. As the same disposes of the matter I see no pressing concern to force me consider the 1st ground of objection.

Accordingly, I strike out the application with costs for being incompetent.

Order accordingly.

Dated at Dar es salaam this 10th day of March, 2023.



E. E. KAKOLAKI

JUDGE

10/03/2023.

The Ruling has been delivered at Dar es Salaam today 10th day of March, 2023 in the presence of Mr. Jeremiah Tarimo, advocate for the

applicant, Mr. Emmanuel Kessy, advocate for the respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

10/03/2023.

