

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CIVIL REVISION NO. 2 OF 2023

(Arising from the decision of Babati District Court in Matrimonial Appeal No. 24 of 2022)

AHAMED ZUBERI.....APPLICANT

VERSUS

SHAMSA JOSEPH.....RESPONDENT

RULING

3/7/2023 & 31/7/2023

BARTHY, J.

The above-named applicant aggrieved with the decision of the District Court of Babati (to be referred to as the trial court) in Matrimonial Appeal No. 24 of 2023, he preferred the instant application for revision. Among other things he sought for an order of this court to call for and examine the record of the lower court in order to satisfy itself as to the correctness and legality of the decision and revise the same.

The application was contested by the respondent who lodged a counter affidavit as well as notice of preliminary objections to the effect that;

- i) That, this application has been overtaken by event as the execution process has taken place.*
- ii) That, this application is bad in law for being filed under unfounded law.*
- iii) That, revision is not a substitute (sic) of an appeal.*
- iv) That this application has no legal legs to stand, as there no Civil Appeal No. 24 of 2023 between the applicant and the respondent which (sic) instituted before the District court of Babati at Babati.*

The respondent prayed for the above preliminary objections be upheld and the instant application be struck out with costs.

By the order of the court the parties were to file written submissions with respect to preliminary objections raised. Mr. Joseph Masanja learned advocate appeared for the applicant whereas the respondent appeared in person unrepresented.

Submitting on the first preliminary objections raised, the respondent argued that, the instant application has been overtaken by events; since the execution process has already taken place.

He further argued that, after the delivery of judgment on matrimonial cause No. 8 of 2022, the respondent herein filed an application for execution and the applicant did not object the same. Thus, the court broker by the name Kibaigwa Auction Mart was appointed to affect the execution process which finalized the matter.

The respondent firm maintained that the current application has no legs to stand. To buttress her argument, she referred to the case of **Wilbroad Kanyana v. Michael N. Kapufi & 7 others**, Miscellaneous Land Application No. 57 of 2019 (unreported) in which the court struck out an application for being overtaken by events, since the execution process had already been done.

Submitting on the second preliminary objection, the respondent maintained that, the instant application has also been filed under unfounded law. She contended that the proper provision which would have moved the court ought to be under the Magistrates' Courts Act [CAP 11 R.E 2019]. However, the applicant has wrongly cited the law, hence it renders the application defective.

On the third preliminary objection, the respondent was firm that this application is incompetent, because the applicant had the remedy to

appeal against the decision of the lower court. She went further arguing that, revision can only be preferred where there is no chance to appeal, since revision is not a substitute to an appeal as the decision of the lower court was appealable.

Submitting on the fourth preliminary objection the respondent argued that this application is incompetent as it shows that it arose from Civil Appeal No. 24 of 2023, which is non-existing matter. She thus invited the court to uphold all preliminary objections and struck out this application.

On reply submission Mr. Masanja conceded that the application is defective, but on different dimension. He submitted that there is variation of dates between the judgment and the decree.

He contended that, while the decree shows it was issued on 2/3/2023, the judgment shows it was delivered on 28/2/2023. He therefore invited the court to strike out the application with the leave to refile.

On rejoinder submission the respondent essentially reiterated her arguments in her submission in chief.

Having gone through the rival submissions of the parties the sole issue for my determination is whether the preliminary objections raised by the respondent have merits.

Essentially Mr. Masanja did not contest the respondent's submission, rather he further contended that the application at hand is defective for having variation of dates on judgment and decree of the lower court.

I have carefully gone through the said judgment and decree; I am of the settled view that Mr. Masanja overlooked the dates on both the judgment and decree.

According to the records of the trial court, the impugned judgment was delivered on 28/2/2023. The decree also bears the date on which the judgment was delivered. Save that the date on which the decree was extracted/issued is on 2/3/2023. Now the date on which the decree was extracted is not mandatorily required to be the same as the date on which the judgment was delivered.

Back to the preliminary objections raised, as pointed out earlier the applicant has not submitted in rebuttal to the respondent's submission in support of the preliminary objection. Hence, I will determine the merits

or otherwise of the preliminary objection basing on the respondent's arguments. I am of the settled view that should the third preliminary objection be determined in affirmative; it is sufficient to dispose of the application before me.

On the third preliminary objection, the respondent contended that the application for revision before this court is incompetent as the applicant had a chance to appeal against the decision of the lower court instead of seeking for revision as the remedy. She was firm that, revision is not a substitute to the appeal.

Rightly as submitted by the respondent that, where there is right to appeal then revision cannot be preferred an alternative remedy. It is generally required that, the party aggrieved with the decision of the lower court, can assail the same through appeal.

There are several decisions to underscore the point. To mention but few, is the case of **D. B. Shapriya and Company Ltd v. Stefanutti Stocks Tanzania Ltd**, Civil Application No. 205/16 Of 2018 Court of Appeal of Tanzania at Dar es Salaam (Unreported) the Court of Appeal unanimously stated that;

*We are fortified in this view by the timebound principle
that revision is not an alternative to appeal.*

Also, in the case of **Transport Equipment Ltd v. Devram Valambhia** [1995] TLR 161, where the court held that;

...if there is a right of appeal then that right has to be pursued and except for sufficient reason amounting to exceptional circumstances there cannot be resort to the revisional jurisdiction of the Court of Appeal."

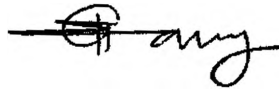
This position was also taken in the case of **Augustino Lyatonga Mrema v. Republic** [1996] TLR 267 where this Court faced with analogous situation stated that:

"To invoke the Court of Appeal powers of revision there should be no right of appeal on the matter the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."

Going by the above cited authorities, I am of the settled view that the instant application for revision cannot stand as the applicant had chance to appeal against the decision of the lower court. I therefore proceed to strike out the instant application. In the circumstance taking into account the relationship of the parties, I will not make order as to costs.

It is so ordered.

Dated at Babati this 31st July 2023.

A handwritten signature in black ink, appearing to read 'G. N. Barthy', written over a horizontal line.

**G. N. BARTHY,
JUDGE**