

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CIVIL REVISIO NO. 5 OF 2022

(Originating from Execution Application No. 01 of 2022 at SUMBAWANGA DISTRICT)

MIGO CIVIL AND BUILDERS

CONTRACTORS CO. LTD.....1ST APPLICANT

AYUBU NYAULINGO.....2ND APPLICANT

VERSUS

MNANGE GENERAL STORE COMPANY LIMITED.....RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The applicants are judgement debtors in Civil Case No. 12 of 2019 and also applicants in Miscellaneous Civil Application No. 2 of 2022 and Execution Application No.01 of 2022 which were filed in the District Court of Sumbawanga. In this application they have filed this application under the provisions of section 79(1)(c) and section 95 of the Civil Procedure Code,

Cap. 33 R.E. 2019 read together with section 44(1)(a) of the Magistrate's Courts Act, Cap. 11 R.E. 2019. They are applying for an order of this court calling for the record of the Proceeding, Ruling and drawn order of the District Court of Sumbawanga in Execution Application No. 1 of 2002 to satisfy itself as to the correctness, legality and propriety of the same; and the revise the said proceedings. Also, they are applying for cost of this application and any other relief that this honorable court may deem fit and just to grant.

The application is supported by an affidavit sworn by Laurent John an advocate representing the applicants. He was also representing the 1st and 2nd applicant in Execution Application No. 1 of 2022 the subject of this application.

The application for execution was heard by the District Court of Sumbawanga and was decided in favour of the Respondent. In the ruling delivered by the District Court and drawn order extracted in Execution No. 1 of 2022, the District Court ordered that the disputed money at the sum of Tshs. 141, 839,509/= should be given to the Respondent. The applicants were not satisfied by the decision. The Board of the 1st applicant made a resolution

dated 22nd day of September, 2022 to file this application and appointed the deponent to prosecute the same.

The deponent has stated that the 1st and 2nd applicant instituted an application for execution No. 1 of 2022 at the District Court of Sumbawanga seeking to execute the Order issued by the same court in Miscellaneous Civil Application No. 2 of 2022 whereby parties were ordered to perform auditing of the sum in dispute and share the loss and profit. The monies subject of the said audit is the initial payment which was Tshs. 156,307,759.25 which was being contested as having been not accounted for by the applicants in the Civil case No. 12 of 2019 which was filed by the Respondent herein.

According to this application, it is the contention of the applicants that the proceedings of the Execution Application No. 1 of 2022 is marred with errors material to the merit of application which involves injustice, and also the court had acted in the exercise of its jurisdiction illegally in the said proceedings as follows:

1. That, the District Court of Sumbawanga departed from its own decision in Miscellaneous Civil Application No. 2 of 2022 and granted the Respondent whole sum of Money i.e., Tshs. 141, 839,509/=

while the holding of Miscellaneous Civil Application No. 2 of 2022 provided that the money should be shared after auditing.

2. That the procedures governing recusal or non- recusal of Magistrate was not followed by the court when the 1st applicant requested recusal of the Magistrate who heard the Execution Application No. 1 of 2022.
3. That the respondent never filed any objection to execution but the court didn't grant the applicant's application for execution.
4. That the District court dismissed the execution application but ordered that the amount in question be given to the respondent in the Bank account which shall be mentioned later on.
5. That the court didn't take Judicial notice of ruling and proceedings of the previous case subject of execution.
6. The respondent never proved at the required standard that the was entitled the said amount.

The deponent has averred that, if this application is not granted the applicant stands to suffer irreparable loss because they are still indebted to the creditors who expects to get paid on the amount which the district ordered to be given to the Respondent.

The respondent is opposing the application; to that effect he has filed counter affidavit sworn by Martin Mhagama, the Director of the respondent company.

In the counter affidavit filed by the respondent, he has deposed that the ruling sought to be revised is free of errors, omissions and material illegalities as alleged by the applicants; and if the application will be granted the respondent stands to suffer more than the applicants.

The facts bringing to life the present application started with the agreement between the respondent and the applicants herein to create a joint venture (herein after may be referred as JVA) for construction of piped water supply works. Through JVA which was entered into on the 12th March, 2017 they were able to win two tenders. Tender No. LGA/144/2016 – 2017/KDC/W/04 for construction of Kafukula piped water supply scheme at Kafukula village at Kalambo District Council and Tender No. LGA/097/2017/2018/WS/W/03 for construction of Zumba Water Supply Project and Civil Works. In order to execute their projects, the 2nd applicant was given two powers to negotiate contract for works/services, to sign execute and endorse all documents related to the contract, to open, operate and close accounts; and to

commence any action on behalf of the respondent and the 1st applicant. That power of attorney expired on 25th September, 2018 and 21/3/2019. As way forward, the directors of the 1st applicant and the respondent had to sit and re-arrange the proper way to execute their duties including to renew the said special power of attorneys.

It would appear and I believe that was the situation that it was difficult to happen. The resistance was from the applicant's side. The respondent instituted a suit against the applicants herein which was registered as civil case No. 12 of 2019, upon hearing of the same she secured a decree dated 8th day of October, 2020 with orders as follows:

- (a) Defendants are ordered to sit together with the plaintiff to implement clause 8 and 15 of joint venture agreement.
- (b) The second defendant is no longer the lawful attorney of the plaintiff.
- (c) Clause 4 of the joint venture agreement is hereby altered.
- (d) The money sum of Tshs. 156,307,759.25 received by the defendants on behalf of the plaintiff should be accounted for by the

defendants so that the profit and loss can be shared after implementations of the orders given above.

(e) Costs if this case to be borne by defendants.

The orders in the decree from the Civil Case No. 12 of 2019 could not be implemented on time. The record shows that the Respondent feared that the remaining amount of money if paid to the account under management of the 2nd applicant would disappear as it had happened to the initial money paid to the joint venture and not yet accounted for by the applicants. Respondent filed Miscellaneous Civil Application No. 2 of 2022 under section 68(e) and 95 of the Civil Procedure Code, [Cap 33 R.E 2019]. The orders prayed for were geared to secure remaining money and also implement the directives in the decree obtained in Civil Case No. 12 of 2019, namely; One, the Court to order parties to sit down and prepare for the joint venture account. Two, that the Court to order RUWASA to deposit the amount remain in the Court account for fear that RUWASA is about to return the money to the Government, pending to be deposited to the joint venture account.

In the application the applicant, respondent herein stated further that he has opted to apply for the orders because if the money will be deposited in Court account it will be safe than if the money will be paid to the accounts managed by the 2nd applicant herein. The proposals were opposed and finally the District Court ordered the money not yet paid be deposited in Court account and parties should comply with orders in the judgment dated 8/10/2020 in Civil Case No. 12 of 2019. The decision was issued on 24/02/2022.

The applicants herein on the 25/05/2022 filed an application for execution No. 1 of 2022. It was intended to execute the orders in Miscellaneous Civil application No. 2 of 2022 against the respondent. The applicants prayed that the total amount which is said to be deposited in the Court account be paid directly to the creditors to whom the 1st applicant owns the same. The move was opposed by the respondent who was under the representation of Mr. Samson Suwi; he filed an affidavit to show cause why the execution should not be allowed. In the affidavit sworn by Martin Mhagama, he deposed the reasons for not allowing the prayers in the application.

The respondent deposed that the orders in the decree of Civil Case No. 12 of 2019 had not yet been complied by the parties; as the District Court had

ordered the applicants to account for Tshs. 156,307,759.25 which had been received by them on behalf of the respondent. In Civil Case No. 12 of 2019 the District Court had ordered for audit of the money initially paid to specify profit and loss so that they may be shared equally between the applicants and the respondent. That had not been demonstrated in the application for execution No. 1/2022 to show income and expenditure. That sum of money (Tshs. 156,307,759.25) was received by the applicants and expended to activities known to the applicants without information to the respondent. The respondent thus prayed that the money not yet paid, be deposited to the respondent's account alone as no creditors were shown to hold the applicants accounted to them. Thus, he proposed that the application be dismissed.

The applicants filed a counter affidavit to oppose the views in the affidavit to show cause why execution should not proceed. The counter affidavit was deponed to by Mr. Laurent John, who is an advocate representing the applicants. He has stated under paragraph 4 for that the application that the Execution Application No. 1 of 2022 has been filed to enforce orders in Miscellaneous Civil Application No. 2/2022 and not the alleged judgment and

decree in Civil Case No. 12 of 2019. However, at paragraph 7 the deponent has referred to Miscellaneous Civil Application No. 2 of 2022.

As I have understood from the submission which were made by the applicants during at the hearing of Miscellaneous Civil Application No. 2 of 2022, it was intended for payment of the money outstanding after the initial payment of money (Tshs. 156,703,375.25) the subject of an order for accounting for by the applicants (defendant) issued in Civil Case No. 12 of 2019.

After hearing by the parties, the District Court Magistrate presiding over the matter made a ruling to the effect that the application is dismissed with costs and further ordered that the amount of money remaining Tshs. 141,839,509/= which had been ordered to be deposited in Court account shall be *"given to the respondent as part of his share in the joint venture with applicant through his bank account whose details shall be mentioned later"*. That ruling is subject of revision in this application.

I have already extracted the content which are in the application chamber summons and affidavit as well the counter affidavit. The most part of what

I have written was for me to make sense of what I have gathered from the record as a whole excluding the submission made.

In this application as I referred herein above the applicants are being represented by Mr. Laurence John advocate and respondent by Mr. Samsoni Suwi learned advocate. This matter was ordered to proceed by way of written submission and parties have duly complied with the scheduling order.

Mr. Laurence John, learned advocate in his submission in chief has submitted upfront that the instant application is legally un-opposed by the respondent because she has filed the counter affidavit which contains general denial of averment in the affidavit. He argues that such practice is highly discouraged by the law. He has cited the case of **Fikirini Issa Kocho Versus Computer Logix Ltd and two Others**, Civil Case No. 151 of 2012, High Court of Tanzania at Dar es Salaam (unreported) where at page 6 it was observed that:

"The consequences of a general denial are such as to entitle the plaintiff to a judgment and decree on admission".

He has submitted that under Order VIII Rule 4, the defendant must clearly deny every material allegation made against him. This Court has also been invited to refer the case of **Beda Y. Mgaya t/s Befca Technical and Supplies Versus the Honourable Attorney General and Another, Civil Case No. 112 of 2019. High Court of Tanzania at Dar es Salaam** (unreported).

The counsel prayed that this Court should treat the application as if the respondent has not filed any affidavit at all and mark that the present application is unopposed.

On the merit of the application, the counsel for the applicants has submitted that the proceedings in application for execution No. 1 of 2022 are marred with errors materials to the merit of the application and the Court acted illegally in exercise of its jurisdiction as per paragraph 5(a), - (f) of the affidavit.

The counsel has submitted that the District Court erred by departing from its holding in Miscellaneous Civil Application No. 2 of 2022 and granted the respondent whole sum of money i.e., Tshs. 141,839,509/= while the holding of Civil Case No. 2 of 2022 was that the money should be shared after

auditing. The counsel has argued that the Court became *functus officio* regarding the appropriation/distribution of the funds immediately the orders were pronounced. He referred the cases of **Nasra Said Versus KCB Bank Tanzania Limited [2015] TLR 540 (HC)** where it was held that:

"It is the trite law that a Court becomes functus officio when it disposes of the case by a verdict or an order that finally and conclusively disposes of the matter".

In this case the executing Court was already '*functus officio*' in regard to the distribution of the money among the parties, it was unjustified to depart and issue other orders as shown above.

The second complaint is on the procedures governing recusal or non-recusal of the Magistrate. It was not followed after the request by the 1st and 2nd applicants to the honorable magistrate presiding over execution application No. 1 of 2022. Parties were not heard and or did not address the Court on the point which is against the holding in the case of **Claude Roman Shikonyi Versus Estony A. Baraka and 4 Others [2019+] 1TLR 192** where was held that:

"It is now settled that no decision must be made by any court of justice or body or authority entrusted with the powers to determine the rights and duties so as to adversely affect the interests of any person without first giving him hearing according to the principles of natural justice."

The proper procedure, according to the submission was enunciated by the court of appeal in the case of **Charles Mayunga@Chizi vs. Republic, Criminal Appeal No. 493 of 2015, Court of Appeal of Tanzania at Tabora**(unreported). The District Court Magistrate would have heard the parties and determine whether the allegations or complaints have any weight and decide to recuse herself or not to recuse herself.

Those procedures were not followed in the impugned case by the trial magistrate presiding over the matter.

The other complaint has been listed under paragraph 5(c) of the affidavit that the respondent never filed any objection to execution but the District Court Magistrate didn't grant the applicants the applications for execution. The counsel has cited section 38(1) of the Civil Procedure Code, [Cap. 33

R.E. 2019]. He has argued that that court may deal with the objection as to the execution of the decree as provided for under the provisions of section 38(2) of the Civil Procedure code, [Cap. 33 R.E.2019].

According to the counsel for the applicants, the execution court ought to have granted the application for execution because there was no any resistance whatsoever from the Judgement debtor (Respondent). The Respondent did not even cross-apply for execution but she was granted the whole principal sum while the applicants are the once who applied for and or initiated the execution application.

Another irregularity which has been raised by the applicants is listed under paragraph 5(d) of the affidavit which is that the court dismissed the execution application but ordered that the amount in question be given to the respondent through the bank account which shall be mentioned later.

The counsel has argued that once the application was dismissed, the District Court was *functus officio* (refer the case of **Nasra Said vs. KCB Bank (T) Ltd** (supra). It was therefore unprocedural for the trial court to state that the money, that is, the sum of Tshs. 141, 879,509/= shall be deposited to a bank account of the Respondent whose number will be revealed later.

The other irregularity is that the District Court did not take judicial notice of ruling and proceedings of the previous case subject of the execution. That is according to paragraph 5(e) of the affidavit filed by the applicants. The counsel for the 1st and 2nd applicant invited this court to take judicial notice of the previous application and cases leading to execution, whereas the same court issued orders for the finance auditing report, paying creditors and dividing the remaining sum to both parties in equal proportion.

The counsel for the applicants also submitted on the irregularity listed under paragraph 5(f) of the affidavit that the respondent never proved at the required standard that he was entitled to the said amount.

The counsel has reasoned that the dispute arose from civil cases which require proof at the balance of probabilities (see **Barelia Kirangirangi vs. Asteria Nyalambwa** [2019] 1 T.L.R. 142(C.A) where it was held that:

"The principle governing proof of case in civil suits is that he who alleges must prove. The rule finds a backing from sections 110 and 111 of the law of evidence Act, [Cap. 6 R.E. 2002]. It is similar that in civil proceedings, a party

with legal burden also bears evidential burden and the standard in each case is on balance of probabilities”

The counsel has submitted that the respondent never proved that she was entitled to the whole share of the money she was granted, in exclusion of the creditors, 1st and 2nd applicants as per the last orders of the same court. The counsel has concluded by praying that the application be granted as if not granted the applicants stand to suffer irreparable loss as per paragraph 6 of the affidavit.

The counsel for the respondent in reply to the written submission in chief has submitted that the respondent is opposing the submission that the application has not been opposed as to entitle the applicants the judgment and decree in admission. He has argued that this Court should not to accord weight on the argument on two reasons. One, that the procedure of moving the Court to that effect as required under Order VIII Rules 3, 4, and 5 and Order XII Rule 1 and 4 of the Civil Procedure Code, [Cap 33 R.E 2019] has not been followed. Two, that the respondent opposed the averment in the counter affidavit as per paragraph 4. In further clarification the counsel for the respondent has submitted that the respondent denied that the ruling had

errors omissions and material illegalities and that the applicants stand to suffer irreparable loss because they are indebted to creditors as averred in paragraphs 5 and 6 of the applicant's affidavit. As to paragraph 6 the respondent averred that she is the one who stands to suffer as the applicants have enjoyed the fruits of the joint venture from the initial and or first payment. He therefore prayed that the prayer for entering a judgment on admission should be ignored.

As to the merit of the application, the counsel for the respondent has submitted that the applicants have invited this Court to revise the proceedings of Execution Application No. 1 of 2022. According to section 44(1) (b) of the Magistrates' Court Act, [Cap 11 R.E 2019], as far as revisions application are concerned, the Court can revise the proceedings of the concerned matter upon being moved by a party or on its own motion *suo motu*.

When the Court is moved by a party, the party moving the Court is mandatorily required to attach the proceedings sought to be revised. Failure to do so renders the revision application to be fatal. Fatal because an application supported with affidavits, everything to be considered by the

Court must be pleaded and or embodied in the supporting affidavit. Parties are bound by their pleadings and Courts are precluded from considering extraneous matters, submissions from the bar; or materials not forming part of the application. Affidavit being evidence must plead and contain all material facts and annexures the party wants to be believed upon by the Court. In the instant application the applicants have not annexed the proceeding which this Court is invited to revise.

It has therefore been submitted by the counsel for the respondent that the applicants have failed to invite properly this Court so that it satisfies itself on the existence of the alleged material errors and illegalities in the proceedings sought to be revised.

The applicants have deprived the Court with the subject matter for revision. To cure, the applicant ought to have attached at paragraph 5 of their affidavit the proceedings of Execution Application No. 1 of 2022 of Sumbawanga District Court. Otherwise, the Court is barred from considering extraneous matters which are not part of the parties' pleadings. Instead, the Court must consider only facts deposed and annexures attached to the affidavit, counter affidavit and reply to counter. The counsel cited the case of **Sophia**

Ngoka Versus Waziri Anania Mwanyondo, Pc. Civil Appeal No. 21 of 2021, High Court of Tanzania at Mbeya (unreported).

On the same line of argument as far as the basis for the duty to attach the proceedings upon an applicant's complaint of existence of irregularities, the counsel cited the case of **Registered Trustee of Sibusiso Foundation Versus Angelus Bandali Ngatunga LCD – 2015 (Volume II reported as case No. 201) at page 284**. The applicant's counsel alleged an illegality on an ex parte award which was held to constitute a good reason for granting an application. The Court in refusing to grant held that:

"However, in the instant case as pointed out by respondent's counsel applicant fail to attach the alleged ex parte award which he alleged illegality for this Court to assess on the illegality. Basically, Court always acts, upon material facts. Absence of the alleged ex parte award before this Court denied this Court an opportunity to ascertain whether is a point of law at issue in which the said illegality is alleged, hence I fail to agree with the applicant's counsel that there is illegality".

The counsel for the respondent also in the same line in regard to pleading and attaching facts and documents upon which the applicant wants his allegations to base on, the Court is invited to read the persuasive decision of Hon. Madam Justice Ebrahim in the case of **Mbeya City Council Versus Ndurungo M.R.A @ Romuald Materu**, Misc. Land Application No. 104 of 2021, High Court of Tanzania at Mbeya (unreported). In this case the applicant had attached an affidavit only without proceedings; the High Court Judge observed:

"Firstly, the complaint that there was no opinion of assessors in the judgment it is not correct as the judgment indicates that they are there. As for the complaint that there was regular change of assessors in the proceedings, the applicant did not attach such record to his affidavit. Therefore, this Court cannot rely on his mere oral account without the copy of the proceedings for satisfaction. Secondly, the averment that there was improper description of the disputed land is also wanting of merit. This is because, no proceedings were attached to the

affidavit for this Court to satisfy itself that the said irregularity was not cured by evidence”.

The counsel in instance to the need to attach the relevant proceedings has referred to many cases that of **Kenedy Owino Onyachi & Another Versus Republic**, Criminal Application No. 26/01 of 2019, Court of Appeal of Tanzania sitting at Dar es Salaam (unreported); **Martha Emmanuel Shayo Versus Jesca Gordon Elias Karlo and Another**, Civil Application No. 171/01 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Sango Mariam Madeleke Versus Lion of Tanzania Tusurance Company Ltd and Another**, Civil Application No. 13/01 of

In the case of **Martha Emmanuel Shayo Versus Jesca Gordon Elias Karlo and Another**, (supra) it was held that:

"Where revision is initiated by a party, the applicant assumes the duty to place before the Court the record; is be the settled law and logical. It is logical because in the absence of a record, there would be nothing to examine and revise”.

The concluded that for a reason that there is non- attachment affidavit the proceedings upon which the Court is invited to revise the chamber summons crumbles wholly thereby leaving the allegations hanging. He prayed that the application should not be considered for lack of material upon which the Court can exercise its revisional powers.

On the submission on paragraph 5(a) of the applicant's affidavit, that the trial Court departed from its holding in Civil Case No. 2 of 2022 the counsel for the respondent submitted that the applicants are misleading the Court. At page 5 of the ruling paragraph 2 the Court ordered implementation of the order in the decree of the main case, Civil Case No. 12 of 2019 of auditing the sum of Tshs. 156,307,759.25/= received by the applicants herein on behalf of the respondent so that the profit and loss be known and be shared by the parties equally. And the Court ordered temporary deposit of the second payment into Court's account pending auditing of the first payment.

The allegations of functus officio are unfounded because the orders in Civil Case No. 2 of 2022 and Execution Application No. 1 of 2022 are different and are related to different amount of money. The argument by respondent was that had it been the trial Court had ordered equal sharing without

conditions to effect auditing then the applicants could not have managed to go back with application for execution No. 1/2022 claiming to have complied with the order of the Court, alleging that the whole amount (Tshs. 156,307,759.25/=) was spent on purchase of materials to suppliers and that they were also claiming for the remainder Tshs. 141,839,509/= to be paid to creditors. The argument that the trial Court was functus officio is unfounded.

That under paragraph 5(b) of the applicant's affidavit, they allege that the magistrate did not comply with procedure for recusal of the Trial Magistrate. This according to the counsel is a mere allegation, which is unsubstantiated due to lack of an attachment. It was incumbent for the applicants to attach the proceedings as well as the letter alleged that it was written to the Court asking the Trial Magistrate to recuse. That could have enabled this Court to be in a position to examine the proceedings and if there was raised any cogent reason by the applicants to warrant recusal. He prayed that the complaint be disregarded as the complaint are mere words from the bar.

In regard to complaint in paragraph 5(c) of the applicant's affidavit, that the execution was not objected to; the same should not waste time of this Court,

as it was objected to by the respondent by filing an affidavit to show cause why the application should not proceed. That prompted the applicant to file counter affidavit. The outcome was reflected in the ruling on Execution Application No. 1 of 2022. He thus prayed that the complaint be disregarded.

The counsel for the respondent has submitted together reply for complain in paragraph 5(d) (e) and (f) and also 6. He has argued that the submission in chief is not well founded not clear. It is not said by the applicants what was the proper procedure they wished the Court would have followed. However, the Court only ordered the sum of Tshs. 141,879,509/= to be paid to the respondent so that she could also benefit the proceeds of the joint venture as the applicants had already received their portion of Tshs. 156,307,759. 25/= and had failed to account how a view that the decision was properly reached by the Court to order the remaining money to be paid to the respondent.

In conclusion the counsel for respondent prayed that the application be dismissed with costs.

I have had time to read the record and application as well as the written submission by the parties. The written submissions were filed pursuant to

the leave of the Court following the prayer by the parties. Before I embark on the merit or demerit of the application, I had difficulties to comprehend the record due to mixing up the citation of the cases in related to the dispute by parties, in particular the applications following the decision in the main case, Civil Case No. 12/2019. Miscellaneous Civil Application No. 2 of 2022 has been interchangeably referred to as Civil Case No. 2 of 2022 and miscellaneous Civil Application No. 2 of 2022 by the parties. It should be noted that after Civil Case No. 12 of 2019, there came Miscellaneous Civil Application No. 2 of 2022. Then, Execution Application No. 1 of 2022. According to the order of events there cannot be a Civil Case No. 2 of 2022 emanating from Civil Case No. 12 of 2019, while the contents subject of adjudication show that it was a miscellaneous application.

Back to the application, the applicants have applied for an order of this Court calling for the record, inspecting and examining the proceedings, ruling and drawn order of the District Court of Sumbawanga in Execution Application No. 1 of 2022 so as to satisfy itself as to the correctness, legality and propriety of the same and revise the said proceedings. After service to the respondent, she filed a counter affidavit sworn by Martin Mhagama. The counsel for the applicants has suggested that there was no opposition by the

respondent and prayed that a judgement in admission be entered. That has been opposed by the counsel for the respondent for the reasons that, first, the respondent opposed in the counter affidavit and two, even if it may be assumed that she did not oppose, that the procedure of moving the Court to that effect as required under Order VIII Rules 3, 4, and 5 and Order XII Rule 1 and 4 of the Civil Procedure Code, [Cap 33 R.E 2019] has not been followed. I think the argument has merit. Under Order XII Rule 4 it is provided that:

"Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

The applicants ought to have made an application for the judgment on admission to be entered immediately they noted that there was an admission. However, according to the law, that must also be preceded by a

notice issued by a party admitting under Order XII Rule 1 of the Civil Procedure Code, Cap. 33 R.E.2022 which provides that:

"Any party to a suit may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Under the circumstances, I with agree with the position submitted by the counsel for the respondent that the procedure has not been followed to entitle the applicants with the judgment on admission.

The applicants have listed a number of irregularities for which they have moved this court to revise the ruling, drawn order and proceedings in Execution Application No. 1 of 2022. The counsel for the respondent submitted to fault the application for failure to attach the proceedings sought to be revised. He submitted that when the Court is moved by a party, the party moving the Court is mandatorily required to attach the proceedings sought to be revised. Failure to do so renders the revision application to be fatal. Fatal because an application supported with affidavits, everything to be considered by the Court must be pleaded and or embodied in the supporting affidavit. Parties are bound by their pleadings and Courts are

precluded from considering extraneous matters, submissions from the bar; or materials not forming part of the application.

In the case of ***The Registered trustees of Archdiocese of Dar es Salaam Vs. The Chairman Bunju Village Court and eleven others, Civil Appeal No.147 of 2006, The Court of Appeal of Tanzania at Dar salaam*** it was held that:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence"

Affidavit being evidence must plead and contain all material facts and annextures the party wants to be believed upon by the Court. With this position this court cannot move on to revise the proceedings as prayed by the applicants, despite the fact that there is a court record; they ought to have pleaded them by attaching the same to the affidavit accompanying the application. In the case of Martha Emmanuel Shayo vs. Jesca Gordon Elias

Karlo & Another, Civil Application No. 171/01 of 2021, CAT at Dar es Salaam(unreported) it was held that:

"Where revision is initiated by a party, the applicant assumes the duty to place before the Court the record, is both settled law and logical.... It is logical because in the absence of a record, there would be nothing to examine and revise..."

All having been said as to the deficiency in the application, I think because there is a decree in the main case which was determined by the district court, the applicants ought to have complied with the directives of the court in the decision in Civil Case No. 12 of 2019 which decree is the subject of execution and not circumventing the orders of the court by choosing only a part of it which is favourable and amusing for them as it is in the present situation.

For the reasons I find the application to lack merit and dismiss it with costs. It is ordered accordingly.

Dated and Signed at **Sumbawanga** this 30th day of October, 202


T. M. MWENEMPAZI
JUDGE

Judgement delivered in Court in the presence of Mr. Laurence John Advocate for the applicants at Mpanda via video conference and Mr. Martin Mhagama, Director of the Respondent and Mr. James Lubusi, Advocate Holding brief for Mr. Samson Suwi, Advocate for the respondent.




T. M. MWENEMPAZI

JUDGE