

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

MISC. CIVIL APPLICATION NO. 52 OF 2022

VENASTICA DANIEL MASINJISA.....APPLICANT

VERSUS

YAHYA KASSIM ISSA.....RESPONDENT

(From Ruling of Dodoma District Court)

Dated 7th day of September, 2022

in

Matrimonial Cause No. 17 of 2021

RULING

Date of last Order: 27 October,2023

Date of Ruling: 3 November,2023

SARWATT, J.;

The Applicant, **VENASTICA DANIEL MASINJISA**, applied for revision of the ruling of the Dodoma District Court, which was delivered on 7th September 2022. The application was made under section 79(1) (c) of the Civil Procedure Code Cap.33 (the Code). It was supported by the applicant's affidavit sworn on 5th October 2022.

A brief fact of this matter is that in the District Court of Dodoma at Dodoma, the applicant filed a petition for divorce in Matrimonial Cause No. 17 of 2021 against the respondent, praying the following orders;

- (a) A declaration that the marriage is broken down irreparably*
- (b) An Order to dissolve the marriage and decree for divorce be granted*
- (c) Equal division of matrimonial properties*
- (d) Maintenance for children*
- (e) Rights of parties to visit their children*
- (f) Any other relief as the Court may deem fit to grant*

Before hearing the petition at the trial Court, the respondent lodged the notice of Preliminary objection that the certificate from the Marriage Reconciliation Board was not valid and was bad in law as the respondent, being the resident of Zanzibar, the Marriage Reconciliation Board of Dodoma had no jurisdiction to reconcile parties and issue a valid certificate. The trial Court heard the preliminary objection and held that the certificate was invalid because the respondent was not summoned and was not allowed to be heard as required by the law. Also, the trial court held that the Court has no jurisdiction to entertain matrimonial cause because the certificate was invalid.

The applicant was aggrieved with the said decision and applied for revision before this Court, praying the following orders;

- 1. That, the honourable Court be pleased to grant a revision order to the effect that, there has been an error material to the merits of the case involving injustice on determining Matrimonial Cause No. 17 of 2021.*
- 2. That, the costs of this application be provided for*
- 3. That, the Court be pleased to issue any such other orders as it shall deem fit to grant.*

The respondent opposed this application by filling the counter affidavit accompanied with the point of preliminary objection to the effect that:

- 1. This application for revision is misconceived and bad in law for being an alternative to appeal.*
- 2. The affidavit supporting an application is bad in law for containing conclusions and arguments.*

The preliminary objection was heard on 27th October 2023, whereas Magreth Mbasha and Elias Machibya represented the applicant, Learned Advocates and Mr. Ditrick Mwesigwa and Mr. George Vedasto, Learned Advocates appeared for the respondent.

In supporting the preliminary objections, Mr. George Vedasto, Learned Counsel for the respondent, submitted that this application for revision is misconceived and bad in law for being an alternative to appeal. Under the law, the party should consider the revision to a case where he has no right to appeal or where the judicial process has blocked the right to appeal. He cited the case of **Ismail Abdallah Limbega v Victor Nyoni, Civil Revision No. 33 of 2020**, on page 4, and the case of **Jowhara Castor Kiiza v Yasin Hersi Warsame, Civil Application No. 332/01 of 2018** Court of Appeal, to support his point. He further stated that matrimonial cause no.17 of 2021 was dismissed for want of jurisdiction. The applicant opted to move this Court by way of revision contrary to the law requirement, which requires the dissatisfied party to appeal and not ask for the revision. He added that the decision the applicant challenged was delivered on 7th September 2022, and this application was filed on 7th October 2022, that is, within the prescribed time to file an appeal. He also cited the **Augustino Mrema v Republic (1999) TLR 373**, where the Court of Appeal held that there should be no right to appeal to invoke the powers for revision. To him, the provision in which the application was brought can be invoked suo motto and not by the parties. To cement his point, he referred this Court to the case of

Gapco Anzania Limited v Shanif Mansoor t/a Mansoor Service Station, Civil Revision No. 4 of 2000. (Court Of Appeal)

Regarding the second preliminary objection, Mr. George Vedasto submitted that the affidavit supporting the application is bad in law for containing conclusions and arguments. The Applicant's affidavit is incurable defective as per paragraph 5; the word "instead" is an argument, and "therefore" is a conclusion. In paragraph 6, "I wonder" is an argument; in paragraph 7, the word "from the above point it is clear" is a conclusion. Furthermore, in paragraph 8, "therefore" is a conclusion. He added that the applicant should state the facts and not the conclusion. He cited the case of **Jamal s. Mkumba and Abdallah Issa Namangu v Attorney General, Civil Application No. 240/01 of 2019**, (Court of Appeal) at page 7 to support his point. To him, paragraphs 5,6,7, and 8 contain arguments and conclusions; if expunged, the remaining paragraphs cannot sustain the application. He, therefore, prayed for them to be expunged and the application be dismissed with costs.

In reply, Mr. Elias Machibya, Learned Counsel for the applicant, argued that the alleged notice of preliminary objection cannot be called a preliminary objection in the eye of the law. The respondent lodged a counter affidavit on

20th March 2023 and raised his notice of preliminary objection in the counter affidavit. He added that this is against Order X1X Rule 1 of the Civil Procedure Code (the Code). The law does not give an avenue to include preliminary objections and prayers. This fault cannot be accommodated in Order VI and VII of the Code as there is only a plaint and a written statement of defence, not an affidavit. To him, the alleged preliminary objection is misconceived. He further submitted that the applicant on his submission did not mention any provision of law which the applicant violated. He mentioned only case law. He cited the case of **Mukisa Biscuits v West and Distributors Ltd** to support his point that the preliminary objection should be on the point of law, which can be for jurisdiction or time limitation since the present preliminary objection is not in the same principle, the same is misconceived.

As to the first preliminary objection, he submitted that it has no leg to stand. He added that there is no word dismissal in the trial court ruling. To him, it is the position of the law that where there is confusion in proceedings, the only remedy is to apply for revision. He cited the case of **Samweli Kobelo Muholo v NHC, Civil Application No. 442/17 of 2018**, Court of Appeal, on page 3 to support his position. He further argued that the decision from the case of **Ismail Abdallah**, cited by the respondent, is

distinguishable. He, therefore, prayed that this preliminary objection be dismissed.

On the second preliminary objection, he stated that the Counsel did not cite any law to support his submission that the affidavit contained arguments and conclusions. To him, the words "instead "and "therefore "in paragraph 5 do not affect the content because using words is a writing and speaking style. Thus, in paragraphs 5,6,7 and 8, the applicant explained what happened in the trial court. He cemented his point by citing the case of **Jamal S. Nkumba and Abdallah Issa Namangu v Attorney General, Civil Application No. 240/01/2019.**

In rejoinder, Mr. George Vedasto stated that it is not true that under the Code, the preliminary objection must be specifically pleaded in pleadings. He argued that the affidavit contains arguments and conclusions that violate Order VI Rule 15(2) of the Code. Moreover, the law does not accommodate individual writing styles and procedures for preparing some legal documents, he therefore prayed the application be dismissed with costs.

After considering the submissions from both sides, the applicant's affidavit, Counter affidavit, and the trial court record, the issue to be

determined in this application is whether the preliminary objections have merits.

To start with the first preliminary objection that this application for revision is misconceived and bad in law for being an alternative to appeal, I will discuss this point starting by citing the provisions of section 79(1) of the Code, which provides that;

" 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 exercise jurisdiction not vested in it by law; or*
- (b) to have failed to exercise jurisdiction so vested; or*
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.*

In the instant application, the respondent argued that the applicant had the right to appeal but did not do so. The applicant also argued that the only remedy for the applicant is to file a revision because the nature of the ruling is not appealable under section 74 of the Code.

The law is clear that revisional jurisdiction can be exercised only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, suitable and sufficient reasons are given for not having appealed. However, for the Court to exercise its revisional power, the one moving this Court must disclose illegalities, irregularities, incorrectness, or inappropriateness of the proceedings or decision of the trial court.

In the instant application, the applicant's affidavit is silent on the issue of illegalities, irregularities, incorrectness or inappropriateness of the proceedings or decision of the trial court. During submissions, Learned Counsel for the applicant stated there is no word of dismissal in the trial court ruling. If there is such confusion, it is the position of the law that the only remedy is to apply for revision. It is a trite law that parties are bound by the pleadings whose proof is cemented by the evidence adduced. This was held in the case of **Hamza Byarushengo v Fulgencia Manya and 4 Others, Civil Appeal No. 246 of 2018** (Court of Appeal) on page 17 of the judgment. Since the applicant's affidavit is silent on the said facts submitted by the learned Counsel for the applicant, I am of the view that this application is misconceived. The applicant should state on her affidavit that there are

illegality, irregularities, incorrectness, or inappropriateness of the trial court's decision proceedings.

However, in his submission, the applicant alleged that notice of preliminary objection cannot be called preliminary objection in the eye of the law. He added that the respondent lodged a Counter affidavit on 20/3/2023 and in the said counter affidavit, raised his notice of preliminary objection, which is against Order X1X Rule 1 of the Code. He further submitted that the law does not give an avenue to include preliminary objections and prayers. This fault cannot be accommodated in Orders VI and VII of the Code as there is only a plaint and a written statement of defence, not an affidavit. According to the submission of the applicant, the law is clear that a preliminary objection must be accompanied by the pleadings. As to the nature of this revision application, the only documents that must be used to file revision are chamber summons accompanied by the affidavit. So, the respondent was correct to file a counter affidavit accompanied by the preliminary objection. It is also prohibited by the law to file a preliminary objection either by another preliminary objection or by a counter affidavit. The law does not provide a remedy the defects complained of by the applicant. It is the duty of the court to refuse the application of a party attempting to do so.

v Sylvester Magembe Ch

2008. However the Court of Appeal in the case of **Marry John** (supra) referred to the case of **Method Kimomogoro v Board of Trustees Tanapa, Civil Application No. 1 of 2005** (Court of Appeal) (unreported), which was held that;

"This Court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another objection or trying to rectify the error complained of."

Since the respondent lodged a preliminary objection, the applicant was not supposed to raise a preliminary objection again. This is pre-empting a preliminary objection, which is not allowed in the face of the law. To me, this point is baseless.

Regarding the second preliminary objection that the affidavit supporting an application is bad in law for containing conclusions and arguments, Rule 3(1) of Order XIX of the Code provides that;

"Affidavit shall be confined to such facts as deponent is able of his own knowledge to prove, except in the interlocutory applications, on which statement of his

belief may be admitted provided that the grounds thereof are stated."

However, Order XIX Rule 1 and 2 of the Code clearly shows that affidavit is evidence in the form of a written statement. In the case of **Msasani Peninsula Hotels Limited and 6 Others v Barclays Bank Tanzania Limited and two others, Civil Application No. 192 of 2006**, the Court of Appeal referred the case of **Uganda v Commissioner for Prisons, Ex- Parte Matovu (1966) E. A 514**, which was held that;

"Again, as a general rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion."

According to the provisions of the law above, I revisited the chamber summons and the supporting affidavit of the applicant to see whether the paragraphs as mentioned herein by the respondent offend the provisions of

Order XIX Rule 3(1) of the Code. I firmly believe that paragraphs 4,5,6,7, and 8 of the applicant's affidavit contain arguments and conclusions. The applicant ought to state facts and not arguments and conclusions. However, in the case of **Msasani Peninsula Hotels Limited and 6 Others** (supra) the Court of Appeal page 8 of the ruling referred to the case of **Phantom Modern Transport (1985) Ltd v D. T. Doble (TZ) Ltd, Civil References No. 15 of 2001 and 3 of 2002**, (unreported) which was stated inconsequential defects in an affidavit that;

"Where defects in an affidavit are inconsequential those offensive paragraphs can be expunged or overlooked, leaving the substantive parts intact so that the court can proceed to act on it."

The above position of the law is also supported by the decision made in the case of **The University of Dar Es Salaam v Mwenge Gas and Lub-Oil Limited, Civil Application No.76 of 1999** (Court of Appeal) (unreported) and followed in the case of **Jamal S. Nkumba and Another v Attorney General, Civil Application No.240 of 2019 (2021) (Court of Appeal)** where it was observed that;

"It is now settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraph inconsequential."

In the instant application, I am of the view that paragraphs 4,5, 6, 7 and 8 of the applicant's affidavit contain arguments and conclusions and not facts as required by the law. The remedy is to expunge the offensive paragraphs from the record, as I am doing now that paragraphs 4,5, 6, 7 and 8 of the applicant's affidavit are expunged. Having expunged these paragraphs from the affidavit, the remaining paragraphs 1,2, and 3 of the applicant affidavits cannot support the application at hand. In that regard, the whole affidavit remains incurably defective, and there is nothing to amend.

For those reasons, and since there is nothing to support the application at hand, I am of the view that the preliminary objections are hereby sustained. I struck out this application for being supported by the incurable defective affidavit.

Each part to bear its own costs of the application.

It is so ordered.




S. S. SARWATT
JUDGE
03/11/2023

DATED at **DODOMA** on the 3rd day of November, 2023.




S. S. SARWATT
JUDGE
03/11/2023