

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF DODOMA  
AT DODOMA**

**CIVIL REVISION NO. 3 OF 2022**

**M/S EQUITY FOR TANZANIA (EFTA) LTD .....APPLICANT**

**VERSUS**

**RAMADHANI MOHAMED MUNGWE .....RESPONDENT  
(Originating from Chemba District Court)**

**Dated 9<sup>th</sup> day of June, 2022**

**In**

**Civil Case No. 2 of 2022**

.....

**RULING**

Date of Last Order: 23<sup>rd</sup> October, 2023

Date of Ruling: 31<sup>st</sup> October, 2023

**SARWATT, J.:**

The applicant, M/S EQUITY FOR TANZANIA (EFTA) LTD, has filed before this Court an application for revision, inviting this Court to revise the proceeding/order of the District Court of Chemba (“the trial court”) for the purpose of satisfying itself on its correctness or legality and propriety. The applicant also prays for the costs of the application and any other orders and relief that this Court shall deem fit and to grant.

The application is made under section 79(1)(a)(b)(c) and section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] (“CPC”) and is supported by the affidavit sworn by Godwin Beatus Ngongi, the applicant’s advocate.

Briefly, in the affidavit, it is averred that the applicant was the 1<sup>st</sup> defendant in Civil Case No. 2 of 2022 before the trial court while the respondent was the plaintiff. That, on 9<sup>th</sup> June 2022, the trial court ordered the same to proceed *ex parte* against the applicant without ascertaining if summons and plaint were properly served to the applicant.

It is further averred that it was on 1<sup>st</sup> August 2022 and 3<sup>rd</sup> August when the applicant received a summons requiring her to file a written statement of defence ("WSD") within 21 days. Still, after entering an appearance to the trial Court, it was discovered that the matter was scheduled for judgment.

Additionally, it is averred that the applicant on 16<sup>th</sup> August 2022 filed this application for revision before this Court, whereas the summons was issued on 24<sup>th</sup> August 2022, and the same was served to the respondent on 25<sup>th</sup> August 2022. It is further stated that this Court issued the call for records to the trial court, and the same was received on 25<sup>th</sup> August 2022, but the trial court proceeded with the matter despite being informed of the existence of this application whereas, on 2<sup>nd</sup> September 2022, an *ex parte* judgment was delivered.

The respondent, RAMADHANI MOHAMED MUNGWE, to oppose the application, filed a counter affidavit sworn by his advocate, disputing all the averment made on the affidavit.

On the date of the hearing of the application, both parties were represented by the learned advocates, whereas Ms. Faraja Shayo and Mr. Godwin Ngongi appeared for the applicant, and Mr. Joseph Masanja appeared for the respondent.

In supporting the application, Ms. Shayo started her submission by adopting the supporting affidavit, reiterating what has been stated in the affidavit. She insisted that the applicant's right to appear to the trial Court and file her written statement of defence was denied by the trial court as she was served with a summons to file it while the matter was already scheduled for judgment.

She contends that it was a procedural irregularity for the trial Court to proceed with the matter by delivering an *ex parte* judgment while it was already called to this Court pursuant to the applicant's application for revision.

Mr. Ngongi recapped the submission of his colleague in support of the application. He added that the trial Court, having heard the matter *ex parte*, was procedurally required to notify the applicant on the date of judgment by

issuing a summons to the applicant, something which they did not, as it is his argument that this Court should address such irregularity.

Mr. Ngongi wound up praying the Court grant the application and quash the trial court's proceedings.

Mr. Masanja, in reply, adopted his counter-affidavit and argued that the applicant was properly served to appear before the trial court to defend the case against her but decided not to honour the same. He stipulated that the applicant was even served through publication but did choose not to appear to the trial Court hence, the matter was ordered to proceed *ex parte*.

He replied further that the fact that the applicant's counsel appeared before the trial court on the date of judgment renders his submission that there was no notification of the judgment date immaterial.

Mr. Masanja also was of the view that the applicant, before coming to this Court by way of revision, was supposed to exhaust the available remedies by lodging an application to set aside *ex parte* judgment before the trial court. To cement this, he referred to the case of **Yara Tanzania Ltd vs D. P. Shapriya & Co Ltd**, Civil Appeal No. 245 of 2018, Court of Appeal, Dar es Salaam, which, with approval, quoted the case of **Integrated Property and 2 Others vs the Company of Habitat and Housing in Africa**, Civil Appeal 107 of 2015.

Having submitted as above, Mr. Masanja prayed this Court to dismiss the application with costs.

On rejoinder, Mr. Ngongi, in the first place, submitted that the Court not to adopt the counter affidavit of the respondent's counsel for the reason that the same was filed with regard to the first application, which was later amended and in such circumstance, the respondent was supposed also to file another counter affidavit. It is his opinion that failure to file a counter affidavit to the amended application means the respondent supports the applicant's application.

With regard to their attendance on the judgment date, Mr. Ngongi rejoined that their appearance was not subject to the trial court's notification of the date of judgment, which is a gross error in the administration of justice. He also rejoined that this application is properly brought before this Court, and the argument that this application is not proper in this Court was decided by the former presiding judge through a preliminary objection raised by the respondent.

He went on to rejoin that the moment this application was lodged, the trial Court's jurisdiction over this matter was seized. Therefore, it is his opinion that the trial court's act to proceed with the matter instead of

forwarding the records to this Court amounts to procedural irregularity, which is fatal.

Ms. Shayo also rejoined on the failure of the trial court to wait for the expiry of 21 days granted on the summons for the applicant to file her WSD.

Before going into the application's merit, I find it proper to examine the status of the counter affidavit, which the applicant's counsel has objected to the Court to adopt on the reason that it was filed subject to this application prior amendment.

Having perused the records of this Court, it is clear to me that the applicant filed an amended chamber application with a supporting affidavit on 14<sup>th</sup> October 2022 pursuant to the order of this Court dated 6<sup>th</sup> October 2022. It was on the same date of 6<sup>th</sup> October 2022 when the respondent prayed to file a counter affidavit which was filed on 9<sup>th</sup> November 2022 as such, I find it irrational to agree with the applicant's counsel to consider the counter affidavit filed after the filing of amended application to be for the first application prior amendment.

Furthermore, the records reveals that the respondent, in the first place, filed only a notice of preliminary objection, which this Court overruled because of the presence of the amended application as such, the original pleadings were rendered to have no legal effect. Further, this Court, under

page 4 of its ruling, which was delivered on 14<sup>th</sup> July 2022 before Hon. A. J. Mambi, J. appreciated the fact that the respondent filed a counter affidavit to the amended application by stating the following;

*"Following the position of the above authorities, this means that in the instant case if after amendment of the chamber summons by the applicant, the respondent still thought it was necessary to object it, he ought to have filed another preliminary objection. **Filing only his counter affidavit meant that he was satisfied that the amended chamber summons lacked flaws. ...Furthermore, since the applicant filed its amended chamber summons and the respondent countered accordingly by his affidavit. This Court do hereby order the matter to proceed at hearing stage.**"*

[Emphasis Added]

For that reason, I find the counter affidavit of the respondent's counsel is valid. The same is hereby adopted as such the contention by the learned counsel for the applicant that their application shall remain uncontested for lacking limbs to stand.

Now, I turn to determine the merit of this application. For proper determination of the same, I find it desirable to recite the provision of section 79 of the CPC, 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 exercised jurisdiction not vested in it by law;*

*(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."*

With this position of law and from the submissions made by the parties, the affidavit, and counter affidavit as adopted, it is clear to me that the applicant, by attacking the jurisdiction of the trial court at the moment when this matter was called by this Court for revision as well as procedural irregularities on issuance of summons to defend the case and to appear for judgment would render the application for revision to be appropriate, but for the nature of this matter, where there is an *ex parte* decree the position is different.

The law under Order IX Rule 9 of the CPC provides for a straightforward remedy to an aggrieved party with an *ex parte* decree to lodge an application for setting aside the same. It states that;



*"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:..."*

It follows that I am in agreement with the respondent's counsel that the applicant was supposed to exhaust available remedies before the trial court before coming to this Court for recourse subject to the holding of the Court of Appeal in the case of **Yara Tanzania Ltd (supra)** where it was held that;

*"So much for the law on the point. To recap, it is now settled that when a party is aggrieved with an ex parte, summary or default judgment of the High Court, **he must first exhaust the alternatives or remedies available in the High Court before coming to this Court on revision or appeal.** If that is not done, the revision or appeal to the Court will be rendered misconceived and prone to be struck out.*

[Emphasis Added]

Also, in the case of **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, Civil Appeal No. 13 of 2021, Court of Appeal, Dar es Salaam, the Court of Appeal had the following to say;

*"It would appear to us to be the principle in the said authorities that where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the ex parte judgment first. **This principle is based on the long-standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. He has to exhaust all available remedies to the lower Court first.**"*

[Emphasis Added]

With this position of the law, it is obvious that the applicant's application would be appropriate before this court subject to section 79(1) of CPC as illustrated herein above if, in the first place, filed an application to set aside an *ex parte* decree before the trial court. In the circumstance, the records are certain that the decree was passed *ex parte* against the applicant. In that regard, the applicant filed this application inviting the Court to revise the trial court proceedings, which initiated the *ex parte* decree.

Basing on this bundle of facts, it is my considerate view that this application is misconceived. For that reason, the contention made by the applicant's counsel that the summons to defend was issued after the setting up the date of judgment and any other concern would have been determined by the trial court on the intended application to set aside *ex parte* decree.

On the other hand, the applicant's counsel contended that this Court had already, by way of notice of preliminary objection, determined the question as to whether this application is proper before this Court. I have closely perused the ruling of this Court dated 14<sup>th</sup> July 2023. It is clear to my mind that this Court found the notice of preliminary objection to be inexistent for having been raised from the original pleading, which was already amended. As such, this Court did not examine the merit of the preliminary objection as contended, and it is not a misdirection to examine the same here and now.

Besides, I find it inconsequential to deliberate upon other faults raised by the applicant's counsel that the trial court proceeded with the matter despite being called by this Court, as well as the failure of the trial court to notify the applicant on the date of judgment because this application has been misconceived as I have demonstrated above.

In respect, I find this application lacks merit for being misconceived.

As a result, the same is struck out with costs.

Ordered accordingly.



**S. S. SARWATT**  
**JUDGE**  
**31/11/2023**

A handwritten signature in blue ink, appearing to be "S. S. Sarwatt", written over the printed name.

**DATED at DODOMA** this 31<sup>st</sup> day of October 2023



**S. S. SARWATT**  
**JUDGE**  
**31/11/2023**

A handwritten signature in blue ink, appearing to be "S. S. Sarwatt", written over the printed name.