THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CIVIL REVISION NO. 35 OF 2023

(Originating from the Matrimonial Cause No. 24 of 2016 in the District Court of Ilala and Miscellaneous Civil Application No. 446 of 2023)

EMMANUEL M. UREMBO ..... APPLICANT

VERSUS

EMILIANA N. NYONI..... 1ST RESPONDENT

AARON LOTH MAKULU ..... 2ND RESPONDENT

RULING

Date of hearing:12/04/2024

Date of ruling: 30/04/2024

NGUNYALE, J.

The applicant has preferred the present application under Section 44 (1) (a) and (b) of the **Magistrate Courts' Act** [Cap 11 R. E 2019] "the MCA" and Section 79 (1) (c) of the **Civil Procedure Code** [Cap 33 R. E 2019] "the CPC" praying for the following orders; -

(i) That the court be pleased to call for and inspect the records of the District Court of Ilala District at Kinyerezi in Matrimonial Cause No. 24 of 2016 which tainted with illegality and material

irregularity and thereby revise the decision of that court made on 09th May 2017 in respect of propriety of inclusion of one farm at Kigamboni into matrimonial properties of the respondents herein and give such directions or orders as it considers necessary in the interest of justice.

(ii) An order nullifying or setting aside any award made to the effect that the said farm at Kigamboni was jointly acquired by the respondents, and thereby illegally awarding the said farm measuring 5.1 acres with the following boundaries namely: North Meshack Mdaki East: Kuruthumu Simba: South: River Mikongwa and West: Abdi Abdallah Mohamed.

(iii) An order nullifying or setting aside any transfer of ownership and or of possession effected in favour of or by the first respondent to any person in the farm located at Cheka area, Minondo Street, Kigamboni Municipality in Dar es Salaam to the first respondent herein, based on or arising from the purported division of matrimonial properties between the respondents herein upon dissolution of their marriage of which the applicant was not a party.

(iv) An order declaring that the farms described at paragraph (ii) above does not qualify to be one of the matrimonial assets mentioned in the judgment and decree of the District Court of Ilala at Kinyerezi in Matrimonial Cause No. 24 of 2016 as one farm at Kigamboni whose discerptions and locations are unknown.

(v) An order declaring that the farm described at paragraph (ii) above does not qualify to be one of the matrimonial property.

(vi) Costs be provided;

(vii) Any further or other relief deemed fit and just to the applicant.

The application is supported by an affidavit of the applicant and his advocate, Marietha Loth Molel. The applicant deponed that; he and the 2nd respondent co- owned a land measured 5.1 acres located at Cheka area, Minondo Street within Kigamboni Municipality in Dar es Salaam. The first piece of land measured 4.0 acres was purchased on 20th March 2012 from Abdi Abdalla Mohamed at consideration of Tanzania Shs. 16M which he paid vide seller's account. 10M was paid by the applicant and the remaining 6M was paid by the 2nd respondent. The second piece of land measure 1.1 acres was purchased on 14th July 2012 from Saleh Mubarak Dollah for the consideration of 4.3 million which he paid vide sellers bank account where he deposited the sum of Tanzania Shillings Three Million Three Hundred Only and the second respondent paid the remaining 1,300,000/- Tshs. Twenty Million and Three Thousand was full consideration for the disputed land measuring 5.1 acres in which the applicant paid 13,300,000/= Tshs through bank account and the 2nd respondent paid the remaining sum, which was Tanzania Shillings Seven Million only.

In his further averments the applicant stated that following the purchase of the disputed land, the applicant owned 66% of the suit land which is equivalent to 3.4 acres while the second respondent owned 34% of the piece of land which is equivalent to 1.76 acres based on actual payments made jointly. The said land was free from any encumbrances, disturbances, interference or trespass until on 11th December 2020 when the applicant visited the suit land. Upon visiting the suit land, he found unusual developments going on which the applicant neither knew nor initiated the same.

Upon inquiry he came to learn that the 1st respondent was the one who initiated those developments. She had acquired the whole farm following judgment and the decree of the District Court of Ilala arising from Matrimonial dispute between the couples (the first respondent and the second respondent). It was established that the 1st respondent (Emiliana N. Nyoni) had instituted Matrimonial Cause No. 24 of 2016 against her husband Aaron Loth Makulu, the 2nd respondent which ended with a decree of divorce and distribution of matrimonial assets. It was also noted that the case citation in the judgment and decree did not tally where the decree was titled as Civil Appeal No. 24 of 2016 and the judgment was titled as Matrimonial Cause No. 24 of 2016 where the

parties were the respondents herein and the suit was heard ex parte against the 2nd respondent and the respondent had listed among other properties, a farm in dispute as the matrimonial property. The said property was mentioned in the course of hearing and execution with uncertainty.

The applicant went on to state in his affidavit that there was no way he could have challenged the decision of the district court of Ilala because he was not a party therein and he was neither informed nor called to testify. He never knew of the existence of those proceedings until when he notices unusual developments on the farmland. He preferred objection proceedings at Ilala District Court vide Misc. Civil Application No. 53 of 2023 but the same was dismissed for being time barred. He stated further that from there he had no other option than to opt for revision to revise the said orders which gave the 1st respondent the farmland located at Kigamboni. He applied for extension of time and the same was granted on 8th September 2023 vide Miscellaneous Civil Application No. 446 of 2023 by this court. The affidavit of Marietha Loth Molel was in regard to what he discovered after perusing file in Matrimonial Cause No. 24 of 2016, facts which has been covered above.

The application was resisted by the counter affidavit of the 1st respondent who contested the averments of the applicant and his associates and the 2nd respondent who supported the affidavit of the applicant.

When the application was called for oral hearing on 12th April, 2024 the applicant appeared represented by Ms. Marieta Mollel learned Counsel whilst the first respondent appeared represented by Mr. Machibya and the second respondent by Mr. Peter Banna, both learned advocates.

Ms. Marieta submitted that the applicant filed an application for revision because he was not a party to the Matrimonial Cause No. 24 of 2016 before Ilala District Court. His only remedy was to challenge the matrimonial case through revision as stated in the case of **Denis T. Mkasa versus Farid Hamza & Another**, Civil Application No. 46/08 of 2018 where the court said that a person who was not a party to the case may challenge the decision through revision. In that way they brought the present revision. Earlier he preferred objection proceedings which was dismissed. The farm which has been mentioned in the judgment was not properly described. Throughout the proceedings there was no description of the farm at Kigamboni. The said farm was

improperly included in execution. The first respondent by using the very judgment executed a decree against the farm owned between the applicant and the 2nd respondent. In the proceedings the 1st respondent did not show how he contributed in acquisition of the said farm. On page 14 of the typed proceedings the 1st respondent said that there was a plot of which he did not know its description because his husband was doing his things secretly. She was not sure whether the property is located at Kigamboni or Bagamoyo or Mkuranga. From the wording of the 1st respondent means she did not know even the location of the said farm and thus she was not able to state what she claimed whether at Kigamboni or elsewhere. The decision of Ilala District court about the farm was for any farm which is located at Kigamboni because there was no description. They thought it is propriety to be considered in revision.

She went on to submit that the applicant who was not a party had no room to defend his rights over the suit land. The court to grant such order without him being heard means his right to be heard was waived illegally. Refereed the case of **M/S Flycatcher Safaris Ltd vs Hon Minister for Lands and Human Settlements Development & Another,** Civil Appeal No. 142 of 2017 the Court of Appeal at page 19 said that it is a cardinal principle in civil cases that a person should not

be condemned unheard. It is the prayer of the applicant that he was denied the right to be heard, besides insufficient evidence of the 1st respondent the court could not inquire more about the suit land.

It was the view of the applicant's Counsel that execution was impropriety. During execution the court broker was involved, in the proceedings the court broker is seen at page 31 of the proceedings as attached to the applicant affidavit. The proceedings are silent as to when he was appointed to execute the decree about the suit land at Kigamboni. At page 39 of the proceedings the court broker whose name is not mentioned prayed to be withdrawn from executing the court decree because he was not availed cooperation from the persons concerned. The court did not appoint another court broker instead at page 44 of the proceedings the 1st respondent said that he has completed execution process. There is no place showing that another court broker was appointed. Execution of immovable property like a farm is guided by Order XX1 Rule 12 (1) (a) and (b) of the Civil Procedure Code Cap 33 R. E 2019 which require that; in attaching immovable property sufficient description and specification of shares owned by the decree holder be established. In this case the decree holder did not comply to this requirement. The decree holder nowhere gave a

description of the plot and shares she deserves. In the case of **M/S Sykes Insurance Consultant Co Ltd vs M/S Sam Construction Co. Ltd**, Civil Revision No. 08/2010 Court of Appeal of Tanzania said that any execution must comply to order XX1 in respect of immovable property. In the instant suit there is nowhere the Ilala District Court complied to this position. The Court insisted that the decree holder must be satisfied that the property is owned by the judgment debtor, the proceedings are silent if that was done. They submitted that execution was a nullity for none compliance to important procedures, they prayed the execution order to be set aside. Even if the execution was ok still the applicant had significant share over the property.

In her further submission she submitted that the judgment and decree do not tally especially on the citation as deponed in the affidavit. At page 14 of the typed proceedings the court closed the evidence and set the judgment date. At that time the location of the farm was not known but the judgment came with the location of the farm that is Kigamboni. It is not known how the court came to get the proper location out of evidence adduced in court. They prayed the court to look on the propriety of all these and set aside the judgment. They prayed the court to grant all reliefs prayed in this application for revision.

In reply Mr. Machibya learned Counsel for the first respondent submitted that the ex parte judgment had a proper citation as Matrimonial Cause No. 24 of 2016. He prayed the court to adopt the affidavit of the first respondent to form part of the application. He complained that the application was filed after extension of time which was granted by this court but the applicant did not attach such judgment. Failure to attach such judgment is a fatal anomaly. In the affidavit there is no paragraph about extension of time. According to him the application is incompetent. He cited the Civil Application No. 5/01 of 2022 between **Ramadhan Bakari & 95 Others versus Aga Khan Hospital** where the Court of Appeal stated the importance of a certificate of delay as an important attachment in seeking an appeal out of time. The substance of this case the applicant wants the court to revise the judgment of the trial court. In his application he ought to attach the decision which gave him extension of time to file the same out of time. In that respect the court should find the application incompetent before the court for not attaching the ruling about extension of time.

About the right to be heard the 1st respondent counsel submitted that the person to inform the applicant about his right to be heard was

the 2nd respondent because they were partners and they were relatives. After exparte judgment the 2nd respondent happened to file an application to set aside exparte judgment but such application was not successful. It was Misc Civil Application No. 363 of 2017 at Ilala District Court. After he failed in such a case is when the applicant filed an application at Temeke District Land and Housing Tribunal instead of the 2nd respondent. The present application is the result of the dismissal of the said application before the tribunal. It was their submission that the applicant wants to use the court to overturn a lawful judgment in favour of the 1st respondent. Even the sale agreements are contradictory. In the sale agreement the name of the applicant was inserted after the agreement later. The boundaries are not clear. On observation it is clear that the agreements are not true, even the bank slip does not tell which farm he was buying. He prayed the application for revision to be dismissed and the ex parte judgment pronounced on 9th May 2017 to remain intact. Since the parties are relatives each party to bear his costs.

Mr. Banna submitted in reply that the applicant and his client claim the same interests. He supported the submission of the applicant that the execution process was unprocedural thus even the evidence about

location of the property was not certain but the magistrate came with certainty from unknown forum. Throughout his submission he referred the Court of Appeal Case of **Ms. Flycatcher** (supra), Order XX rule 50 and Order XXI Rule 12 both of Civil Procedure Code that execution should be legally proper with accuracy.

In rejoinder Ms. Molel submitted that para 19 of the applicant affidavit state clearly about extension of time which was granted by the court. She dismissed the arguments of the Counsel for the 1st respondent that the affidavit lacked such important averments. In concluding, she said that they reiterate their earlier submission in support of the application.

Having considered the application documented together with oral argument for and against the application, the issue for my determination is whether in circumstance of this case, the court can grant the orders sought. Before getting to this issue, I feel compelled to resolve first the issue of pleading and attaching ruling which extended time to the applicant to file this application as raised by Mr. Machibya in his reply submission.

I have perused the application documents; I am satisfied that it was pleaded that the applicant obtained extension of time as deponed

under paragraph 19 of the affidavit which shows that it was Misc. Civil Application No 446 of 2023 and the ruling thereto is attached. Without taking much of my energy, the argument is therefore rejected.

Now back to the application, it is undisputed fact that this application originates in Matrimonial Cause No. 24 of 2016 in which parties were 1st and 2nd respondents. From the chamber summons the court is called to make revision in terms of section 44 of the MCA and 79(1)(c) of the CPC which are reproduced below;

Section 44(1)(a)(b) of the MCA provides;

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

(a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay;

(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:

Paragraph (a) above carries the supervisory power of the High Court over the pending proceedings in the district court or court of resident magistrate in which it may call and inspect and give direction to such court for the interest of justice. On the other hand, paragraph (b) applies to proceedings which has been finalised in such case on application by any party or *suo motto*, the court if it thinks there is an error material to the case involving injustice may revise such proceedings.

Section 79(1)(c) of the Civil Procedure Code reads;

'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) N/A

(b) N/A

(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.

The above provisions give power to the High Court to invoke its revisionary power when the subordinate court exercise its jurisdiction illegally or with material irregularity. Generally, the court's power of revision can only be invoked; **one,** where there is no right of appeal; **two,** where right of appeal exists but has been blocked by a judicial process; **three,** where although a party has a right of appeal, sufficient reason amounting to exceptional circumstance exists; and **four,** where a person was not a party to the relevant proceedings. See **Nondo Kalolmbola t/a N.J. Petroleum SPRL & Another vs Broadgas Petroleum (TZ) Limited**, Consolidated Civil Application No. 165 of 2019 [2022] TZCA 395 (CAT at Dar es Salaam; www.tanzlii,org.tz; 27 June 2022).

The applicant in this case falls under the fourth condition that is, was not a party to Matrimonial Cause No. 24 of 2016. The main reason advanced by the applicant for this court to invoke its revisionary power over the district court proceedings is that a farm of 5.1 acres was given to 1st respondent while it did not form part of the matrimonial property and was not given right to be heard. On his part Mr. Machibya stated that the application was supposed to be informed of the pending matrimonial proceedings by the 2nd respondent who is his relative.

Right to be heard is one of the tenets of the rules on natural justice which has constitutional recognition under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time which directs that, when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to among others, a fair and full hearing. The law is settled that any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at, had the affected party been heard. See **Director of Public Prosecutions vs Rajabu Mjema Ramadhani**, Criminal Appeal No. 223 of 2020 [2023] TZCA 45 (23 February 2023; TANZLII).

In this application while I agree that every person must be given a right to hearing before adverse decision is pronounced against him, in the circumstance of this case, I think, it cannot be said the applicant was to be given the right to be heard in Matrimonial dispute which mostly concern married couples. As to listed properties there is no evidence presented to the court that the applicant had interest in the farm. That is to say that the district court was unaware of the interest of the applicant in the farm located at Kigamboni when dealing with the issue of division of matrimonial assets between the respondents here.

Likewise, the court could not have given him right to be heard because he had no interest in the Matrimonial dispute. In the case of **Grand Regency Hotel Limited vs Pazi Ally and Another**, Civil Application No. 368 of 2019 [2022] TZCA 539 (6 September 2022; TANZLII) the court stated

> *'Thus, a person's right to be heard, in our view, is not achieved by merely joining one to the judicial proceedings like the applicant would like in this case. The person joined to the proceedings must be able to be fully heard on his rights in a legal cause to be presented. We are settled in our mind that in order for a full and meaningful enjoyment of a right to be heard, the court affording such a right to a litigant must be competent to fully hear the matter and finally determine the rights of the parties involved in the dispute.'*

From the above, a follow up question is; can the court revise proceedings of which the applicant has no interest in it? does the applicant has no other remedy to claim his interest in the landed property? The first posed question is answer by looking at the purpose behind revision which is to examine the record with the view to satisfy as to its correctness, legality or propriety of any finding, order or any decision made thereon. Here comes the argument of the applicant's counsel that the district court decision is tainted with failure to describe

the farm sufficiently and erroneously given to 1st respondent (para 11 and 13), that evidence was not given as to where exactly the farm was located (para 12), case number in the judgment and decree did not tally (paragraph 10).

I have given thorough thought to the complaint and arrived to the view that to address those complaint there is a need to look at the scope of the court in revision proceedings. In **Patrick Magologozi Mongella vs The Board of Trustees of The Public Service Social Security Fund**, Civil Application 342 of 2019 [2022] TZCA 216 (TANZLII; 22 April 2022) the court had opportunity to deal with the meaning of correctness, legality or propriety of any decision and regularity when dealing with the application for revision like the present one. After referring to some India Laws and decision, the court stated;

> *'... In determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of*

natural justice and fair play. None of these endeavours will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority on a first appeal by re-hearing the case on fact and law and coming up with its own findings of fact. Any suggestion that the Court can re-hear and re- appreciate the evidence when exercising its revisional jurisdiction will obliterate the distinction between the Court's appellate authority and its power of superintendence, respectively....'

In this application apart from the raised issue not being within the scope of revision, those complaints have been raised by a third person who was not party to the proceedings. In my view complaint which does not touch right to be heard cannot be raised by a third party who was not a party to the proceedings sought to be revised, this right is only available to person who were parties to the case. Revision by a person who was not party to proceedings is only limited to establishing that the decision was given against his interest without being given opportunity to be heard and there is no any other remedy but revision only.

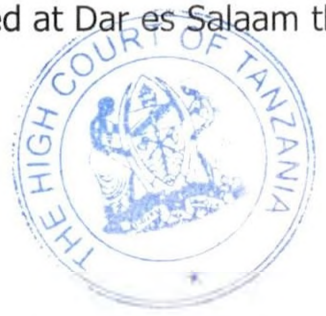
In this application because the district court was dealing with matrimonial dispute which did not concern the applicant, so the applicant had no any interest in such proceedings before the district court for him to be heard. This is so, because even in the affidavit the

applicant has narrated that the farm is jointly owned with the 2nd respondent and to prove that he attached purchasing agreement, the facts which is contested by the 1st respondent. By the way, the district court did not decide the issue of ownership rather it was from uncontested evidence of the 1st respondent that the farm at kigamboni was part of the jointly acquired property with the 2nd respondent. If the applicant wants to assert his ownership over the 5.1 acres located at Kigamboni, he can refer the matter to the competent court having jurisdiction over land matters for it to make decision over ownership.

In other words, since the jurisdiction of courts is a creature of statute, land ownership cannot be adjudicated in matrimonial dispute as the applicant wishes this court to hold, the order of the district court distributing the farm to the 1st respondent has not blocked right of the applicant to claim his right and share over the landed property by way of objection proceedings or instituting a new suit subject to time limitation.

From what has been endeavoured above, this application is not maintainable, consequently I hereby strike out the application.

Dated at Dar es Salaam this **30th** day of **April, 2024.**



D.P. NGUNYALE

JUDGE

Ruling delivered this **30th** day of **April, 2024** in presence of Marietha Mollel for the applicant who is present, Peter Banna for the 2nd respondent, second respondent in present in person.

D. P. NGUNYALE

JUDGE