IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA SUB-REGISTRY

AT SUMBAWANGA

CIVIL REVISION NO.02 OF 2023

(Originating from Application for Execution No.2 of 2018 Sumbawanga District Court, Civil Appeal No. 03 of 2014 Originating from Civil Case No.21 of 2000 of the District Court of Sumbawanga)

BETWEEN

MORIS MBILINYI .....1ST APPLICANT

HAIBE MOHAMED ABDALA.....2ND APPLICANT

VERSUS

COSTANTINO NZUMI .....1ST RESPONDENT

THERESIA NZUMI.....2ND RESPONDENT

CRDB BANK LTD.....3RD RESPONDENT

SALUM S AMOUR (COURT BROKER) .....4TH RESPONDENT

Last order: April 9, 2024
Ruling: May 28, 2024

RULING

NANGELA, J.:

The applicants herein applied to this court for revisionary orders through an application premised under Sections 79 (1) and 95 of the Civil Procedure Code, Cap. 33 R.E 2019. The application was brought to the attention of this Court by way of a chamber summons supported by an affidavit deponed by Mr. Ladislaus Rwekaza, the Advocate representing the applicants.

In their application, the applicants are seeking for the following orders:

1. That this honourable court be pleased to call for and examine the correctness, legality, propriety and or otherwise of the ruling of the Hon. Ndelwa-DRM of the Sumbawanga District Court in Application for execution No. 02 of 2018, due to the material errors committed on the proceedings for execution.
2. Costs of this application be granted for.
3. That, this honourable court to give as it considers necessary in the interests of justice.

Earlier this court had directed the parties to dispose of this matter by way of written submissions. The parties duly complied with the directions of the court and filed their respective submissions. I will consider their arguments for and against before I render my own verdict regarding whether the prayers sought by the applicants in this application should be granted or denied.

Submitting in support of this application, Mr. Rwekaza, the learned counsel for the applicants, contended that, in year 2000, the applicants and the 3rd Respondent had filed a suit at the Sumbawanga District Court, Civil Case No.21 of 2000 for declaratory orders that the Applicants are the

owners of a piece of land identified as Plot No. 120 Block KK and Plot No. 99 Block KK Jangwani area, Sumbawanga municipality.

He submitted that the said suit was heard on merit and the court nullified a sale of those respective properties. Aggrieved by the decision of the court, the Applicants herein preferred an appeal, DC Civil Appeal No. 3 of 2014 before the High Court at Sumbawanga. Having heard the appeal, his Lordship Mgetta, (as he then was) dismissed it on the 16th day of November 2017, for lacking merits.

Mr. Rwekaza submitted that, still aggrieved, the applicants filed an application (Misc. Civil Application No.18 of 2018) for extension of time to file a Notice of Appeal to the Court of Appeal. This was heard by his lordship, Dr. Mambi, J., who granted the applicants 21 days to appeal to the Court of Appeal. He submitted that the order that arose out of that ruling was contrary to what the applicants had prayed for in Misc. Civil Application No.18 of 2018. He contended that the applicants had lodged a Notice of Appeal to the High Court to challenge judgment and decree on the Civil Appeal No.3 of 2014 by Hon. Mgetta, J (as he then was).

He submitted that, later, the applicants filed Civil Application No.26 of 2018 seek for leave to appeal to the Court of Appeal of Tanzania. However, his lordship Mrango, J (as he then was) refused the application, a fact which forced the applicants to move ahead for a second bite by lodging an

application (Civil Application Np.283/09 of 2019) before the Court of Appeal of Tanzania.

He contended that when such was heard by the Court, serious irregularities were pointed out in the ruling of this Court in the Misc. Civil Application No.18 of 2018. On that premise, he submitted that the applicants went ahead to file an application for extension of time (Misc. Civil Appl. No. 22 of 2021) with a view to file a review of the ruling of this Court (Dr. Mambi, J) in Misc. Civil Application No.18 of 2018. On the 18th of August 2022, His Lordship Nkwabi, J. heard and granted the application.

Mr. Rwekaza submitted that, on the 24th of August 2022, the applicants filed Misc. Civil Application No.21 of 2022 seeking for review of the ruling of this court, (Dr. Mambi, J.,) in the Misc. Civil Application No.18 of 2018. He contended that when the same was pending before His Lordship Mruma, J., the applicants filed an application for stay of execution before the Sumbawanga District Court, to wit, Misc. Civil Application No.19 of 2022 praying that the Sumbawanga District Court should stay proceedings in execution No.2 of 2018 originating from the Civil Case No.21 of 2000.

Mr. Rwekaza submitted that, on the 21st of April 2023, Hon Ndelwa, SRM dismissed the said application for being incompetent and proceeded to grant the application for execution in favour of the 1st and 2nd Respondents. He

submitted that; such a decision is what prompted this current application for revision.

Having accounted for such a background and adopted the contents of the supporting affidavit filed in support of this application, it was Mr. Rwekaza's contention that, paragraphs 5 to 19 of the said affidavit do disclose grounds upon which the application is premised.

He argued that the decision by Mrs Ndelwa SRM, is tainted with illegalities and material irregularities. He contended that, in the first place, the District Court of Sumbawanga did not afford the applicants their rights to be heard in respect of why the execution should not be taken against them but proceeded to determine the said application for execution. He submitted that such was a sufficient material irregularity warranting the intervention of this court as the execution proceedings were conducted inconspicuously and were one-sided.

He relied on the case of **Mbeya-Rukwa Autoparts and Transport Ltd vs. Jestina George Mwakyoma** [2003] TLR 251 and submitted that, it is trite law that a denial of right to be heard will vitiate entire proceedings. He contended that, since the learned District Court Magistrate failed to afford the applicants with their right to be heard, the proceedings and the ruling arrived at by that court in the Misc. Civil Application No.02 of 2018 should be declared a nullity.

He submitted that, as a matter of law and prudence, since there was a pending application for review, to wit the Misc. Civil Application No.21 of 2022 in respect of the same matter, the District Magistrate Court of Sumbawanga ought to have stayed the execution proceedings pending determination of the application for review which was already filed in the High Court of Tanzania at Sumbawanga.

Besides, Mr. Rwekaza contended that, the District Court of Sumbawanga has slipped into errors when it continued to hear and grant the application for execution to the 2nd respondent while the same was already reported to be deceased and the court failed to observe the requisite procedures in that respect. He submitted that, it is clear and on record that, when the Civil Application No. 283/09 of 2020 was scheduled for hearing by the Court of Appeal, the learned counsel for the 1st and 2nd respondent informed the court that the 2nd respondent had died since the 26th of January 2021.

To strengthen his submission, he additionally relied on the proceedings in the Misc. Civil Application No. 567/09 of 2021 which sought to add a legal representative of the 2nd respondent to the proceeding which were pending before the Court of Appeal at the time. He urged this court to take judicial notice of such proceedings in terms of section 58 and 59 of the Evidence Act, Cap.6 R.E 2022.

He contended that, the failure to adhere to the procedure of joining a legal representative of the 2nd

Respondent to the execution proceedings and proceeding to issue the ruling on the 21st of April 2023 in favour of the 2nd respondent was a fatal irregularity sufficient to nullify the proceedings which were a nullity because such a decree holder had already passed on since the 26th of January 2021.

He contended that there was a contravention of Order XXII Rule 3(1) of the Civil Procedure Code, R.E 2019. Reliance was also placed on the case of **Sharifu Nuru Muswadiku vs. Razaka Yasu Mswadiku Chamani**, Civil Appeal No.48 of 2019(CAT)(Bukoba) (unreported).

Mr. Rwekaza submitted further that, the application before the District Court was filed under a no-existing form No.CC 10 which had already been nullified by the Chief Justice after approving new forms in relation to executions, (No. F-5) as per G.N. No.388/2017 on the 30th of August 2017. On that account, he contended that the District Court ought to have declined to entertain the application.

In yet a further submission, Mr. Rwekaza argued that while the Judgment issue by Hon. R.N Mugissa- SRM nullified the sale of Plot No. 120 Block KK and Plot No. 99 Block KK, located in Jangwani area, Sumbawanga Municipality, the order issued by Hon. Ndelwa ordered the suit property to be handed over to the 1st and 2nd respondents, hence conflicting with the earlier orders of the same court.

Relying on the case of **Marwa Mahende vs. Republic**, [1998] TLR 249, he submitted that this being a superior court to the District Magistrate's Court, it has a duty

of ensuring that there is compliance with the law by all courts below. He urged this court to grant the prayers sought and nullify the ruling and all consequential orders given in the execution proceedings in respect of the Application for Execution No. 02 of 2018. He also prayed for costs of this application.

On the 13th of November 2023, Mr. Mathias Budodi, learned counsel representing the respondents, file a reply to submission to Mr. Rwekaza's main submission filed. In his submission, he contended that, having gone through such submissions, his position is that the application has no merits and ought to be dismissed with costs. Mr. Budodi contended that, the ruling made by Hon. Ndelwa, SRM in the Application No. 2 of 2018 was fair and just as neither was it tainted by irregularities nor was there illegalities committed by the trial court while attending its proceedings.

He contended that, there was no miscarriage of justice by any means possible. He urged this court to take note of the fact that neither was the ruling nor the proceedings of the District Court of Sumbawanga at Sumbawanga attached to form part of this application for revision, a fact which renders this application incompetent as per section 79 of the Civil Procedure Code, Cap.33 R.E 2019.

Mr. Budodi submitted that, the applicants' contention that the District Court of Sumbawanga denied them right to be heard was a misleading and fallacious argument and one that is utterly misconceived. He argued that such was not

substantiated as during the hearing of the Misc. Civil Application No. 2 of 2018, the applicants were fully represented by advocates from C/O RWELA LAW ADVOCATES, and the trial court adhered to all tenets of a fair trial as before its ruling the applicants was accorded right to be heard, thus making the allegations of denial of such a right fallacious.

Mr. Budodi argued that the argument advanced to the effect that the trial court had slipped into an error when it dismissed the application for stay and proceeded to hear and determine the execution proceedings while there was a pending application for review, i.e., the **Misc. Civil Appl. No. 21 of 2022** is also erroneously presented due to the fact that, the application for the stay of the execution, (i.e., Misc. Civil Application No.19 of 2022) was filed out of time. He contended that, since it was filed out of time, it was right for the trial court to have it dismissed with costs. He contended, therefore, that, in so doing, it cannot be said that the trial court slipped into an error as the applicants want this court to believe.

Besides, it was Mr. Budodi's submission that, the mere filing of an application for review, revision or even filing an appeal to a higher court, does not grant a party an automatic stay of execution. He charged that, the judgement debtors are duty bound to file an application to the court and show sufficient cause for the granting of a stay of execution, such

being a requirement of the law as per Order XXI Rule 24 (1) of the Civil Procedure Code, R.E 2019.

He added that, as a matter of principle, an application for stay of execution must be filed within prescribed time failure of which entitles a court to have it dismissed as per section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2019.

Mr. Budodi contended that in the affidavit sworn by Mr. Rwekaza, nowhere is it stated that after the dismissal of the Msc. Civil Application No. 19 of 2022 the applicants took any steps to appeal against that decision, meaning that they were contented with the dismissal order. Mr. Budodi replied as well to the contention that the trial court has slipped into an error where it proceeded to hear and determine the application for execution to the extent of and granting victory to the 2nd respondent while such a respondent had already passed on and no procedure was adhered to after the 2nd respondent had been reported to be died.

In his submission, Mr. Budodi submitted, that, as the records will show, on the 24th of May, 2021 one, Advocate Lwila, did address the court that the 2nd decree holder has passed on and, on the 12th day of February 2022, Advocate Budodi addressed the court informing it that the 1st decree holder had been appointed to be the administrator of the estate of the deceased (the 2nd decree holder) by a letter of appointment. For him, since the 1st respondent was a party to the case, there was no need to apply that he be joined to the case to which he was a party. He contended, therefore,

that the proceedings and the ensuing orders therefrom were all given in the present case of a legal representation who was himself a party to the case.

For that reason, he contended that, Order XXII Rule 3 (1) of the CPC could not have been applied as such could have been the case where the legal representative was not already a party to the proceedings.

Concerning the applicants' contention that the Misc. Civil Application No.2 of 2018 was filed under a non-existing form CC-10 while that form had already been nullified by the Honourable Chief Justice and new forms were put in place since 2017, Mr. Budodi argued that since there was no miscarriage of justice and the court had jurisdiction to grant the orders sought, any irregularity in relation to forms could, through the overriding objective principle be taken care of. Reliance was placed on the decision of this court in the case of Chela **James Ghanai & Another vs. Deogratius Ndanu**, Review No. 02 of 2020, (HC) (Tabora) (unreported).

He submitted that the way the trial court was moved in the Misc. Civil Application No.2 of 2018 did not in any way possible prejudice the applicants and the same did not occasion any miscarriage of justice. On that account, Mr. Budodi urged this court to make a finding that this application lacks merit and should be dismissed with costs.

Through their Advocate Mr. Rwekaza, the applicants filed a brief rejoinder submission reiterating what was submitted in-chief and the contents of the affidavit sworn by

Mr. Rwekaza. He argued that, although the Respondent has contended that failure to attach the ruling of the court renders the application incompetent, this court should reject such a proposition and refuse to be bound by technicalities as the same does not occasion a miscarriage of justice.

He contended that the trial did not afford the applicants a chance as regards the exhaustive improvements made to the suit premises on Plots No. 99 and 120 Block KK Jangwani area, within Sumbawanga Municipality. It was his contention that, having dismissed the application for a stay of execution, the trial magistrate ought to have proceeded to hear the application for execution by giving the applicants right to be heard and show cause why execution should not be taken against them.

Concerning infringement of Order XXII Rule 3 (1) of the CPC, the applicants' counsel rejoined that, the respondents' counsel is misleading the court as the District Magistrate Court of Sumbawanga did not address such an issue and the name of the Respondent never got substituted to include that of the administrator of estate, hence, a material irregularity.

He also rejoined that, since the application was filed under non-existing form, the judgment and decree in Civil Case No.21 of 2000 by Hon. Mugissa – SRM nullified the sale of Plot No.120 and Plot No. 99 Block "KK" but the order of Hon. Ndelwa had the effect of delivering the suit premises to the 1st and 2nd Respondents. He contended that such was an

error that goes to the root of the matter and the case of Chela James Ghanai (supra) was distinguishable. He urged this court to grant the prayers sought by the applicants.

I have carefully considered the rival submissions. The issue which I am called upon to address is whether the current application has any merit in it. Before I go to the lengthy submissions, if I will need to, let me start by one fundamental issue raised by the learned counsel for the respondents, that is, the non-attachment of the ruling and proceedings of the District Court to the application, a ruling and proceedings which the applicants want this court to revise.

The learned counsel for the respondents has contended that such a failure is fatal as it renders the application incompetent. If so found, it will mean that the same will have to be struck out without wasting much time. In his rejoinder submission, the applicants' counsel seems to concede that such a vital document was not attached to the application but contends that such is correctible as it does not occasion injustice.

The issue for me is whether such a failure is fatal. I think it is fatal omission. I find it be so because, how then will this court be able to appreciate what the applicants are asserting if the decision which they seek to revise is not attached to the application for revision?

To back up that position, I find that the decision of the Court of Appeal in the case of **Amos Flugence Karungula**

vs. Kagera Co-operative Union (1990) Ltd, Civil Application No. 2 of 2013, (CAT) (at Bukoba) (unreported) is quite instructive and still valid to an application like the one at hand, even if the laws applicable to this court are different from those applied by the Court of Appeal. To me, what matters from this authoritative decision of the Court of Appeal is the principle it has enunciated regarding application for revision and how such be 'garbed'.

In that case, the Court of Appeal, while considering an application for revision, and noting that several documents including the record of the lower court and the orders which the applicant sought to be revised were not attached to the application, had the following to say:

> "The position ... is now settled on the legal premise that copy of proceedings, judgment/ruling and Decree/order are mandatory part of applications seeking to invoke the revisional jurisdiction of the Court. *In The Board of Trustees of The National Social Security Fund (NSSF) vs. Leonard Mtepa,Civil* Application No. 140 of 2005, (unreported) the Court was presented with a question whether an application for revision which lacked record of proceedings of the High Court subject of proposed revision, was complete record for us to exercise

> our jurisdiction of revision. We said: "...This Court has made it plain, therefore, that if a party moves the Court ... to revise the proceedings or decision ..., he must make available to the Court a copy of the proceedings of the lower court or courts as well as the ruling and, it may be added, the copy of the extracted order ... An application to the Court for revision which does not have all those documents will be incomplete and incompetent. It will be struck out. "

In that case the decision which was sought to be revised was of the High Court and the Court of Appeal laid down such a settled legal position. If that be for a decision of the High Court, it will be even more demanding in respect of a revisionary matter laid before this court where the proceedings and ruling of a lower court which an applicant seeks to be revised are not attached to his or her application. In my humble view, the same principle will equally apply.

In that above cited case of **Amos Flugence Karungula** (supra), the Court of Appeal of Tanzania, citing its own subsequent decision made in the case of **Chrisostom H. Lugiko vs. Ahmednoor Mohamed Ally**, Civil Application No.5 of 2013 (unreported), added that, the rationale for attaching such documents is to furnish a fuller picture of the dispute before the Court can exercise its

discretionary power of revision. In that latter case the Court of Appeal stated as follows:

> "...we are unable to say anything meaningful in relation to Land Application No. 25 of 2007 because we are not seized with all the proceedings relating to the said application. As such we cannot step in and make an order of revision over something we do not have the full picture."

From such a premise, the Court of appeal could not save the sinking boat of the applicant even of the applicant had argued that the court should, it being a court of justice. Such argument is equally as what the applicants herein made in their submission contending that this court should not be tied up by technicalities but should strive for substantive justice.

Indeed, that is the priority of any court, but the underlying circumstances must permit it to do so, including that of being fully furnished with the materials that paint the whole picture regarding the matter for which it (the court) is being called to exercise its revisionary jurisdiction upon. Failure to attach all such requisite documents sought to be revised deprives the court of such an opportunity.

In the case of **Amos Flugence Karungula** (supra) the Court of Appeal was very clear that:

> "The duty to attach record of proceedings ... required before the

> Court can be moved in revision is strictly placed on the applicant seeking such revision.

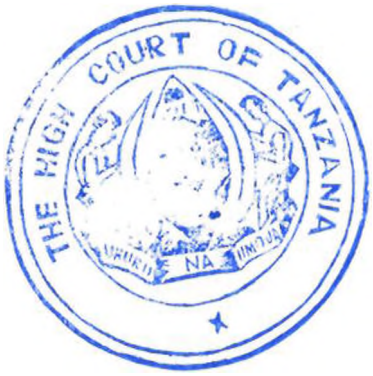
To show the strictness of the matter, the Court was also very categorical that where an applicant fails to properly dressed-up his/her application for revision in the manner as the Court had stated, such an application cannot be salvaged, even if the respondent had included in his/her affidavit in reply, the documents that are missing from the application. That will not salvage the application.

From that context, it is my finding that, since the applicants had not attached the proceedings and the ruling/order of the lower court which they crave that this court should look at and, under section 79(1) and 95 of the Civil Procedure Code, Cap.33 R.E 2022, exercise its revisionary powers there upon, the current application is deprived of its competence. That being the case, it cannot be heard and be fully determined by this court in the exercise of revisionary jurisdiction under such provisions upon which it is premised while the vital documents which ought to have been attached to make it sufficiently and properly dressed up are missing.

Being incompetent, the only deserving action is to have it struck out with costs. In the upshot, and without considering the merits of the rest of arguments and issues raised in this application, I hereby struck it out with costs.

Order accordingly.

DATED AT SUMBAWANGA ON THIS 28th DAY OF MAY 2024



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DEO JOHN NANGELA

JUDGE

Right to Appeal is Fully Explained.