

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

MISC. LAND REVISION NO. 16 OF 2023

REF. NO. 20230920000528090

*(Arising from Civil Case No. 18 of 2021 and Application for Execution No. 03 of 2023 at
Resident Magistrate Court Musoma)*

AYUBU ISACK 1ST APPLICANT
BHOKE MARWA 2ND APPLICANT
AMOS WAMBURA MWIKWABE 3RD APPLICANT
DOMINIC JOSHUA 4TH APPLICANT

VERSUS

ANNA MNANKA RESPONDENT

RULING

09th & 31st May, 2024

M. L. KOMBA, J.:

In this application, applicants praying for the following orders;

- (i) This court be pleased to call for and revise the order of the resident Magistrates' Court at Musoma in Execution No. 03 of 2023 dated 11/8/2023.*
- (ii) That this court look into and decide on the legality, correctness and propriety of the order.*

The application is made by way of Chamber summons and affidavit sworn by all applicants. When served with affidavit, the respondent raised Preliminary Objection with four points. The matter was scheduled for hearing and parties has to argue the PO before the main Application.

On the day set for hearing, applicants were represented by Mr. Baraka Makowe, while respondent had a legal service of Mr. Emmanuel Gervas both are advocates. For easy of clarity, points of objection read:

- 1. That the applicant contravenes the provision of law for filing this application which amount to time bared.*
- 2. That the applicant contravenes the provision of law for failure to determine that application for revision is not an alternative of appeal.*
- 3. That, the applicant contravenes the law for failure to determine that application for revision is incompetent and bad in law as the applicants have no legal effects against the decree holder granted by the trial court.*
- 4. That, this application is bad in law for non-joining the third necessary party who was the party to the original case which violate the principle of right to be heard and also this application become new case which have no referred case.*

Arguing for the PO Mr. Gervas informed this court he opted to abandon one point and started with the background to the matter that Revision No. 16 of

2023 originated from Civil Case No. 18 of 2021 and Execution No. 03 of 2023 at Magistrate Court Musoma. It was his submission as per second point of objection that application of the execution was preferred after the appeal No. 01 of 2023 by applicants were withdrawn and on 11/8/2023 the execution completed and respondent was given the disputed land which is mining pit (*duara*) for mining activities. The area was latter on fenced.

It was his further submission that this revision is filed as alternative to appeal and referred the case of **Halais Pro-Chemical vs Wella A.G**, [1996] TLR 269 that the power of revision is within the court itself and cannot be an alternative to appeal. The same was precedented in **Hassan Ng'anzi Khalfan vs Njama Juma Mbega (legal Representative of The Late Mwanahamisi Njama) & Another (Civil Application No. 218 of 2018) [2020] TZCA 32 (20 February 2020)** where Justices cited the case of **Moses Mwakibete vs the Editor Uhuru and 2 Others**, 1995 TLR 134 and **Transport Equipment Ltd vs Devlam P. Valambya** 1995 TLR 161 that except under exceptional circumstance the part cannot file revision as an attentive to appeal.

Counsel went on informing this court that applicant were parties in case No. 18 of 2021 and execution was done legally and averred that if they were not

satisfied on what was done during execution, they were supposed to move the court by appeal and not revision. He insisted the application has no merit as is opted as an alternative to appeal against orders by the Magistrate Court.

On the third point he submitted that applicants were not affected by the order of the Resident Magistrate Court of Musoma issued on 11/8/2023, as the award was directed to different person/party who are Members of Mining Pits No. 162 and 163 (Wanachama wa Maduara 162 na 163) and not applicants herein. Further, he said the execution of award was against Members of Mining Pits No. 162 and 163 who did no object. By his submission he prays this court to find the application is bad in law.

Arguing for the last point Mr. Gervas submitted that applicants fail to join important party as Civil Case No. 18 of 2021 involved nine (9) parties and applicants were among them and the important party was Members of Mining Pits No. 162 and 163 but the current application, as submitted, is between four applicants against the respondent. He complained that there are other parties who were not joined including Members of Mining Pits No. 162 and 163. It was his firm submission that action of non-joining other party makes the application to be new as it lacks connection with the Civil Case. Referring the case of **Attorney General vs Maalim Kadau & 16**

Others (Civil Application 51 of 1996) [1997] TZCA 84 (26 February 1997) he said the court insisted that parties have to remain constant and that non joined party were infringed their right to be heard. From what he has submitted, he prayed me to dismiss the application with costs.

Responding to what has been submitted, Mr. Makowe started with the last point about non joinder of parties. It was his opinion that who goes to court is one believe to be affected. He wonders if the interpretation of the case of **Kadau** is correct that all parties have to go to court. It was his submission that it is applicants who were aggrieved by the order of the court issued on 11/08/2023. To him it is not possible that even others who were not affect has to come to court for the purpose of maintaining the number.

Submitting on the second point which is effect of the decree, he submitted that what make them before this court is order of the court issued on 11/8/2023 and not the decree. He further submitted that decree affects many people as *members of mining pits* is not a single person and that the issue that it does not affect applicants herein needs evidence. It was his position that this point lacks qualities of PO.

On the second point, he submitted that under the law, appeal and revision are two different things and they apply for revision of non-appealable order. He said by this PO he will be in a position to know if section 74 of the Civil Procedure Code, Cap 33 (the CPC) is appealable. He submitted that the cited section is about appealable orders but execution is not among them while insisting that Mr. Gervas did not say if execution is appealable. He prays the PO to be overruled with costs.

During rejoinder Advocate Gervas insisted that the order issued on 11/8/2023 originated from Civil Case which was decided on 15/12/2022. He insisted that execution was not objected and there was no appeal so applicant can't jump to revision while execution was not objected or appealed. About interpretation of section 74 of the CPC he said sub paragraph (1) (b) and (h) permit the affected party to appeal. About execution he was brief that the law is clear that they were supposed to object rather than filing revision.

I have carefully gone through the submissions advanced by counsel for both parties. First, I have to address whether argument raised by the counsel for the respondent qualify to be termed as Preliminary Objection. The law governing PO was elaborated in the case of **Mukisa Biscuit**

Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A 696

where Sir Charles New Bold stated that;

'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'.

As hinted, application was supported by affidavit of applicants, and ruling issued on 11/8/2023 and judgment on Civil case No. 18 of 2021. The complain by applicants is elaborated in affidavit specifically at paragraph 4 and 5 that judgment debtor were not identified and the order is equivocal. This is pleading and I find the PO is properly raised. The second issue is whether it is meritorious.

Respondent attack the application for non-joining of parties as per ruling issued on 11/8/2023. Before deciding on whether is mandatory to join parties in subsequent application or appeal, it is important to note this application originate from execution proceedings. I agree with Mr. Makowe that only aggrieved party has to go to court. I also agree with counsel Gervas that a

party whom execution was ordered against, are not among the applicants on this review. Mr. Makowe submitted that only aggrieved party has to go to court, which is true but the question is; they have to go to court under what forum.

In the application at hand, the execution had only three parties. Respondent herein who appeared as the decree holder on one side; Members of Mining Pits No. 162 and 163 who correctively were judgment debtors on the other side. Applicants were not party in execution. As submitted by Mr. Gervas, if party was aggrieved by execution which was not party the remedy is to file objection proceedings, being the third party to a suit they may object proceedings if is satisfied that execution affects them or else were supposed to appeal.

In the application at hand, applicants were not party, they did not object execution and did not dispute that fact as the order attached in chamber summons reveal. However, they pray to this court to review order which is not directed them as they were not part. If they found themselves to be interested or affected in any way concerned by the said order, the law is clear, they were supposed to file objection proceedings. See the case of **Juma Issa (administrator of the Estate of Issa Feruzi) and 3 Others**

**vs Charles Ndessi Mbusiro (PC Probate Appeal 11 of 2019) [2020]
TZHC 1536 (27 July 2020)**

Basing on paragraph 1 of their affidavit, applicants were defendants in the civil suit where the respondent was the plaintiff, them being defendants were in a good position to appeal against all which, they found was not proper. Court of Appeal in several occasion warn the use of revision as an alternative to appeal unless there are exception circumstances. See **Mantrac Tanzania Ltd vs Junior Construction Co. Ltd & 3 others, Civil Application No. 552/16 of 2017, Kempinski Hotels S.A vs Zamani Resorts Ltd & Another (Civil Application No. 94 of 2018) [2019] TZCA 507 (12 December 2019), Felix Lendita vs Michael Longidu (Civil Application 312 of 2017) [2018] TZCA 299 (10 December 2018) and Yara Tanzania Limited vs DB Shapriya & Company Limited, Civil Application No. 345/16 of 2017 (all unreported),**

So far as the second point of objection has merit and I find no need to analyse other points. This revision has been preferred as an alternative to

appeal which is not commendable practice. For that matter the PO is upheld, the application is hereby dismissed with costs.

DATED at **MUSOMA** this 31st day of May, 2024.



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M. L. KOMBA
Judge