

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 30 OF 2023

(Arising from Court of Resident Magistrate of Dar es Salaam at Kisutu

Execution no 95 of 2020)

MICHAEL NDONGO NGUDUNGU..... APPELLANT

VERSUS

JASMINE BAHASHA SALUGOLE..... RESPONDENT

RULING

29th Jan & 12th February, 2024

KIREKIANO, J.:

This ruling is on a preliminary objection raised by the respondent to the effect that, this court under order XXI Rule 10 (2) a- j and (3) of the Civil Procedure Code [RE 2019], lacks jurisdiction to determine the application for revision filed by the applicant.

For coherence purpose in this ruling, I find it pertinent to preface my ruling by giving a brief background of this application.

The parties herein were spouses, their union came to an end by decree of divorce which also ordered division of matrimonial assets. This was before the Court of Resident Magistrate of Dar es Salaam at Kisutu, in

matrimonial cause no 19 of 2020. On reasons of non-appearance, the trial court entered an ex parte judgment against the respondent herein. The parties' relationship was extended by court proceedings and litigations particularly on execution of order of division of assets.

The applicant therefore filed execution proceedings no 95 of 2020 seeking execution of the decree particularly, attachment and sale of a motor vehicle with registration number T311 DKM.

These execution proceedings resurrected the respondent's appearance, she made an application (misc. civil application no 166 of 2022) before the trial court for an order to set aside ex parte judgment so that she could be heard. This application was granted on 25/05/2023 and consequently, the execution proceedings of the ex parte decree were overtaken by this event. The learned Resident Magistrate in charge presiding over the execution proceedings on 02/08/2023 made an order thus;

Since the ex parte judgment leading to this execution has been set aside it means there is no more decree to execute.

The application for execution ends here naturally'

The trial court went on to make an order uplifting the order of attachment of the said motor vehicle.

Based on this order, the applicant under section 79 (c) of the Civil Procedure Code Cap 33 [RE 2019] seeks this court to revise the proceedings of the trial court in the execution proceeding, set aside the order uplifting the attachment of the motor vehicle, and make appropriate orders.

The application is contested by the respondent who filed a counter affidavit and preliminary objection challenging jurisdiction of this court to revise interlocutory order, in the alternative, the respondent argues that this court lacks jurisdiction because the applicant was supposed to apply for restoration of the execution proceeding if he had good reason for non-appearance or he could have appealed against the order if sufficient reason were established.

In support of the objection, the counsel for the respondent Mr. Omary Msemo, took a stance that the impugned order was interlocutory in nature thus given section 43 (2) of The Magistrate Court Act Cap 11 the application for revision shall not lie to the high court.

In support of this proposition, he cited the decision **Fatma Salmin vs Shamim M. Thakur (4 of 2011) [2011] TZHC** to the effect that appeals and applications for revision from subordinate courts, if are against

orders/decisions which do not finally determine the suit are barred, meaning that they shall not lie to the High Court.

Alternatively, the counsel for the respondent argued that the applicant could have invoked the provision of section 95 of the Civil Procedure Code for restoration of the proceeding if he had good cause for non-appearance.

As such, the counsel for the respondent was of the view that the respondent could have appealed if sufficient reason was demonstrated to the effect that the right of appeal was blocked by the judicial process. This is in view of decision in **Dr Muzamil Musal Kalokola Vs Minister for Justice and Constitutional Affairs and Attorney General Civil application no 567/01 of 2018.**

The applicant responded by appreciating the spirit of section 43 of the Magistrate Court Act Cap 11 that application for revision or appeal against interlocutory orders are not tenable. He was of the view that the impugned order was not interlocutory because the same had the effect of determining the rights and interest of parties in the subject matter.

He was thus of the view that, the decision cited in **Fatma Salmin** is distinguishable since the same did not involve revision of an order finally determining the matter. He did not subscribe to the respondent's

submission that since the execution emanated from the main case it did not finally determine the rights of the parties.

The applicant was of a different view on the alternatives suggested by the respondent arguing that the same are not worthy of preliminary points of objection given the decision in **Mukisa Biscuit Manufacturing Ltd Vs West End Distributors Ltd [1969] EA** that is a preliminary objection shall consist of pure point of Law which have been pleaded or which arises by clear implication out of pleadings and which if argued may dispose of the suit.

The Counsel for the applicant was seemingly posing another objection of his own against the respondent's counter affidavit. I wish to say here briefly that in this ruling this court indulged to determine the merit or otherwise on the respondent' objection on the applicant' application.

Having appreciated the facts surrounding the application and the considered the contending submissions by the parties, it is common grounds that, this court will generally refrain from entertaining appeals or revisions on preliminary or interlocutory orders unless such decision or order has the effect of finally determining the suit. This is the position of law which finds its expression under Section **43 of the Magistrate Court**

Act Cap 11 [RE 2019] but also section 79 (2) **of the Civil Procedure Code Cap 33 [RE 2019]**.

The parties' contention is whether the order uplifting the attachment as issued by the trial court and as such ending the execution proceedings as demonstrated above was interlocutory.

In the case of *Agness Simbambili Gabba vs David Samson Gabba (Civil Appeal 26 of 2008) [2009] TZCA 26* The court of appeal in its decision which I find instructive cited *Israel Solomon Kivuyo v. Wayani Langoyi and Naishooki Wayani (1989) TLR. 140* quoting from *JOWITT'S DICTIONARY OF ENGLISH LAW, 2nd Edition at page 999 that:*

*Thus, interlocutory applications in an action include all steps taken to assist either party in the prosecution of their cases, whether **before or after judgment**; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; **or of executing the judgment when obtained.***

Such are applications for time to take a step, e.g. to deliver a pleading for discovery, for an interim injunction, for appointment of a receiver, for a garnishee order, etc

In this application at hand, the right of the parties over the subject matter that is the motor vehicle registration number T311 DKM were sub

judice before the trial court having made decision to hear the parties inter parties. The execution proceedings had its foundation on the existence of decree. The decision to set aside the ex parte judgement as rightly stated by the trial court meant that there were no more execution proceedings in which order could be made.

In this state of affairs, I also find that steps taken after judgement including steps to execute the decree falls within the scope of interlocutory order. Determination of rights of the parties on subject matter at issue that is motor vehicle with registration number T311 DKM will be fully determined in matrimonial cause no 19 of 2020 not the defunct execution proceedings no 95 of 2020. Deciding otherwise would be putting the car before a dead horse which I do not believe that is what the applicant counsel wanted.

In the end I find merit in the point of objection raised, the application revision filed is incompetent. The same is strike out. Considering the parties relationship that is the proceedings stems from matrimonial proceedings, I shall not make order as to cost.



A. J. KIREKIANO

JUDGE

12/02/2024

COURT:

Ruling delivered in chamber in presence of Mr. Omari Msemu for the respondent and in the absence of the applicant.



Sgd:

A.J. KIREKIANO

JUDGE

12/02/2024