THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT MUSOMA)

CIVIL REVISION No. 20231123000086814

(Arising from the Resident Magistrates' Court of Musoma at Musoma in Matrimonial Cause No. 2 of 2023)

NOELA MEDARD WAMBURA ..... APPLICANT

Versus

JUMA MASAGATI MABERE ..... RESPONDENT

RULING

08.02.2024 & 22.02.2024

Mtulya, J.:

The applicant, **Noela Medard Wambura** was aggrieved by the Ruling of the **Resident Magistrates' Court of Musoma at Musoma** (the court) in **Matrimonial Cause No. 2 of 2023** (the Cause) hence approached this court praying for revision of the Cause. However, before the revision could take its course, **Mr. Emmanuel Gervas**, learned counsel for **Mr. Juma Masagati Mabere** (the respondent), had registered three (3) points of objection resisting the mandate of this court to hear and resolve the dispute.

The points were scheduled for hearing on 8th February 2024, and both parties have decided to marshal learned minds to assist this court in resolving the points. The applicant had called **Mr. Barack Alfred Dishon** and **Mr. Doto Dija** whereas the respondent invited Mr. Gervas. In brief, the points were related to the following issues, namely: first, the applicant has contravened Rule 40 of the

Law of Marriage (Matrimonial Proceedings) Rules, GN. No. 246 of 1997 (the Rules); second, the applicant has breached Order XIX Rule 3 of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Code); and finally, the applicant has contravened section 79 of the Code.

In registering relevant materials in favour of the points, Mr. Gervas had submitted, in brief, that: the applicant had lodged Revision instead of Reference which is in breach of Rule 40 of the Rules. According to Mr. Gervas, the matter in the court was not resolved on merit hence the only available remedy for the applicant was Reference and not Revision. In the opinion of Mr. Gervas, parties are discouraged to file revision as an alternative to appeal. In substantiating his point, Mr. Gervas had cited precedents in **Transport Equipment Limited v. Dephram P. Valambhia** [1995] TLR 161; **Halais Pro-Chemie v. Wella A.G** [1996] TLR 269; and **Moses Mwakibete v. The Editor- Uhuru and Two Others** [1995] TLR 134.

Regarding the second protest, Mr. Gervas submitted that the law enacted in Order XIX Rule 3 of the Code requires deponents of affidavits to state issues of their own understanding or beliefs, and not extraneous matters in species of hearsay, legal arguments, objections, prayers and conclusions. In the opinion of Mr. Gervas, the applicant from the tenth to eighteenth paragraph in her affidavit

has stated issues related to jurisdiction of the court, jurisprudence, legal reasoning, legal justification, legal arguments, and illegal proceedings, which are issues beyond his belief and understanding as a normal native person. Similarly, Mr. Gervas submitted that the applicant in the last paragraph of the affidavit is calling for the record of the lower court to check for illegalities. According to Mr. Gervas, the applicant has registered a prayer in the affidavit which is contrary to the indicated Order XIX Rule 3 of the Code.

In citing authorities in support of his submission, Mr. Gervas had cited the decision of **Uganda v. Commissioner of Prisons Ex-Parte Matovu** (1966) EA 541. Regarding the remedies of the complained paragraphs in the applicant's affidavit, he prayed them to be expunged from the record. On application of the principle of overriding objective to cure the alleged defects in the complained paragraphs, Mr. Gervas submitted that the precedent in **Mondorosi Village Council & Two Others v. Tanzania Breweries Limited & Four Others**, Civil Appeal No. 66 of 2017, shows that the principle cannot be applied blindly as against the mandatory provisions of the procedural law which go to the very foundation of the case.

In his last protest, Mr. Gervas complained that the applicant has cited section 79 of the Code in moving this court to hear the Revision, but declined to cite specific sub sections which regulate the

instant Revision. According to Mr. Gervas, reading section 79 (1) (a), (b) and (c) of the Code, the present application does not fit in any of the sub enactments. In his opinion, sub section (1) (a) regulates exercise of court's mandate without powers; sub section 1(b) regulates failure of the court to exercise its jurisdiction; and sub section 1(c) regulates exercise of powers illegally. Giving his justification, Mr. Gervas stated that the court had jurisdiction as from the enactment of section 76 of the **Law of Marriage Act [Cap. 29 R.E. 2019]** (the Law of Marriage); the court exercised its jurisdiction by hearing the parties and resolved the matter by striking out the application; and finally, there is no any illegality spotted in the proceedings of the court.

In replying the points of objection, Mr. Dishon and Mr. Dija thought that the points have no any merit whatsoever and could be briefly replied without much interpolations. According to them, Rule 40 of the Rules read together with Rule 44 of the Rules regulate cases which are pending before the court whereas the Cause was struck out from the registry hence Rule 40 has nothing to do with the instant Revision. Similarly, the dual learned counsels, stated that the cited precedents on the subject have no use in the instant Revision.

According to the dual learned counsels, the second protest relates to statements in affidavits and application of Order XIX Rule 3 (1) of the Code. In their opinion, the Order provides that affidavit must be confined in facts and the applicant's affidavit in the tenth to eighteenth paragraph is confined in the facts which are in the knowledge and belief of the applicant. The dual submitted that Mr. Gervas had decided to select specific words from the facts from entire paragraphs in the applicant's affidavit for reasons better known to him. According to them words in the applicant's paragraphs are not supposed to be read in isolation of other words and that the cited words by Mr. Gervas are known, they are part of the Ruling of the court and can be pronounced by any persons, even by a tomato seller in market areas.

The dual submitted further that even if the tenth to eighteenth paragraphs in the applicant's affidavit are expunged, there is still an argument in favor of the Revision to be resolved as the ninth paragraph and chamber summons display the complaint of the applicant. Regarding the principle of overriding objective and the cited case of **Mondorosi Village Council & Two Others v. Tanzania Breweries Limited & Four Others** (supra), the dual contended that it is not applicable in the present Revision as the cited paragraphs do not go to the root of the matter, and the precedent in **Uganda v. Commissioner of Prisons Ex-Parte Matovu** (supra) is not applicable

as in the instant case the words were read in isolation with the whole text in the paragraph. Ending their submissions in the second protest, the dual thought that each case is decided depending on its peculiar facts and supported their move by citation of the precedent in **Jamal S. Mkumba & Another v. Attorney General**, Civil Application No. 240/01 of 2019, where the Court had ordered amendment of the affidavit to comply with the complained facts as the cited facts in affidavit do not affect substance of the matter.

On the last protest, the dual thought that section 79 of the Code provides for powers of this court to revise proceedings of the lower courts in several species and sub sections (1) (b) and (c) of the Code regulate the present revision matter. According to the dual, the court had failed to exercised its mandate as it declined to peruse attachments in the Cause which justified the circumstances and difficulties in acquiring the certificate from the Marriage Reconciliation Board. To the dual, the circumstances and difficulties are captured by section 101 (f) of the Law of Marriage Act. Similarly, the dual submitted that the action of the court to refuse the Cause was illegal as the Cause was not the first case to be registered in the court involving the same parties on the same subject matter.

In a brief rejoinder, Mr. Gervas submitted that Rule 40 of the Rules is very clear and vivid that Reference can be preferred during

pendency of the suit in courts and after delivery of the decision. Regarding the second protest, Mr. Gervas insisted that the applicant's affidavit from the tenth to seventeenth paragraph there are issues of legal arguments, points of law, conclusions and prayers. In the opinion of Mr. Gervas, there are not selection of some specific words in the indicated paragraphs as contended by the applicant's learned counsels. Mr. Gervas submitted further that the eighteenth paragraph in the applicant's affidavit contains prayers and the cited precedent in **Jamal S. Mkumba & Another v. Attorney General** (supra) is distinguishable as it resolved on verification clause.

Regarding the last point of objection, Mr. Gervas submitted that the court in the Cause had invited and considered section 101 (f) of the Law of Marriage Act and that section 79 of the Code is unapplicable as it regulates Revision, and the applicant does not meet the prerequisite put in place criteria under section 79 of the Code. In the opinion of Mr. Gervas, section 79 of the Code is reserved for this court to call revision, *suo moto*, and not the parties, as in the present Revision.

I have had an opportunity to peruse the first and third complaints of the respondent and submissions registered by the learned minds of the parties. The two indicated complaints will not

detain this court. The reason is obvious that they are straight forward complaints. They emanate from enactment in Rule 40 of the Rules and section 79 of the Code. For easy appreciation of the matters, the dual enactments are copied in this Ruling. Rule 40 of the Rules provides that:

> *Where,* ***before or on the hearing of a matrimonial proceeding*** *by a magistrate, any question of law or usage having the force of law arises on which the magistrate entertains a reasonable doubt the court may, either on its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.*

This enactment was enacted in plain English language that: *before or on the hearing of a matrimonial proceeding by a magistrate entertains a reasonable doubt, the magistrate may refer such doubt for decision of the High Court*. It is familiar canon of statutory interpretation that when a statute is enacted in plain language, the sole function of the courts is to enforce it according to its terms. That is the starting point in interpreting statutes (see: **Republic v. Mwesige Godfrey & Another**, Criminal Appeal No. 355 of 2014). The instant Rule 40 of the Rules was enacted in plain English language hence it must be interpreted in accordance to the enacted terms, *before or on the hearing of a matrimonial proceeding*. The present revision is not part of the disputes pending

in any subordinate courts. It was resolved to the finality and the applicant was aggrieved by the Ruling.

On the other hand, section 79 the Code provides for three (3) circumstances in which aggrieved parties may approach this court, namely: first, when it appears, a subordinate court has exercised jurisdiction which is not vested in it by law; second, when it appears, a subordinate court has failed to exercise jurisdiction vested in it by the law; finally, when it appears a subordinate court acted in the exercise of its jurisdiction illegally or with material irregularity. The three (3) circumstances were enacted in plain language and alternatives. The applicant had cited the law and her learned counsels have cited the two last alternatives. Mr. Gervas thinks the indicated alternatives are inapplicable. I am aware there is no contest on the powers of the court in the Cause. The dispute is on two issues, namely: first, whether the court had failed to exercise its jurisdiction vested in it by the law; and second, whether the court acted in the exercise of its jurisdiction illegally or with material irregularity.

I have glanced the contents and complaints of the applicant via her affidavit, and found that the last two circumstances match with the complaint. Her complaints are generally related to the failure of the court to exercise its jurisdiction vested to it. Similarly, the

applicant believed that the court acted illegally hence approached this court to interpret the materials registered at the court in the Cause. I am conversant that Mr. Gervas submitted that the duty to call revision is vested to this court *suo moto*, and not the applicant to file the revision.

The argument may stem from the enactment of section 79 (1) of the Code. The section provides that: *the High Court may call for the record of any case which has been decided by any court subordinate to it*. However, the section is silent as to whether the High Court is the only institution, which is mandated to call for revision. In any case, the word *may* in the enactment may be interpreted to open up for other persons to have access to this court through their own move. The move finds support in article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution), which is superior than the enactment in section 79 (1) of the Code.

I am aware Mr. Gervas has complained on the use of the legal technical words by the applicant from the tenth to eighteenth paragraph in her affidavit. According to Mr. Gervas, the applicant is ordinary native, but had produce legal technical words such as jurisdiction of the court, jurisprudence, legal reasoning, legal justification, legal arguments, and illegal proceedings, which are

reserved to learned minds. In his opinion, the applicant breached Order XIX Rule 3 of the Code, which requires deponents in affidavits to state issues on their own knowledge, understanding or beliefs.

According to Mr. Gervas, the words to the applicant are extraneous matters in the species of hearsay and legal arguments. In replying the complaint, the applicant's learned mind submitted that the words were singled out to suit Mr. Gervas submission and in any case the words are known by ordinary persons, including a tomato seller in market places. The enactment in order XIX Rule 3 (1) provides, in brief that: *affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove*. The issue in the instant contest therefore, is whether the applicant knows and can prove the words: jurisdiction of the court, jurisprudence, legal reasoning, legal justification, legal arguments, and illegal proceedings. Taking the words in isolation, any one would have said the words are legal and technical reserved for law students and practitioners or else legal minds.

However, reading from the first to the seventeenth paragraph of the applicant's affidavit as a whole and in context of the Revision, the words can easily be appreciated by any person, including a normal person. It is unfortunate, at this age, for a learned advocate to reserve specific English and legal words for learned minds.

The submission of Mr. Gervas is associated with colonial mentality, which has no place in our jurisdiction, at least at this moment. After the enactment of article 107A (2) (b) and (e) of the Constitution and section 3A & 3B of the Code, this court has been interpreting statutes and resolving dispute in favor of speed trials and declining technicalities. The role of this court is to render services to the communities and will remain so. This place is not a bush where parties may hide to escape their contest on merit (see: **SME Impact Fund CV & Two Others v. Agroserve Company Ltd**, Civil Appeal No. 9 of 2018; **Mroni Garden Construction Ltd v. Esther Nicholas Matiko**, Civil Appeal No. 9 of 2022; and **F.B.M.E Bank v. John Kengele & Two Others**, Commercial Revision Case No. 1 of 2008). In any case, the words or standard of normal native person is not reflected in the applicant's affidavit. It is not certain where Mr. Gervas has extracted them. This court is normally confined on record in resolving contests.

Finally, I understand the applicant is praying for this court to call, examine and revise decision of the court in the Cause and had moved further to display the same in chamber summons. However, she displayed the same player in her final paragraph in the affidavit. In brief, she prayed: *proceedings and decision of the Resident Magistrate Court of Mara at Musoma to be called and this honorable*

court ascertain the legality, correctness and appropriateness of its decision. This clause is not supposed to be in the applicant's affidavit. This is a prayer, not a fact.

The complaint of Mr. Gervas on the subject has merit. Regarding the appropriate available remedies in such circumstances, the reply is found in the Court's precedent of **Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited**, Civil References Nos.15 of 2001 & 3 of 2002, that:

> *It seems to us that where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it.*

The thinking received a support of the same Court five (5) years later in the precedent **Msasani Peninsula Hotels Limited & Six Other v. Barclays Bank Tanzania Limited & Two Others,** Civil Application No. 192 of 2006. This court is bound by the decisions of the Court hence moved to expunge the offending paragraph eighteenth in the applicant's affidavit. The remaining parts of the affidavit are left intact and form the cause of action for revision in this court.

In the end, I dismiss the points of objection raised by Mr. Gervas without costs. The reasons are obvious that the applicant

and respondent are wife and husband contesting in a matrimonial cause.

Ordered accordingly.

F.H. Mtulya

Judge

22.02.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of the applicant, **Noela Medard Wambura** and her learned counsels **Mr. Barack Alfred Dishon** and **Mr. Doto Dija** and in the presence of the respondent, **Juma Masagati Mabere** and his learned counsel, **Mr. Emmanuel Gervas**.

F.H. Mtulya

Judge

22.02.2024