IN THE HIGH COURT OF TANZANIA

(DAR-ES-SALAAM SUB- REGISTRY)

AT DAR ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2021

(Arising from Matrimonial Cause No. 75 of 2015)

ZAHARA I. MWITA..... APPLICANT

VERSUS

ISIAGA K. MWITA .....1ST RESPONDENT

ELIZABETH MBAS MWITA .....2ND RESPONDENT

RULING

25th July 2023 & 2023 & 27th February, 2024

MWANGA, J.

The applicant lodged an application in this court by way of chamber summons under section 79(1) (c) of the Civil Procedure Code, [Cap 33 RE 2022] (hereinafter referred to as the CPC), and section 44 (1) (a) (b) of the Magistrate Court Act, [Cap 11 RE 2019] (hereinafter referred to as the MCA) seeking for such reliefs as;

1. *That, this honourable Court be pleased to call and examine the records of Matrimonial Cause Na. 75 of 2015 at Kinondoni District Court in regards to the ruling, order and proceedings delivered 7th December 2020 by Hon. Lyamuya PRM.*

2. *That, this Honourable Court may be pleased to set aside the order of the trial Court dated 7th December 2020.*
3. *That, costs of this application be borne by each party.*

This application has been taken at instance of Legal and Human Right Centre and is supported by an affidavit sworn by Melchzedeck Joachim learned advocate for the applicant. On the other hand, the respondent lodged counter affidavit to contest the application together with preliminary objection to the effect that;

1. *This court has no jurisdiction to entertain this matter, as there was no decision that was decided in matrimonial cause No. 75 of 2025 as the matter was struck out before determination*.

By the parties' consensus, this court ordered the preliminary objection be disposed of by written submission, the order which was duly complied with by the parties. In this application, the applicant was represented by Mr. Melchzedeck Joachim learned Advocate while the respondent was represented by Mr. Frances M. Mwita learned advocate.

In his submission in support of the preliminary objection Mr. Mwita argued that the trial court struck out the suit for the applicant's failure to furnish the trial court with proof that the matter was filed under legal

aid. He elaborated that was after the court *suo motu* discovered that there was nothing to support the payment made or a certificate of exemption filed in lieu of the payment of the court fees. He added that nothing else was discussed in regard to the merits of that suit.

He further argued that, the matter was merely struck out at the initial stage of the proceedings and the matter was not determined to the finality on merits. He contended that the provisions cited in this application, clearly stated that, there must have been a matter decided by subordinate court for an application of revision be filed before this court.

To substantiate his submission, he cited the case of **Alex Miiame & Others v Tanzania Cigarette Company Limited** Civil Application no. 101 of 2005 (CA) (unreported*).*

It his view that the remedy of a matter which is incompetent before the court is to be struck out for the same implies that there is no matter at all before the court. And that this court has no jurisdiction to determine such matter as there was nothing before the district court after matter was marked struck out. He therefore prayed that this application be struck out with costs*.*

In reply to the above argument, Mr. Melchzedeck relied on section 44 of the MCA and section 79 (1) (c) of the CPC which confer powers to the High Court to call for records and examine what took place in the due course of making a decision. He added that if he was to appeal against the decision before this court, he would be told that the correct remedy is to refile the matter in the same registry as it was strike out means the case is a good it never happened.

It was also contended that he believes on the notion that when the matter is struck out it is as good as if the matter was never before the court. He further argued that the order for striking out a matter is an actual judicial decision that the High Court can exercise revisional powers and peep to see the correctness of the procedures.

Further he stated that on 27th November they were appearing for further orders, and not hearing on the non-payment of fees. This non-payment was not for "in between" the matter documents like submissions, this non-payment was for a document that initiated a matter. To him the trial magistrate was supposed to order the production of proof.

On a brief rejoinder Mr. Mwita stated that applicant in her submission conceded that Matrimonial cause no. 75 of 2015 was struck out but

misconceived the same point by submitting that the provision of the law does not state any limit of the high court on the matter struck out. He maintained that once a matter has been struck out as it was in the case of the matrimonial cause before the district court point remain as if there was nothing before that District court. In such circumstance the remedy for the applicant was to re-file the application and rectify any error that defaulted the application.

Having gone through the parties' rival submissions the sole issue for my determination is whether the preliminary objection has merits.

From the record, it is not in dispute that matrimonial cause No. 75 of 2015 was struck out, following a concern raised by the trial court *suo motu* that perquisite filing fees were not paid. In his submission, Mr. Mwita contended that since the matter was struck the remedy available to the applicant was to refile the matter.

On the other hand, the learned advocate for the applicant maintained that this court has wide powers to exercise powers of revision conferred to it under section 44(1) of the MCA and 79(1) of the CPC. With respect, in view of the referred provisions, the powers of revision conferred to this court are not limitless. They are subject to several conditions.

For instance, section 44(2) of the MCA sets a condition that an application for revision cannot be preferred on an interlocutory order or preliminary objection whose effect does not finally determine the matter. The said provision reads;

> *44 (2) Subject to the provisions of subsection (3), no appeals or* ***application for revision*** *shall lie against or be made in respect of any preliminary or interlocutory decisions or order of the district court or a court of a resident magistrate unless such decision or order* ***has the effect of finally determining the criminal charge or the suit.***
>
> [Emphasis added]

Equally powers of the revision conferred to this court under section 79(1) is also subject to a condition stipulated under section 79(2) that an application to the effect cannot be preferred against an interlocutory order or decision on preliminary objection unless such order or decision has the effect of finally determine the matter. The said provision reads;

> *(2) Notwithstanding the provisions of subsection (1),* ***no application for revision shall lie or be made*** *in respect of any preliminary or interlocutory decision or order of the*

Court unless such decision or order ***has the effect of finally determining the suit****.* [Emphasis added]

It follows therefore that the two provisions referred to by the learned advocate for the applicant, provide limits within which the application for revision can be preferred form the decision of the lower court. The issue is whether the decision of the trial court had the effect of finally determining the matter.

The phrase ***"finally determining the suit"*** means that a decision or order which has an effect of finally determining the rights and liabilities of the parties. In the case of **Junaco and Another v. Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 (unreported) the Court of Appeal defined the phrase *"finally determining the matter"* to mean:

"An order or decision is final if it finally disposes the rights of the parties"

In the instant matter, the decision by the trial court arose from the concern raised by the court *suo motu* which resulted for the matter be struck out as shown above. Hence it never determined the rights of the parties. That means it did not determine the matter to finality since the applicant had a remedy to have the matter refiled.

Having said that I find that this preliminary objection is meritorious, therefore, the application is incompetent before the court and it is accordingly struck out. Given the nature of the matter, I order each party to bear its own costs.

Order accordingly.

H.R. MWANGA

JUDGE

27/02/2024