

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC COMMERCIAL REVISION NO 200 OF 2016

BETWEEN

AMI TANZANIA LIMITED -----APPLICANT

VERSUS

DORIN DONALD DARBRIA -----RESPONDENT

RULING

Dates; 26/10/ 2016 & 24/11/2016

SONGORO, J

AMI Tanzania Ltd the applicant filed an application applying to the court to call record and proceedings of Resident`s Magistrates Court of Dar es Salaam Civil Case No 286 of 2009 and satisfy itself, if the Following orders are proper. The orders are;

1. if the decretal amount of USD 18,762,891.75 and Shs 58,523,778 ordered by the Residents Magistrates
2. Whether or not it was proper for the court to apply compound interests on the decretal sum, and
3. Whether or not the Resident Magistrate Court has jurisdiction to order execution and specifically issue a garnishee order of USD 18,762 891.75

The application for revision was made under Section 43(3) and 44 (1) (b) of the Resident Magistrates Court Act Cap 11 and Section 79(3) of the Civil Procedure Code Cap 33 [R.E 2002] and was supported by an affidavit of Angeline Kavishe Mtulia.

Resisting the Application, Dorin Donald Darbia, the respondent file a counter affidavit sworn by Audax Kahendaguza Vedasto Learned Advocate and opposed the application.

In addition, respondent raised preliminary objections on points of law, first, the court has no jurisdiction to hear and entertain revisions because Section 38 of the Civil Procedure Code Cap requires all questions arising from the execution of execution of the decree be decided by executing court. Secondly, the court has not been moved to exercise its powers of revision, and thirdly, application is bad for not being accompanied with the order and or proceedings sought to be revised.

Since it is a rule of practice that, the preliminary objection must be heard first then parties were invited to pursue the objection. Mr. Nyika, Learned Advocate appeared for the Applicant and Audax Kahendaguza Vedasto Learned Advocate appeared for the respondent and pursued objections raised.

In pursuing three objections, Mr. Audax informed the court that, the court has no jurisdiction to hear and entertain revision because under Section 38 of the Civil Procedure Code Cap 33 all question arising between the parties in execution of the decree are supposed to be determined by the court executing the decree. It was therefore his argument that, since there is a court which passed the decree, then all

matters raised in the revision may be considered and determined by the Resident Magistrate Court and not the High Court.

To support his point, the counsel drew the attention of the court to several court decisions including decisions in the case of Registered Trustees of Social Action and another Versus Happy Sausages Ltd and 10 Others and Sebastian Rweikiza Kinyondo Versus Medard Mutalemwa Mutungi.

Moving on the second preliminary point of objection the Respondent's Counsel argued and submitted that, Section 79(2) of the Civil Procedure Code Cap 33 states categorically that, an order made by the court is final and may not be re-opened for revision and further consideration. So the application is offending the provisions of Section 79(2) of the Civil Procedure Code Cap 33 which bars the court to undertake revision.

More Respondent's Counsel stated that, Section 79(1)(c) of the Civil Procedure Code Cap 33 [R.E 2002] has been improperly invoked because once it is cited there must be a statement and proof that there is no appeal.

On the third point of objection the Respondent counsel argued and submitted that, the application is bad in law because it is not accompanied with an order or proceeding to be revised. Since

proceeding and order to be revised were not annexed to the application and file in court, it follows therefore the application for revision is bad in law.

To support his argument the Respondent`s Counsel drew the attention of the court to a decision in the case of Mabanganya Versus Lomma and Sanga Civil Application No 1 of 2002 which decided that, one who moves the court for revision has to supply the records and order sought to be revised.

Finally, Mr. Audax rested his submission by praying to the court that, to dismiss the revisions filed by the applicant on the basis of the above mention reason with costs in their favour.

Resisting objections raised Mr. Nyika for the applicant first told the court that, the court has jurisdiction to hear the application for revision and section 38 of the Civil Procedure Code Cap 33 doesn't take away the jurisdiction of the court

Responding to the Respondent`s point that, matters raised in revision application may also be resolved by the Resident`s Magistrate Court which made the said order, Mr. Nyika told the Court that, judgment and execution orders, including a Garnishee Order issued by the Resident Magistrate Court, may not be re-open in the same court because are *functus official*.

Therefore it was the view of the applicant that, bearing in mind that, the court is *functus official* that, is reason they have file a revision in the High Court.

To support his argument that, court becomes functus official after making its decision, the counsel drew the attention to several decisions including a decision in the case of Scholastica Benedicto Verus Martine Benedict [1993] TLR p2 which decided that, once a court make its verdict it becomes funtus official.

On the objection that, the applicant did not annex copies of proceedings and order, which is being sought to be reviewed Mr. Nyika replied that, there is no legal requirement that, an application for revision has to be accompanied by proceedings and an order to be revised. Finally, applicant counsel prayed for dismissal of objection raised and the application for revisions be heard.

Having closely examined preliminary objection raised by the respondent`s counsel and upon full consideration of submissions and points raised by parties, I am of the settled view that, there are only two points of preliminary objection for determination. The first point is if the court has jurisdiction to hear the revision which has been initiated by the applicant. The second objection is whether or not the court has been properly moved to undertake revision.

On the objection of jurisdiction I have considered the respondent's objection that, the revision applied for is in respect of execution proceedings and garnishee order, so the court has no jurisdiction and jurisdiction lies with court which is executing the decree, and find Section 43(2) of the Magistrate's Court's Act Cap 11 states as follows.

Subject to the provisions of any law for the time being in force, all appeals, references, revisions and similar proceedings from, or in respect of, any proceedings of a civil nature in a district court or a court of a resident magistrate which are authorized by law shall lie to and be heard by the High Court.

Thus guided by the words which reads all "*appeals , references revisions and similar proceeding from or in respect of any proceedings of a civil nature in a district or a court of a resident magistrate court....shall lie to and the heard by the High Court*" used Section 43 (2) of the Magistrates Court Act Cap 11 gives me strong impression that, this court has jurisdiction to hear and determine revision in any civil proceedings of civil nature which is in the Resident Magistrates .

The words "any proceedings of civil nature" in my includes "execution proceeding" like the one which are still going on in Resident Magistrates Court Civil Case No 286 of 2009.

So I find pursuant to Section 43 (2) the revision any civil proceedings including execution proceedings from the Resident Magistrates Court lies to the High Court.

In view of what is stated above the objection as to the jurisdiction may not stand and court has power of revision of any civil proceedings. The objection as to the jurisdiction fails

Turning to objection of whether or not the court has been properly moved and I find parties have addresses the court extensively on whether the cited provisions of the law may move the court and enable it to hear and entertain revision.

With same spirit I also perused provisions of Section 79 (1)(2)(3) of the Civil Procedure Code Cap 33 and find it is relevant when the High Court on its own motion call the record of a case which has been decided by subordinate court to it and in which no appeal lies and conducted revision.

Therefore once a revision is based on Section 79 of the Civil Procedure Code, obviously it must be a revision which has been initiated by the High Court itself on already decided case.

Next the court find Sections 43 and 44 of the Magistrates Courts Act Cap 11 are specific provisions of law which allows the High Court to undertake revision on any proceedings of a civil nature which is in a district court or a court of a resident magistrate, meaning even if such proceedings is partly heard and still going on.

It appears to me that, Section 79 of the Civil Procedure Code refers to finalized case while Section 43 and 44 of the Magistrates Courts Act refers revision on any proceedings.

Now upon reading the applicant chamber summons an order which is being sought by the applicant is framed as follows that;

The Honourable Court be pleased to call for the record and the proceedings of the Resident Magistrates Court of Dar es Salaam at Kisutu in Civil Case No 286 of 2009. Between Dorin Donald Dabria Versus Ami Tanzania and satisfy itself as to its legality

Thus bearing in mind the applicant application for revisions is in respect of proceedings of Resident Magistrates Court and not on a finalized case, it is my view that, the relevant and enabling provision of the law to be cited are Section 43(3) and 44 (1) (b) of the Magistrates Court Act Cap 11 because are enabling provisions for review of court record and proceedings and that, is what the applicant requested the court to do.

But when I revisited the Applicant Chamber Summon for the second time I find the application is made under Section 43(3) and 44 (1) (b) of the Resident Magistrates Court Act Cap 11 and Section 79(3) of the Civil Procedure Code Cap 33 [R.E 2002] instead of citing Section 43(3) and 44 (1) (b) of the Magistrates Court Act Cap 11

With great respect to the applicant in their counsels, I am not aware of any piece of legislation which is known as the Resident Magistrates

Court Act Cap 11. I am aware we have a piece of legislation which known as the Magistrates Courts Act Cap 11 which is relevant to application for revision.

Also, I have checked Section 1 of the Magistrates Court Act Cap 11 and finds it states as follow that,

This Act may be cited as the Magistrates' Courts Act.

It follows therefore the applicant in citing Section 43(3) and Section 44(1) of the Resident Magistrates Court Act Cap 11.[R.E 2002] in the Chamber Summons, while there is no such pieces of legislation it is obvious that, the applicant has cited in his application a wrong legislation and provision.

At no point in time a section of non-existence legislation and non-existence provisions of the law may enable the court to entertain and determine the application for revision.

In the case of Abdul Aziz Suleman versus Nyaki Farmers' Cooperative Ltd. and Another (1966) E.A 409 the Court of Appeal for East Africa observed and emphasized that, the applicant is required to cite the relevant provision from which the Court derives the power to hear and determine the application.

Also, courts in several decisions including in decisions in Arusha Civil Application No. 4 of 2006 Robert Leskar Versus Shibesh Abebe Unreported have consistently and persistently stated that, "If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved

Likewise in numerous decisions, courts have insisted that, a party must cite the relevant provision from which the court derives its power to hear and determine the application. Also non-citation of relevant provisions renders the application to be incompetent.

It follows therefore since the applicant did not cite any of section of the Magistrates Court Act Cap 11 which enables the court to entertain application for revision, I dare to say that, the court has not been moved to undertake revision of record and the proceedings of civil case No 268 of 2009 which are still going on by a way of execution of the decree

On citation of Section 79 of the Civil Procedure Code Cap 33 the section is relevant and enabling provision if the revision being undertaken by the High Court on its motion and revision is on finalized case. The circumstances in the present revision is a request for revision of record and proceedings of subordinate court.

The court appreciate that, there is big difference on revision which may be undertaken pursuant of Section 79 (1) and (3) of the Civil Procedure Code and revision which may be undertaken under Sections 43 and 44 of the Magistrates Court Act.

Finally, I find since the applicant did cited Sections 43(3) and 44(1) (b) of the Magistrates Court Act Cap 11 in his application for review of the proceedings, it certain that, the court was not moved because ,relevant

and enabling provisions was not cited and that, renders the application to be incompetent.

With that, court finding I don't see any plausible reason to proceed in determining other objections and point raised. Subsequently, I struck out the application for revision with costs in favour of the Respondent.

Also, I order and direct that, the file of Kisutu Resident Magistrates Court Civil Case No 286 of 2009 be returned to Kisutu for subsequent steps. The Right of Appeal is fully explained to the parties.

Dated at Dar es Salaam this 23rd day of November, 2016


H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 23rd day of November, 2016




H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Nyika, Learned Advocate for the Applicant and George Vedasto Learned Advocate for the Respondent.