

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

AT SONGEA

REVISION CASE NO. 01 OF 2019

**(Originating from Miscellaneous Civil Application No. 28 of 2018
Songea District Court at Songea)**

JAMES MBEYA APPLICANT

Versus

1. SONGEA NAMTUMBO AGRICULTURE

MARKETING COOPERATIVE UNION 1ST RESPONDENT

2. CHANGANYIKENI SACCOS LTD..... 2ND RESPONDENT

3. SAHARA MEDIA GROUP..... 3RD RESPONDENT

4. SHADA INVESTMENT CO LTD..... 4TH RESPONDENT

5. RUVUMA CIVIL CONTRACTORS CO. LTD 5TH RESPONDENT

JUDGMENT

Date of Last Order: 11/06/2020.

Date of Judgment: 13/08/2020.

BEFORE: S.C. MOSHI, J.

The applicant James Mbeya, through the services of Mr. ELSEUS NDUNGURU has made an application by chamber summons under section

44(1) (b) of the Magistrate Court Act Cap.11 R.E 2019 and section 79(1) (c) of the Civil Procedure Code Cap. 33 R.E 2019 seeking, the following orders:-

- 1. That, this court be pleased to call and revise the proceedings, order of Miscellaneous Civil Application No. 28 of 2018 Songea Resident Magistrates' Court dated 20/03/2019 and revise the same and further give necessary orders pertaining thereto.*
- 2. Costs be provided for.*
- 3. The court be pleased to give any other order which it might deem fit*

The applicant was represented by Mr. Eliseus Ndunguru, learned advocate whereas the 1st respondent was represented by Mr. Donald Deogratus, advocate. Other parties appeared in person i.e. through their officers.

The application was argued by way of written submissions. The applicant's advocate submitted among other things that, revision is not an alternative to an appeal but where there are circumstances of which right of appeal cannot be exercised revision is the only way to challenge the

decision of the lower court. He said this is due to the fact that order XL of the Civil Procedure Code Cap. 33 R.E 2019 provides clearly that appeal shall not lie to this court on any decision made in respect of order XXI, Rule 94 and 95 of the Civil Procedure Code of which is the basis of this application.

He contended that the basis of this application is to challenge the illegality of the decision of the trial court which dismissed the application on account that the original or certified copies documents of the annextures to the affidavit were not tendered in court as exhibits. The trial court relied on section 64 and 65 of the Evidence Act Cap. 6 R.E 2002.

He argued that, the application before the trial court was brought by way of a chamber summons supported by affidavit. In the circumstances during hearing the parties were only required to make submissions. He said that, the trial court misdirected itself in so holding. As during hearing of an application made by chamber summons and supported by an affidavit exhibits are not tendered rather parties substantiate what is contained in the chamber summons and affidavit by way of submission unless the court requires otherwise. He made reference to **Bruno Wenceslaus Nyalifa**

Vs. The Permanent Secretary, Ministry of Home Affairs and the Honorable Attorney General, Civil Appeal No. 82 Of 2017 Court of Appeal sitting at Arusha (unreported), where it was held thus: -

"The documents which were annexed to the affidavit should not have been disregarded on the ground that they were not tendered in court. this is for the obvious reason that, affidavit is evidence and the annexures thereto is intended to substantiate the allegations made in the affidavit unless it is controverted therefore the document can only be relied upon to establish a particular fact".

He further argued that the trial court supported its decision by section 64(1) and section 65(a) of the Evidence Act. He said that these provisions are only applicable when the matter is intended to be proved orally, when the matter is intended to be proved by way of affidavit as it was in the case before it, these provisions are not applicable. The ground being that an affidavit is a substitute of oral evidence and therefore the court does not call the maker of the affidavit to testify before it.

He stated that, the cited provisions are applicable when the question of proof of contents of document is at issue, where a person intending to rely on it as part of his evidence but as far as the issue of annextures is concerned in affidavit, is only intended to substantiate the evidence contained in affidavit of which can only be relied upon when allegation made in the affidavit is controverted by the other party. He said that, this was not the case in the present case as the contents of the said documents were not controverted and even the trial court did not require the applicant to produce the original documents if at all it had doubts on their genuineness.

It was his submission that, without prejudice to what has been said above and upon his perusal of the Evidence Act, Civil Procedure Code and other laws of the land there is no law which provide for requirement of annextures which are mentioned in affidavit be certified before being filed in court. It was therefore his submission that the findings of the trial court was not backed by any law. He therefore invited this court to revise the decision issued by Songea Resident Magistrate Court in Miscellaneous Civil Application no. 28/2018 because it is tainted with a lot of illegalities and its propriety as well as its correctness is questionable.

The advocate for the first respondent replied by stating that, the application which was lodged before Songea Resident Magistrates Court vide chamber summons accompanied by sworn affidavit had a prayer before the same that the applicant be granted an order for delivery of the house located at plot number 27 Block G within Songea Municipality.

He said that, the affidavit in the said application had among other attachments, a photocopy of certificate of sale of immovable property as a proof of ownership by purchase and as the corner stone for the then presiding Resident Magistrate to ascertain the credibility and authenticity of the application.

It was his submission that as it was for the purpose of proof on disposition by way of sale, the evidence so adduced ought to have been a primary or secondary upon certification as in compliance with section 100 (1) of the Evidence Act Cap. 6 R.E 2002. He also referred to Order XXI Rule 94 of the Civil Procedure Code Cap 33 R.E 2019 of which the application before the trial court was founded. In making the said application a copy of certificate of sale has to be supplied to which the applicant's advocates complied with but he attached secondary evidence in disregard to section 65 (a) of the Evidence Act Cap.6 R.E 2019.

In support of his submission he cited the case of **Edward Mwakamela Vs Republic**, (1987) TLR 121 and **Asson Rwebangura Vs. Republic**, (1975) LRT 26, where it was held that secondary evidence to be admissible must satisfy the provisions of section 67 of the Evidence Act and the admission of the secondary evidence must be certified from the original.

The second and third respondents filed a counter affidavit and not written submissions as they were ordered on 30/4/2020. The fourth respondent filed nothing at all. The fifth respondent has submitted that he was neither part of the Miscellaneous Civil Application Number 28 of 2018 at Resident Magistrate Court of Songea at Songea. He said that he is aware that the house in question is property of the first respondent. He is not aware of any sale certificate so far. He was of the view that, there is no ground for faulting the ruling in the Miscellaneous Civil Application no 28/2018.

I have considered both parties submissions, the record of the trial court and the relevant laws.

The basis for *ex parte* ruling subject to this application is to the effect that the annexures which were annexed to the applicant's affidavit in

support of the application were photocopies, and uncertified copies hence contravening section 64 and 65 of the Evidence Act Cap. 6 R.E 2019 and that they were not tendered in court as exhibits.

The issue is whether the court erred by ruling out that the annextures which were attached to the applicant's affidavit in support of the application couldn't be considered because they were photocopies; hence the provisions of Section 64 and 65 of the Evidence Act, Cap. 6 R.E 2019 were not complied with.

The trial Magistrate ruled out thus: -

"both annextures were mentioned by the learned counsel for the applicant but he never tendered original copies of the same and the annextures themselves are not certified contravening the provisions of section 64 and section 65 of the Evidence Act [Cap 6 R.E 2002] specifically section 64(1) and section 65 (a) of the said Act in respect of primary evidence and secondary evidence."

I at the outset, find that applicant's submission is at the upper hand. The reasons being that during hearing of application made by chamber summons and affidavit, exhibits are not tendered in court rather the parties

substantiate by way of submission what is contained in the chamber summons and affidavit. The case of **Bruno Wenceslaus Nyalifa** (supra) is relevant.

Furthermore, section 64(1) and section 65(a) are not related to affidavits in support of the application. Also there is no law which mandates that annextures to an affidavit should be certified.

It has been time and again decided that courts are duty bound to do substantial justice rather than relying on technicalities which are not backed by law and which do not prejudice the parties. Procedural laws are supposed to be handmaiden of justice; they shouldn't be used to defeat justice, See **Rawal Vs Mombasa Hardware**, [1968] EA 392 and **General Marketing Co Ltd Vs A.A Sharif**, [1980] TLR 61. Had the magistrate thought that there was need to see the original copies he would have requested the parties to make them available instead of dismissing the entire application as he did.

That said, I quash the proceedings and ruling. I further set aside the orders which were made, there from. I decided to quash the whole proceedings because on 12/3/2019 when the case was placed before Mr. Waane the respondent had failed to respond to preliminary objection. The

case was not for hearing of the substantive application. So, it was wrong to order an ex-parte hearing of the application while the respondent was not notified of a hearing date.

In the event, I order that the application be heard *denovo* before another Magistrate with competent jurisdiction. The case file should be remitted to the District Court immediately.

Right of Appeal is Explained.


S.C. MOSHI
JUDGE
13/08/2020

