IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 8 OF 2006

1.MANENO ABED
2.RAHIMA ABDALLA MADENGE } **.....APPLICANTS**

VERSUS

TAHFIF AMIR (BY HIS NEXT FRIEND SALIMA MASOUD).....RESPONDENT

R U L I N G

Mwarija, J,

This is an application for revision brought under s. 44 (1) of the Magistrates' Court Act, Cap. 11 R.E 2002 and s.95 of the Civil Procedure Code, Cap.33 R.E 2002. The applicants, Maneno Abeid and Rahima Abdallah Madenge through the services of Mr. Komba, learned Counsel have applied for revision of proceedings and orders made by the Resident Magistrate's Court of Dar es Salaam, at Kisutu in Civil Case No. 106 of 2005. In the grounds for revision, the

learned Counsel for the applicants seeks to fault the ruling of the learned trial Principal Resident Magistrate dated 15th November, 2005.

On the request of the learned Counsel for the applicants, which request was not objected to by the learned Counsel for the respondent, I ordered that the application be argued by way of written submissions. Since the learned Counsel for the applicants had raised a preliminary objection challenging the competence of the counter-affidavit sworn by Salima Masoud, the respondent's next friend, the arguments on that point were embodied in the submissions. The argument by Mr.Komba was that the counter-affidavit contained extraneous matters by raising points of law instead of facts. He pointed out what he contended to be an offending part of the affidavit to be paragraph (2) (a) (b), (c) (d),(e) and (f) . He submitted that those items of the paragraph raise

preliminary objections and consequently renders the counter-affidavit defective. Citing the case of **Uganda v. Commissioner of Prisons Ex-parte Matovu** (1966) E.A .514, he argued that the counter-affidavit ought to be struck out thereby rendering the application unopposed.

Responding to the submissions by the learned Counsel for the applicants on the preliminary objection, Dr. Lamwai, learned Counsel for the respondent argued that some of the matters deponed by the respondent in the counter-affidavit were matters of facts while others were matters of mixed law and facts.

Having carefully considered the submissions by the learned Counsel for the parties on the preliminary objection, I am of the settled view that sub-paragraphs (a),(b),(c) and (f) of paragraph 2 of the counter-affidavit contain extraneous matters. The sub-paragraphs raise matters of law, arguments and conclusions. Sub-

paragraph (a) raises a point of law on limitation while sub-paragraph (b) is an argument that the application is incompetent while in sub-paragraph(f) he made a conclusion that the application did not disclose any ground for revision. That was improper because he expressed his opinion instead of a fact.

Despite the above shown defects in the counter-affidavit however, sub-paragraph (e) which states matters of facts, answers the matters deponed in the affidavit by Mr.Koba in paragraphs 3,4 and 5 which form the substance of his affidavit. The offending parts of paragraph 2 of the counter affidavit may therefore be expunged or ignored and the remaining parts may be used in the determination of the application. In the case of **Phantom Modern Trasport (1985) Limited v D.T. Dobie (Tanzania) Limited,** Civil Reference No. 15 of 2001 and 3 of 2002, the Court of Appeal held as follows on that point.

" 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"

On the basis of the position as stated above, I find that despite the defects in the counter-affidavit, the same can be used in the determination of the application, only that sub paragraphs (a),(b) (c) and (f) are to be ignored.

Coming now to the substance of the application, as said earlier in this ruling, the applicants have applied to this court to revise the ruling of the trial court dated 15th November, 2005. The main contention by the applicants is that the learned Principal Resident Magistrate erred in holding that the applicants who were the 1st and 2nd defendants respectively at the trial, did not file written

statements of defence. In his submissions, Mr. Komba, learned Counsel for the applicants argued that apart from the fact that the trial magistrate's finding was erroneous, the applicants entered appearance in the trial court and therefore it was a misdirection on the part of the trial magistrate to order that the suit be heard ex-parte.

Responding to the submissions, Dr. Lamwai, learned Counsel for the respondent argued that it was a fact that the applicants failed to file written statement of defence and under O. VIII r. 14 (2) of the Civil Procedure Code, the court rightly granted the respondent (then the plaintiff) leave to prove its case exparte. Apart from that argument, Dr. Lamwai argued two points in connection with competence of the application.

Firstly, he argued that the ruling sought be revised being an interlocutory order, cannot in law be brought. He added that since the applicants could resort to an appellate

jurisdiction of this court, they were not entitled to come by way of revision. He said further that since the case had been heard and determined, the application had been overtaken by event and the only remedy available to the applicants is an appeal. The learned Counsel for the applicant did not file rejoinder submissions and therefore I will decide the application on the basis of the filed submissions.

Starting with the issue whether the revision in tenable, it is true as submitted by Dr. Lamwai that the current position of the law is that preliminary or interlocutory decisions or orders are not subject to revision unless such decisions or orders finally determine the suit. That is in accordance with Act No. 25 of 2002. That Act amended s.43 of the Magistrates' Court Act by adding the following provision to that section.

" subject to the provisions of subsection (3), no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision 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 ".

The above being the mandatory requirement of the law, were the applicants entitled to bring the revision ?. The application for revision as pointed out earlier was brought under s.44 (1) of the Magistrates Court Act. Which provides as follows:-

" 44 –(1) in addition to any other powers in that behalf conferred upon the High Court, the High Court-

(a) Shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay.

(b) May, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that

behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decisions or order therein as it sees fit ".

As would be clearly seen, the provision under which the application was brought confers this court with additional powers of supervisions apart from the revisional powers provided for under s.43 of the Magistrates' Court Act. The applicants therefore applied to the court to exercise those powers but did not specify the specific part under s.44 (1) of the Act on which their application was based. In other words the applicants did not cite the enabling provision for their application. It is a trite law now that an omission to cite a proper enabling provision of

the law renders an application incompetent. There are a series of decisions which held to the effect that wrong or non-citation of the enabling provision of the law renders an application incompetent. Some of those cases are **Aloyce Mselle v The consolidated Holding Corporation,** Civil Appeal No. 11 of 2002 and **Edward Bachwa & 30 ors** v. **The Attorney General & Another,** Civil Application No. 128 of 2006. In the latter case, the Court of Appeal held as follows:

> " ... wrong citation of the law, section, subsection and/or paragraph of the law or non-citation of the law will not move the court to do what it is asked and renders the application incompetent".

That defect in the application is sufficient to dispose of this matter.

On the basis of that legal position therefore, I find the application to be incompetent and hereby struck it out. Each party to bear its own costs.

A.G.Mwarija

JUDGE

8/9/2010

8/09/2010

Coram : Hon. A. G. Mwarija, J.

For the Applicant - absent

For the Respondent – Present in person

CC: Butahe

Ruling delivered

A.G.Mwarija

JUDGE

8/9/2010