

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
CIVIL REVISION NO 27 of 2009

TANZANIA PORTLAND CEMENT CO. LTD.....APPLICANT

VS

ROSE T. MKAMBA.....RESPONDENT

Ruling

Date of last Order: 14-04-2011

Date of Ruling: 03-06-2011

JUMA, J.:

This is a Ruling following an application by Tanzania Portland Cement Co. Ltd seeking an order of this court to set aside its Order dated 13 December 2010. This court had for want of prosecution; dismissed a pending application by Tanzania Portland Cement asking this court to exercise its revisional jurisdiction to call and examine the correctness, legality or propriety of the record of the District Court of Kinondoni at Kinondoni (Employment Cause No. 2 of 2008). The relevant Employment Cause No. 2 of 2008 was presided over by a Resident Magistrate.

On 14th May 2009 the applicant filed the Civil Revision No. 27 of 2009 by a chamber application to request this court to call for and examine the record of the Employment Cause No. 2 of 2008 pending at the district court. Records further show that after filing its application with supporting affidavit to seek the exercise of the power of revision by this court, the applicant never made any appearance. On her part, respondent Rose T. Mkamba responded by appearances in person pursuant to mentions and hearing which this court had scheduled from time to time. I summoned the parties to appear before me on 29 October 2010, and only the respondent duly appeared. The absent applicant did not assign any reason then. I ordered the respondent to file her own Counter Affidavit and I mentioned the matter further to 16th November 2010. Respondent duly complied on 4th November 2010 when she filed her counter affidavit.

Once again, on scheduled 16th November 2010 the applicant did not appear for the mention of its application for revision. Respondent seized the moment to remind the court that it was for the third straight time, the applicant was absenting from

prosecuting its application. I once again rescheduled the hearing of the application to 13th December 2010 with the hope the applicant would show up. The applicant did not. I need not over emphasize the fact that while it is the responsibility of this court to schedule mentions and hearings after the filing of Civil Revision No. 27 of 2009, that responsibility does not relieve the applicant of its duty to follow up on the application and prosecution of that application diligently expected of an applicant represented by learned counsel. I dismissed the Civil Revision Number 27 of 2009 upon gathering from the absences, that the applicant had lost any interest to prosecute the Civil Revision Number 27 of 2009 in this court.

Application to restore the Civil Revision No. 27 of 2009 proceeded by way of written submissions. Through its submissions that were prepared and filed by the Law Associates (Advocates); the applicant advanced its reasons why the order of this court should be vacated. The applicant submitted that after filing the Civil Revision No. 27 of 2009, the Tanzania Portland Cement Co. Ltd did not receive any communication from the court. That it was very much later on 4th February 2011

when the applicant realized that this court had dismissed the Civil Revision No. 27 of 2009 for want of prosecution.

The applicant strongly believes that it has good and sufficient cause to warrant the setting aside the dismissal order since it was not notified of the hearing date and as a result it cannot be condemned for failure to prosecute its case. According to the applicant, it is the Registry of this court which should have notified the applicant of the date set for hearing of the Civil Revision No. 27 of 2009.

In her replying submissions, respondent Rose T. Mkamba strenuously disputed the claim by the applicant that the applicant did not receive any communication from this court about the mentions and subsequent hearing of the Civil Revision No. 27 of 2009. Respondent submitted that it was the applicant's counsel who served the respondent with the summons to appear on 29th October 2010. That the respondent consequently filed a Counter Affidavit on 4th November 2011 and served it on the Law Associates Advocates on the same day, and the law firm acknowledged service. Respondent invited

this court to dismiss the applicant's prayer seeking the setting aside of the order of dated 13 December 2010.

Having considered the submission by the opposing parties it is important first to reflect the issue whether this court was properly moved by the applicant both when he filed Civil Revision Number 27 of 2009 on 14th May 2009; and secondly whether this court was properly moved when the applicant filed its chamber application to request this court to set aside its order dated 13th December 2010 dismissing Civil Revision Number 27 of 2009. Determination of sufficiency of reasons to restore an application that had been dismissed depends on the question whether the court has been properly moved by appropriate provisions. In other words, in an application seeking a restoration of an application that had been dismissed for want of prosecution, the court must be satisfied that the application which it is sought to be restored was properly before the court before its dismissal. The court cannot restore an application that was in the first place incompetently before it.

The chamber application, which the applicant filed on 14th May 2009 as a basis for the Civil Revision Number 27 of 2009

employed section 43-(2) of the **Magistrate's Court Act, Cap 11**

R.E. 2002 (MCA) to move this court. Section 43-(2) reads:

"(2) - 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 suit."

Looked at more closely, subsection (2) of section 43 cannot move this court to exercise its power of revision. In my opinion, the applicant should have instead cited sub section (3) to pray for revision power of this court if the applicant believed that the decision of the Kinondoni District Court finally and conclusively determined the Employment Cause No. 2 of 2008. Subsection (3) states,

43-(3) 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 authorised by law shall lie to and be heard by the High Court.

The way the applicant cited inapplicable subsection (2) instead of (3) of section 43, makes me believe that the applicant is not aware that the **Written Laws (Miscellaneous Amendments)**

(No. 3) Act, 2002, (Act No. 25 of 2002) amended the **MCA** by adding a new subsection (2) and by renumbering the former subsection (2) to become the present subsection (3). Court of Appeal of Tanzania in **Yohana Nyakibari & 22 Others Vs. DPP- Criminal Reference No. 1 of 2006** observed that **Act No. 25 of 2002** amended section 5 (2) (d) of the **Appellate Jurisdiction Act, 1979**; section 74 of the **Civil Procedure Code 1966** and section 43 of the **Magistrates Courts Act, 1984** in order to avoid unrestricted appeals or applications for revision or interlocutory orders.

It is clear from the chamber summons, the applicant moved this court by citing inapplicable section 43-(2) of the **Magistrate's Courts Act, Cap 11** as amendment by the **Written Laws (Miscellaneous amendments) (No.3) Act, 2002, Act No. 25 of 2002**. The law is now settled in Tanzania that non citation or citation of wrong provisions of law renders the application totally incompetent. I may as well add that a litigant, who moves the court by citing a provision which had been changed by subsequent amendment of the law, cannot be taken to have properly moved the court. It is my finding and holding that the Civil Revision No. 27 of 2009 was in the first place not

competently before this court. This court cannot restore Civil Revision No. 27 of 2009 which was, in the first place, not competently before it.

In the upshot, the application seeking to set aside the order of this court dated 13 December 2010 is hereby dismissed with cost.

It is ordered accordingly.



I.H. Juma
JUDGE
03-06-2011

Delivered in presence of: Addo Mwasongo, Advocate (for the Appellant) and Rose Mkamba (for Respondent) in person.



I.H. Juma
JUDGE
03-06-2011

