IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL REVISION NO. 4 OF 2020

(Originating from the Resident Magistrate's Court of Arusha at Arusha Misc. Civil Application No. 43 of 2019, Civil Case No. 12 of 2010 and Misc. Civil Application No. 12 of 2010)

THE REGISTERED TRUSTEES OF KARATU VILLAGES WATER SUPPLY (KAVIWASU) ..... 1ST APPLICANT

THE REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF MBULU ..... 2ND APPLICANT

Versus

DANIEL TEWA ..... RESPONDENT

RULING

27th November & 18th December, 2020

Masara, J

The Applicants preferred this application under sections 79(1)(c) and 95 of the Civil Procedure Code, Cap 33 [R.E 2019] moving the Court to call for and examine the records of the proceedings of the Resident Magistrates' Court of Arusha (RM's Court) in Civil Case No. 12 of 2010, Misc. Civil Application No. 43 of 2019 and Misc. Civil Application No. 12 of 2010 in order to satisfy itself as to the legality and propriety of the proceedings, ruling and orders given thereto. The application is supported by a joint affidavit sworn by Stephen Siay and Fr. Valentine Karama, principal Officers of the Applicants. The Respondent opposed the application by filing a counter affidavit deponed by himself. The Respondent also raised two points of Preliminary Objections, couched in the following terms:

a) *That the Applicant's application for revision is incompetently before this court for being filed as an alternative to appeal; and*
b) *That, the Applicant's application is an abuse of judicial processes and thus bad in law.*

It was resolved that the Preliminary Objections be heard alongside the main application and that the two be argued through filing written submissions. The Applicants appeared in Court represented by Mr. Samwel Welwel, learned advocate, while the Respondent were represented by Mr. Qamara Aloyce Peter, learned advocate.

Before dealing with the submissions, I feel obliged to state, albeit briefly, facts leading to the Application herein. The Respondent successfully sued the Applicants before the RM's Court of Arusha vide Civil Case No. 12 of 2010. Hearing thereof proceeded ex parte. It appears from the record that the Applicants filed their Written Statement of Defence but it was filed out of time. This moved the trial magistrate to hear and deliver an ex-parte judgment against the Applicants. In its ex-parte judgment delivered on 15/10/2010, the trial Court ordered the Applicants to connect water services they had disconnected from the Respondent and pay the Respondent a sum of Tshs. 70,000,000/= being costs of fetching water, transport costs, costs of applications and loss of rent since 2000. The Applicants were also ordered to pay costs of the suit and interest of the decreed amount at a commercial rate of 30% from the date the cause of action arose to the date of judgment.

The Applicants filed Misc. Civil Application No. 106 of 2011 in this Court, Massengi, J, seeking for an extension of time to file revision against Civil

Case No. 12 of 2010 but the application was dismissed on 4/1/2012 for various reasons, one of them being that it was time barred. Undaunted, the Applicants filed Misc. Civil Application 17 of 2012, Sambo, J, applying for an extension of time to file revision against Civil Case No. 12 of 2010. This application was dismissed on 10/4/2013. On 4/9/2013, the Applicants filed Misc. Application No. 183 of 2013 seeking for an extension of time to file appeal against ex-parte judgment, in Civil Case No. 12 of 2010. Unfortunately, records of that application. On 28/12/2017, the Respondent moved the RM's Court to execute the decree in Civil Case No. 12 of 2010 but encountered a Preliminary Objection from the Applicants that the 2nd Applicant was not a party to Civil Case No. 12 of 2010. In its ruling delivered on 10/9/2018, the court ordered the file to be remitted back to the trial magistrate for rectification of the error regarding the names of the 2nd Applicant. On 4/4/2019, the second Respondent's name was rectified, to read Registered Board of Trustees Catholic Diocese of Mbulu instead of Catholic Diocese of Mbulu which appeared earlier in Civil Case No. 12 of 2010.

On 1/8/2019, the Applicants filed Misc. Civil Application No. 43 of 2019, moving the trial Court to investigate the Objection raised by the Applicants on the properties to be attached in the execution of the decree which properties do not belong to the judgment debtors. In its ruling delivered on 8/6/2020, the RM's Court dismissed the Objection proceeding filed on the ground that the reasons objecting the grant of execution advanced by the Applicants' advocate were not sufficient to bar the execution. It is after that

decision that this application was filed. I will now turn to the submissions of the parties herein with respect to the preliminary objections.

Submitting in support of the first point of Preliminary Objection, Mr. Qamara contends that the Applicants' application is incompetent as it is filed as an alternative to an appeal since it is seeking to revise and set aside the decision of the RMs' Court of Arusha in Misc. Civil Application No. 43 of 2019. The learned advocate stressed that as the Preliminary Objection was upheld in the Objection Proceeding in Misc. Civil Application No. 43 of 2019 when the same was dismissed with costs, it means that the Preliminary Objection had the effect of finally disposing the application; therefore, the Applicants were supposed to resort to their immediate remedy which was filing an appeal to this Court under section 74(2) of the Civil Procedure Code, Cap 33 [R.E 2019] (the 'CPC'). The Respondent's counsel maintains that courts cannot invoke revisional powers when an appeal process has not been blocked by judicial processes. He added that in their chamber summons and supporting joint affidavit, the Applicants did not show whether their right of appeal was blocked by any judicial process. He referred this Court to various decisions such as ***Halais Pro-Chemie Vs. Wella A.G*** [1996] TLR 269 and ***Margareth Justus Bussa and 2 Others Vs. The District Executive Director of Magu District Council***, Civil Application No. 14 of 2013 (unreported).

Mr. Qamara added that since under paragraph 9 of the affidavit, it shows that the Applicants' Objection Proceeding was dismissed with costs, the

appropriate remedy was to institute a suit as provided under Order XXI Rule 62 of the Civil Procedure Code. That the law is clear that where a claim for objection proceedings is preferred the party against whom an order is made may file a fresh suit to establish the right which he claims and the order made there from shall be conclusive. He concluded that the resort made by the Applicants is wrong, urging the court to dismiss or strike out the application for being incompetently before this court.

Substantiating the second Preliminary Objection, Mr. Qamara contends that the instant application originated from Civil Case No. 12 of 2010 which was also challenged by the Applicants in Misc. Civil Applications No. 106 of 2011, 17 of 2012, 183 of 2013 and finally Misc. Civil Application No. 43 of 2019 in the RM's Court. The learned counsel submitted that the Applicants have prevented the Respondent from realizing the fruits of the decree in Civil Case No. 12 of 2010 for about 10 years now. According to Mr. Qamara, the Applicants have filed multiple applications in different courts which amount to forum shopping and abuse of the court processes. He cited the case of ***Starpeco Limited and 3 Others Vs. Azania Bank Ltd and Another***, Misc. Commercial Application No. 11 of 2020 (unreported) to buttress his argument. He invites the Court to sustain the Preliminary Objection and dismiss or strike out the application.

Submitting against the preliminary objections, Mr. Welwel contended that the Applicants' application as indicated in the affidavit is based on the procedural irregularities committed by the RM's Court which are purely

grounds for revision. He argued that for example while the trial Resident Magistrate was invited to rule on the Preliminary Objections, she went further to the extent of determining the merits of Misc. Civil Application No. 43 of 2019 before the parties were heard therefore that amounted to material illegality and irregularity while exercising her jurisdiction. The learned advocate added that the trial Magistrate made reference to the parties' submissions while none was filed or argued. In his submission, Mr. Welwel asserted that procedural irregularities are always challenged by way of revision, therefore revision is a proper remedy in this application as stated in the affidavit in support of the application. Were the parties heard in the objection proceedings, the remedy would be an appeal but since the parties were not heard, the proper remedy is revision, argued Mr. Welwel. He added that, parties would have filed a fresh suit had the trial magistrate exercised her jurisdiction to investigate the Applicants' claim but the jurisdiction was exercised illegally and with material irregularities as contained in the Applicants' affidavit which makes this application necessary in the circumstance. Mr. Welwel further stated that the cases cited by the Respondent's counsel are distinguishable because in those cases the Court of Appeal was interpreting Section 4(3) of the Appellate Jurisdiction Act, Cap. 141 and not the provisions of the CPC.

Mr. Welwel also submitted that a revision is preferred where an appeal is not provided for. He added that Order XXI Rule 62 of the CPC restricts appeal on the objection therefore the only available remedy is revision as there are glaring material irregularities and illegal use of jurisdiction including failure

to afford parties right to be heard. He added that intervention is necessary since the right to be heard is a fundamental right.

Mr. Welwel did not have much to say on the second limb of the Preliminary Objection reasoning that the Respondent's counsel mentioned multiple applications filed in court but he did not submit whether they relate to the same thing. He added that it is was the first time that the Applicants filed Objection Proceedings in Misc. Application No. 43 of 2019 under the proper names objecting the attachment of their properties. He implored the court to dismiss the Preliminary Objections with costs for they lack merits.

In a rejoinder submission, Mr. Qamara reiterated that the remedy available in Objection Proceedings is to file a fresh suit but since the objection proceeding subject of this revision was disposed by a Preliminary Objection the remedy could only be an appeal as per section 74(2) of the CPC and not by a revision as was done in this case. On the second limb of Preliminary Objection, Mr. Qamara was of the view that the Applicants in all applications filed submitted themselves to the court's jurisdiction without raising any objection regarding the impropriety of their names, therefore raising it at this stage after losing in all the aforementioned applications is an afterthought and abuse of judicial process.

I have dispassionately gone through the Applicants' application, in view of the affidavit and counter affidavit in support and against the application as well as the contending submission of the rival counsel for the parties, the

issue placed before this court for determination is whether the Preliminary Objections raised by the Respondent's counsel have merits.

To begin with the first limb of Preliminary Objection, the Respondent's counsel's argument is that the Applicants have preferred revision as an alternative to appeal. Mr Welwel is against this view contending that in the Objection Proceeding in Misc. Civil Application No. 43 of 2019 the Applicants were not heard on the Preliminary Objection raised, therefore the decision in that regard was tainted with glaring irregularities and illegality that can best be remedied by revision in this court.

It is apparent that in the Applicants' application one of the prayers sought in the application is to call for and examine the record of proceedings of the RM's Court of Arusha in respect of Civil Case No. 12 of 2010 and Misc. Civil Application No. 43 of 2019 so as to satisfy itself as to the legality and propriety of the proceedings, ruling and orders given thereto. Again, in the Preliminary Objections raised what both advocates discussed is in respect of Misc. Civil Application No. 43 of 2019, Civil Case No. 12 of 2010 never featured in their submissions.

It is worth noting that the proceedings in respect of Civil Case No. 12 of 2010 were not made part to the record in the instant application. Only a copy of the judgment was supplied. Therefore, determination of their propriety in the absence of those proceedings is burdensome, and justice will not seem to have been done. This was also stated by the Court of Appeal in the case

of ***The Board of the Trustees National Social Security Fund (NSSF) Vs. Leonard Mtepa***, Civil Application No. 140 of 2005 (unreported), where the Court observed;

> *"This Court has made it plain, therefore, that if a party moves the Court under Section 4(3) of the Appellate Jurisdiction Act, 1979 to revise the proceedings or decision of the High Court,* ***he must make available to the Court a copy of the proceedings of the lower court or courts as well as the ruling and, it may be added, the copy of the extracted order of the High Court. An application to the Court for revision which does not have all those documents will be incomplete and incompetent.***"(emphasis added)

It is therefore the finding of this court that since the proceedings of Civil Case No. 12 of 2010 were not made part of this application, equally this Court cannot be in a position to revise the said proceedings.

Under Order XL Rule 1(b) of the CPC, an appeal shall lie from an order made under Order VIII Rule 14 of the CPC pronouncing judgment against a party. Therefore, in so far as revision of the proceedings in Civil Case No. 12 of 2010 and as pointed out, the remedy available in law is an appeal and not revision as prayed by Mr. Welwel.

Regarding the Objection Proceeding filed in respect of Misc. Civil Application No. 43 of 2019, the law is settled that any person aggrieved by Objection Proceedings the remedy available is to file a fresh suit in terms of Order XXI Rule 62 of the CPC. The relevant provision provides:

> *"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he*

claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

Mr. Qamara went further stating that in the application at hand, the right to institute a fresh suit cannot be invoked because the Objection Proceeding was determined basing on the Preliminary Objection raised. He cited section 74(2) which gives avenue to a party aggrieved by a decision reached as a result of a Preliminary Objection or interlocutory order which has the effect of finally determining the suit to appeal. He took that stance arguing that the Objection Proceeding in Misc. Civil Application No.43 of 2019 was determined to its finality basing on the Preliminary Objection raised. I agree with the learned advocate, however, I wish to add that the remedies available in a case of that nature are two. In the first place, the aggrieved party has opportunity to file suit as per the provision above and alternatively, he has also right to appeal in terms of section 74(2) of the CPC. I say so because the above provision provides a remedy in any Objection Proceedings regardless of the way it was finally determined.

As rightly submitted by Mr. Qamara, revisional powers cannot be applied as an alternative to an appeal. In ***Transport Equipment Ltd Vs. Devram P. Valambhia*** [1995] 161, the Court of Appeal observed;

"The appellate jurisdiction and revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive.; ***if there is a right of appeal then that right has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of the Court of Appeal."*** (emphasis added)

This has been followed by a number of cases. See for example: ***Moses J. Mwakibete Vs. The Editor-Uhuru, Shirika la Magazeti ya Chama and Another*** [1995] TLR 134; ***Halais Pro-Chemie Vs. Wella A.G*** (supra); ***Felix Lendita Vs. Michael Long'idu***, Civil Application No. 312/17 of 2017 (unreported). In ***Hassan Ng'anzi Khalifan Vs. Njama Juma Mbega (legal representative of the late Mwanahimis Njama) and Another***, Civil Application No. 218/12 of 2018 (unreported), where it was held:

> *"The above said, we think the impugned decision could be challenged by way of an appeal with or without leave of the High Court. The Applicant has not brought to the fore exceptional circumstances that would legally entitle him to resort to the revisional powers of the Court, instead of its appellate jurisdiction. Thus, the application before us is incompetent and bad in law for being preferred as an alternative to an appeal."*

Notwithstanding the position above, which I also hold dear, I do agree with the counsel for the Applicants that the decision of the Resident Magistrate Court was on a matter not canvassed on merits. Before her was a notice of preliminary objections raised against the propriety of the Objection Proceedings. Instead of making a decision on the preliminary objections, she made a decision on the substance of the application without pronouncing herself on whether she upheld the objections raised or not. That was wrong. I therefore agree with Mr. Welwel that the decision of the trial magistrate in Application No. 43 of 2019 does not fall in the categories of decisions that would attract remedies provided under Order XXI Rule 62 or Order XL Rule 1(b) of the CPC. The first point of objection is accordingly overruled.

As far as the second Preliminary Objection is concerned, the Respondent's counsel contends that the Applicants' tendency of filing multiple applications is an abuse of judicial process. However, the learned advocate did not cite the provision of law infringed. An aggrieved party is not barred from challenging a decision likely to affect his/her right on the pretext of abusing the court due process unless it is proved that the applications filed aim at curtailing one from enjoying his rights intentionally. A court's primary duty is to protect all those who feel that their rights are infringed. To ascertain whether the applications filed by the Applicants aimed at abusing due process and denied the Respondent the right to enjoy the decree for almost ten years, there has to be proof backed with evidence. The Second point of objection, in my view, does not qualify to be a Preliminary Objection within the meaning elaborated in ***Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd*** [1969] E. A 696, where the defunct Court for East African stated:

> *"A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*

From the above prescripts, it is apparent that the second point of Preliminary Objection does not qualify as a preliminary objection within the above stated position of the law. I therefore overrule the second limb of Preliminary Objection on that basis.

Having overruled all the preliminary objections as elaborated above, I now turn to deal with the substance of the application. I have already pronounced myself on the fate of Application No. 12 of 2010. I will not deal with that application as its records are not before me. This ruling will only deal with the propriety of the decision in Misc. Application No. 43 of 2019 before the Court of the resident Magistrate, Arusha.

Mr. Welwel submitted that failure to afford parties the right to be heard on and making reference to advocates' submissions which were not filed and argued; further, the act of the trial magistrate to give an omnibus decision regarding the objection proceedings and the application for execution; also citing a wrong number in the ruling, amounted to an illegality which attracts a decision of this Court in the exercise of its revisionary powers under Section 79 (1)(c) of the CPC. Mr. Qamara, on the other hand, disagree with that position. Quite unusually, Mr. Qamara raised another objection to the effect that there was no Application titled Misc. Application No. 43 of 2019 and asked the Court to strike out the same. He did this in his reply submission. I consider the move made by the advocate highly unprofessional. Having raised two objections, it would be expected that it was within his knowledge that there was no such application, if at all he so believed.

Mr. Qamara went further to justify the decision of the RM's court stating that the objection proceeding preferred before it was inappropriate as what was required is for them to show cause why the decree in Civil Case No. 12 of

2010 should not be executed. He therefore concluded that the application before this Court is misconceived and ought to be dismissed with costs.

After a careful consideration of the parties' affidavits in support and against the application, and having also considered all the submissions filed by the counsels for the parties herein, I am of the view that the issue that begs determination of this Court is whether the application for revision has merits. I have already pronounced myself when I was dealing with the first preliminary objection raised by the counsel for the Defendant. I overruled that objection due to what I observed in the decision of the learned Resident Magistrate. I am in total agreement with Mr. Welwel that the decision reached by the learned Resident Magistrate was erroneous as it purported to decide the matter before the court on merits while parties had only submitted on the preliminary objections. Incidentally, the learned Magistrate seem not to have premised her decision on the application before her, that is Misc. Civil Application No. 43 of 2019. She wrote a ruling with respect to execution preferred under Civil Case No. 12 of 2010. That was done notwithstanding that all pleadings, proceedings and the written submissions before her were with respect of Misc. Civil Application No. 43 of 2019. That was another illegality made by the trial magistrate.

In the event and for the reasons stated, I sustain the application regarding the impropriety of the ruling in Misc. Civil Application No. 43 of 2019. I hold that the trial magistrate in the exercise of her jurisdiction thereof she acted illegally by not affording parties the right to be heard on the substance of

the application before her. In the exercise of revisional powers vested on me by Section 79(1)(c) of the Civil Procedure Act, I quash and set aside the proceedings and ultimate decision in the said Misc. Civil Application No. 43 of 2019. I direct that the objection application be heard *de novo*, preferably before a different magistrate. Considering the circumstances of this case, I direct that each party shall bear their own costs for this Application.

Order accordingly.

Y. B. Masara

JUDGE

18th December, 2020