

TANZANIA / JUDGMENT

RULING CMG CONSTRUCTION COMPANY LTD VS HERFRID JOHN MGENI print

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA CIVIL REVISION NO. 7482 OF 2024 CASE REFERENCE NO.
202404061000007482 (Origination from Application for restitution in Misc. Civil Application No
26854 of 2023 in the district court of Mbeya at Mbeya) CMG CONSTRUCTION CO.
LIMITED APPLICANT VERSUS HERFRID JOHN
MGENI.....1ST RESPONDENT MOHAMED ALLY MASHANGO T/A
MASHANGO INVESTMENT COMPANY LTD2ND RESPONDENT LAROY
AGGREGATE LIMITED3RD RESPONDENT CHRISTOPHER
MBWILO4TH RESPONDENT

RULING

3rd September & 20th November 2024 NONGWA, J. The applicant has filed this application for revision against the decision in Application for restitution vide Misc. Civil Application No. 26854 of 2023 in the district court of Mbeya at Mbeya and seeks the following orders;

1. That, this Honourable Court be pleased to call for and examine the record of proceedings of Miscellaneous Civil Application No. 26854 of 2023 in the District Court of Mbeya, and satisfy itself as to the correctness, legality or propriety of the decision thereof on an application for restoration of properties attached and sold in the execution for ex parte decree in Civil Case No. 17 of 2022 which was set aside vide Miscellaneous Civil Application No. 30 of 2023.
2. That, upon examining the records above said, this Honourable Court be pleased to quash and set aside impugned orders made thereat and order the 3rd and 4th Respondents to return to the Applicant's tipping trucks with registration numbers T.742 DWK, T.747 DZV, T.503 DXH, T.842 and T. 852 DZZ all of them make FAW 340 HP 20 tons or its value as well as damages and interest as pleaded in the application for restoration.

3. This honourable Court be pleased to issue any decision, directive, order and/or relief it deems fit and just to grant. The application is confronted with three points of preliminary objections from the 3rd respondent subject of this ruling;
1. That this revisional proceedings is untenable in law for being preferred as an alternative to appellate process;
2. That the applicant's affidavit is defective for containing legal argument and conclusion and not confined to the facts contrary to Order XIX Rule 3(1) of the Civil Procedure Code [Cap 33 R: E 2022] (the CPC). 2
3. That the application is made in abuse of the court process. In alternative, the current application is res judicata as the same matter has already been determined by this court in the Civil Revision No. 03 of 2023. Briefly, the 1st respondent obtained ex-parte judgment against the applicant in Civil Case No. 17 of 2022 in the court of the Resident Magistrate of Mbeya at Mbeya. In the course of executing the decree the applicant's five tipping trucks were attached. The applicant through Misc. Civil Application No. 17 of 2023 was granted extension of time to set aside ex-parte judgment and in Misc. Application No. 30 of 2023 ex-parte judgment and decree was set aside. The applicant did not sit idle, applied and was granted order uplifting attachment order vide Misc. Application No. 18 of 2023. On the other hand, the attached vehicle was sold to the 3rd and 4th respondents necessitating the applicant to approach the district court with application for restitution of attached vehicles. That application was christened as Misc. Civil Application No. 26854 of 2023. In that application, the trial court allowed application to the extent that the applicant was entitled to proceeds of the sold vehicles which was lying in court account. The applicant did not see justice with such findings, she has approached this court by application for revision. 3 As stated earlier the 3rd respondent has raised preliminary objection, guided by the principle that once there is a preliminary objection, it must be dealt with first before the application or appeal is heard. I ordered hearing of preliminary objection to proceed. Present were Mr. Kamru Habibu Msonde, Ms. Jalia Hussein and Mr. Sheck Mfinanga, all learned counsels for the applicant, 1st & 2nd respondent and 3rd respondent respectively. Arguing the first objection that revision has been preferred as alternative to appeal, Mr. Mfinanga has submitted that applicant was a party to Misc. Civil Application No. 26853 of 2023 thus cannot apply for revision. He submitted, it is the law that a person cannot invoke revisionary power when there is right of appeal. He supported the argument with the case of Ramadhani Myolele vs Hamadi Ali Islam, Misc. Civil Application 40 of 2022 [2022] TZHC 14176 (24 October 2022; TanzLII), Bank of Tanzania v. Said A. Marinda and Others, Civil Application No. 74 of 1998 (unreported) and Said Ali Yakut & Others vs Feisal Ahmed Abdul, Civil Application No. 4 of 2021 [2011] TZCA 145 (23 February 2011; TanzLII). Counsel for the 3rd respondent contended, as the applicant was a party to the case has right of appeal and is barred from preferring 4 application for revision. He concluded, this court has no jurisdiction to entertain the application and is an abuse of court process. In reply Mr. Msonde submitted that the objection was misconceived and lack merits. While admitting

that revision is not an alternative to appeal, counsel submitted that appeal is a creature of the statute and referred the court to the case of *kweka vs ngorika bus service* [2006] TZCA 10. He argued that the applicant has no right of appeal, the point being the decision emanates from ruling and drawn order. Counsel submitted that appeal from orders is governed by section 74(1)(a) to (i) and Order XL(1)(a) to (v) of the CPC and appeal relies only on orders mentioned therein. That the applicant is aggrieved by the ruling and order made under section 89 of the CPC to which there is no right of appeal. He fortified the argument with the case of *Kalebu Kiboja Mjinja vs Shadrack Daniel Tembe*, Civil Appeal No. 24 of 2020 [2021] TZHC 2048 (28 January 2021; TanzLII), *Amir R. Abdallah vs Mohamed A. Wadi*, Civil Revision No. 2 of 2022 [2022] TZHC 13100 (31 August 2022; TanzLII) and *Ally Saad (2) vs Peter Leburu Mchau & Another*, Civil Appeal No. 171 of 2022 [2023] TZHC 15823 (23 February 2023; TanzLII). Counsel contended further that as the ruling was made under section 89 5 of the CPC which is not mentioned under order XL, the applicant had no right of appeal. Mr. Msonde distinguished all cases relied by counsel for the 3rd respondent and prayed the first objection be overruled. The epicentre of the issue is whether decision in restitution proceeding is appealable. Mr. Mfinanga submission is that as the applicant was a party to Misc. Civil Application No. 26854 of 2023 has right of appeal and cannot invoke revisional power of the court. Mr. Msonde has submitted that ruling or drawn order under section 89 of the CPC is not among the appealable orders under section 74 and order XL of the CPC. I wish to begin by emphasizing that jurisdiction of the court is crucial for it to try a case. In *Shyam Thanki and Others vs New Palace Hotel* [1971]1 EA 199 the court stated; 'All the courts in Tanzania are created by statute and their jurisdiction is purely statutory.' In the case of *CRDB Bank PLC vs Lusekelo Mwakapala*, Civil Appeal No. 143 of 2021 [2023] TZCA 17637 (22 September 2023, TanzLII), it was held that: 'It is worth noting that, the question of jurisdiction is crucial and must be determined by the court/tribunal at the earliest opportunity. Jurisdiction is everything without which a court has no power to determine the dispute before it. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings. Generally, a court is barred to entertain a matter in which it has no jurisdiction.' The decision whether to invoke appellate or revisional powers of the court one has to look on the nature of the decision and the prescription of the statute. Appeal from the original decrees are governed by section 70 of the CPC and appeal from orders by section 74 and order XL of the CPC. According to Mr. Msonde that decision under section 89 of the CPC is an order. I hold the different view, section 3 of the CPC define decree in the following manner; 'Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include-

- (a) an adjudication from which an appeal lies as an appeal from an order; or

- (b) any order of dismissal for default.’ 7 The above is self explanatory that the decision under section 89 of the CPC is a decree. In that regard reference to section 74(1) and order XL of the CPC that order under section 89 is not mentioned is made redundant. Section 70(1) of the CPC provides; ‘Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction.’ As it is settled that decision under section 89(1) of the CPC is decree, then appeal lies to the high court. Commenting on section 144(1) of the Indian Code of Civil Procedure which is *pari materia* with section 89(1) of Civil Procedure Code Cap 33, Mulla the Code of Civil Procedure, 18th Edition at page 1304 states; ‘The determination of a question under this section is a decree and appealable as such and this is so even if the court exercises the power of granting restitution in its inherent jurisdiction. (see s 2 cl (2): definition of decree.’ Applying the above principle to the matter at hand it behoves to say the applicant has right of appeal. It is trite law that revisional jurisdiction of the Court is exercisable in matters which are not appealable to the Court or where the appellate process has been blocked by a judicial process. The rationale being to minimize the usurping of the revisionary powers as a substitute to appeal. See *Moses J. Mwakibete v. The Editor-Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd* [1995] TLR 134. The reason is not far-fetched, in revision proceeding powers of the court is not to correct the decision but how such decision was reached. The above fits squarely under section 79(1) of the CPC under which also the applicant has moved the court, it provides; ‘The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-
- (a) to have exercised jurisdiction not vested in it by law;
- (b) to have failed to exercise jurisdiction so vested;
- (c) or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.’ In *Patrick Magologozi Mongella vs The Board of Trustees of the Public Service Social Security Fund*, Civil Application 342 of 2019

[2022] TZCA 216 (TANZLII; 22 April 2022) dealing with the application for revision like the present one, the court stated; 9 ‘So, for instance, in determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play. None of these endeavours will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority on a first appeal by re-hearing the case on fact and law and coming up with its own findings of fact.

Any suggestion that the Court can re-hear and re- appreciate the evidence when exercising its revisional jurisdiction will obliterate the distinction between the Court's appellate authority and its power of superintendence.' [Emphasize added.] I have gone through chamber summons and affidavit of the applicant and failed to garner any evidence that shows that there was any process of appeal against the impugned decision of the trial court or that the appeal remedy was blocked by the judicial process or any exceptional circumstance in which the court can invoke its revisional powers. I am of the firm view that the applicant still has an appeal as the proper avenue to approach this court. I therefore, sustain the first objection. 10 As the first preliminary point of objection alone suffices to dispose of the application, it will be hypothetical and a mere academic exercise to waste time deliberating on the rest of the preliminary points of objection. Consequently, I find and hold that, the instant application is misconceived and proceed to strike it out with costs. V.M. NONGWA. JUDGE 20/11/2024 Dated and Delivered at Mbeya this 20th November, 2024 in presence of Mr. Ibrahim Athuman for the 1st and 2nd respondents and H/B of Habibu Kamru Msonde for the applicant and Mr. Sheck Mfinanga for the 3rd respondent. V.M. NONGWA JUDGE 11

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