

TANZANIA / JUDGMENT

RULING LUCAS MWAMPEZA VS AIDAN MSIGWA

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TANZLIIDECIDED
17 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CIVIL REVISION NO. 28019 OF 2024 CASE REFERENCE NO.
202411061000028019 (Originating from Civil Case No. 9272 of 2024 in the district court of Chunya)
Between LUCAS MWAMPEZAAPPLICANT VERSUS
AIDAN ANDREA MSIGWA RESPONDENT

RULING

17th December 2024 & 28th January 2025 NONGWA, J. This application is made under section 44(1)(a)(b) of the Magistrates' Courts Act [Cap 11 R: E 2019] "the MCA" and section 79(1)(c) of the Civil Procedure Code [Cap 33 R: E 2019] "the CPC", the applicant seeks for the following orders;

1. That this Honorable Court may be pleased to call for and inspect the record of the District Court of Chunya at Chunya in Civil Case No. 9272 of 2024 for the purpose of satisfying itself of the as to the correctness, legality and propriety of the proceedings and order dated 04th November 2024 and order dated on the 28th October 2024 (Hon. J. Mahanus SRM). 1
2. That this Honourable Court, having been satisfied that there are errors material to the merits of the proceedings and resultant order involving injustice, revise and quash them; and in place, substitute the same with another decision or give directions as it considers necessary in the interests of justice as it thinks fit.
3. Costs of this Application be borne by the Respondents; and
4. Any other reliefs/ direction as the Honorable Court deems just and fit to grant. Briefly it is stated, the respondent has filed Civil Case No. 9272/2024 against the applicant for trespass into his gold bearing rocks under Primary Mining Licence No. 1164-MBY at Ifumbo Village within Chunya District and Mbeya Region pending. He also filed Miscellaneous Civil Application No. 9352/2024 for temporary injunction which was granted ex-parte and Miscellaneous Civil Application No. 9835/2024 in which warrant to show cause was issued. The main suit, that is Civil Case No. 9272/2024 went up to Final Pre-Trial Conference stage, before hearing started parties discovered that applications filed by the respondent had not been finalized, the court was moved to depart from the Final Pre-Trial Conference orders.

Upon hearing parties, the court vacated its order made during Final Pre-Trial Conference to accommodate finalization of Miscellaneous Civil Application No. 9352/2024 and Miscellaneous Civil 2 Application No. 9835/2024. The applicant saw injustice in that order and has filed this application for orders mentioned earlier at the beginning of this ruling. Upon being served with the application documents, the respondent filed counter affidavit opposing the application and accompanied it with three points of preliminary objections to the effect;

1. That, this application is incompetent for failure to attach the impugned ruling/order.
2. That this application is premature, incompetent and bad in law for being preferred against the decision or order which is non revisable in terms of section 79 (2) of the Civil Procedure Code Cap. 33 R.E. 2019 reading together with section 43 (2) of the Magistrates Courts Act Cap. 11 R.E. 2019.
3. That this application is frivolous, vexations and abuse of the court process. As it is ordinarily the practice of this court that, once a preliminary objection is raised, the court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. Hence, I allowed the preliminary objections to be argued, before the hearing of the application on merit. 3 On the hearing, the applicant was represented by Ms. Irene Mwakyusa, learned advocate whereas the respondent had service of Mr. Habibu Kamru Msonde, also learned advocate. By consensus of parties endorsed by the court, hearing of preliminary objection was by filing written submissions. In his submission, Mr. Msonde abandoned the first objection and proceeded to argue the second and third objection together as listed above. He submitted that the law is that a party to proceedings is not allowed to appeal or apply for revision against a decision or order which is interlocutory and has no effect of finally determining the suit. He stated, the order which aggrieved the applicant has no effect of finally determining the rights of parties in the case pending before the lower court. He referred to section 79(2) of the CPC and section 43(2) of the MCA to the effect that they prohibit to apply for revision when the decision has no finality effect. He fortified the argument with the decision of the Court of Appeal in case of Murtaza Ally Mangungu vs The Returning Officer of Kilwa & Two Others, Civil Application No. 80 of 2016 and Vodacom Tanzania Public Ltd vs Planetel Communications Ltd

[2019] TZCA 686. And that of this court in Ilimgadi Lihimbo vs Tito Christopher Njiba, Land Revision No. 3 of 2020) [2021] TZHC 6195 (10 September 2021; TanzLII) and Bahati Geofrey Kyando (Administratrix of the Estates of the late Geofrey Laiton Kyando 4 vs Henry Nyandindi & 20 Others, Land Revision No. 3 of 2020 [2021] TZHC 12571 (26 October 2021; TanzLII). Mr. Msonde contended that, although no decision of the trial court is attached, the decision or order complained does not finally determines the rights of the parties in the pending civil case, that is no right of the parties has been determined in that case. That what is complained is procedural issue on conduct of the main suit while the interlocutory applications are yet to be determined. Counsel argued, the order is interlocutory and no appeal or revision relies against it. This he called makes the

application frivolous, vexatious and an abuse of the court process, he, relied on the case of Kiama Wangai vs Mugambi and Another [2013] EA 474. Finally, prayed the objections be sustained and the application struck out with costs. In rebuttal, Ms. Irene submitted that the application is not for revision but for the court to call and inspect the record for purpose of satisfying itself as to its correctness, legality and impropriety which when the court finds there is error may proceed to quash the resultant orders. Counsel distinguished all cases relied by the respondent's counsel. Counsel submitted that the application is made under section 44(1)(a)(b) of the CMA which do not bar the application like this one. Alternatively, it was submitted, should the court find the application is improper but spot any irregularities, it should proceed to revised them. 5 She stated that revision under the MCA has no limitation as opposed to those under the CPC as provided by section 79(3). She referred the court to the case of Abdu Hassan vs Mohamed Ahmed, without providing full citation however it is Abdu Hassan vs Mohamed Ahmed [1989] TLR 181 (HC). On whether the application was frivolous, it was submitted that the applicant has valid complaint not on the decision but on the procedure to reach that decision which involve back and forward in the case and that constitute irregularities to be examined by the court, Ms. Irene submitted. Based on the above, the applicant's counsel prayed the objections be dismissed with costs. Having considered the rival submissions for and against the objections, the issue for my determination is whether the preliminary objections have merits. I will start to examine the law under which the application is made as the applicant's submission hinted and see if the objections by the respondent is valid. Section 44(1)(a)(b) of the MCA provides; '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 6 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 decision or order therein as it sees fit: Whereas section 79(1)(c) of the CPC 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) N/A
- (b) N/A
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity., Powers of the court under section 44(1)(a) of the MCA is supervisory and is done on the on-going proceedings. Supervisory powers of the high court over the subordinate court are exercised

suo moto and not by application by any person though it may be from a complaint lodged 7 administratively. In the case of Abdallah Hassani vs Juma Hamis Sekiboko, Civil Appeal No. 22 of 2007 (unreported) cited in Director of Public Prosecutions vs Elizabeth Michael Kimemeta @ Lulu, Criminal Appeal No. 6 of 2012 [2012] TZCA 3 (17 September 2012; TanzLII) the court stated: 'Looking at the quoted provision, we are of the settled view that the mode by which a matter comes to the High Court and the type of powers to be exercised under one subsection differ from the other. Under subsection 1 (a) the court acts suo motu and of course this can be ignited by a complaint, a tip- off from a law-abiding citizen or a discovery of undeserving element in the course of its inspection of lower court's records. Here, the High Court's powers are mainly administrative and not judicial as such. We are fortified in this view by the wording used. The court would give directions where necessary in the interest of justice and the Courts shall comply with such directions without undue delay. This cannot be on merits of the case because the High Court cannot direct a lower court what decision it should make and how. In our view direction envisaged here are the ones related to the supervisory role of the High Court and which would include for example, transferring a case from one Court to another or from one magistrate to another or directing that it be put on first track during scheduling for hearing. Under this subsection, in giving its orders, the High Court is not enjoined to contact any of the parties involved.' [Emphasize supplied.] 8 Thus, in Peter Michael Madeleka vs Republic, Criminal Appeal No. 263 of 2022 [2024] TZCA 356 (14 May 2024; TanzLII), the court concluded that; 'We think the appellant will now be aware if indeed he was unaware that, section 44(1)(a) of the MCA gives no right in the litigant to move the High Court to exercise its supervisory powers it being exercisable at the instance of the court itself.' Given the above, this application cannot be entertained under section 44(1)(a) of the MCA as that is only exercisable by the court suo moto and a party cannot move the High Court to exercise its supervisory powers through a formal application as done by the applicant in this case. That means the court is wrongly moved under sub-section 44(1)(a) of the CMA, which as the law stands is not fatal. Regarding section 44(1)(b) of the MCA and 79(1) of the CPC, this are typically reserved for revision and it applies for finalised proceedings in the subordinate courts. The catch word under section 44(1)(b) is determined while section 79(1) is decided. Revisional power of the court may be made suo moto or upon application by a party or interested person but it has to be done under the confine of law giving right for revision. Having made the above distinction on application of supervisory and revisional powers of the high court, I now move to consider whether the court is clothed with powers to revise the impugned order. According to 9 the respondent it is interlocutory orders not amenable to revision under section 79(2) of the CPC while the applicant alternative argument was that if the court find any irregularity should revise the proceedings. Section 44(1)(b) of the MCA applies to the determined cases which means to the case which has been finalised. Whereas section 79(1) of the CPC if also to decided cases. In this matter there is consensus that the orders subject of the application has not determined or decided rights of parties, and the case is still pending in the district court, except that the applicant is amused by the conduct of the proceedings in the district court. That is to say the impugned order is interlocutory and have no effect of finality. In

Murtaza Ally Mangungu vs The Returning Officer of Kilwa & Two Others, Civil Application No. 80 of 2016 (Unreported) the court stated; 'In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply the nature of the order test. That is, to ask oneself whether the decision or order complained of finally disposes of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.' Ms. Irene submitted that revision under the section 44 of the MCA has no limitation and relied on the case of Abdu Hassan (supra). I have read the said decision and observed that the limitation envisaged is grounds upon which revision may be done and not the nature of decision sought to be revised. This was observed in the case of Transport Equipment Ltd vs Devram P. Valambhia [1995] TLR 161 the court stated; 'In fact, as Mr. Mbuya pointed out, section 44(1)(b) of the Magistrates Courts Act provides for very wide powers of revision than what is contained in Section 79(1) of the CPC.' In most cases, the provision giving remedy for revision stipulates grounds upon which it may be taken, that is not the case under section 44(1)(b) of the MCA, and that is the limitation the court discussed in Abdu case. Without being repetitive, section 44(b) applied to already determined and not pending cases. From the discussion above, this court has no powers to revise the order or decision in a pending case before the subordinate court, those decisions are excluded by the law under sections 43(2) of the MCA and 79(2) of the CPC from revision. I therefore find merits in the 2nd ground of preliminary objection. On submission that this application is frivolous, vexatious and abuse of court process, Ms. Irene submitted that the applicant has valid complaint. In order to prove vexatious proceedings, a party must demonstrate that the opposite party has persistently instituted legal proceedings and that such proceedings have been without reasonable ground. In the case of Bulyanhulu Gold Mine Ltd & Others vs Petrolube (T) Ltd & Another, Civil Application No. 364 of 2017 [2020] TZCA 1844 (11 November 2020; TanzLII) the court referred to the meaning of frivolous and vexatious as defined by the Academic's Legal Dictionary, 22nd Edition by S. L. Silwan to mean;

- (i) Frivolous and vexatious complaint to mean: A complaint put in against any person for the purpose of annoyance. (ii) Frivolous to mean: Clearly lacking in substance, clearly insufficient as a matter of law.' And in the Concise Oxford Dictionary, Tenth Edition which define; 'Vexatious to mean: causing annoyance or worry, and brought without sufficient grounds purely to cause annoyance.' Unfortunately, Mr. Msonde did not elaborate how this application was frivolous and vexatious, he based his argument on ground that the applicant ought not to have filed this application. Of course, the applicant felt justice not rendered after the magistrate departed from the Final Pre- Trial Conference orders, in the quest for justice, has lodged the matter for the court to revise and give direction. In my view by challenging the court decision by way of revision, though may be in wrong forum cannot in any manner be said the applicant launched vague and unsubstantiated proceedings to qualify as vexatious or frivolous matter. I therefore find no substance in the argument. In the upshot, the second ground of preliminary objection is sustained, this application is incompetent for the reasons stated above. I hereby struck it out with costs. The matter is

remitted to the district court to proceed from where it stopped. V.M NONGWA JUDGE 28/1/2025 Dated and Delivered at Mbeya this 28th January in presence of Ms. Irene Mwakyusa for the Applicant also holding brief of Mr. Kamru Habibu Msonde for the respondent. V.M NONGWA JUDGE 13

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