

TANZANIA / JUDGMENT

rose tanna ally nyabange vs athuman ally nyabange administrator of the estate of the late warioba nyabange and 2 others 2022 tzhc 15208 14 december 2022

COURT
TZHCDECIDED
14 December 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB- REGISTRY OF MWANZA) AT MWANZA MISC. CIVIL APPLICATION NO. 15 OF 2022 ROSE @TANNA ALLY NYABANGEAPPLICANT VERSUS

1. ATHUMAN ALLY NYABANGE (administrator of the estate of the /ateWARIOBA NYABANGE)..... 1st RESPONDENT
2. MAGORI ALLY NYABANGE..... 2nd RESPONDENT
3. NYADHI INVESTMENT CO. LIMITED..... 3rd RESPONDENT

RULING

Dec. 7th & 11*, 2022 Morris, J In this matter, the applicant is moving this court to revise the proceedings and orders of honourable Deputy Registrar dated 15th September 2022. Briefly, the Applicant and the 2nd respondent were ordered by this Court to pay costs to the 1st respondent (decree holder in Land Case no. 48 of 2014). Through Reference No. 01/2020 the judgement debtors were ordered to pay costs of TZS. 10,574,500/= which culminated into Execution No. 32/2022. In the latter proceedings, the Deputy Registrar (DR) ordered attachment and sale of Plot No. 152 of Bweri Area, Musoma. The 3rd respondent was, thus, appointed to accomplish the task. Aggrieved, the applicant has preferred this application. The 1st respondent opposed this application and, in addition, filed a notice of preliminary objection (PO) that; "the application is misplaced and incompetent as this honourable court lacks jurisdiction to revise the decision of the Deputy Registrar in execution proceedings" When the matter came up for hearing of the PO, the applicant was represented by Advocate Emmanuel John while the 1st respondent enjoyed legal service from Advocate Duttu Chebwa. The 2nd and 3rd respondents, though duly served, entered no appearance. Submitting for the raised PO, the counsel for the 1st respondent argued that the Court lacks jurisdiction to entertain the application. He reasoned that the application is intended to challenge ex-parte order given under Order XXI Rule 21 of the Civil Procedure Code, Cap 33 R.E. 2019 (herein after the CPC). He stated further that, the applicant in his affidavit, is

faulting the Deputy Registrar's decision to proceed on ex-parte basis while the court had been informed of the cause for the absence of the judgment debtors' counsel. In law, according to him, when a party challenges a matter which proceeded ex-parte for want of appearance, the proper cause is to apply 2 to set aside the ex-parte order by exhibiting sufficient reasons of his absence. Further, the Counsel submitted that the prayer sought by the applicant in the chamber summons, is to revise proceedings and order of this court in Execution No. 31/2022. To him, the decision of DR is deemed to be the decision of the High Court. Challenging such decision one may go by way of review, revision, appeal and reference where the Deputy Registrar was acting as Taxing Officer under the Advocates Remuneration Order of 2015. Moreover, Advocate Chebwa argued that though the application was made under sections 38 and 95 of the CPC, the same raises matters falling well beyond the cited provisions. He was of the opinion that, by allowing this application, the Court will be revising its own decision. He referred to the cases of Nurdin Mohamed Chingo v Saium Said Mtiwe & Another, HC. Civil Reference No. 6 of 2022 (at page); and Iron and Steel Ltd v Martin Kumaiija and 117 Others, HC Labour Revision No. 169 of 2022 at page 12 (both unreported). According to him, in the cited cases the concurrent holding is that DR's orders are not revisable by the High Court. In his reply, the counsel for the applicant submitted that, it is cardinal principle of law that, every application must state the law upon which it is made. Upon citing it, the parties are able to determine whether court had jurisdiction or not. The present application has been made under section 38(1) of CPC whose essence is to determine any question arising from execution proceedings. To him, the envisaged questions must be determined by Court. He argued further that the said provision does not state if such question(s) should come from ex-parte or inter-partes proceedings. The Counsel also argued that questions to be determined are outlined under paragraph 15 of the applicant's affidavit. He submitted that to appreciate the gist of the application, both the chamber summons and the supporting affidavit must be read together. It was his further argument that, CPC has specific provisions governing revision, namely section 79 and the same is not included in the present application. In counter to the other side's argument that the applicant should set aside the ex-parte order first he argued that the same is misplaced. However, he added as an alternative, should the Court find that the applicant is challenging non-appearance, the corresponding paragraphs of the affidavit should be expunged so that the application is thereafter heard on merit. For case cited by the respondent, Advocate John simply argued that they are distinguishable as they did not analyze section 38 of CPC. He, accordingly, prayed for the preliminary objection to be overruled with costs. 4 In rejoinder the counsel for the 1st respondent submitted that the application is under sections 38(1) and 95 of the CPCoxA. such provisions are incompatibility with the prayers. To him paragraph 15 cited by the applicant also relates to the principle of right to be heard which is an integral part of non-appearance. Further, section 95 is for inherent powers, which is irrelevant for it does not warrant grant of the present application. I have keenly read the submissions of both parties and record of the Court regarding the raised PO. Though I see value in the defence argument that ex parte orders may be set aside by same court {Herman Omar Mganga v Winnie Sheba Seme, CA Civil Appeal No. 368 of 2019 (unreported) followed}; the basic question for determination is whether or not this Court is clothed with necessary jurisdiction to entertains and/or grant the application. Undisputedly, the application is made under sections 38 (1) and 95

of the CPC. Section 95 provides for the inherent powers of this Court. It needs no further elaborate discussion. However, section 38 (1) reads as follows; 'All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.' 5 In principle, the applicant is praying to revise the decision of the Deputy Registrar in Execution No. 32/2022. He is particular about such prayer. The phrase runs thus; "that the court be pleased to revise the proceeding (sic) and court order of Honourable Deputy Registrar A.W. Mmbando dated 15th September 2022". The rivalry submissions of both Counsel have a significant appreciation that the said DR performed her duty as a judicial member of this Court. The variance is the effect of her order and the remedial approach for any aggrieved party thereof. Whereas the Counsel for the applicant opines that the Court can do the 'revising' exercise by determining the questions raised in the application; the defence Counsel opposes such approach. This Court is less persuaded by the submissions by the applicant's counsel that one needs to read the prayers contextually as supported by the affidavit. In law, the document which must contain prayers of the application is the chamber summons. More so, the prayers sought thereat need to be backed with enabling provision(s) which confer jurisdiction to the court grant the same. I am also mindful of the developing jurisprudence that the court may disregard the omission to cite proper provision where it has the requisite jurisdiction to entertain the application as decided in *Bin Ku/eb Transport Company Limited v Registrar of 6 Tittles and 3 others*, CA Civil Application No. 522/17 of 2022 at page 7 (unreported). The foregoing development notwithstanding, prayers are never contained in affidavits. Reference is to Order XIX of CPC and *Uganda v Commissioner of Prison Ex-Parte Matovu* E.A 520; *Yusuph Makame and 6 others vs. Ai Hushoom Investment (T) Ltd and another*, HC Misc. Land Application No. 674/2021 (unreported). The rule therefrom is that; '...as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statement of facts and circumstances to which the witness deposed either of his own knowledge or from information which he believes to be true. Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion' (bolding rendered for emphasis). Consequently, the court will look at the chamber summons to see if has jurisdiction to grant the prayers sought therein. Expressly, the couching of prayer (1) in the chamber summons subject of the current matter is unequivocal that the applicant seeks to revise the impugned proceedings. With adequate respect to the applicant's advocate, the term revise connotes a technical meaning in law. One of its fundamental parameters is that the court enjoying revisionary powers should on higher hierarchy than the court which gave the decision subject of revision. If indeed the applicant envisaged to move the Court to interrogate any question arising from the execution proceedings, she should have been particularly precise. As correctly submitted by the counsel for the 1st respondent, this Court lacks jurisdiction to revise the order of the Deputy Registrar. In law, the decision of such judicial officer is the order of this Court. In addition to the cases cited by the defence {*Nuridin Mohamed Chinga*, and *Iron and Steel Ltd* ^{supra}} I associate myself with the pronouncement of the Court in the case of *Songea Satom Company v Barclays Bank Tanzania* and another, Misc. Civil Reference No. 15 of 2021; and *Philipo Joseph Lukonde v Faraji Ally Said*, Land Reference No. 01 of 2022 (both unreported). It was stated

in the former case that; '..except where the law clearly states otherwise, a decision or order rendered by the Deputy Registrar of the High Court is a decision of the High Court.' Further, in Nizar Abdallah Hirji v Rehema Salumu Abdallah, Misc. Civil Application No. 34 of 2020 (unreported) it was held that; "unlike in taxation matters, the decision of Deputy Registrar being a decision 8 made in execution of a decree by a court which passed the same, is a decision of this court." In the upshot the preliminary objection is found to be of merit. It is sustained. The application stands struck out. Considering the nature of this matter, none of the parties awarded costs. Emmanuel John, learned Counsels for the applicant and Advocate Dutu Chebwa for the 1st respondent. C.K. orris December 14th, 2022 z 9

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