IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOSHI

MOSHI DISTRICT COURT

CIVIL REVISION NO. 4 OF 2020

(c/f Moshi District Court Misc. Civil Application No. 22 of 2019)

JUMA SWALEHE ..... 1st APPLICANT
RAMLA JUMA SWALEHE ..... 2ND APPLICANT
ATHUMANI JUMA SWALEHE ..... 3RD APPLICANT
BARAKA JUMA SWALEHE ..... 4TH APPLICANT
BISULA JUMA SWALEHE ..... 5TH APPLICANT
SALIM JUMA SWALEHE ..... 6TH APPLICANT
AZIZA JUMA SWALEHE ..... 7TH APPLICANT
RAMADHANI JUMA SWALEHE ..... 8TH APPLICANT
RASHID JUMA SWALEHE ..... 9TH APPLICANT
ASHURA JUMA SWALEHE ..... 10TH APPLICANT

VERSUS

ZAHARA KITINDI ..... 1ST RESPONDENT

DOMINIC B. FRANCIS ..... 2ND RESPONDENT

RULING

Last Order: 08th June, 2021

Date of Ruling: 10th August, 2021

MWENEMPAZI, J.

This application for revision has been brought under the provisions of section 79(1) (b) and section 79(2) of the Civil Procedure Code, Cap 33 of the

Revised Laws, 2002 and section 44(1) (b) of the Magistrates' Courts Act, Cap 11 R.E 2019. The application is through a chamber summons supported by an affidavit sworn by Juma Swalehe on behalf of all the applicants. In the application the applicants are praying for revision of the ruling and order of the honorable Resident Magistrate in Civil Case No. 45/1999.

The matter has a very long back ground however I will only concentrate in the facts that lead to the present application before this court. According to records, the applicants herein being spouse and their children had filed a suit at the District Court through Civil Case No. 45/1999 praying for a declaratory order that the attachment and sale of the suit house was unlawful. The case was decided in their favour and they proceeded with execution whereby the respondents herein had filed for stay of execution at the court of appeal. On hearing of the application for stay of execution that is when the error in a plot number of the suit house was pointed out by one of the justices of appeal. Consequently, the applicants' advocate was prompted to file at the District Court **Misc. Application No. 22/2019** seeking to correct the error in the decree and the judgment. On hearing the application, the honorable magistrate dismissed it on the grounds that the proposed amendment would

change the cause of action. In this application the applicants are praying for this court to revise the decision of the Senior Resident Magistrate which dismissed their prayer to correct the judgment and decree which was issued by the District Court in **Civil Case No. 45/1999**. The corrections suggested was deleting Plot No. 152 Block 'DDD' Karanga, Moshi and substituting it with Plot No. 157 Block 'DDD' Karanga, Moshi. In their affidavit the applicants avowed that reference to Plot No. 152 in the amended plaint had been a clerical error. They further stated that their family house is on Plot No. 157 and not Plot No. 152 which does not belong to them.

On hearing of the application parties prayed to proceed by way of written submission and leave was granted. Advocate P.E. Shayo prepared and filed submission for the applicants' while Advocate E.M. Minde prepared and filed submissions for the respondents.

Mr. Shayo began his submission in support of the application by explaining that the issue for revision revolves around the correct number of the plot of the house which was attached in execution of the decree, whether it was Plot No. 152 or Plot No. 157. He also prayed for the affidavits of Advocate

Peter Mushi Jonathan and Juma Swalehe to be adopted and form part of his submission.

Submitting further Mr. Shayo explained that the present application has its origin in Moshi District Civil Case No.111 of 1994 which led to the applicants being evicted from a family house on Plot No. 157 Block DDD Karanga in which they were residing 1994. The eviction was in December, 2001 at the time the trial of Dc Civil Case No. 45/1999 was ongoing where in the case, the applicants were asserting that their residential house was not liable for attachment and sale. The decree and judgment in Civil Case No. 45 of 1999 indicated that the house in dispute the one which was sold to the respondents is the one in Plot No. 152, Block DDD, Karanga Moshi Township. He submitted that the correct number of the plot is 157 Block DDD, Karanga Moshi Township and that the crux of the present application lies in that difference whereas the applicants filed an application before the district court praying for the error in judgment and decree in Civil Case No. 45 of 1999 dated 5/9/2014 be corrected by deleting and substituting it with the correct number that is Plot No. 157 Blok DDD, Karanga Moshi Township.

The learned counsel submitted further that the issue for determination before this court is at what time can a decree or judgment of a court be corrected? Is it limited by time? What principles are applicable for a judgment or decree to be certified under the provisions of the relevant law? He went on submitting that in the trial court before honorable Maziku S.R.M, the application was dismissed for the reasons that the same was time bared, the error was fundamental and not a mere clerical error and that it would amount to substituting a new cause of action a matter which the learned counsel disputed and asserted that it was only a misnaming or a misdescription of the suit house.

It was Mr. Shayo's further submission that from the beginning to the end of the trial in the District Court Civil Case No. 45 of 1999 parties were of one mind as to the identification of the suit house that is they were referring to the house which had been attached and sold the house in which they were residing and that house was on Plot No. 157 registered in the name of the first applicant. He added that even in the advert for the sale of the house the Proclamation of sale, the written statement of defence of the second respondent, the oral submission and the certificate of title all referred to the

house on Plot No. 157 and not Plot No.152. he admitted that there was a genuine error in the amended plaint but argued that such an error has been explained in the affidavit of advocate Peter Mushi and that of Juma Jonathan in support of the present application. He also submitted that there has been no change in the ownership of the plot so the error was innocuous and inconsequential as it did not induce the respondents in shaping their defence in reference to it and that is to say they were obviously aware of the error.

According to Mr. Shayo, the error was not repeated in the evidence of the applicants and so no injustice would result to the respondents if the rectification of the decree and judgment is granted by this court. Furthering his submission, Mr. Shayo stated that refusal to amend the error has resulted into great injustice to the applicants and rendered nugatory the applicants' victory by losing their family house which was the whole purpose of instituting Civil Case No.45 of 1999.

Concluding his submission, Mr. Shayo gave a detailed explanation on the interpretation of section 96 and 97 of the Civil Procedure Code, in relation to the use of the phrase 'any time' a court may correct its decree or judgment. He did so with the help of the following cases; **Jewel & Antiquities (T)**

Ltd Vs. National Shipping Agencies Co. Ltd. (1994) TLR. 107. In this case the court held, "*on our part we are satisfied that the phrase at any time means just at any time subject to the right of the parties*". Also, the learned counsel cited the case of **Zabron Pangamaleza vs. Joachim Kiwarak and Another** (1987) TLR. 140.

In the end Mr. Shayo submitted that to allow such a technicality to deprive the applicants of their residential house will be going contrary to the principle of overriding objective which is meant to give parties substantive justice. He insisted that correction of the error will not in any way prejudice the respondents or create a new cause of action as argued by the trial magistrate in her ruling.

Responding to the applicants' submission, Ms. Minde also gave a brief back ground of the matter and then highlighted two issues which she thought were worth to be determined by this court under the present application. The issues are one whether the alleged errors are arithmetical and if so, whether this court can interfere by way of revision.

Ms. Minde submitted that the application for revision is misconceived and bad in law thus it is their prayer that the same be dismissed with costs.

Substantiating her position, she argued that to allow the amendment of Pleadings, Judgment and Decree is against established principle in the case of James Kabalo Mapalala vs. British Broadcasting Corporation in Civil Appeal No. 43 of 2001 2004 TLR 143. In this case it was held that, "Where a judgment has been delivered in a case, pleadings cannot be amended". She then submitted that this finding by the court of appeal is based on the principle that litigation becomes endless. She was of the view that if the applicants think that the matter is fundamental then it means it goes to the root of the subject mater and under the circumstances Revision is not the answer.

Submitting on the issue as to whether substituting Plot No. 152 for 157 changes the subject matter, Ms. Minde stated that the two are distinct and separate properties thus the attempt to substitute one for the other changes the subject matter altogether. She argued that parties are bound by their pleadings and the court is bound to grant remedies according to prayers.

Still on the same point Ms. Minde submitted that section 96 of the CPC only allows corrections to Judgments, Decrees or Orders. It was her views that in the present case the amended plaint made reference to Plot No. 152, Block

DDD, Karanga Moshi Township and the Judgment and Decree of Civil Case No. 45/1999 referred to the same plot so there was no mistake and or accidental error made. She contended that the correction sought is not a clerical or arithmetic error envisaged by section 96 of the CPC thus any attempt to change the Judgment and Decree would result to a serious departure from the requirements of the law.

The learned counsel finally submitted that the application seeks to amend a judgment and decree so as to include a different property altogether and that is not arithmetic error so the correction sought would definitely introduce a new subject matter.

Rejoining the submission, Mr. Shayo reiterated his submission in chief and further clarified the issue on the error sought to be corrected by stating that the error in citing the plot as No. 152 was an accidental misreading of the handwritten script by the typist. He thus argued that the correction sought does not introduce any new cause of action or new issue because parties were of one mind in Civil Case No. 45/1999 that the suit house was the one in Plot No. 157. He insisted that the applicants never resided in the house located on Plot No. 152 neither is such house owned by them. He questioned

the fact that if Plot No. 152 was the subject matter, then why didn't the respondents attach the same. He thus pleaded with this court to allow the application for the interest of justice and save the applicants from losing their residential house for the simple human error.

I have carefully gone through the records and the submissions from both parties for and against the application. Now, in determining the application before me I will discuss the following issues which prompted the present application.; One, is whether the error pointed out by the applicants in their application was clerical. Two, whether allowing the proposed corrections would amount to changing the cause of action.

Before going to the issues for determination I wish to highlight few important facts which are not in dispute. **First** is the fact that the applicants owned a house located at Plot No. 157, Block DDD, Karanga Moshi Township. **Second** is that the house was subjected to attachment and sale after the first respondent obtained an ex-parte decree over the first applicant in district court civil case No.111/1994. **Third** is that the house was ordered to be attached and sold after failure by the first applicant to set aside the ex-parte decree.

Now, going back to the first issue as to whether the error sought to be corrected by the applicants is clerical. A clerical error is defined in Oxford Dictionary to mean *a mistake made in copying or writing out a document*. In Wikipedia, a clerical error is defined as *an error on the part of an office worker, often a secretary or personal assistant*. In the case at hand, the error referred to was on a plot number. To answer this issue, we have to go back to **Civil Case Application No. 45/1999** at the district court where the applicants sought the court's declaration that their house was residential hence not liable for attachment under section 48(1) (e) of the CPC. Given three undisputed facts above, it is apparent that the house in dispute is the one that was attached and sold as this was the reason why the applicants instituted **Civil Case Application No. 45/1999** at the district court. If this is so then the answer to the first issue is answered in affirmative because the applicants declared in their affidavit that the house on Plot No. 152 does not belong to them and they never lived there. The respondents on the other hand did not disprove that fact. This proves that the error was definitely a clerical one which if left unattended will lead to injustice on the part of the applicants who won the case. I must admit that I also agree to the logical explanation given by the learned counsel Mr. Shoo in his submission that the

error is clerical as it was caused by the typist when she accidentally misread the handwritten script and typed Plot No 152 instead of Plot No. 157.

Moving on to the second issue as to whether allowing the proposed corrections would amount to changing the cause of action, the answer is negative. It is unfortunate that the error went unnoticed until the case was decided but that this is why the law under section 96 and 97 of the Civil Procedure Code, Cap 33 R.E 2019 made room for amendments to be done at any time.

The honorable magistrate in Misc. Application No. 22/2019 misinterpreted the error by deciding that it was fundamental and not merely clerical as it was on the subject matter and she was of the view that the proposed amendments would introduce a new cause of action. This was a literal interpretation of the situation which led to miscarriage of justice. I think in that scenario the honourable magistrate ought to have employed a contextual interpretation by not only looking at the subject matter as stated on the plaint but as described by evidence on record and the background of the matter giving rise to the application before her. By so doing she would have noticed that the amendment proposed would not have caused injustice

to the other party neither would it have introduced a new cause of action as she thought nor was it proposing a different subject matter.

In light of the above, I find this application has merit and proceed to allow it. The Ruling and order of the District Court is hereby quashed and set aside. Costs to follow events. It is ordered accordingly.

Dated and delivered at Moshi this 10th August, 2021

T. MWENEMPAZI

JUDGE

Ruling delivered in Court this 10th August, 2021 in the presence of the applicants and Mr. Charles Mwanganyi Advocate for the applicants and Mrs. Elizabeth Maro Minde, Advocate for the Respondents.

T. MWENEMPAZI

JUDGE