IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL REVISION NO 1 OF 2017
BETWEEN
AMI TANZANIA LIMITED ----------APPLICANT
VERSUS
DORIN DONALD DARBRIA ----------RESPONDENT

RULING

SONGORO, J

This is a ruling on the revision filed by AMI Tanzania Limited the applicant of the Judgment and Decree of Civil Case No 286 of 2009 of Kisutu Resident Magistrate Court.

According to applicant, he claim was a party in Civil Case No 286 of 2009 in Kisutu Resident Magistrate where a judgment and decree were entered and currently the execution of the decree and orders made thereunder is the process of execution.

The applicant through a letter from IMMMA Advocates alleges that, the Judgment and decree which are to be executed has errors which call for immediate revision of both the Judgment and decree issued in Civil Case No 286 of 2009.

Since applicant`s revision was initiated by a letter from IMMMA Advocates, I made an order that, AMI Tanzania Limited, the applicant make a presentation and highlight specific grounds and areas under which they prefer for revision. Also I made an order Dorin Donald Darbia the Respondent be served with ground of revision filed by applicant so that, she may also respond to those grounds.

In view of the court guidance the applicant filed four grounds of revision which reads as follows that;-

1) The trial court erred in including interest on items (g) and (h)of the Decree at 10% and 5 per annum computed from 31st August, 2009 a date which the container was released but the date was not mentioned or ordered anywhere in the Judgment.

2) That, the court applied compound interest on both dollar and shillings account.

3) The court made no finding on whether the applicant was indeed served with the notice to show cause before the proceedings in order execution proceed.

4) That, the matter has been moving from different magistrates contrary to the established practice that, reasons has to be assigned.

5) The court ought to scrutinize the application for execution of the Decree to see of it was in line with the Judgment and Decree sought to be executed

So on the basis of the above mentioned grounds of revision, the applicant prayed to the court to consider them and revise a trial court decision.

Therefore, after applicant has filed his grounds of revision were served to Dorin Donald Darbia the Respondent, who also though his counsel made nice submissions in response to the filed grounds of revision.

Now in the first grounds of revision Mr. Gasper Nyika for AMI Tanzania Limited, stated proceedings of Kisutu Resident Magistrate Court which ordered execution of a court decree dated 19/3/2014, the trial court erred in including interest on items (g) and (h) of the Decree at 10% and 5% per annum which is computed from 31st August 2009 a date which the alleged containers were released.

He then faulted the decree of the trial court, by pointing that, a date of 31st August 2009 which the decree states as a day which computation of interest

commences was not decided in the trial court judgment as a day which computation of interest commence.

Mr. Nyika contested that, the trial court erred in law in its Judgment while determining the granted interest by not making and finding and decision in its Judgment on when a date of interest commences.

It was the submissions of Mr. Nyika on first ground of revision that,, since the Judgment of the trial court did not make any finding that, 31/8/2009 was a date alleged container were released it was error on the part of the trial court to insert that, date in the Decree as the basis a of computation of interests of 10% and 5% on item (g) and (h) of the Judgment/Decree.

Moving to the second ground of revision, the applicant counsel argued that, the trial court erred in law in applying and imposing compound interests rate in both USD Dollars and Tanzania Shillings in a court decree. The applicant`s Counsel argued faulted the trial court by stating in the Judgment there was any finding and decision on compound interest, on decretal sum.

Mr. Nyika then pointed out by charging compound interests in the court decree the trial court erred in law because compound interests applies where the is a contract which provide for charging compound interest and that, may not be ordered by court if there is no such provision in the agreement.

To support his point on charging of a compound interests the applicant counsel drew the attention of a court to a decision in the case between Ferguson Versus Fyfee and Another 1835-42 All ER 45 which decided that, compound interest should not be granted to a successful plaintiff unless there is an agreement between the parties.

He also stated that, since there was no agreement between the two providing for compound interest then simple interest was supposed to be ordered by the court. To support his argument, the counsel referred the court to decision in the case between Euro Blitz 21 Pty Limited, Ivo Branco and Secena Aircraft Investment SC, Supreme Court of Appeal of South Africa, where it was stated that,, it is accepted generally that, where in written agreement a compound interest is not expressly provided for, only simple interest is due and payable.

The applicant counsel then insisted that, by including and allowing the charging of compound interests the trial court committed illegality which required a revision.

In regard to 3rd ground of revision, the applicant counsel argued that, the execution of court decree which lead to garnishee order and attachment of the Respondent`s bank account proceeded without issuance of a notice to show cause.

He then explained that, a court record shows that, summon to appear of 16/6/2016 was issued by executing court on 20/6/2016 and served to Massaba Law Chamber`s Advocate on the 7th June, 2016 who briefed Mr. Audax, the Advocate of Decree Holder. But the counsel explained that, there was no court finding on whether the decree debtor was served with summon to show cause as to why decree should not be executed.

The applicant counsel then submitted that, it was irregular for the executing court to proceed with the execution without being satisfied that, Judgment debtor was served with notice to show because why a court decree should not be executed. Mr Nyika insisted that, failure to serve a Decree debtor with notice to show cause error on the part of the executing court.

On the 4th ground of revision, the applicant contested that, the trial Civil Case No 286 of 2009 was moving from one magistrate to another without parties being told reasons, which contrary to established principle of law. The counsel then explained that, it is a law that, in the event of a case shift from presiding Magistrate to another reasons must be offered to the parties and the court has to record the reasons. But in the proceedings of Civil Case No 286 of 2009 the above mention procedure was not adhered too. So that, cause confusion and occasion injustice on the part of the decree debtor because he failed to follow the proceedings properly.

In respect of 5th ground of revision the applicant contested that, the decree and does not conform the Judgment of the trial court because there are orders which are due for execution in the court decree but were not granted in the Judgment. Then relying on a decision of Civil Revision No 6 of 2015 in the matter Balozi Abubakari Ibrahim and Another Versus Ms Senandys Limited and 2 others, the Court of Appeal in the revision stated that, the execution of Decree is a judicial function and ought to be carried transparently, efficiently, and judiciously. Therefore a high degree of discipline is required.

In the light of his submissions on above stated grounds of revision, Mr. Nyika prayed to the Court to undertake a revision, consider alleged errors and quash and set aside the proceedings and orders in the Kisutu Resident Magistrate Court Civil Case No 286 of 2009

Responding to applicant grounds of revision, Mr Audax Kahendaguza Vedasto for the Respondent, submitted that, the 1st and 2nd ground of revision are indeed not seeking a revision but are attacking merit of orders made in the

proceedings of trial court. He also submitted that, grounds of revision raise matters of evidence while the High Court has no evidence at hand to weigh which matter is correct in order to make r correction.

Reacting to the point that, the applicant was not accorded a right to be heard the respondent submitted that, since the matter proceeded Ex-Parte the only remedy open to the applicant was to apply to set aside Ex-Parte Judgment. Relying on the decision in the case between Mtondoo Versus Janmohammed (1970) HCD 326 the Respondent`s Counsel then argued if the applicant wants to argue any point on merit of the case he is obliged first to apply for setting aside of Ex-Parte Order. But he may not be entertained to be heard on merit of the case when there was an Ex-Parte Order.

In respect of a ground of revision that, the applicant was condemned unheard the Respondent argued that, the applicant admit that, Mr. Massaba Advocate of the applicant sent Mr. Audax to hold his brief. Therefore the question that, applicant was condemned unheard may not arise.

In regard to a ground of revision that, amount awarded in the decree is huge than which was awarded in the Judgment, Respondent argued that, the applicant in the application did not state the amount which was granted in the Judgment and an amount to be executed in court decree. The respondent counsel then argued that, by failing to state amounts awarded in the Judgment and Decree to be enforced that, shows the applicant has failed to pursue the revision, despite the fact was granted an opportunity to do so.

Commenting on the what took place in Civil Case No 286 of 2009 the Respondent`s counsel stated that, the applicant abandoned the case in the mid-way after is trying to set it aside and the is why the trial court want to enforce its decree

Concerning a claim that, the decree has error on granted interests, Respondent`s counsel stated courts in several decision including a decision in case between Karata Ernes Versus AG Civil Revision No 10 of 2010 have often s decided that, if there is any dispute between the parties relating to the execution, discharge or satisfaction of the court decree at any stage that,, dispute must be referred and determined by the executing court under Section 38 of the Civil Procedure Code Cap 33]R.E 2002]

So, it was the views of Respondent`s counsel that, revision before the High Court is not proper forum for resolving dispute surrounding a court decree of Resident`s Magistrates Court. The counsel then cited a decision in the case of CRDB Bank Limited Versus George Kilindu Civil Application No 74 of 2010 where the Court of Appeal openly stated that, it is not a forum for revision of the Court Decree and dismissed the application for revision. He the prayed to the court to make the same ruling.

On allegations that, a date which containers as a basis of charging interest was not stated in the Judgment , Respondent counsel refuted the allegation and stated that, a date in which container was removed/released was stated at page 5 of the Judgment. So allegations that, the date of release of container was not stated in the Judgment has no merit because the judgment is clear on the date.

On a claim that, the trial court awarded compound interest, the Respondent`s counsel highlighted that, the applicant has not shown where in the court decree a compound interest was charged, and computed. He then explained that, the trial court and decree did not provide for compound interests.

Finally, Respondent`s counsel argued that, in all five grounds of revision the applicant has failed to substantiate alleged errors which were committed by the trial court to warrant a revision of the proceedings and decree.

The court subjected to close scrutiny the applicant`s grounds of revision in line with the respondent arguments opposing the revision, and find in essence under Section 79 of the Civil Procedure Code Cap 33 the High Court statutory authorize the High Court to revise Judgment and orders of subordinate courts. Indeed the section 79(1) 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; or
>
> (b) to have failed to exercise jurisdiction so vested; or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Guided by the above mentioned cited section of the law, I am convinced that, this court has power to call and examine subordinate`s court proceedings and examine if there is material irregularity in the proceedings, or Judgment or decree.

In view of the above I noted that, the respondent has raised a concerned that, in the trial court Judgment there is no court finding and a decision on a date when the containers were released, so that, it may be the basis of computation of interest in items (h) and (g) of the trial court judgment.

Also the applicant has raised a concerned that, the decree to be executed has taken 31/8/2009 as a date which container were released and date which interest in items (h) and (g) has to be computed.

In other words the applicant raises a concern that, a date for computation of interests was not provided in trial court judgment, it only appears in the court decree and that, is an error and irregular.

I have taken time to consider the point raised by applicant that, a date for computation of granted interest was not stated in the trial court Judgment and find according to Rule 4 of Oder XX of the Civil Procedure Code Cap 33 its stated a Judgment must contain decisions on all points raised for determination and if interests is granted, a date which granted interests starts to accrue and when such interests ceases must be provided in the trial judgment. Therefore, it such date or dates which is decided upon in the trial court judgment, which are lifted and inserted in the Court Decree for execution. It follows therefore what is provided in the court decree must resemble with what was decided in the trial court judgment.

Guided by the above cited position of the law, I carefully revisited the applicant first ground of revision that, the trial court erred in law in computation of interest from 31st August 2009 in its "Decree" because such date was not decided upon by the trial court in its Judgment, and that, was an error. Honestly I have consider that, point and find determination of that, point requires examination of trial court Judgment in Civil Case No 286 of 2009 which was delivered by Hon A.W.Mmbando on the 19/3/2014.

Therefore upon further perusal of the trial judgment, I noted that, trial court made a detail summary of facts and presented evidence from pages 1 to 16. Then from page 17 to 27 the trial court made its finding and decision on issues which were before it for determinations.

Quite frankly upon perusal of the trial court judgment, I did not find any trial court finding or court pronunciation or decision that, the granted interests will be

charged from 31/8/2009 as a date which container were released. In other words in the trial court judgment, there is no a court pronunciation that, the granted interests will be charged from 31st August 2009.

So in the trial court judgment apart from a decisions or order awarding interests in items (g) and (h), the trial court did not state a calendar date when the granted interests becomes due and payable and the end of chargeable interest.

Indeed at page 29 of the trial court judgment interest was granted in items (g) and (h) in the following words and way;-

> (g) Payment of 10 % monthly interest of USD 7,641. 50 from the **date the containers were released** to the date of actual payment.
>
> (H) Payment of 5% monthly interest on USD 7,641.50 **from the date the containers** was to be released to the date of actual payment.

As it can be noted in items (g) and (h) which appears at page 29 of the trial court Judgment the granted interests were pegged on dates which containers were released. The trial court was silent on exact calendar dates which containers were released. In view of the cited omission to state dates which granted interest starts to accrue, or to be computed and when it will end, I find trial court committed an error of law by failing to state exact calendar dates which are the basis of computation of interests.

Honestly I find the imposition of interests in the two items without court pronunciation on exact calendar dates when two interests are chargeable was an error and irregular because court determination on dates is missing. Mr. Audax, Learned Advocate of the respondent strongly tried to convince the court that, if there are any error on the decree, then the matter may be referred back to the executing court for correction. I also assessed that, point and find indeed the cited errors on the exact calendar dates when interests in item (g) and (h) of the judgment originated from

trial court judgment as explained above. Things would have been easier if the mentioned error were only in a court decree. In such circumstances correction of error may be done in the court decree and that, would have been the end of the matter. But as stated before the cited error is also in the trial court judgment in the sense that, there is no trial court pronunciation on a date which interests start to be charged.

It is in this regard I doubt whether trial court after handing down its judgment may later be convened to sit down and make correction of errors on its own judgment. In my view the argument of Audax of referring the cited errors to the court executing Decree would have been valid if the spotted errors were only in a court decree alone. But as I have find and decided the error goes into item (g) and (h) of the trial court judgment.

In AIR Commentaries on the Code of Civil Procedure by Manohar and Chitaley, Volume 5, 1998, it is stated that,, for an error to be a ground of review, it must be one which is visible on apparent face of the record, It must be an error so manifest and clear, that, no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes error of law. .

In the instant case, and cited errors, is that, the trial magistrate did not make a finding on items (h) and (g) on dates when the two interest states to run or to be computed. I am fully convinced that, the cited errors can easily be seen by anyone who runs and reads the trial court judgment and the decree.

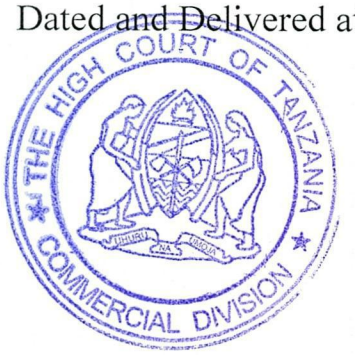
Next, the court find if such errors are left they appears to be material irregularity which goes to the trial court judgment and decree and may not be easily

enforced because of chaos on the exact a date of computation of interest will remain to be capable of several interpretations and chaos.

The above mentioned point alone is capable of disposing the matter, and I see no plausible reasons to proceed with the remaining grounds of revision.

Finally, pursuant to Section 79 of the Civil Procedure Code Cap 33 and revision which I have undertook, I hereby quash and set aside a Judgment, decree and all orders made in the Kisutu Civil Case No 286 of 2009 and order fresh retrial of the above mentioned case before another Magistrate.

Dated and Delivered at Dar es Salaam this 14th day of June 2017



H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Gaspar Nyika, Learned Advocate of the applicant and George Vedasto Learned Advocate of the Respondent.