IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 25 OF 1977

ULF NILSSON - APPLICANT

VERSUS

ALICE LUNGULI - RESPONDENT

RULING ON REVISION

**KALEGEYA, J.**

One Ulf Nilsson represented by Mr. Rutabingwa Advocate, having been aggrieved by the Ruling of Kisutu Resident Magistrate's Court dated 24\3\97 on his preliminary objections has come to this Court armed with a chamber summons supported by an affidavit praying for invocation of its revisional powers under S. 79 of the Civil Procedure Code and reverse the finding of the lower court. The Respondent, Alice Lunguli, represented by one Mr. Msemwa, Advocate, resisted the same.

In order to appreciate the issue at hand, going through the history of the matter can't be avoided, and the following is its summary.

In Civil Case No. 477\95 the Respondent sued the Applicant for, among others, recovery of Swedish Kronor 65,000 paid as down payment for a contract not performed to required standard; Swedish Kronor, 8000 for unnecessary travel expenses incurred, Tshs. 3,000,000/= as damages for inconvinience and embarrasment, Tshs. 1,400,000/= being value of property vandalised and the usual prayers on interest and costs. On the other hand the Applicant, while disputing the claim, counter-claimed shs. 4,448,000/=, interest and costs allegedly being an outstanding balance on a contract of house renovation due to him from Respondent. On 30\1\96 the Respondent's claim was dismissed for non-appearance and on 7\2\96 judgement was entered in favour of Applicant regarding the counter-claim. Thereafter the

Respondent's chamber application to set aside the dismissal order and exparte judgement was dismissed. That was on 25\4\96. Then there followed taxation of costs on 5\7\96, and execution proceedings in which the Respondent's house was attached On 4\11\96, among others, the Court ordered.

"The attached property to be sold by Public Auction on 24\11\96".

However, the above order could not be carried out as the Respondent filed (on 6\11\96) a chamber application supported by an affidavit, and since it forms one of the central issues in the present matter, let me reproduce it substantially-

"..... ,

(made under Order XXI, 24 (1) and (2) and Order XXXVII Rule 1 of the (sic) section 48 (i)(e) of the Civil Procedure Code 1966; and section 68 (e) and any other enabling provisions of the law) (emphasis mine).

.....

.....

.....

(i) That the Honourable Magistrate be pleased to grant a temporary order of injunction restraining the Respondents.....from disposing off and or in any way alienating the suit property pending the determination of the main suit.

(ii) That the Honourable Court may be pleased to raise the order for attachment and sale of property known as and situate on plot No. 493\40 Kinondoni District, Dar es Salaam..... ..."

Again, as was the case in previous applications, laxity on the side of the Respondent's advocate led to dismissal of this application on 18\12\96, which was followed by another Court order (on 7\1\97) to the following effect.

"Proclamation of the sale of the attached property to issue. The sale to be done by public Auction on Sunday of 26\1\97".

On 17\1\97 the litigation seemed to be coming to an end as what seemed to be remaining then was how the decree was to be settled. On that date the following is what transpired in court when Milanzi and Rutabingwa, learned Counsel were representing the Respondent and Applicant respectivelly.

"**Mr. Milanzi:** We have reached settlement in the mode of discharging the debt. We therefore pray that the order for sale of J\debtor's house the coming Sunday, i.e. 19\1\97 should be suspended for three months w.e.f. today.

**Mr. Rutabingwa:** It is okay. The amount due up to the time of filing the application is Tshs 6,081,108/=. The interest at 10% for July today - 1,017,835.60. The judgement debtor is undertaking to pay 1 million today and then another million by 10th February. And then the balance to be paid on or before 17th of April, 1997. In the event of default sale to proceed. The judgement debtor should also pay the Court Broker's fees.

**Mr. Milanzi:** I am in agreement with those terms.

**Order:** Sale of the attached house suspended for three months.

- J\debtor to pay Court Brokers fees
- Settlement of the case in respect of the decretal as in the mode and terms herein above".

Fourty one days later (on 26\2\97), this time advocated by Mr. Msemwa, learned Counsel, the Respondent filed another chamber application as follows:-

".....

(Made under XXI, R. 57, sections 48(1)(e), 68 and 95 of the Civil Procedure Code, 1966 together with any other enabling provisions of law).

.....following reliefs:-

(a) That attachment order in respect of applicant (1) house on plot No. 493\40 Kinondoni Dsm be raised since the said house is residential

....."

In response, the applicant, represented by Mr. Rutabingwa, raised preliminary objections - that the application is barred by limitation of time as 30 days have already elapsed since similar application was dismissed on 18\12\96 (which was filed on 5\11\96); that the affidavit lacked proper verification, and that the application offended the provisions of O.VI CPC - filing photocopies instead of copies.

I have laboured through the history of the matter leading to the issue before us, even at the danger of making this ruling unduly long, just for clarity. While still on this I should point out that while the applicant has throughout been represented by Mr. Rutabingwa, Advocate, the Respondent has had a string of advocates, Dr. Lamwai, Mr. Milanzi, Mr. Mchome, and now Mr. Msemwa, prompting Mr. Rutabingwa's observation "that he has been changing advocates like clothes", which though cynical, is not without justification, and which act could have contributed to the present state of affairs.

Now let us go back to the central issue in this matter: the ruling of the Resident Magistrate's Court on the preliminary objections raised by Mr. Rutabingwa, which ruling is the subject of these revisional proceedings. The learned Resident Magistrate over-ruled the objections by finding that the chamber application filed on 5\11\96 and dismissed on 18\12\96 was different from the one filed on 26\2\97 (both chamber applications quoted above); that Respondent in the present application was not time barred as she had the protection of S. 20 of the Law of Limitation, Act, which section stipulates that time starts to run when the person outside the territory returns and finally that the objections and counter objection on the affidavits and photocopies were not material, and thus ordered the application to proceed on merits.

As earlier pointed out, advocates for both parties were afforded opportunity to assist the court in these revisional proceedings. They almost reiterated their submissions made before the lower court. In these proceedings, however, the complaints raised do not touch the decision concerning preliminary objection on affidavits and photocopies hence I will not consider them.

Let us start with the complaint on the preliminary objection concerning the nature of the two chamber applications:- whether or not the one filed on 6\11\96 and dismissed on 18\12\96 is similar to the one filed on 26\2\97. Mr. Rutabingwa for the Applicant insistently submitted that the two applications being similar, apart from the latter being barred because of the affluxion of time, legally it could not be filed afresh and that the only course open to the Respondent was to apply to set aside the dismissal order thus restoring the former.

As vividly shown above the former application was brought under O.21, R 24(1) and 2, O.37, Rule 1, S. 48 (1)(e) and 68 (e) CPC: prayers were for a temporary order of injuction against Applicant from disposing or alienating the property (house) and also for an order raising attachment. The latter application, made under O.21, R.57, S.48 (1)(e), 68 and 95 CPC was for a single prayer: attachment on the house be raised as it is residential. Order 21 is the Order in the Civil Procedure Code governing execution of decrees and orders. Rule 24 (1) of O.21 relates to courts other than those which passed the decree to which extracted decrees have been sent for the sole purposes of execution. Rule 57 relates to investigation of claims to and objections to attachment of attached property. O.37, Rule 1 CPC deals with temporary injuctions against property in dispute in a suit which is in danger of being wasted, damaged or alienated. S. 48 (1)(e) excludes a "residential house or building, or part of a house or building occupied by the judgement debtor, his wife and dependant children for residential purposes" from attachment in execution of a decree. S. 68 is a supplemental provision and under (e) it is provided, "In order to prevent the ends of

justice from being defeated the court may, subject to any rules in that behalf - make such other interlocutory orders as may appear to the court to be just and convenient". S. 95 is the prominent section acting as a safety valve relating to the inherent powers of the court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court". These are the orders and sections of the CPC referred to in the two applications.

Clearly therefore apart from citing the wrong provisions of the law (again another exposition of laxity of the advocates concerned) in the former application - ie. O.37 which is totally inapplicable here and so is Rule 24(1) of O.21, the two applications are similar in substance and form. Of course, in the former application, in the first prayer, the applicant was extravagant with words because she could not refer to "final determination of the suit" as she was not applying to set aside any of the dismissal orders or ex-parte judgement. However, temporary injuction order to restrain disposition of the attached property and prayer two, to raise the attachment were aimed at one goal - to prevent the attached house from being sold as it is unattachable under the law. That in prayer two, in the first application the applicant didn't specify, (as she did in the 2nd application) that the house in question is legally not subject to attachment is immaterial and is cured by the clear indication of S.48(1)(e) CPC in the title of the chamber summons, and the contents of the affidavit in support thereof (in paragraph 11 thereof the deponent alleges that it is a dwelling house).

Concluding on the above issue, I am satisfied basing on the substance of both chamber summons together with the contents of the supporting affidavits, that both applications are the same notwithstanding the inclusion of irrelevant order and section of the CPC. Mr. Rutabingwa's preliminary objection on this should have been upheld by the lower court.

Next to consider is what should the respondents have done. Mr. Rutabingwa for Applicant contends that Respondent should have

applied for reinstatement of the former application as he could not file a fresh chamber application similar to the former which was dismissed, adding that in any case the fresh application was time barred.

Indeed, having held that both applications are similar, and the former having been dismissed (on 18\12\96) "for want of prosecution", Mr. Rutabingwa's submission can only be upheld. Under the Civil Procedure Code there are no specific provisions for applications in relation to failure of parties to appear and consequences thereof but as these take the general form of suits applicant would fill the position of plaintiff and Respondent that of Defendant, and consequences for non-appearances of plaintiffs and Defendants during the proceedings would invaluably also apply to Applicants and Respondents.

In the case at hand, on 15\12\96 Mr. Milanzi, Advocate for Respondent (Respondent in this matter) was the one who applied for time to study the counter-affidavit and contact his client and that matter was adjourned by consent to 18\12\96, and the order insisted "Last hearing on 13\12\96 at 11.00 am". On the agreed date and time Mr. Milanzi did not surface and the application earned a dismissal order. Clearly therefore the matter falls under O.9, Rule 9 CPC under which order, after dismissal of the matter due to failure of plaintiff on due hearing date the same can't be filed afresh but rather, if a party wishes, can apply to have the dismissal order set aside ("... shall be precluded from bringing a fresh suit ... but may apply for an order to set the dismissal aside ...if he satisfies the court that there was sufficient cause for his non-appearance.."). Thus, on this also Mr. Rutabingwa's submissions should have been upheld. The Respondent had just one alternative: to apply to set aside the dismissal order and not to file a fresh application.

I would have ended there because the nucleus of the matter has already been provided with an answer but for one more issue which requires clarification. Considering the way the lower

court treated the question of Limitation of time which drew in other important issues, and also considering the fact that these are revisional proceedings, I have found it necessary to deal with it as well.

Mr. Msemwa, Advocate, for the Respondent submitted, which submission was upheld by the lower court that as the Respondent was outside the country, S. 20 of the Law of Limitation protected her because time starts to run from the day of her return into the country, adding, that and more so in this case where the advocates were acting without her authority - that those holding the power of Attorney and who engaged those Advocates were not legally recognised. S. 20 of the law of Limitation states,

> "In computing the period of limitation prescribed for any suit or an application for execution of a decree, the time during which the defendant has been absent from the United Republic shall be excluded".

Suffice to say that, the above quoted section can't be called to the aid of the Respondent as Mr. Msemwa, learned Counsel and the lower court seem to suggest. This section protects a person who is outside the territorial bounderies when a cause of action arises, and has no representation but not a person who though outside the country originates proceedings and prosecutes the same either through advocates or persons with powers of attorney. In the present case the Respondent though residing outside the country was the one who filed the case against the present Applicant. Not only that, she subsequently appointed people with powers of Attorney, and the various advocates she engaged is a telling factor on this - that the said advocates at times proved to be laxy does not make the said representation illegal or non-existent.

When discussing this limitation of time issue, with respect, the learned Resident Magistrate rumbled into irrelevant matters and misdirected himself in the end. He went through the history of the case, found that the advocates for Respondent did

represent her in court though in laxy manner which was enough a finding to enable him determine on the applicability of S. 20 of the Law of limiation but still he went on, and for clarity let his words portlay the picture.

> "It may not be relevant to not (sic!) that the applicant is a lay person. It is clear that this matter if were properly handled by Dr. Lamwai and his partners this problem wouldn't have arisen at all. I am made to understand that the applicant's case was dismissed due to lack of seriousness on the part of the Counsel for applicant. Thereafter the situation could not be saved at all. I would think in the interest of justice the applicant should not be punished for the fault which is not hers. Her house is now under attachment. The house is residential if the applicant really knew of what was happening or what was going to happen I do not think that she would have remained silent. I find that the applicant is not the one to blame" (emphasis mine - this same Magistrate is the one before whom all the substantive applications were prosecuted and who gave the orders!). He did not end there for he added that the power of attorney given to the persons who purported to engage the various lawyers for Respondent was not registered in Tanzania, and that "in the eyes of the law, therefore, there is no power of Attorney. The purported power of Attorney in law can't be acted upon. I so find"!

Apart from the fact that the learned Resident Magistrate has been the very person before whom this case has proceeded right from the start hence can't be heard to say that "he was made to understand....." that the advocates were lazy. I am sure he is aware that advocates do not need that instrument commonly known as "Power of attorney" in order to represent a party in Court. The case started in 1995 with advocates: the alleged power of Attorney to PHARES EMMANUEL KANONI AND WILFRED CHIZUMI was provided in late December 1996. Unless supported by evidence, which is non-existent, at least on record the trial magistrate

could not certainly state as he did that all the advocates who appeared in court up to late December were engaged by the two people abovenamed on behalf of Respondent nor that they acted without due authority. Once an advocate appears in court, unless otherwise challenged, it is taken that he has full authority to represent the party on whose behalf he is appearing. But, even if we were to tread on the "power of attorney" at hand, starting from the date it was provided, it can't be said that in law it "does not exist as it was not registered". The document on record shows that it was duly stamped and registered on 30\12\96 on the same day it was sworn. Mr. Msemwa could not pursue this argument further when called upon to scrutinise the stamps on the said instrument on court record. So that as it may, common sense can't stomach what the lower court and Respondent are trying to sell across. That the various advocates sprung from no where and on no one's competent instructions to defend a party they were not aware of to an extent of a striking a settlement which got recorded in court. And not only that, the so called unauthorised persons went further and raised 2 million shillings which was paid towards the reduction of the decretal sum (1 million is on record as having been paid on the day the settlement was recorded and another one was paid subsequently as per Court Broker's letter dated 20\1\97 and on court record, and not disputed by Mr. Msemwa). I find that the Respondent was legally represented, and in any case, in practice, while an advocate's laxity at any particular stage in court proceedings may be considered by Court (as was decided by the Court of Appeal in Civil Application No. 1 of 1997 - In the Matter of an Intended Appeal between Feliv Tumbo Kissimo and TTCL Co. Ltd and TPTC) when deciding on certain matters like applications for extending period within which to take an essential step in Court proceedings it is not an automatic ground for granting the application as it will depend on the nature of a particular issue and surrounding circumstances. Neither can such laxity make the

otherwise advocate's appearances in the whole case illegal or non-existent.

Having concluded that the Respondent was fully represented then she can't escape the web of limitation of time by hiding behind S. 20 of Law of Limitation in her defence. However, as the only way open to her is to apply for restoration of the former application she can still apply for enlargement of time within which to apply to set aside the dismissal order of 18\12\96.

In conclusion therefore I hold that the two applications are similar and the same: that in law the respondent could not have filed a fresh application but should have applied to restore the dismissed application: that the Respondent is already time barred but can still apply for enlargement of time within which to file an application to set aside the dismissal order of 18\12\96 which would be considered on merits.

While still on this, I should further direct that in the event the Respondent decides to apply for enlargement of time within which to file an application to set aside the dismissal order of 18\12\96 the matter should be handled by another Magistrate. I am prompted to give these directions because of what is on record-in his ruling the Resident Magistrate observed that the previous application was "dismissed largely because it is made under different provisions of the law" but this is not borne out by the record - in his own recordings, vide just five words, he simply and briefly indicated that it was being "dismissed for want of prosecution". There was no debate nor discussion regarding its merits or otherwise, where then did he get the above observation? Also in the excerpt already quoted when discussing the issue of limitation, he recorded,

"Her house is now under attachment. The house is residential" (emphasis mine).....How did he come to conclude on this when this was the very core of the applications which applications had not been heard? This is what should have been investigated upon as per S. 48(1)(e) and O.21, R 57 CPC. With

this conclusion, the last order he made in his ruling of hearing the "application on merits", would have been rendered futile as seemingly the decision had already been made in his mind. In order to absolve him from being branded biased (even if he is not) any such application to proceed before another Magistrate with competent jurisdiction. The court then, in its wisdom, will consider enlargement of time and if granted will investigate and consider the matter within the clear provisions of the Law (S. 48 (1)(e) and O.21. Rule 57 CPC)

The lower courts findings are accordingly set aside and orders made in terms indicated above.

AT DAR ES SALAAM
27TH SEPTEMBER, 1997

(L. E. Kaleqeya)
JUDGE