

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

REVISION APPLICATION NO. 3 OF 2017

(Arising from the Misc. Revision No. 3 of 2012 of the Resident Magistrate's Court of Bukoba, Civil Appeal No. 65 of 1998 of Muleba District Court and Original Civil Case No. 19 of 1996 of the Rukindo Primary Court)

ERASMUS RUHUNGU

(The Administrator of the Estate of the Late
Gaudensia Rwakailima)

}----- **APPLICANT**

VERSUS

ANGELINA BAGENYI-----RESPONDENT

RULING.

This ruling is in respect of a notice of Preliminary objection filed by Mr. Zedy Ally learned Advocate who champion for the respondent Angelina Bagenyi.

The objection on point of law as preferred run thus:-

- (i) The court has not been properly moved.*
- (ii) This court is not clothed with jurisdiction to entertain the matter.*
- (iii) This application has been hopelessly filed out of time.*

The learned Advocate for the respondent therefore prayed the application be dismissed with cost.

With the permission of this court parties filed written submission in disposing the Preliminary Objections.

Before going to the arguments advanced in support of and in opposing the Preliminary Objection raised I find it pertinent first to give in abbreviate the facts that led to the present **Application No. 3 of 2017** before this court.

The facts are that on the 20th November, 2013, the Resident Magistrate's Court (MAGUTU SRM) at Bukoba RM's Court in **Revision No. 3 of 2012** revised the proceedings of the Rukindo Primary Court **Civil Case No. 19/1996** in respect of the ruling that was delivered on the 5th day of September, 2012.

The last Order in the impugned ruling reads *"I set aside the ruling delivered on 5th day of September, 2012 and nullifies the execution proceeding done before Hon. H. Mussa PCM. It is so ordered.*

A.A. Magutu – SRM

20/11/2013"

The **Application No. 3/2013** was determined exparte.

The Applicant attempted to institute an appeal against the said order before this court but the same was struck out and finally dismissed by Hon. Khaday, J.

Further, the applicant tried to file an application for review before the Resident Magistrate's Court at Bukoba but the same was also struck out basing on the same Preliminary Objection. That having been done, the respondent filed an application for execution before the Resident Magistrate's Court wanting to execute the said decision in **Resident Magistrate Revision No. 3/2012**; the application was granted and on

the 3rd of October, 2016 the RM i/c Bukoba issued an Execution order directing the Ward Executive officer of Kashanda Ward to execute the decision.

The Applicant was still dissatisfied where he complained before this court i.e to the Judge In-charge by a letter dated 4th July, 2017 written on his behalf by Dr. J. Lugaziya learned Advocate. Following the said complaint letter I did call all the court Records in relation to this matter and found it as a matter of right to call all the parties or their Advocate to address me on this where the Advocates opted to file a formal revision application hence the present application i.e **Revision Application No. 3 of 2017**.

Now, coming to the arguments advanced in support of the P.O. stating from the last point on time limitation. Mr. Zedy ally argued that the **Revision Application No. 3 of 2017 arises from Misc. Civil Revision No. 3 of 2012** of which its ruling was delivered on 20th day of November, 2013.

That the law Governing limitation of time in filing Revision provides the time to be only within sixty (60) days of the Order, Ruling or decision sought to be revised.

That it is provided for under paragraph 21, Part III of the 1st **Schedule of the Law of Limitation Act [Cap. 89 RE: 2002]**. He cited the case of **Tima Haji Vs. Amiri Mohamed Mtoto and Another Civil Revision No. 61 of 2003** (Unreported) where at page 17 it is stated:-

“Since the Application for revision was filed long after the expiry of sixty days which is the period of limitation, the first Preliminary Objection is upheld and accordingly the application for Revision is dismissed.”

Responding to that Mr. Lameck Learned Advocate for the Applicant had it that the Law of Limitation is not Applicable in matters originating from the Primary courts like the one we have. That this dispute finds its origin from the **Civil Case No. 19/1996** of the Rukindo Primary Court. That the Governing provision at the instance of looking for the limitation of time is the Customary Law (Limitation of proceedings) **Rules, 1963 G.N. No. 311 of 1964**. That going by the items made under the schedule of the **G.N. No. 311 of 1964** he confirms that there is no any provision that sets for the limitation of revising the decisions and proceedings of the Resident magistrate’s Courts on the matters arising from the Primary courts. In support of his argument, he cited the case **Solomon Mwaipopo Vs. Laston Jonas, (PC) Civil Appeal No. 38 of 1993 High Court of Tanzania Mbeya District Registry** (Unreported) where Chua, J. as he then was stated

“It is pointed out for the benefit of the appellate District Magistrate and the trial Magistrate that the Law of Limitation Act does not apply to Primary Courts. The applicable law is KANUNI ZA SHERIA ZA KIENYEJI (KIKOMO CHA MUDA WA KUENZISHA MADAI) 1963.”

That the application had been brought under the **Magistrate Courts Act Cap. 11 RE: 2002**. That in line with this law and regarding the limitation

of time to apply for the Revision as he has done he cited the holding of Hon. Katiti, J.(as he then was) in the case of **Abdu Hassan V. Mohamed Ahmed (1989) TLR181** where he held that:-

- (a) NA.
- (b) Revision taken under the Magistrates Court of 1984 has no limitation.

He finally submitted that the holding of the cited case of **Tima Haji Vs Amiri Vs Amiri Mohamed Mtoto and Another** was on a Revision of a case which originated from the case originating from the Resident Magistrates Court of Kinondoni with the original jurisdiction.

Upon my anxious perusal of the **Magistrate Court's Act Cap 11 RE:2002** and the **Law of Limitation Act Cap 89 RE: 2002** I failed to trace a provision that sets a Limitation period in relation to appeals, revision from the Resident Magistrate Courts in their appellate and revisional jurisdiction to the High court.

It is provided for under the Magistrate's Court Act (Supra) under Section 25 (1) (b) as hereunder:-

Section 25 (1) (b) in any other proceedings any party, if aggrieved by the decision or order of a District Court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal therefrom to the High court, and the High court may extend the time for filing an appeal either before or after such period of thirty day has expired."

This piece of legislation governs decisions or orders of a District Court in the exercise of its appellate and revision jurisdiction and not decisions and orders of a Resident Magistrate Court in the exercise of its appellate and Revision jurisdiction as it is in this matter.

Our courts are courts of law and they assume jurisdiction as conferred by law. In the case of **Misezera@ Minani V. Republic, Criminal Appeal No. 117 of 2006** CAT Dar (Unreported) the court stated.

“Our courts are a creature of statutes and they have such powers as are conferred upon them by statute.”

The establishment and jurisdiction of a District Court is governed by **Section 4 (1) of the Magistrate Courts Act, Cap. 11 RE: 2002.** (the MCA). That Section provides:-

“4 (4) There is hereby established in every District a District Court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the District in which it is established.”

The above been the case, establishment of a court of a resident Magistrate is governed by **Section 5 (1) and (2) of the MCA** It provides thus:-

“S. (1) The Chief Justice may, by Order published in the Gazette, establish courts of a Resident Magistrate which shall, subject to the Provisions of any law for the time being in force, exercise jurisdiction in such areas as may be specified in the order.”

(2) The designation of a court of a resident Magistrate shall be that specified in the order establishing it.

Given the different laws governing their establishment and jurisdiction, the two courts (District Court and a court of Resident Magistrate) are different and each has its own registry for filing cases.

S. 22 of the MCA (supra) is categorical on Revisional Jurisdiction. It provides:-

S. 22 (1) A District Court may call for and examine the record of any proceedings in the Primary Court established for the District for which it is itself established, and may examine the records and registers thereof for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the Primary Court, and as to the regularity of any proceedings therein, and may revise any such proceedings.

As evidenced from the above cited provision its with no shadow of doubt that the Resident Magistrate Court established under **Section 5 (1) and (2) of the MCA** has no jurisdiction i.e. appellate or revisional jurisdiction on matters originating from Primary Courts.

I am fortified by the decision in the case of **Desai V. Warsama [1967] E.A. 351** in which it was held:-

“it is well established law that a judgment of a court without jurisdiction is a nullity and HALSBURY 351 sets out the proposition briefly thus:-

“Where a court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing.”

It goes without saying that the decision and orders given by the RM’s court of Bukoba in **Civil Revision No. 3 of 2012** by A.A. Magutu, SRM dated 20th November, 2013 was nothing.

All what I have tried to demonstrate above goes into the veins in the wisdom and rationale in the decision of the case of **Abdu Hassan V. Mohamed Ahmed (1989) TLR 181** that “Revision taken under the Magistrates **Court Act of 1984 has no Limitation (now the MCA Cap. 11 RE: 2002)**).

The arguments advanced by Mr. Zedy Ally and the cited case applies instances where the decision or order intended to be revised originates from a court that exercises its jurisdiction vested upon it. Therefore the position in the case of Tima Haji V. Amiri Mohamed Mtoto and Another (supra) is distinguishable from the matter at hand as correctly argued by Mr. Lameck learned Advocate.

The 2nd limb of the Preliminary objection is that this court is not clothed with jurisdiction to entertain the matter. Mr. Zedy submitted that after the Applicant lost in the case Misc. Civil Revision No. 3 of 2012 in the Resident Magistrate’s Court, he filed an Appeal which is Civil Appeal No. 5 of 2014 before this court of which he lost as per the *Ruling delivered on the 15th*

*day of May, 2015 by Madam Khaday, J. He went on arguing that since this court has already sat and determined Civil Appeal No. 5 of 2014 then it lacks jurisdiction to hear and determine this Revision as it is *functus officio*.*

I have had a chance of glancing on the ruling delivered by Madam Khaday, J. and found that the appeal was dismissed following the P.O. raised by the respondent's counsel that the appeal was time barred as it contravened **S. 25 (1) (b)** and **S.25 (3)** of the Magistrate Courts Act Cap. 11 RE: 2002. Further that the Applicant had no locus standi to Prosecute the matter because he is not a legal representative of the original party – Gaudensia.

At page "4" of the said ruling it is written and I quote.

"I find no difficult in upholding the P.O. so raised by the Respondent Angelina Bagenyi. As hinted above, it is not in dispute that Appeal No. 5 of 2014 that has been preferred by Gaudensia Rwekailima against Angelina Bagenyi was filed beyond 30 days period set by the law. This is surely in contravention of the provision of Section 25 (1)(b) of the Magistrate Court Act. Furthermore, it is not in dispute that the matter has been filed in this High Court Registry insteady of being filed in the District Court registry as provided for by Section 25 (3) of the same Magistrate Court Act".

The appeal was found time barred and was thus dismissed under **Section 3 of the Law of Limitation Act Cap 89 RE: 2002.**

It is outright that the Hon. Judge was misled, misinformed and misdirected by the learned counsel who championed for the Respondent. Much as the Provisions of the Law cited were correctly cited, the matter was quite different. The impugned decision was not of the District Court but of the Resident magistrate Court exercising revisional jurisdiction in **RM Civil Revision No. 3 of 2012** Muleba District **Civil Appeal No. 65 of 1998** and Original Rukindo Primary Court in **Civil Case No. 19 of 1996**.

As I have stated earlier that the decision of the **RM's Court in Civil Revision No. 3 of 2012** was nothing, the said decision and order was a non appellable decision or order.

There is no any known law that prescribe the procedure of filing an appeal from the RM's Court exercising appellate or Revisional jurisdiction.

S. 25 (3) is categorical thus:-

"25 Appeals, etc, from district courts in their appellate and revisional jurisdiction.

(3) Every appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order in respect of which the appeal is brought."

The subtle question is where could the applicant institute his appeal which was from the Resident Magistrate court exercising Revisional jurisdiction over a matter originating from the Muleba District Court **Civil Appeal No. 65 of 1998** and original Rukindo Primary Court in **Civil Case No. 19 of 1996**.

It is upon the above reasons I find that this court is not functus officio to the decision of Madam Khaday, J. in Appeal No. 5 of 2014. This court could have been functus officio had the appeal been determined on merits and the same grounds be brought in this Revisional proceedings.

Therefore, I find Mr. Zedy Ally's argument on this point to be deceitful and with an aim of misleading this court. I have no any other avenue than that of overruling it and refresh him that this court is clothes with jurisdiction to determine the revision under **S. 31 (1) and (2) of the Magistrates' Court Act Cap. 11 RE; 2002.**

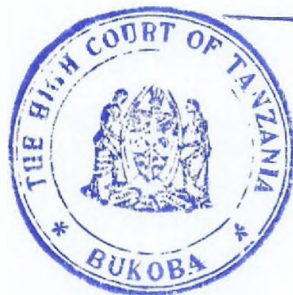
On the first limb of the Preliminary objection that this court is not properly moved as the application is made under **S. 31 (2) of the MCA Cap. 11 RE: 2002** is that reading in between the lines of **S. 31 (2) of the MCA** it in cooperate and encompasses S. 31 (1) upon which the Advocate alleges to be a specific provision ought to have been cited by the applicant's Advocate.

Even if this court could find the objection on wrong citation valid as attempted to be argued by Mr. Zedy Ally, that could have rendered the application incompetent. But yet could this court leave a void order as it is in this matter which Ultra Vires the mandate of the maker (the RM's Court revising the order of the Primary Court which as demonstrated had no authority to revised the order) and let an *"illegal Order" or rather "nothing" to stand. I respectively think not"*.

The Preliminary objection raised therefore are devoid of merits and must be overruled.

From the arguments in support of the Preliminary objection which expressly admits that the Resident Magistrate Court of Bukoba in RM Misc. Revision No. 3 of 2012 did revise the order of the Rukindo Primary Court located within Muleba District which as I tried to demonstrate had no such powers; this automatically give a blessed path to this court to quash and set aside the proceedings and subsequent orders emanating from such illegal proceedings as I hereby do under S. 31 (1) (2) of the MCA Cap. 11 RE: 2002.

Taking into account the relationship between the parties, the nature of the whole matter and the illegality which was occasioned by the RM's Court I give no order as to costs.




S.B. Bongole

Judge

08/06/2018

Date: 8/6/2018

Coram: Hon. S.B. Bongole, J.

Applicant: Present

- Mr. Lameck

Respondent: Mr. Zedy Ally

B/C: Gosbert Rugaika

Mr. Lameck, Advocate for

My Lord, the application comes for ruling and we are ready.

Mr. Zedy Ally:

My Lord, we are also ready.

Court: Ruling delivered.




S.B. Bongole

Judge

08/06/2018

Right Appeal explained.




S.B. Bongole

Judge

08/06/2018