

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

CIVIL REVISION No. 05 OF 2021

(Originating from Misc. Civil Application No. 17/2020)

TPB BANK PLCAPPLICANT

VERSUS

LENARD A. MUKAMA..... RESPONDENT

RULING

21st June & 19th July, 2021.

TIGANGA, J.

In this ruling this court has been moved under section 79 (1) (a) (b) and (c) of Civil Procedure Code [Cap 33 R.E 2019], read together with section 31 (2) of the Magistrate Court Act [Cap 11 R.E 2019], seeking the following orders;

- a) That this court be pleased to call for and revise the decision and proceedings of Magu District Court in Misc. Civil Application No. 17/2020 for purpose of satisfying itself as to the correctness, legality and propriety in the proceedings and whole decision dated 16/02/2021.
- b) The costs to follow the course.

The application was supported by the affidavit of Mr. Julius Mushobozi, Advocate, who was instructed to represent the applicant in Misc. Civil Application No. 17/2020 before Magu District Court. In a ruling delivered by the District Court, dated on 29/12/2020, the applicant was allowed to file a fresh affidavit within 14 days and the case was fixed on 13/01/2021 for mention.

That on 08/01/2021, the counsel for applicant appeared in the District Court of Magu to file fresh affidavit, but he was informed that, the files have been called to the High court of Tanzania at Mwanza for following the complaints by the other party since 07/01/2021, therefore there was no court file in which to lodge the fresh affidavit.

On 13/01/2021, when the case was called for mention, he appeared before the District Court of Magu District, when he was informed by honourable E. J. Kimaro, the Resident Magistrate, that, the case files had not been returned from the High Court of Tanzania at Mwanza, and that parties would be informed when the file will remitted back.

Also that, on 15th January, 2021 the applicant made follow up to the High Court of Tanzania, Mwanza Registry where he was informed that, the

file have been taken to the Deputy Registrar for necessary order after the respondent had filed the complaint and that he would be informed by summons to appear before the Deputy Registrar as well as to the date to appear before the trial Magistrate of Magu District Court for necessary orders.

It is further deposed that on 18/02/2021, the applicant received summons to appear on 22/02/2021 before Magu Urban Primary Court, to show cause why execution should not be conducted against him, where, upon follow up it was revealed that, the case came on 21/02/2021 for mention before the District Court and equally the same was dismissed for non appearance of the applicant.

Following that discovery, the counsel for the applicant started the process to set aside the dismissal order but in vain as the said application was rejected without the applicant being heard. The effort to make it re admitted was fruitless, as even after approaching the Magistrate in charge, he did not only fail to assist him, but also refused to furnish him with the affidavit explaining what happened.

Together with the affidavit filed in support of the application he attached the order dated 16/02/2021 which ordered the dismissal of Application No. 17/2020.

The application was countered by the counter affidavit sworn by the respondent, Leonard A. Mkama, in such counter affidavit he deposed that the applicant failed to file a fresh application/affidavit due to his own negligence.

The respondent deposed further that, when the applicant appeared on 13/01/2021 he had no any document or fresh affidavit/application which he intended to file and he did not request or beseech the court to file such a fresh affidavit. It is his deposition that the absence of the case file in court does not block or restrain the applicant to file fresh application/affidavit.

According to him, if the applicant was serious about the case, he would have filed a fresh application/affidavit by filling it to the clerk of the court or through judicial website system which he normally does. The court always receives documents and stamps them, even if the files of the case are absent.

Regarding the reason for which the case was dismissed, he submitted that the case was not dismissed for non appearance but for failure of neglecting to file fresh application/affidavit within 14 days as ordered by court on 29/12/2020.

Further to that, he averred that, the court rejected the application because the applicant was abusing the court process, as it is the habit of the applicant to file applications whenever the respondent tries to file application for execution in Primary Court in order to prevent the respondent from realising the justice of this decree. Giving example of the said instances, he tried his best to point out instances when he was prevented to execute the decree. He said when he filed execution application for the first time, the applicant filed an application for extension of time before the District Court of Magu, which was granted, and he filed an appeal which was dismissed for non appearance. Following that dismissal, the applicant filed Misc. Civil Application No. 17/2020 before the District Court of Magu, to set aside a dismissal order dated on 01/10/2020, which application was objected by the preliminary objection through which it was ordered that, the applicant file afresh affidavit, which he failed to do

consequence of which the application was dismissed for failure to comply with the order of the court to file fresh affidavit.

Following that dismissal the applicant once again filed another application for setting aside a dismissal order in order to stop the respondent from executing the decree which was dismissed for being an abuse of the court process. He said all application which are being filed, this one inclusive, intends to delay the case and therefore delay justice.

Hearing of this application was by order of this court done by way of written submissions, where by Mr. Julius Mshobozi represented the applicant while the respondent fended for himself, but engaged one Nyando L. Nashon (Advocate) for only drawing the submission which he filed, personally.

Mr. Mushobozi, reminded the court in his submission in chief that, he filed this application under section 79 (1) (a) (b) and (c) of the Civil Procedure Code, [Cap 33 R.E 2019] read together with section 31(2) of the Magistrates' Courts Act [Cap 11 R.E 2019]. He also pointed out the historical background which gave rise to the application at hand, that on 06/05/2019, the respondent obtained a loan of Tshs. 1,500,000/= from the

applicant and mortgaged a house as security. The loan was to lapse after one year which was ending on 06/08/2020. The respondent defaulted thus causing the applicant to take legal steps to recover the money. To the surprise of the applicant, instead of paying the loan, the respondent instituted the claim of Tshs. 10,000,000/= against the applicant thus a series of the applications leading to this revision.

Following the decision passed against him by the Primary Court, the applicant lodged an appeal No. 18/2020 which however was dismissed for want of prosecution leading to the filing of the Misc. Civil Application No. 17/2020 seeking to set aside the dismissal order. The respondent raised a preliminary objection against an application No. 17/2020 which was decided on 29/12/2020, the decision which ordered the applicant to file a fresh affidavit within 14 days which were ending on 12/01/2021, and the matter was fixed for mention on 13/01/2021.

Before the date of filing the said fresh affidavit, the respondent filed a complaint to the Judge in charge; following that complaint the case files were called from the District Court to the High Court, something which made it difficult for applicant to file a fresh affidavit.

According to him, on 16/02/2021 the application was dismissed for want of prosecution, that was before loading an application for setting aside the dismissal order, but the same was summarily rejected for being an abuse of court process, which prompted this application for revision.

He asked the court to interview and revises the proceedings of the District Court of Magu dated 16/02/2021 by the District Court of Magu which order was issued before the hearing of parties. According to him, these two circumstances were tainted with confusion illegality which can be cured by application for revision.

He referred to the 3rd, 4th, 5th, 6th, 7th, 8th and 11th 12th as well as 13th paragraphs of the affidavit which he prayed to be part and parcel of the submission he made. He submitted that when he was given leave of 14 days to file a fresh affidavit as ordered on 08/01/2021, he went to Magu District Court but he was informed that the case file was called and set to the High Court following the complaint lodged by the respondent. Following that state of affair, the Registry Officer at Magu District Court did not accept the said affidavit. That, according to him, was done due to the fact that as a matter of practice, once a case file has been fetched un typed to the High Court, the subordinate courts business ceases until directives are

given as to the correctness and the propriety of the proceedings regarding the ground for which the case file was called.

Therefore, it is his opinion that the District Court was not justified to hold that the applicant did not file the fresh affidavit as ordered while they knew that he appeared to file but was told to await. It is his complaint therefore that, the applicant was unjustifiably punished without being heard, on the reason as to why he did not file the said fresh affidavit as ordered. It is the counsel's contention that, had he been heard, he would have told the court that he presented the affidavit for filing but the same was not admitted.

Arguing on his second ground, he submitted that; the matter was fixed for mention on 13/01/2021, on the very day they attended to court only to be told the same story that the court case file was yet to be returned from the High Court, and that in the absence of the respondent who did not attend on that date, the applicant through his counsel was advised to wait and in case of change he could be informed, and when they made follow up to the High Court, they were assured that the case file was still in the office of the Hon. Judge in charge.

He submitted that, the dismissal of the application on the date of mention, that is on 16/02/2021 was illegal and irregular. In his opinion the matter cannot be dismissed on the date of mention. He relied on the case of **Linjewile vs Hassan**, Misc Land Application No. 203 of 2020, High Court of Tanzania at Dar es salaam (unreported), at page 6, Hon. Mugetta, J held *inter alia* that, it is not the practice in our jurisdiction that, courts do not dismiss or make other orders that substantially buying a case to finality on the date fixed for mention, but a case can be dismissed on the date of hearing not mention.

Further more, even the fact that the case file had already been returned to the District Court and was scheduled for mention on 16/02/2021 on the date when the matter was fixed for mention was not communicated to the applicant. Therefore the case was dismissed without the applicant being informed. The counsel cited the case of **Ramadhani Amini vs Yusuph Rajabu** [1994] TZ HC 11 reported in Tanzli, Maina, J, that;

"Court should not accept evidence that a party has been notified verbally of a hearing date, as such acceptance will create chaos and Miscarriage of justice in the whole judicial process"

He cited another anomaly in the order dated 16/02/2021 that, the order said there was an order to file fresh affidavit with chamber summons, while the order dated 29/12/2020, ordered the applicant to file a fresh affidavit only, these are according to him two different scenarios, while the former meant fresh application, the latter meant, same application but new or fresh affidavit, he asked the court to consider this confusion as well, as the ground for revision.

Another irregularity cited are discrepancies regarding the dates. He submitted that the matter was never called for mention on 13/01/2021; he submitted that there was no business in the case file until on 16/02/2021 when the matter was dismissed. He cited the case of **Stanbic Bank Tanzania Limited vs Kagera Sugar Tanzania Limited**, Civil Application No. 57/2007 CAT - in which the Court of Appeal allowed revision on the bases of the state of confusion in the proceedings.

He also submitted that the application was rejected, not on the reason that it was time barred, but because it was an abuse of the court process. In his opinion that, could be ascertained after the court had heard the person on the issue he want to address the court. That means, the

court ruled the matter to be an abuse of the court process without first hearing parties, which is against the principle of Natural Justice. To support that contention he cited the case of **Hussein Khanbhai vs Kodo Ralph Siara**, Civil Revision No. 25 of 2014 CAT - Arusha at page 6 where it was held inter alia that;

"It is evidence from the record that, the parties were not heard. The order of summary rejection of the application made before the date of the hearing of the application, given the circumstances, the decision reached is a nullity. We are therefore constrained to intervene"

Basing on the strength of the authority and argument, he asked for the application to be allowed with costs.

In his reply, the respondent submitted that, he had a loan agreement with the respondent, but before the expiration of the loan period, the applicant breached the contract by trespassing into respondent's matrimonial house and business premises thereby restraining the respondent from conducting business. Following that breach, the respondent instituted Civil Case before Magu Urban Primary Court and the

applicant was adjudged to be liable to pay the loss he caused to the respondent herein above.

He submitted further that, in this matter the applicant has the tendency of filing numerous applications to obstruct the respondent from realising his justice. He reiterated what he deposed in the affidavit filed in opposition of the application, the information which has already formed part of this ruling.

He cited the case of **Sandra Wilson Ngui vs Bank of Africa (T) Limited and 2 other**, Misc. Commercial Application No. 122 of 2019, where the court considered filing of several applications seeking the same order amounted to abuse of the court process. He also cited the case of **Kuringe Real Estate Company Limited vs Bank of Africa T. Limited and others**, Misc. Commercial Application No. 81 of 2020 [2020] TZHCC which also discourages filing multiplicity of application over the same subject matter.

He cited section 95 of Civil Procedure Code [Cap 33 RE 2019] as the provision to be used to prevent the abuse of the court process also that the rejection of the application by the Magu District Court was in line with

section 95 of the Civil Procedure Code, to prevent an abuse of the process of the court.

He submitted further that, the order dated 29/12/2020 ordered the applicant to file a fresh affidavit within 14 days, but the applicant failed to do so. That there is no evidence to support the allegations that, he tried to file one but he was prevented, instead he came up when he heard the information that the respondent had filed execution proceedings. It was when the applicant went to the District Court to file the application to set aside the dismissal order, which application was rejected for being an abuse of the court process.

He submitted in respect of the 3rd, 4th, 5th and sixth ground that the application was dismissed simply because the applicant failed, ignored and refused to file fresh affidavit as ordered by the court.

He generally submitted that it was on the basis of the conduct of the applicant, the court was satisfied that, the application he was filing was an abuse of court process as he failed to file a fresh affidavit when he was required to do so within 14 days.

He reminded this court principle of justice that justice delayed is justice denied. He asked the court to disregard the submissions made by the applicant and dismiss the application for want of merits.

In rejoinder Mr. Julius Mushobozi, Advocate, submitted that the reply did not respond in his submission in chief. He argued that the respondent has not disputed that the case file was called to the High Court, also that the application was dismissed on the date when it was scheduled for mention and that the applicant was not summoned to attend, also the fact that the rejection of the application was made without hearing of the parties was not disputed.

He submitted that, the delay if any was caused by the respondent who complained to the High Court. That the reply did not point out the fact that the respondent borrowed 3 million but he was awarded by the Primary Court Tshs. 10,000,000/=.

Distinguishing the authority in Sandra's and Kuringe's case as cited by the respondent, he submitted that, in these cases, the holdings was based on the applicants filing multiplicity of the application with same orders sought,

different from this application in which there is no multiplicity of application filed, but one application to set aside the dismissal order.

Also that the two relied on cases were based on the objection raised against the proceedings that they were in abuse of court process and parties were heard, unlike in this case where parties were not heard. He lastly asked the court to base on the above elaborated grounds and allow revision with costs.

That being extensive summary of the record, the application, the counter affidavit and the submissions filed in support and against the application, I find it important to point out that this court under section 79 (1) (a) and (c) of the Civil Procedure Code [Cap 33 RE 2019] has powers to call for the record of any case which has been decided by the District or Resident Magistrates court in which no appeal lies, and revise the same if it find that, the District Court acted without jurisdiction or acted illegally or with material irregularities.

However, this is when the proceedings so revised are originating from the said court. While under section 31 (2) the powers to do so extends even to the proceedings which originated from the Primary Court.

These proceedings originated from Primary Court, therefore the most appropriate provision is section 31 (2) of the Magistrate's Courts Act [Cap 11 RE 2019]. Generally speaking, the powers as stipulated under section 30 (1) (b) aims at the court satisfying itself as to the correctness, legality and propriety of any decision or order and as to the regularity of any proceedings therein.

In this application the complained off irregularity which this court should correct are; **one**, that the proceedings of Misc. Civil Application No. 17/2020 were dismissed for want of prosecution or for want of filing of a fresh application, on the date when the matter was fixed for mention. **Two**, that the matter was dismissed without the applicant being accorded opportunity to be heard as to why he did not file the said application. **Three**, that the new application to set aside the dismissal order was summarily rejected on the ground that, it was an abuse of the court process without, hearing the applicant on the said application and without necessarily explaining what court process which was abused.

It is a principle of law that in any proceedings whether in appeal or revision, filed to challenge the decision of the lower court, the impugned decision must be attached to the application. In this application, the

applicant has been very categorical in the Chamber Summons that he was challenging and asked this court to satisfy itself as to the correctness, legality and or propriety in the proceedings and the whole decision passed in Misc. Civil Application No. 17/2020 dated on 16/02/2021.

Further to that, the order attached to the application is one which is referred in the Chamber summons, therefore, this court will confine its discussion and findings on the proceedings and order passed in Misc. Civil Application No. 17/2020, dated on 16/02/2021 I will therefore not deal with the said order which rejected the application on the ground that the same was abusing the court process, because, it was not mentioned in the chamber summons, and secondly the said order was not attached to the application at hand.

Now, reverting at the said order that is in Misc. Civil Application No. 17/2020 which dismissed the said application on 16/02/2021, it goes without saying that, on 29/12/2020 the applicant was allowed by the Ruling of the District Court to file a fresh affidavit (not application) within fourteen days probably from the date of that order. Together with that order the application was scheduled for mention on 13/01/2021, probably to ascertain as to whether the applicant had complied with the order. The

record does not show that eh case was called on 13/01/2021, and there is no explanation in the record as to why they said case was not called before the Magistrate on that date.

However, what happened on that date is explained in the affidavit filed in support of the application, in paragraph 5 that the applicant was verbally informed on 08/01/2021 that the case filed was called to the High Court on 07/01/2021 following the complaint by the Respondent, therefore there was no file within which to file the said fresh affidavit.

In paragraph 6 of the affidavit, the applicant depose that on 13/01/2021, the counsel attended to court as directed in the order of 29/12/2020, but was informed by Hon. Kimaro - RM that the case file was not yet returned from the High Court, and that he would be informed when the case file would be remitted back from there, the record does not show as to whether parties were informed either by summons, or otherwise, not only that the case file was returned from the High Court but also that it would be called on 16/02/2021, for mention instead of 13/01/2021.

On 16/02/2021, the record shows that when the case was called, the applicant was present obvious for reason that as a person who complained,

kept on following his complaint and was better placed to know when the High Court returned the file.

Having received the file, the District court being aware that, the applicant could not have known that the case file had already been returned, was duty bound to order service to the parties so that they can appear before it. The decision which dismissed the said Misc. Civil Application No. 17/2020 was made without hearing the applicant against whom the said decision was made. It was the duty of the court to require him to state why did he fail to file the said fresh affidavit as ordered by the court on 29/12/2020. The court was supposed to dismiss the application after hearing the reasons as to why he did not do so. It should be noted here that the right to be heard is not only a common law principle, but it is the constitutional right as provided and guaranteed by Article 13 (6) (a) of the constitution of the United Republic of Tanzania, 1977, this has been interpreted in a number of case authorities, to mention few are **Abbas Sherally and Another vs Abdul SHM Fazalboy**, Civil Application No. 133 of 2002 - CAT - DSM **DPP vs Sabinis Inyas Tesha and Another** [1993] TLR 237 and **Francis Kwaary Musei vs Hon. Wilbroad PEter Slaa and other** Civil Application No. 2/1999 - CAT - Arusha decided

(2003) (unreported), in all these case, it was held that the right to be heard is constitutionally guaranteed, and any adverse decision made without affording a person the opportunity to be heard is liable to be declared a nullity by the higher court.

As I have already pointed out, the adverse decision of dismissing the application on 16/02/2021 was made without the applicant being aware that the case was on that date called for mention, hearing or orders. That said and basing on the authorities cited herein above, I find the District Court decision passed on 16/02/2021 was passed in violation of the principle of Natural Justice, therefore it is liable and so deserve to be declared a nullity.

That said, and on that base, I revise the order of the district Court dated 16/02/2021 and nullify it, I restore Misc Civil Application No. 17/2020 and order the same continue from where it had ended. I further order that since there was an order to file a fresh affidavit and the applicant was prevented by the fact that the case filed was in the High Court, I order that, within 14 days of the return of the case file before the District Court, the applicant should file the said affidavit before the case/application has

proceeded with hearing on merit, before another Magistrate of competent jurisdiction.

As the order which prompted this application for Revision was issued by the court *suo moto* without even being asked by the respondent no order as to cost is made.

It is so ordered.

DATED at MWANZA, this 19th day of July, 2021

