

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

**CIVIL REVISION NO.33 OF 2012
(Revision from Temeke District Court Civil Case No. 40 of 2008)**

FREDRICK MEENAAPPLICANT

Versus

EDHA ABDALLAH T/A CAMEL OIL.....RESPONDENT

Date of last order: 05/03/2014

Date of Ruling: 02/04/2014

R U L I N G

F. Twaib, J:

This is a revisional proceeding commenced by the Court *suo motu* after the Hon. Judge in Charge saw it fit to do so, upon receiving a letter of complaint from Fredrick Meena ("the applicant") requesting the Court to investigate an order made by the District Court, Temeke, on 28th December 2012. The circumstances surrounding the issuance of that order are the subject of these proceedings.

The applicant asserts that on 20th January 2012, he was surprised to receive a Court order issued by Mkwawa, RM, on 28th December 2011, claiming that the learned Magistrate had gone through the file and found

that he (the applicant) had filed an application for execution, and then proceeded to issue orders staying the purported execution.

It is pertinent to set out the record of the proceedings in the District court on that material day. They are as follows (I reproduce the proceedings as they appear in the record of the RM's Court):

28.12.2011

Coram K.S. Mkwawa SRM

Applicant

Respondent

R/O Msumi

Mrs. Kazimoto for the applicant

Before this Court there is an application for execution. We pray for an ex parte order to maintain status quo pending hearing application interparties. The prayers are brought u/o XXXIX rule 5 (2) and Rule 4 of CPC Cap 33 RE 2002. This Court has powers to grant such orders.

Court:

"Indeed there is evident in the court file an application for execution filed by the decree holder which has resulted to this present application. The present application is that of among other matter intended to seek for stay of such execution. There is no doubt that if status quo is not maintained to await the determination of the application there may be a danger that irreparable loss may occur on the part of the applicant. It becomes prudent and just to maintain the status quo pending the determination of the application. The DH/respondent be served with the necessary documents. It is so ordered."

Counsel Mussa for the applicant has attacked the statement reportedly made to the District Court by Ms. Kazimoto, learned advocate for the respondent herein while praying for an interim order for stay of execution. She said that the statement "before this Court there is an application for

execution” was a lie, since no such application had been filed in the said Court at the time. Counsel also attacked the learned Resident Magistrate’s statement that “indeed there is evident in the court file an application for execution filed by the decree holder which has resulted to this present application...” This was also, according to Mr. Mussa, a lie.

These statements were obviously false. The respondent and his counsel do not dispute that. But were they lies? A lie would entail knowledge of the falsity of the statements, made with an intention to mislead. The respondent maintains that these statements were genuine mistakes, as Ms Kazimoto had actually said “...application for stay of execution...” but the Magistrate wrote, instead, “...application for execution...” In any case, argues counsel, there was nothing that could be gained by misleading anyone, since the existence of an application for execution was not a condition precedent for an application for stay of execution. That is true. But it is also capable of justifying the urgency for an *ex parte* hearing and order for maintenance of *status quo*.

I have examined the record in the light of the circumstances. I am inclined to agree with the respondent’s counsel that there was the likelihood of human error either in counsel Kazimoto’s submissions or, perhaps more likely, in the way the learned Magistrate recorded her.

However, I am not persuaded to agree that the Magistrate’s order was genuine or a mere human error. When the Magistrate said, “Indeed there is evident in the court file an application for execution filed by the decree holder which has resulted to this present application...”, he implied that he had satisfied himself that there were two applications in the file—one for execution filed by the decree holder, the other for stay of execution filed by the judgment debtor in response thereto, for stay of execution.

Though it is difficult to say that he had knowingly intended to mislead anybody, the learned RM was at least guilty of gross negligence. If he did not lie, then he must have assumed that there were two applications, one of which was execution by the decree holder, without checking to see whether there was in fact such an application. For, if he really perused the record, he would not have seen such an application, as there was none. His failure to check the record and proceeding to make a false remark about it would amount, at the very least, to gross negligence on his part.

It is a moot question as to whether the learned RM would have granted the interim orders if he had not noted that there an application for execution by the decree holder was in the record. It can however be implied that he would not likely have seen the urgency that led him to entertain, and grant, an interim *ex parte* application for maintenance of the *status quo* and issue an order to that effect. In the premises, I find that there were irregularities in the manner in which the learned RM handled proceedings on that material day. I would thus not allow the orders made consequent thereto, to stand. I nullify the lower Court's proceedings of 28th December 2012, and set aside the order for maintenance of *status quo*.

The matter may proceed before another Magistrate of competent jurisdiction, provided that such a proceeding is still practicable, depending on the stage the matter has reached (in appeal, etc.). The respondent shall bear the costs of these proceedings.

DATED AT DAR ES SALAAM this 3rd day of April, 2014.

Fauz Twaib
Judge