

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY AT ARUSHA

MISC. CRIMINAL APPLICATION NO.29 OF 2022

(Originating from Criminal Case No.3 of 2019 at the Resident Magistrate's Court of Manyara at Babati)

NASHON ODHIAMBO MAKOKETCHA.....1ST APPLICANT

BELELA ERASTO KOU.....2ND APPLICANT

SAMSON SYLVESTER RUMENDE.....3RD APPLICANT

Vs

THE REPUBLIC.....RESPONDENT

RULING

Date of last Order:1-8-2022

Date of Ruling:22-8-2022

B.K.PHILLIP,J

The applicants herein lodged this application under the provisions of section 30(1) (a) (i) of the Magistrates' Courts Act , ("MCA") praying for the following Orders;

- i) That this Court be pleased to call for and examine the record of proceedings of the Resident Magistrates' Court of Manyara in Criminal Case No. 3 of 2019 for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling of the trial Magistrate and as to the regularity of any proceedings therein and may revise any such proceedings.
- ii) Any other order /relief(s) this Honourable Court may deem fit and just to grant.

The application is supported by a joint affidavit sworn by the applicants. The Respondent filed a Counter affidavit in opposition to this application together with a point of preliminary objection couched as follows;

-That the applicants in this matter seek to challenge an interlocutor Order.

This ruling is in respect of the point of preliminary objection stated herein above.

A brief background to this application is that the applicants were arraigned at the Resident Magistrates' Court of Manyara at Babati on the following Charges;

1st Count for the 3rd applicant only; forgery contrary to section 333, 335(a) and 337 of the penal Code;

Particulars of the offence; Samson Sylvester Rumende on the 20th day of May 2011 at unknown place , within Babati District in Manyara Region , with intent to defraud or deceive, forged a sale agreement dated 20th May 2011 for Motor Vehicle with Registration No. T 264 AGG, make Toyota Land Cruiser Prado between Belele Erasto Kou and Jumuiya ya Hifadhi ya Wanyamapori Burunge [JUHIBU] purporting to show that the said Motor Vehicle was purchased at the price of Tanzanian Shillings Ten Million (Tshs 10,000,000/) , the fact he knew to be false.

2nd Count for the 2nd applicant only, fraudulent evasion of tax contrary to section 15(b) of the Motor Vehicles (Tax on Registration and Transfer) Act. [Cap 124 R.E 2002].

The particulars of the offence; Belela Erasto Kou on diverse dates between 1st and 31st March 2011 at Babati District in Manyara Region , fraudulently evaded to pay tax amounting to Tanzanian Shillings Eight Hundred Twelve Thousand Five Hundred Only (Tshs 812,500/=).

3rd Count for all applicants; fraudulent evasion of tax contrary to section 15(b) of the Motor Vehicle [Tax on Registration and Transfer] Act [Cap.124.R.E. 2002].

The particulars of offence; Nashoni Odhiambo Makokecha, Belela Erasto Kou and Samson Sylvester Rumende on diverse dates between May and July 2011 at an unknown places within Babati District in Manyara Region jointly and together fraudulently evaded to pay tax amounting to Tanzania Shillings Two Hundred Sixty Seven Thousand and Five Hundred only (Tshs 267,500)

The point of preliminary objection was heard viva voce. The learned State Attorney, Lilian Kowero appeared for the respondent whereas the 3rd respondent , Mr. Samson Sylvester Rumende appeared in person. The hearing proceeded ex-parte against the 1 and 2nd applicants since they did not enter appearance on the hearing date.

Submitting for the point of preliminary objection Ms. Kowero argued that the affidavit in support of this application reveals that the applicants are challenging the order of the Resident Magistrates' Court of Manyara at Babati, in which the trial Magistrate upon hearing the prosecution side ruled out that the applicants have a case to answer. She contended that the aforesaid order of the trial Court is an interlocutory order because it did

not make the final determination of the case. Expounding her arguments, she submitted that an interlocutory order is an order which intervenes between the commencement and the end of the suit or proceedings to either decide a particular matter which is not a final decision of the Court. To cement his arguments he referred this Court to the case of **Freeman Aikael Mbowe and 8 others Vs Republic, Misc. Criminal Application No.126 of 2018**, (unreported). She urged this Court to strike this application.

In response, Mr. Rumende submitted as follows; that in this application the applicants are moving this Court to exercise its supervisory powers under the provisions section 30(1) (a) (i) of the MCA so as to ascertain the correctness/propriety of the ruling of the trial Court in which it ordered that the applicants have a case to answer. He conceded that the lower Court's order that the applicants have a case to answer is an interlocutory order. However, he argued that this Court has powers under section 30(1) (a) (i) of the MCA to examine the correctness and propriety of the ruling of the lower Court and make necessary orders as it deems fit. He prayed for the dismissal of the point of preliminary objection so that the application can be heard on merit.

In rejoinder, Ms. Kowero submitted that Mr. Rumende conceded that the order of the trial Court the subject of this ruling is an interlocutory order. The provision of section 30(1) (a) (i) of the MCA relied upon by the applicants in this application confers to this Court powers to call the records of the lower Court *suo motto*. The applicants have no right to move this Court under the aforementioned provisions of the MCA to call

the records of the trial Court. She contended that the appropriate section under which the applicants can move this Court to call the trial Courts' records is section 43 of the MCA. She pointed out that an application made under a wrong provision of the law is incompetent and deserves nothing except to be struck out.

Having analyzed the submissions made by Ms. Kowero and Mr. Rumende as well perused the Courts' records, let me proceed with the determination of the point of preliminary objection. It is a common ground that the order of the trial Court the subject of this ruling is an interlocutory order because it does not make a final determination of the applicants' case. The position of law is that no application for revision or an appeal can lie against an interlocutory order of the lower Courts for a simple reason that the same does not make a final determination of the matter. No wonder Mr. Rumende's argument was to the effect this is not an application for revision. The applicants have moved this Court to exercise its supervisory powers under section 30(1) (a) (i) of the MCA.

I noted that though the point of preliminary objection is not on the provision of laws under which this application is preferred, in the course of arguing this application the issue on the provisions of the law under which this application has been preferred emerged and I find myself compelled to entertain it because it is imperative that before entertaining any matter the Court must be properly moved.

Going by Mr. Rumende's arguments, that is, in this application the applicants are moving this Court to exercise its supervisory powers, a

pertinent question which arises here is ; Do the provisions of section 30(1) (a) (i) of the MCA confer to this Court supervisory powers over the Resident Magistrates' Court of Manyara?. Upon perusing the provisions of section 30(1) (a) (i) of the MCA, I noted that the same is under sub –part (c) of Part III of the MCA which specifically provides for *the Appellate and revisional Jurisdiction of the High Court in relation to matters originating from the Primary Court*. Therefore, even if, for the sake of argument, it is assumed that a party to case at a Resident Magistrates' Court can move this Court to exercise its supervisory powers, the provision of the law cited by the applicants in their chamber summons (Section 30(1) (a) (i) of the MCA) is a wrong provision of the law because the applicants' case does not originate from the primary Court. It originates from the Resident Magistrates' Court. The supervisory powers of this Court for matters originating from the District Courts and Courts of the Resident Magistrates' are provided under section 44 of the MCA which in sub-part (b) of Part IV of the MCA. Thus, this application is incompetent since this Court has not been properly moved [See the case of **Tanza Coal East Africa Mining Limited Vs Minister for Energy and Minerals , Misc. Commercial Application No.74 of 2014, (2016) TLS.LR. 152** and **Harishchandra G.N. Shelkhe Vs Cliff Jiwan and two others , Application No.19 of 2004, (unreported)**]

The above aside, even if this Court would have been properly moved, it is noteworthy that the applicants' concern is to the effect that the lower Court's Ruling is erroneous. However, in my considered opinion the supervisory powers of this Court envisaged in the section 44 of the MCA

do not give a room for this Court to revise the lower Court's Rulings/orders in a manner suggested by the applicants, that is , by filing an application which is in reality an appeal in disguise against interlocutory orders of the lower Court. In other words, this Court cannot embark on exercising its supervisory powers over the lower Court's Ruling in which it has ruled that an accused person has a case to answer. Doing so will make the administration of justice chaotic. The lower Courts will be denied the opportunity to determine matters within their jurisdiction to their finality. Since it is a common ground that the order of the lower Court the subject of this application is an interlocutory order, in which the lower Court ruled that the applicants have a case to answer, this applications is absolutely incompetent.

In the upshot, this application is hereby struck out. The original case file should be remitted to the trial Court forthwith for continuation of hearing of the defence case. It is so ordered.

Dated this 22nd day of August 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", with a long horizontal stroke extending to the right.

B.K.PHILLIP

JUDGE.