

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: OTHMAN, C.J., LUANDA, J.A., And KAIJAGE, J.A.)

CIVIL APPLICATION NO. 67 OF 2014

KITINDA KIMARO.....APPLICANT
VERSUS
ANTHONY NGOO.....1ST RESPONDENT
DAVIS ANTHONY NGOO.....2ND RESPONDENT

**(Application for revision of the decision of the High Court of Tanzania
at Arusha)**

(Mugasha, J.)

**Dated 20th day of March, 2014
in
Misc. Civil Application No. 39 of 2014**

RULING OF THE COURT

29th October & 3rd November, 2014.

LUANDA, J.A.:

This is an application for revision brought by way of Notice of Motion supported by an affidavit of Kitinda Kimaro, the applicant. The application is brought under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the Act) in which the applicant is inviting this Court:-

"to call for and examine the record (namely, the Proceedings dated 19th March, 2014 and Ruling and Order both dated 20th March 2014) of the High Court of Tanzania at Arusha in Miscellaneous Civil Application No. 39 of 2014 (c/f High Court of Tanzania at Arusha Civil Case No. 17 of 2010) between Anthony Ngoo (Applicants) and Davis Anthony Ngoo (Applicants) versus Kitinda Kimaro (Respondent) for purposes of satisfying itself as to the correctness, legality or propriety of the Ruling and Order aforesaid as well as to the regularity of the Proceedings therein and that the Court may nullify the same."

[Emphasis supplied].

The respondents resisted the application. The parties through their advocates Mr. Mpayi Kamara for the applicant and Mr. Akoonay Sang'ka and Mr. Michael Ngalo for the respondents submitted and defended

their respective positions. We will, however, not go into details of their submissions owing to the reason we are going to give hereunder.

We wish to begin by saying that when these revisional proceedings were filed on 16/4/2014, the respondents had already lodged Civil Appeal No. 25 of 2014 on 28/3/2014 in the Court and the proceedings in that appeal had commenced by entertaining a preliminary objection raised by the applicant and a decision was made. In the course of hearing of the application, the Court on its own motion raised a point of law with a view to satisfying itself as to whether the Court can exercise its powers of revision under section 4 (3) of the Act when it is seized with proceedings, the subject matter of revision.

Mr. Kamara was of the view that the Court can do so under the aforestated section, notwithstanding the fact that the proceedings are no longer with the High Court. And when he was asked about raising the issue during the hearing of the appeal as is provided under section 4 (2) of the Act, he said those powers are the exclusive domain of the Court.

On the other hand, Mr. Ngalo said the Court was not properly moved. The application is misconceived and so the same should be struck out with costs, he maintained.

As stated earlier on, the proceedings, the subject matter of these revisional proceedings are no longer at the disposal of the High Court.

Section 4 (2) and (3) of the Act reads:-

4 - (1) N/A

(2) For all purpose of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.

(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction **to call for and examine the record of any**

proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court. [Emphasis supplied].

(4) N/A

(5) N/A

Under section 4 (2) and (3) of the Act, the Court can exercise its revisional powers in two ways. One, in the course of hearing the appeal. And two by calling the proceedings which are in front of or at the disposal of the High Court. The Court had the occasion to interpret what the terms "before" and "to call for record" in **Kombo Mkabara v. Martin Louse Frisch**, Civil Application No. 3 of 2000 (CAT, unreported) where it said:-

"In a nutshell, the provision applies to the revision proceedings before the High Court. The expression "before the High Court" which we have duly emphasized can

only be reference to proceedings still in the High Court. Chambers Twentieth century Dictionary defines the word "before" to mean, inter alia, "in the presence or sight of :under the consideration or cognisance of" we are thus of the settled view that subsection (3) applies to proceedings under the consideration or cognisance of the High Court, in other words proceedings in which the High Court is still seized of jurisdiction. This construction is underscored by the words "to call for", similarly emphasized, which can only mean calling for a record still before the High Court"

In our case we have seen that the respondents have already filed Civil Appeal No. 33 of 2013 in the Court. It goes without saying that the High Court is no longer seized with those proceedings. It follows

therefore that section 4 (3) of the Act is not applicable. So, the Court is not properly moved.

Before we pen off, we wish to comment on the statement of Mr. Kamara that a party in an appeal cannot resort to section 4 (2) of the Act as the powers are exclusively vested in the Court. It is true, those powers can only be invoked by the Court in the course of hearing the appeal. But that does not mean a party in the appeal is not allowed to draw the Court's attention to look into the illegality or irregularity and see whether the matter complained is fundamental and had occasioned a miscarriage of justice.

In **SGS SOCIETE GENERALE DE SURVEILLANCE AND ANOTHER v. VIP ENGINEERING & MARKETING LTD & ANOTHER**, Civil Application No. 107 of 2006 the Court said:-

"Fourth, the revisional jurisdiction under section 4 (2) is invokable by the Court itself (see, Dar es salaam Education and Office stationary case, supra). For clarity, it is not excluded

that a party may draw the court's attention to an illegality or irregularity occasioning a miscarriage of justice in the lower court's proceedings or judgment and on which the court may decide to invoke its revisional jurisdiction under section 4 (2). It is open to the court to take cognizance of it through the parties and for it to call upon their views on it. The discretion in the exercise of revisional jurisdiction under section 4 (2) is preeminently one for the court. It is not of any right to the parties."

[Emphasis supplied].

In fine, the application is misconceived and incompetent. The same is hereby struck out with no order as to costs.

DATED at ARUSHA this 31st day of October, 2014.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL