IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 122 OF 2014

LUDGER BERNARD NYONI ..... APPLICANT

VERSUS

1. NATIONAL HOUSING CORPORATION
2. KIMBEMBE AUCTION MART LIMITED AND COURT BROKERS } **.....RESPONDENTS**

(Application for Revision from the decision of the High Court of Tanzania at Dar es Salaam)

(Nyerere, J. And, Makuru, J.)

Dated 30th September, 2010

In

Civil Application No. 4 of 2012

RULING OF THE COURT

29th May & 6th June, 2018

MUGASHA, J.A.

The applicant is seeking revision of the decision and Order of the High Court in Civil Application No. 4 of 2008 given by Nyerere, J. and Makuru, J. on 11.12.2008 and 30.9.2010 respectively. The application is by way of Notice of Motion brought under Rule 65(1), (2), (3), (5) (7) and 54(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Accompanying the application is the affidavit sworn by Ludger Bernard Nyoni, the applicant.

In order to appreciate what underlies this application, its brief background as gathered in the accompanying documents is as follows: Way back in 2000, the respondent successfully commenced a summary suit against the applicant for non-payment of rent arrears of Tshs. 365,417/= in respect of a residential house No. 176 C Block IX situated at Kawawa Road within the municipality of Ilala. Having obtained the eviction order dated 24th October, 2003 which was executed on 7th March, 2005, the respondent was evicted from the house in question. Aggrieved, the appellant unsuccessfully appealed to the High Court to have the execution order set aside but the appeal was dismissed on 4th July, 2008. Subsequently, the applicant unsuccessfully applied for leave to appeal to the Court and the application which was dismissed on 11th December, 2008 by Nyerere, J. Later, he applied for extension of time to apply for leave to appeal to the Court but the application was dismissed on 30th September, 2010 by Makuru,J. It is against the said backdrop the applicant was prompted to bring the present application.

The application was greeted by a notice of Preliminary Objection on following points:-

(a) That this Honourable Court has not been properly moved by the applicant for non-citation of section 4(2) and (3) of the Appellate Jurisdiction Act [CAP 141 RE.2002]

(b) That, the Application is incompetent for lack of records for revision.

At the hearing, the applicant was present and fended for himself. Mr. Aloyce Sekule learned counsel represented the 1st respondent. The 2nd respondent was absent though duly served with notice of hearing, pursuant to the affidavit sworn on 18th May, 2018 by the process server. We thus, invoked Rule 63(2) of the Rules to proceed with the hearing in the absence of the 2nd respondent.

To expound the preliminary points of objection, Mr. Sekule submitted that, the present application suffers wrong citation having not been brought under section 4(3) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002). He added that, while the applicant is seeking revision of the decisions of the High Court by Nyerere, J and Makuru, J, the applicant has not included the respective proceedings and Drawn Orders in the record of

revision. He concluded his submission by arguing that, the cumulative effect of the pointed out anomalies render this application incompetent. He thus urged us to strike out the application with no order as to costs.

On the other, the applicant adopted his reply to the notice of the preliminary objection he earlier filed. He argued that, the revision at hand is not regulated by section 4(2) and 4(3) of AJA, but rather the Court Rules under GN 368 of 2008. He denied the record to be incomplete arguing that, the record of the High Court includes what transpired between the parties in respect of a summary suit at Kisutu RM's Court Civil Case No. 258 of 2000 annexed to the application. Moreover, he urged the Court to overrule the preliminary objections as they intend to derail the hearing of the Revision.

There is no dispute that this is a revision initiated by the party. What is in dispute is whether the application is properly before the Court. What clothes the Court with revisional jurisdiction where it is moved by a party is section 4(3) of the Appellate Jurisdiction Act which provides:-

> *"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".

There is a plethora of Court decisions which have categorically expounded that this Court can be moved by a party to invoke its revisional jurisdiction under the cited section 4 (3) of AJA. The decisions include: **HALAIS PRO-CHEMIE VS WELLA A.G.** [1996] TLR 269**, TRANSPORT EQUIPMENT LTD VS D.P VALAMBHIA** [1995] TLR 161 and **MOSES MWAKIBETE VS THE EDITOR-UHURU AND TWO OTHERS** [1995] TLR 134.

Rule 65 of the Rules regulates among other things, the modality of drawing of the application and the specific time in which it has to be filed. The Rules does not clothe the Court with jurisdiction to entertain and determine revision applications. In this regard, it was not proper for the applicant to seek revision under Rule 65 (1), (2), (3), (5), (7) of the Rules.

Regarding what should be contained in the record of revision, the position of the law is now settled that, copies of proceedings, judgments/ruling and decree/order are vital documents to be included in

an application seeking to invoke the revisional jurisdiction of the Court (See **AMOS FULGENCE KALUNGULA VS KAGERA CO-OPERATIVE UNION (1990) LTD,** Civil Application No. 2 of 2013 (unreported). In **CHRISOSTOM H. LUGIKU VS AHMEDNOOR MOHAMED ALLY,** Civil application no. 5 of 2013 (unreported), a decree was not in the record of application for revision. Giving a rationale on the essence of having before it the entire requisite documents before exercising its power of revision, the Court said:-

> *"...we are unable to say anything meaningful in relation to Land Application No. 25 of 2007 because we are not seized with all the proceedings relating to the said application. As such, we cannot step in and make an order for revision over something we do not have the full picture."*

Given the fact that, the matter under scrutiny originated from the Resident Magistrates Court, the Court gave directions on what should be incorporated in the record of revision initiated by a party in the case of **BENEDICT MABALANGANYA VS ROMWALD SANGA**, Civil Application No. 1 of 2002 (unreported) having stated:

> *".... The record of proceedings of the High Court, and in case of the appellate jurisdiction of the High Court, then the*

record of proceedings of the lower court or courts, must be before the Court. This is glaring certain from the very definition of what revision entail and if the court is to perform that function....

Now when the Court acts on its own motion it will have to call for those records itself. ***But when the Court is moved, as in this case, then one who moves it will have to supply those records."***

[Emphasis supplied]

Moreover, in the **BOARD OF TRUSTEES OF NSSF VS. LEONARD MTEPA,** Civil Application No. 140 of 2005 (unreported) the Court addressed the issue whether it could exercise revisional jurisdiction in an application for revision which lacked the complete record of proceedings of the High Court. We said:-

"...This Court has made it plain, therefore, that if a party moves the Court under section 4 (3) of the Appellate Jurisdiction Act, 1979 to revise the proceedings or decision of the High Court, he must make available to the Court a copy of the proceedings of the lower court or courts as well as the ruling and, it may be added, the copy of the extracted order of the High Court. An application to the Court for

revision which does not have all those documents will be incomplete and incompetent. It will be struck out."

Given the circumstances and the settled position of the law, it is the applicant who is duty bound to place entire proceedings of the High Court before the Court is properly moved to exercise its revisional jurisdiction. We are of a considered view that, the applicant's failure to include the Chamber summons and affidavits which initiated the applications and a subject of the Rulings and the respective Drawn Orders intended to be revised makes the record incomplete and renders the application not competent. In essence, there is nothing to be revised. We have also gathered that, the High Court judgment by Mihayo, J. in Civil Appeal No. 4 of 2008 which dismissed the applicant's appeal is also not incorporated in the record of revision. This in itself would have adversely impacted on the present application.

On account of discrepancies ranging from non-citation and failure to include in the record what is intended to be revised, we agree with Mr. Sekule that, the present application is rendered incompetent and therefore the Court is not properly moved to invoke its revisional jurisdiction.

In view of what we have endeavoured to explain we are constrained to strike out the incompetent application with no order as to costs.

DATED at **DAR ES SALAAM** this 4th day of June, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL