

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 496/01 OF 2020

**HARITH RASHID SHOMVI APPLICANT
VERSUS**

**AZIZA JUMA ZOMBOKO RESPONDENT
(Application for revision from the Judgment and Order of the High Court
of Tanzania, at Dar es Salaam)**

(Ebrahim, J.)

dated the 18th day of September, 2020

in

Civil Appeal No. 56 of 2020

RULING OF THE COURT

31st August & 6th September, 2022

MWAMBEGELE, J.A.:

This is an application for revision. The applicant moves the Court to call and examine the proceedings of the High Court of Tanzania, at Dar es Salaam (Ebrahim, J.) in Civil Appeal No. 56 of 2020 and the judgment and order thereof dated 18.09.2020 with a view to satisfying itself as to their correctness, legality or propriety and make orders as may be appropriate. It is by a notice of motion taken out under the provisions of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of

the Revised Edition, 2002 (the AJA) and Rule 65 (1), (2), (3), (4), (5) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion is supported by an affidavit affirmed by Harith Rashid Shomvi, the applicant and resisted by an affidavit in reply affirmed by Aziza Juma Zomboko, the respondent.

The notice of motion is pegged on the following four grounds:

1. Whether the properties acquired by a woman during the subsistence of marriage cannot be matrimonial properties;
2. Whether the chamber summons which is being supported by an affidavit which has not been replied by the respondent can go into stage of hearing as of law;
3. That the learned judge erred in law in delivering the judgment in total disregard of the Court of Appeal decision in the case of **Mwanahawa Muya v. Mwanaidi Maro**, [1992] T.L.R. 78; and
4. That the application is much squared by **Halais pro-chemical v. Wella A.G** [1996] T.L.R. 269 and **SGS Societe Generale De Surveillances S.A v. VIP**

Engineering & Marketing Ltd, Civil Application No. 84 of
2000 under proposition of exceptional circumstances.

The essential facts of this matter are not difficult to comprehend. They are as follows: The applicant and respondent were, respectively, husband and wife. After some years of charade life, the respondent petitioned for a decree of divorce and division of matrimonial assets before Kinondoni Primary Court vide Matrimonial Cause No. 31 of 2018. For easy reference, we shall henceforth refer to the Kinondoni Primary Court as the trial court. The trial court was satisfied that the marriage of the parties had been broken down beyond repair and, consequently, issued a decree of divorce along with an order for division of a house which was the only matrimonial asset acquired by the applicant before marriage and developed jointly by the parties. The trial court ordered sale of the said house after valuation and the respondent was ordered to be given a quarter of the sale proceeds.

The house in question was sold by a court broker through a public auction for Tshs. 15,000,000/=. The decision of the trial court irritated the applicant. He thus lodged revisional proceedings before the District Court of Kinondoni vide Civil Revision No. 3 of 2019 to assail the decision

of the trial court which aggrieved him. The District Court ordered that the case file be remitted to the trial court for it to consider that valuation of the house in question is done before selling of the same as it was previously ordered. However, it is noteworthy that other prayers by the applicant that another house and a salon car acquired by the respondent during the subsistence of the marriage which were not included in the matrimonial assets for division were not considered by the District Court on the ground that they were new issues which were not dealt with by the trial court.

Undeterred, the applicant unsuccessfully appealed to the High Court of Tanzania vide Civil Appeal No. 56 of 2020. The High Court (Ebrahim, J.) upheld the decision of the District Court. Still undaunted, the applicant lodged the instant application on the grounds enumerated above.

When the matter was placed before us for hearing on 31.08.2022, the applicant appeared in person, unrepresented. The respondent was also present in Court and had the services of Mr. Novatus Michael Muhangwa, learned advocate. It is worth of note that two days prior to that date, on 29.08.2022 that is, the matter was called on for hearing

before us for the first time, the counsel for the respondent raised a legal question on the competence of the matter but the applicant could not respond to it. He sought an adjournment so that he could engage or consult a lawyer for the answer.

On the hearing date, when we called upon the applicant to address us on his application, he simply adopted the affidavit and written submissions filed earlier in support of the application, without more.

For his part, the respondent's counsel who did not file an affidavit in reply to contest the application, was limited to respond on only legal grounds. We took that course upon our numerous authorities that a party who did not file an affidavit in reply will not be allowed to respond from the bar to an applicant's factual arguments, except for those on law – see: **Fweda Mwanajoma and another v. Republic**, Criminal Appeal No. 174 of 2008 and **Jonas Betwel Temba v. Paul Kisamo & Another**, Civil Application No. 10 of 2013 (both unreported). As we stated in **Francisca Mbakileki v. Tanzania Harbours Corporation**, Civil Application No. 71 of 2002 (unreported) where a respondent does not dispute matters of fact made in an affidavit, there is no need to file

a counter affidavit or affidavit in reply. The respondent was still legally entitled to contest the application despite not filing an affidavit in reply, for that failure did not mean the application was not contested - see: **The Editor Msanii Africa Newspaper v. Zacharia Kabengwe**, Civil Application No. 2 of 2009 (unreported).

In his response on matters of law, Mr. Muhangwa was very brief but focused. He repeated the legal point he had raised two days back to the effect that the application was incompetently before us because the applicant had an avenue of appeal in terms of section 80 (4) of the Law of Marriage Act, Cap. 29 of the Revised Edition, 2019 (the Law of Marriage Act). The learned advocate argued that the law does not allow one to prefer a revision as an alternative to an appeal, unless there are special circumstances so to do. He cited to us our decisions in **Hassan Ng'anzi Khalfan v. Njama Juma Mbega (Legal Representative of the Late Mwanahamisi Njama) and Jambia Ng'anzi Khalfan**, Civil Application No. 218/12 of 2018 and **JV Electrical & Electronics Co. Limited and Shangai Electric Power T & D Engineering v. Rural Energy Agency and Two Others**, Civil Application No. 162/01 of 2019 (both unreported) to buttress his proposition. On the strength

of these authorities, the learned counsel implored us to strike out the application with costs for being misconceived.

Rejoining, the applicant prayed that we should consider ground four of the Notice of Motion which shows that the matter has special circumstances which necessitated an application for revision instead of an appeal. In that ground, the cases of **Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269 and **SGS Societe Generale De Surveillances S.A v. VIP Engineering & Marketing Ltd**, Civil Application No. 84 of 2000 (both unreported) are cited.

The law, as it stands now, is settled that revisional powers of the Court are not an alternative to its appellate jurisdiction. That this is the law has been pronounced by the Court in a string of decisions. Such decisions are **Hassan Ng'anzi Khalfan** (supra) and **JV Electrical & Electronics Co. Limited** (supra) cited to us by the learned advocate for the respondent. Others are **Halais Pro-Chemie** (supra), **Moses Mwakibete v. The Editor - Uhuru and two others** [1995] T.L.R. 134 and **Transport Equipment Ltd v. Devram P. Valambhia** [1995] T.L.R. 161, to mention but a few. In **JV Electrical & Electronics Co. Limited** (supra), we reiterated the position we stated in **Halais Pro-**

Chemie (supra) on the circumstances in which an applicant aggrieved by a decision of the High Court may seek a revision instead of appealing.

We observed:

*"In **Halais Pro-Chemie** (supra), this Court set out four circumstances, where a party aggrieved by an order of the High Court may seek revision instead of appealing. The circumstances in that decision are; **one**, where the Court on its own motion calls for the record of the High Court for revision; **two**, where there are exceptional circumstances; **three**, where matters complained of are not appealable with or without leave and; **four**, where the process of appeal has been blocked by judicial process."*

Likewise, we cannot resist the urge of reiterating what we stated in **Moses Mwakibete** (supra) and restated in **Transport Equipment** (supra) and **Halais Pro-Chemie** (supra) that:

"Before proceeding to hear such an application on merits, this court must satisfy itself whether it is being properly moved to exercise its revisional jurisdiction. The revisional powers conferred by subsection (3) were not meant to

be used as an alternative to the appellate jurisdiction of this court. In the circumstances, this court, unless it is acting on its own motion, cannot properly be moved to use its revisional powers in subsection (3) in cases where the applicant has the right of appeal with or without leave and has not exercised that option."

In the case at hand, the High Court (Ebrahim, J.), as already alluded to above, upheld the decision of Kinondoni District Court in Revision Application No. 3 of 2019. Having been aggrieved by the decision of the High Court, in terms of section 80 (4) of the Law of Marriage Act, the readily available remedy to the appellant was to lodge an appeal. For easy reference, we take the liberty of reproducing subsection hereunder:

"(4) Any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal therefrom to the Court of Appeal on any ground of law or mixed law and fact."

The applicant did not comply with the letter of this subsection under the pretext that there are special circumstances attached to the present matter. We, respectfully, are not ready to agree with the

applicant. We have scanned the entire record of revision in the light of the affidavit and written submissions supporting the application but have been unable to find any special circumstances to support the applicant's contention. Ground four of the Notice of Motion which the applicant implored us to consider to sieve special circumstances, simply refers to the cases of **Halais Pro-Chemie** (supra) and **SGS Societe Generale De Surveillances S.A** (supra) in which grounds on which an applicant may resort to revisional jurisdiction of the Court instead of appealing. However, the grounds referred to in the two cases as discussed above are wanting in the matter before us to warrant us invoke our revisional powers as prayed.

The above said, we think this application was filed without justifiable cause and so find and hold. The proper course that should have been taken by the applicant was to lodge an appeal to challenge the decision of the High Court in accordance with the letter of section 80 (4) of the Law of Marriage Act reproduced above. As far as we are concerned, the applicant has not brought before us exceptional circumstances that would legally entitle him to resort to the revisional powers of the Court, instead of its appellate jurisdiction. Thus, the

application before us is incompetent and bad in law for being preferred as an alternative to an appeal. We strike it out.

As an order for costs will add salt to the injury to the already sour relationship of this erstwhile couple, we refrain from making any order to that effect. We think it will be in all fairness that each party to these revisional proceedings shoulders its own costs. We so order.

DATED at DAR ES SALAAM this 2nd day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 6th day of September, 2022 in the presence of Applicant in person and Mr. Novatus Michael Muhangwa, learned counsel for the Respondent is hereby certified as a true copy of the original.


C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL