IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 567/01 OF 2018

DR. MUZZAMMIL MUSSA KALOKOLA ..... APPLICANT

VERSUS

THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(An application for Revision from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Teemba, Kitusi and Arufani, JJ.)

dated the 12th day of October, 2018

in

Reference Civil Application No. 76 of 2017

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JUDGMENT OF THE COURT

20th February & 10th August, 2023

KOROSSO, J.A.:

The instant application is brought by way of notice of motion pursuant to section 4(3) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and rules 4, 65 (3) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is moving the Court to revise the decision of the High Court of Tanzania sitting at Dar es Salaam (Teemba, Kitusi and Arufani JJ.) in Reference Civil Application No. 76 of 2017 on various grounds which essentially culminate into the following ground, that is, apparent errors on the face of the record in the process of determining

Reference Civil Application No. 76 of 2017. The notice of motion is supported by the affidavit deponed by Dr. Muzzammil Mussa Kalokola, the applicant. On the other hand, through Mr. Samwel Lukelo, Principal State Attorney, the respondents filed an affidavit in reply opposing the application.

To appreciate the substance of the instant application, we find it necessary to present a brief background as follows: The applicant had originally lodged a petition against the respondents in Civil Application No. 2 of 2016, under the Basic Rights and Duties Enforcement Act, Cap 3 (the Basic Rights Act) (BRDEA) challenging violations of Articles 4, 8, 13, 21, 26, 64(1) and (5) and 98 of the Constitution of the United Republic of Tanzania, 1977 as amended (the Constitution) praying for thirty declaratory orders which we shall not reproduce.

Before hearing the petition on merit, the High Court deliberated on eight points of a preliminary objection raised by the respondents challenging the propriety of the petition. In its ruling, the High (Kihio, J. as he then was) sustained two of the points of objection and held that the petition was fatally defective for contravening section 6(e) of the BRDEA. In consequence, the petition was struck out with costs.

Dissatisfied with the decision of a single Judge of the High Court, the applicant lodged a reference application under Ruled 9(2) of the Basic Rights and Duties Enforcement Act (Practice and Procedure) (BRDEA Rules) before a panel of three Judges of the High Court. The reference application encountered two preliminary objections filed by the respondents as follows: one, that the application was incompetent for offending the provisions of rule 9(2) of the BRDEA Rules; and two, failure to properly move the court rendering the application to be incompetent. The High Court (Mkasimongwa, J.) upon considering arguments for and against the objection points on 28/12/2016 reasoned that the main issue for consideration was its competence. He held that the application was misconceived since the conditions for such a reference were not met because the impugned decision only decided that the petition was incompetent for being supported by an incurably defective affidavit and contravening section 6(e) of the BRDEA and not that it was frivolous and vexatious, a condition precedent to give rise to the reference. The Judge on page 48 of the record of appeal stated:

> "*Rule 9(2) of the Rules provides for limitations of decisions that can be referred to the panel of three judges. It is only where the judge concludes that the petition is vexatious or frivolous; any party*

aggrieved by that decision has the right to refer the matter to a panel of three judges."

It was further held that under the circumstances, other remedies were available for the applicant apart from pursuing one under rule 9(2) of the BRDEA Rules. Consequently, the application was found incompetent and struck out with costs.

The applicant was aggrieved by the said decision and subsequently he lodged another application, Civil Reference No. 76 of 2017, pursuant to rule 9(2) of the BRDEA Rules and section 14(2) of the BRDEA seeking three prayers that essentially urged the High Court to quash the decision by the Kihio, J. and order that Civil Reference No. 17 of 2016 proceed for hearing and determination on merit before a panel of three judges of the High Court. The application was faced with preliminary objections from the respondents contending that Civil Application Reference No. 76 of 2017 was incompetent and bad in law for contravening section 14(2) of the BRDEA, Rule 9(2) of the BRDEA Rules, and section 9 of the Civil Procedure Code, Cap 33 (the CPC). There was also an objection contending that the reference was frivolous, vexatious, and an abuse of the court process and thus incompetent.

The application was heard and determined by a panel of three Judges of the High Court who sustained the preliminary objections raised

and held that since Mkasimongwa, J. did not decide that the application was frivolous and vexatious although the same was filed under Rule 19(2) of the BRDEA Rules, the application for reference in that regard was incompetent. The panel struck out the reference.

The applicant's dissatisfaction with the said decision gave rise to the instant application. The application is founded on seventeen grounds as found in the notice of motion which we need not reproduce for reasons to be revealed soon.

On the day the application came up for hearing, the applicant was present in person and unrepresented, whereas Mr. Solomon Lwenge and Ms. Vivian Method, learned State Attorneys entered appearance for the respondents.

At the inception of the hearing, the parties were called upon to address the Court on the competence of the application and particularly, whether the applicant had the right to appeal in this matter. The applicant, upon adopting the affidavit supporting the application and the written submission lodged on 12/2/2019 and the supplementary thereof, filed on 20/2/2023 contended that considering that the impugned decision did not originate from a decision where the merits of the application were determined, an appeal was not an option that was available hence in

pursuit of justice he had to file the present application for revision. He implored the Court to consider the instant application as competent because what it seeks is first, for the Court to put things in order by providing a proper definition of the term "vexatious or frivolous"; and two, address the fact that in Civil Application No. 2 of 2016 (Kihio, J.) the limitations for a single Judge when determining a preliminary objection were overstepped and overlooked in contravention of rule 8(2) of the BRDEA Rules in Misc. Cause No. 16 of 2017 (Mkasimongwa, J.) and Civil Reference Application No. 76 of 2017 (Teemba, Kitusi and Arufani, JJ).

On the other side, Ms. Method argued that since the applicant had a right to appeal against the impugned decision, was available for the applicant the instant application should not be entertained by the Court. Elaborating, the learned Senior State Attorney argued that under section 14(1) of BRDEA, the right to appeal is available to the applicant and thus a revision could not be invoked citing various decisions to reinforce her stance, including the case of **Jowhara Castor Kiiza v. Yasin Hersi Warsame**, Civil Application No. 332/01 of 2018 and **Edward Msago v. Dragon Security Service Limited**, Civil Application No. 556/01 of 2021 (both unreported). She argued that the applicant has not demonstrated any exceptional circumstances to warrant invocation of revision since an

appeal should have been preferred. She thus implored us to hold that the application is incompetent and strike it out with costs.

Mr. Kalokola's rejoinder was a reiteration of his submission in chief urging the Court to find the arguments by the learned Senior State Attorney to be unmerited under the circumstances.

Having heard the rival submissions from both sides, we are of the view that the determination of the issue raised by the court suffices to dispose the application guided by the court's decisions on applications for revisions. For instance, in the case of **Mantrac Tanzania Limited v. Junior Construction Company Ltd and 3 Others**, Civil Application No. 552/16 of 2017 (unreported), the Court recited the pre-requisites to move the Court to invoke its revisional powers underscored in the case of **Halais Pro-Chemie v. Wella A. G.** [1996] T.L.R. 269, inter alia that:

> *"(i). The Court may on its own motion, and at its own motion, and at any time, invoke its revisional jurisdiction in respect of the proceedings of the High Court;*
>
> *(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;*

(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the matters which are not appealable with or without leave;

(iv) A party to proceedings in the High Court may invoke the revisionai jurisdiction of the Court where the appellate process has been blocked by judicial process."

Other decisions include; **Christom H. Lugiko v. Ahmednoor Mohamed Ally**, Civil Application No. 5 of 2013; **Jumanne Jafari Nguge v. Nzilikana Rajabu**, Civil Reference No. 4 of 2013 (both unreported). In the case of **Transport Equipment Ltd v. Devran P. Valambhia** [1995] T.L. R. 164, the Court held:

"The appellate jurisdiction and the revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive, if there is a right of appeal then that right has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort ot the revisional jurisdiction of the Court of Appeal."

(See also, **Augustino Lyatonga Mrema v. Republic and Masumbuko Lamwai** [1999] T.L.R. 273, **Moses Mwakibete v. The Editor, Uhuru, Shirika la Magazeti ya Chama and Another** [1985] T.L.R. 134, **Balozi Abubakar Ibrahim and Another v. Ms. Benandys Limited**

and Two Others, Civil Revision No. 6 of 2015 (Unreported) and **Jowhara Castor Kiiza** (supra)).

When the above principle of law governing revision applications is considered, certainly, the power of revision of the Court may be invoked only where there is no right of appeal or where the right exists it has been blocked by judicial process, or when a party has provided sufficient reason amounting to exceptional circumstances.

What is certain as held by Mkasimongwa J. in Misc. Civil Cause No. 17 of 2016 is that under rule 9(2) of BRDEA Rules, a decision of a single judge determining preliminary matters in an application challenging the provisions of the Constitution may be referred to three judges subject to prescribed conditions. Certainly, the role of the High Court in reference is to consider whether a petition or complaint is frivolous or vexatious. In Misc. Cause No. 17 of 2016, the High Court found that the single judge in Civil Application No. 2 of 2016, did not go so far as to make any such determination, only made a finding that the application was incompetent having found that the affidavit supporting the application was incurably defective and contravened section 6(e) of BRDEA. Indeed, in the reference application, it was also observed that the applicant had other available remedies under the circumstances instead of the reference he

was seeking under rule 9(2) of the BRDEA Rules and section 14(2) of BRDEA which stipulate respectively thus:

> *"Rule 9(2)- where the Judge decides that the petition is vexatious or frivolous, any party aggrieved by that decision may refer the matter to a panel of three Judges.*

And the latter rule provides:

> *Section 14(2)- where a judge of the High Court* ***determines that any application is made frivolously or vexatious,*** *and whereupon appeal to the High Court from a decision of a subordinate court a Judge of the High Court determines that the raising of a question is merely frivolous or vexatious,* ***the matter shall be referred to the High Court*** *constituted pursuant to section 10, and the decision of that Court on that question shall be final."*
> [Emphasis added]

Undoubtedly, the application of the above provisions is dependent on the court finding that the single judge decided that the petition was vexatious or frivolous, which was not the case here as held by Mkasimongwa, J. in the Reference Application, Misc. Civil Cause No. 17 of 2016. A panel of three judges in Civil Reference Application No. 76 of

2017, concurred with the finding in Misc. Civil Cause No. 17 of 2016 (Mkasimongwa J.).

Indeed, the single judge of the High Court in Civil Application No. 2 of 2016 never considered whether the application before him was vague, embarrassing, vexatious, or frivolous even though it was one of the preliminary points of law raised by the respondents in the notice of preliminary objections. The single judge only considered and determined two preliminary points of objection, one, that the petition is fatally defective for contravening section 6(e) of BRDEA, and two, that the affidavit in support of chamber summons was incurably defective for containing extraneous matters by way of legal arguments, evidence, citation, opinions, and conclusion contrary to Order XIX rule 3(1) of the CPC. The single judge sustained both points of objection and struck out the application.

It thus follows that under the circumstances, the application filed under rule 9(2) of the BRDEA Rules was misconceived since the prescribed conditions therein were not fulfilled. However, as observed in the decision in Misc. Cause No. 17 of 2016 and Civil Reference Application No. 76 of 2017, the applicant's other avenues to seek remedy for his dissatisfaction with the decision in Civil Application No. 2 of 2016 were open. Section 14(1) of BRDEA stipulates:

Section 14(1) Any person aggrieved by any decision of the High Court on an application brought under section 4, 5 or 6 may appeal to the Court of Appeal.

Taking the above into account, we are inclined to endorse the submission by the learned Senior State Attorney that being aggrieved with the decision of the single judge, by virtue of section 14(1) of BRDEA, there was a remedy for the applicant to appeal to this Court and not to come by way of revision.

The Court's power of revision can only be invoked where there is no right of appeal or where the right exists but it has been blocked by judicial process, or where a party provides sufficient reason amounting to exceptional circumstances. In the instant application, the applicant has not demonstrated good and sufficient reasons amounting to exceptional circumstances for the application for revision to be considered and determined.

In his oral submission, the applicant stated that he decided not to appeal because he considered that Civil Application No. 2 of 2016, which gave rise to the impugned decision in Civil Reference Application No. 76 of 2017 was never decided on merit and thus believed an appeal was not the right course to pursue. Having considered the submissions from both

sides on the matter, we are of the view that the perceived irregularities could have constituted grounds for appeal rather than grounds of revision as it were.

For the foregoing, we are constrained to decline determining the application because, the application has not properly moved the Court to exercise its revisional power. In the end, we strike out the application with no order as to costs since the issue that has led to disposing of the application was raised by the Court *suo moto*.

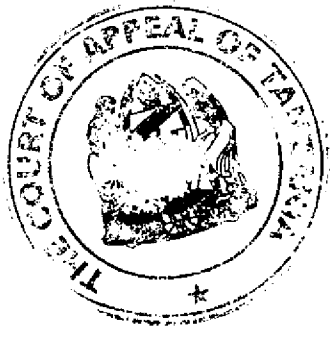
DATED at **DAR ES SALAAM** this 9th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of August, 2023 in the presence of the applicant in person, unrepresented, and Ms. Vivian Method, learned Senior State Attorney counsel for the respondents is hereby certified as a true copy of the original.



J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL