IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KAIRO, J.A., And MURUKE, J.A.)

CIVIL APPLICATION NO. 270/17 OF 2022

FRANCISCA KOKUGANYWA ALFRED ..... APPLICANT

VERSUS

MUSSA SALEH ..... FIRST RESPONDENT

MAENDELEO BANK PLC ..... SECOND RESPONDENT

(Application for revision from of the Ruling and Order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Msafiri, J.)

Dated the 22nd day of March, 2022

in

Reference No. 10 of 2022

.....

RULING OF THE COURT

3rd & 16th November, 2023

NDIKA, J.A.:

The applicant, Francisca Kokuganywa Alfred, seeks revision of the order of the High Court of Tanzania, Land Division at Dar es Salaam ("the High Court") in Reference No. 10 of 2022 dated 22nd March, 2022. In support of her application, she duly swore an affidavit. On the other hand, Mussa Saleh and Maendeleo Bank PLC, the first and second respondents respectively, lodged separate affidavits in reply strongly resisting the application.

The context in which this matter arises is uncomplicated. The applicant succeeded in the High Court against the respondents in Land Case No. 304 of 2015 as the court (Maige, J., as he then was) invalidated the sale of her mortgaged property, namely, Plot No. 29, Block 'G', Magomeni Area, Kinondoni, Dar es Salaam comprised in Certificate of Title No. 39132 ("the property"). The sale had been made to the first respondent by way of auction on 30th August, 2015 in a purported exercise by the second respondent of power of sale under a mortgage deed between it and the applicant.

Armed with the High Court's decree, the applicant sought to repossess the property. She thus instituted Execution No. 77 of 2019 for execution of the decree by eviction of the first respondent from the property. The executing court (W.A. Hamza, Deputy Registrar) granted the application on 12th October, 2021. In consequence, on 1st November, 2021 the Deputy Registrar issued an eviction order against the first respondent and appointed Abdallah Tambaza t/a Tambaza Auctioneers to execute it.

Not to be outdone, the first respondent challenged the ordered eviction by way of reference to the High Court pursuant to Order XLI, rule 1 of the Civil Procedure Code, Cap. 33 ("the CPC"). By its ruling dated 22nd

March, 2022, the court (Msafiri, J.) vacated the Deputy Registrar's eviction order. It reasoned that the decree sought to be executed was only declaratory on the invalidity of the impugned sale and that it did not grant any executable relief to the applicant in form of vacant possession of the property. As hinted earlier, the aforesaid order is the subject of this application.

Before us, Mr. Alex G. Mgongolwa, learned counsel for the second respondent, demurs that the application is incompetent for being preferred in alternative to appeal. He essentially submits that the Court's power of revision in terms of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 ("the AJA") cannot be invoked by a party on a matter that it is appealable to this Court except where there are exceptional circumstances or if the right of appeal is blocked by a judicial process. He is emphatic that the impugned decision of the High Court is appealable pursuant to section 5 (1) (c) of the AJA and that there exist no circumstances warranting resort to the revisional power of the Court. In support of his submission, the learned counsel relies on our decisions in **Fatuma Hussein Shariff v. Alikhan Abdallah (As the Administrator of the Estate of Sauda Abdallah & 3 Others**, Civil Appeal 536 of 2017 [2021] TZCA 47 [24 February 2021; TanzLII] and **Ramadhani Mikidadi**

v. Tanga Cement Company Ltd., Civil Application 275 of 2019 [2022] TZCA 578 [26 September 2022; TanzLII].

For the first respondent, Mr. Nyaronyo M. Kicheere, learned counsel, supports Mr. Mgongolwa's stance.

On the other hand, Mr. Ndurumah K. Majembe, learned advocate for the applicant, disagrees with his learned friends. His argument is largely two-fold. He contends, at first, that the impugned decision of the High Court is not appealable. Secondly, he faults Msafiri, J.'s assumption of jurisdiction in the reference, contending that the learned judge had no power to hear and determine a reference from the Deputy Registrar sitting as the executing court.

In a brief rejoinder, Mr. Mgongolwa maintains that the applicant is entitled to appeal against the High Court's decision in terms of section 5 (1) (c) of the AJA because the impugned order falls within the description of "every other order of the High Court." He maintains that the alleged error of law committed by the High Court could have been corrected by way of appeal.

Section 4 (3) of the AJA upon which this application is predicated provides that:

> *"(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."*

While the Court has consistently interpreted and applied the above provisions allowing interested parties to apply for revision if they have no right of appeal, the settled principle of general application is that a party to the proceedings before the High Court who has the right of appeal cannot apply for revision in alternative to appeal, but that he or she may do so in exceptional circumstances or if the right of appeal is blocked by judicial process: see **Moses J. Mwakibete v. The Editor – Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** [1995] T.L.R. 134; **Transport Equipment Ltd v. Devram P. Valambhia** [1995] T.L.R. 161; **Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269; and **Balozi Abubakar Ibrahim & Another v. Ms. Benandys Ltd & 2 Others**, Civil Revision No. 6 of 2015 [2015] TZCA 5 [30 October 2015; TanzLII].

In **Mwakibete** (*supra*), a seminal decision on the matter, the Court held on 22nd March 1995 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 ss. (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 ss (3) in cases where the applicant has the right of appeal with or without leave and has not exercised that option."* [Emphasis added].

The Court repeated the above standpoint in **Transport Equipment Ltd** (*supra*), apparently without referring to **Mwakibete** (*supra*). Subsequently, in **Halais Pro-Chemie** (*supra*), the Court, having revisited **Mwakibete** and **Transport Equipment Ltd** (*supra*), concluded as follows so far as both party-initiated revision and revision *suo motu* are concerned:

> *"We think that Mwakibete's case read together with the case of Transport Equipment Ltd are authority for the following legal propositions concerning the revisional jurisdiction of the Court*

under ss (3) of s 4 of the Appellate Jurisdiction Act, 1979:

(i) The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in 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 Court in matters which are not appealable with or without leave****;*

(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where ***the appellate process has been blocked by judicial process****."* [Emphasis added]

It is, therefore, evident that while the right of a party to the proceedings in the High Court to seek revision is so constrained, the Court can exercise its revisional jurisdiction *suo motu* at any time even where a right of appeal exists.

In view of the above exposition of the law, we are enjoined to determine whether the instant application for revision is proper.

It is logical to begin our deliberations on the above issue by stressing that the controversy between the parties lies in the manner the execution of the decree in issue by the High Court was carried out. In this context, we wish to observe, at the outset, that the Deputy Registrar in the instant case had jurisdiction to deal with the execution proceedings in Execution No. 77 of 2019 in terms of Order XXI, rules 21 and 22 of the CPC. This is so because the provisions of Order XLIII, rule 1 (g) and (h) of the CPC expressly vest every Deputy Registrar with such powers as follows:

> *"**1.** Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court-*
> *(a) to (d) [Not applicable]*
> *(e) to admit, reject or allow the amendment of an application for execution of a decree under Order XXI, rule 15;*
> *(f) to issue notice under Order XXI, rule 20;*
> *(g) **to order that a decree be executed under Order XXI, rule 21;***

(h) ***to issue process for execution of a decree under Order XXI, rule 22;***

(i) to stay execution, restore property, discharge judgment-debtors and require and take security under Order XXI, rule 24;

(j) if there is no judge at the place of registry, to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35;

(k) to (m) [Not applicable]" [Emphasis added]

We are aware that section 5 (1) (b) (ix) of the AJA provides that an appeal against any order of the High Court made under Order XLIII, rule 1 of the CPC lies automatically to this Court. For clarity, we extract the relevant part of the said provision thus:

5*.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal–*

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say–

(i) to (viii) [Not applicable]

(ix) any order specified in rule 1 of Order XLIII in the Civil Procedure Code, or in any rule of the High Court amending, or in substitution for, the rule;"

It is undoubted that instead of appealing to this Court against the Deputy Registrar's order in terms of section 5 (1) (b) (ix) of the AJA, the first respondent challenged the said order by way of "reference" to the High Court pursuant to Order XLI, rule 1 of the CPC. To be sure, rule 1 of Order XLI stipulates as follows:

*"**1.** Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court."*

Evidently, the above provision governs the procedure for a subordinate court, handling a suit in which a decree is not subject to appeal or where handling execution of any such decree, to seek the opinion of the High Court, by way of reference, on a specific legal question or usage. The subordinate court concerned, acting *suo motu* or upon the application of any of the parties, would draw up a statement of the facts of the case and the point on which doubt is entertained and then refer such statement with its opinion on the point for the consideration and decision of the High Court. Given this settled position, it may be argued that the impugned decision of the Deputy Registrar could not be legally referred to the learned judge of the High Court as it happened in the instant case as if it was a decision of a taxing officer in terms of Order 7 (1) and (2) of the Advocates Remuneration Order, Government Notice No. 264 of 2015.

We have duly considered Mr. Mgongolwa's argument that the alleged error committed by the High Court by its impugned order could be corrected by way of an appeal with leave in terms of section 5 (1) (c) of the AJA because the impugned order falls within the description of *"every other order of the High Court."* That may be so, but the instant case, without prejudging its merits, presents arguably exceptional

circumstances amenable to the revisional process. For the execution process appears to be marred by confusion of the roles of the Deputy Registrar and the Judge of the High Court in enforcement of decrees and orders of the High Court.

In the premises, we dismiss the second respondent's preliminary objection and order that this matter to proceed to hearing on a date to be fixed and notified by the Registrar. Costs shall be in the cause.

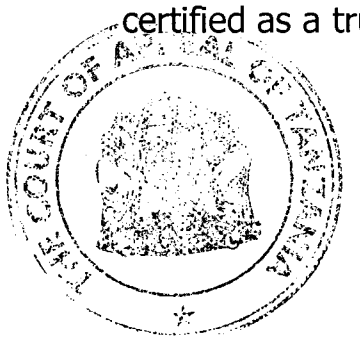
DATED at **DAR ES SALAAM** this 15th day of November, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Mr. Ndurumah Keya Majembe, learned advocate for the applicant also holdings brief for Mr. Nyaronyo M. Kichele and Mr. Alex Mgongolwa, learned advocates for the 1st and 2nd respondents is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL