IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CIVIL REVISION NO. 47 OF 2007

YASMIN MOHAMED HUSSEING KASSAM
(as Guardian of Nabil Mohamed Hussein Kassam,
and Abdulaziz Mohamed Bussein Kassam,
Minors).....APPLICANT

VERSUS.

AFZAL
SAMEJA.....RESPONDENT

RULING

1/12/2011 & 12/9/2014.

This is a ruling in respect of preliminary objection (PO) lodged by the respondent in this application, AFZAL SAMEJA against the application filed before this court by the applicant, YASMIN MOHAMED HUSSEING KASSAM (as Guardian of Nabil Mohamed Hussein Kassam and Abdulaziz Mohamed Bussein Kassam, who are Minors). The application is seeking for the following orders;

1. That this Honourable court may be pleased to call for the record of the RM's Court of Dar es salaam, at Sokoine (lower court) in Misc. Civil Case No. 3 of 2006 for purpose of satisfying itself as to legality, propriety and or regularity of the proceedings therein and in particular the ruling and orders of the court dated 3rd September, 2007,. and if not so satisfied, make an order nullifying and quashing the same.
2. Any other or such relief this court may deem fit to grant.
3. costs be provided for.

The application is made by way of chamber summons under s. 43 (2) and 44 (1) (a) and (b) of the Magistrates' Courts Act, Cap. 11, R. E. 2002, s. 95 of the Civil Procedure Code 1966 and any other enabling provisions of the law. It is supported by the affidavit of one Sylvester Eusebi Shayo, counsel for the applicant.

The PO raised by the respondent is footed on the following four point;

a) That in so far as the applicant was a party to the proceedings before the lower court, she has an automatic right of appeal and cannot invoke revisional jurisdiction.
b) That in so far as revisional proceedings were initiated by the applicant then the application ought to have been accompanied with a drawn order.
c) That in so far as the applicant has been pursuing similar and or related remedy in High Court Civil case No. 80 of 2003, then it is prudent that the present proceedings be stayed pending finalisation of the initiated proceedings in that case.
d) That in so far as the order complained of has already been enforced by the demolition of the suit premises then this application has already been overtaken by events and its determination will not serve any useful purpose.

The applicant did not concede to the PO, and the parties were ordered to make their respective arguments in writing. They accordingly filed the same. The applicant was represented by Mr. Shayo learned counsel as hinted earlier while the respondent was advocated for by Mr. Rutabingwa, learned counsel.

In deciding this matter, I opt for the following scheme; I will test the first point of PO [numbered **a)** herein above] by considering the law, record and the arguments by the parties and make a finding. If need arises, I will also consider the rest of the points of PO. Reasons for this plan are that, according to the circumstances of the case and the anatomy of the application, the first ground of PO will be capable of disposing of the entire application in case it will be upheld.

In support of the first ground of PO the learned counsel for the respondent submitted thus; before the lower court the present respondent successfully applied against the present applicant, for vacant possession regarding premises on plot No. 12 Tandamti Street, Kariakoo area, Dar es salaam. The lower court exercised its original jurisdiction; hence any party aggrieved by its decision had a right to appeal to this court. That right was not blocked in any way so that the applicant could be justified to file this application for revision.

The learned counsel also submitted that, the procedure used by this court in revising decisions made by subordinate courts is similar to the procedure used by the Court of Appeal of Tanzania (CAT) in revising decisions of this court. He added that, the law is to the effect that, an application for revision is incompetent where a right to appeal exists and the applicant fails to exercise that right. He cited the CAT decision in **Maira, Sanze and Company Advocates v. Tanzania Revenue Authority, Civil Application No. 101 of 2000** (unreported) to fortify the argument. He contended further that, the application at hand is incompetent for the applicant's failure to appeal against the decision of the lower court. He thus urged this court to dismiss the application.

In his replying submissions, the learned counsel for the applicant argued thus; the procedure for revisions before this court is different from the procedure for revision before the CAT. The difference is based on the fact that the former procedure is governed by ss. 43 and 44 of Cap. 11 and s. 79 of Cap. 33 while the later is guided by s. 4 of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 and rule 65 of the Court of Appeal Rules, 2009. The two laws have different wordings. The learned counsel also submitted that, the right of revision in the High Court is independent of the right of appeal and a party to court proceedings may apply for revisions though the right of appeal exists too.

Furthermore, the learned counsel for the applicant charged that the revisional right under s. 43 and 44 of Cap. 11 is wider than the revisional right under s. 79 of Cap. 33, he cited the following precedents to support

this point; **Zabron Pangamaleza v. Joachim Kiwaraka & another [1987] TLR 140** (CAT), **Abdu Hassan v. Mohamed Ahmed [1989] TLR 181** (HC), **Kampuni ya Uchukuzi Mwanza Limited v. Gabriel C. Riwa [1986] TLR 40** (HC) and **Southern Esso v. Peoples Bank of Zanzibar and another [2001] TLR. 43** (HC). The learned counsel also distinguished the case of **Maira, Sanze and Company Advocates** (supra) on the ground that it interpreted the Court of Appeal Rules and not ss. 43 and 44 of Cap. 11. He also argued that, the respondent failed to cite any authority showing that a revision preferred before this court under ss. 43 and 44 of Cap. 11 was rejected on grounds that an applicant has a right to appeal.

In his rejoinder submissions, the learned counsel for the respondent reiterated his submissions in chief and added that, no any precedent cited by the applicant's counsel decided that a party to court proceedings may apply for revision before this court while the right of appeal exists. He added that the legal stance that revisional powers of this court under ss. 43 and 44 of Cap. 11 are wider than its revisional powers under s. 79 of Cap. 33 does not mean that the revisional right can be exercised where the right of appeal exists. The learned counsel also submitted that, the remarks in Mulla, the Code of Civil Procedure, 16th Edition, Vol. 1, at pate 1222 supports the stance that a party cannot apply for revision before the High Court unless there is no any other remedy available for him. He also cited a decision of this court in the case of **Mahmud Shamte v. Mary Shamte, Civil Revisin no. 57 of 2004, at Dar es salaam** (unreported) where it was held that at any rate, a revision of the lower court's decision should not be used as a substitute to an appeal which has been struck out.

I now engage myself in testing the first ground of PO. According to the arguments by the parties who are ably represented, it is not disputed that the applicant had a right of appealing against the lower court decision, but she did not wish to exercise that right. In my view, the parties are justified in believing so because, from the record and their respective arguments, it is not disputed that both the applicant and the appellant were parties before the lower court. The lower court heard

both of them and ultimately made a ruling (dated 2/9/2007) granting the application before it. From the impugned ruling of the lower court, it is clear that a preliminary objection based on various points (the point of jurisdiction inclusive), had been raised by the present applicant, and they were decided by the lower court in that same ruling. The lower court thus decided the application on merits. Whether or not that decision was right, is not an issue to be decided in this forum.

The main issue according to the arguments by the parties is therefore reduced to this; *whether or not the applicant in the matter under discussion could file the application for revision the way she did, amid the existence of her right of appeal.* As indicated previously, the application is preferred under ss. 43 (2) and 44 (1) (a) and (b) of Cap. 11, s. 95 of Cap. 33 and any other enabling provisions of the law. However, I will take it that, the applicant is essentially applying for revision under ss. 43 (2) and 44 (1) (b) of Cap. 11 though she also cited s. 95 of Cap. 33 as enabling law. This view is based on the grounds that, s. 43 (2) of Cap. 11 directs that appeals, revisions and references of civil nature from the District Court or Resident Magistrates Court lie to this court. S. 44 (1) (a) of Cap. 11 does not give this court revisional powers, it only gives it supervisory role of giving directions to subordinate courts in the form of guidance, see **Director of Public Prosecution v. Elizabeth Michael Kimemeta @ Lulu, CAT Criminal Application No. 6 of 2012, at Dar es salaam** (unreported).S. 44 (1) (b) of Cap. 11 is the actual section that vests this court with revisional powers related to matters arising from subordinate courts. S. 95 of Cap. 33 does not apply here because, it only applies where there is not law guiding a particular situation, see the decision by the CAT in the case of **Aero Helicopter (T) Ltd v. F.N. Jansen [1990] TLR 142.** In the matter under discussion however, as hinted before s. 44 (1) (b) of Cap. 11 takes over, hence s. 95 of Cap. 33 becomes displaced.

In my further view, and according to the provisions of s. 43 (2) of Cap. 11, appeals and revisions from a Resident Magistrates' Court must only be those authorised by the law. It must also be born in mind that, appeals from those same proceedings are also governed by ss. 70-76,

Order XXXIX (appeals from original decrees) and Order XL (appeals from orders) of Cap. 33. Again, revisions of such proceedings are also controlled by s. 79 of Cap. 33.

The provisions of s. 44 (1) (b) of Cap. 11 under which this application was mainly based, read and I quote for a readymade reference;

> "In addition to any other powers in that behalf conferred upon the High Court, the High Court may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit"

The generality of all the above cited provisions of law is, in my construction, that the legislature intended to create the right of appeal differently from the right of revision. It also enacted different laws to be followed by an aggrieved party to court proceedings who wants to exercise either of the two rights, where the law authorises him/her so to do. It is for this reason that the law clearly categorises which matters are appealable and which are not. It also categorically guides as to which matters are subject to revision. Moreover, the law is to the effect that, every Act of parliament is deemed to be a public Act and shall be judicially noticed as such, and every section of an Act takes effect as a substantive enactment without introductory words, see ss. 22 and 23 of the Interpretation of Laws Act, Cap. 1 R. E. 2002.

In my view therefore, the legislature intended to create two parallel legal lines for seeking rights that do not meet, though they heed to the same designation, i. e. they all intend to dispense justice by way of correcting defects embodied into the decisions or proceedings of lower courts. In so doing, the legislature specified which matters will be revisable and which will be appealable. The legislature did not, in my view, intend to make revisable matters appealable or appealable matters

revisable, otherwise it could not have bothered to enact rules of appeal differently from the rules of revision. This particular view is based on the understanding that, every law is enacted for a specific purpose, and no law can be enacted purposelessly or for cosmetic intent.

It follows therefore that, to accept the applicant's argument that the right to appeal and the right to revision can be exercised interchangeably or alternatively, will amount to stretching the construction of the above cited legal provisions beyond their elasticity and against the legislative purpose. The effect of accepting that argument will be to invite chaos in courts for, aggrieved parties to court proceedings facing similar circumstances will resort to distinct procedures of seeking remedies. For that reason, the law in our jurisdiction will neither be certain, nor consistent, nor predictable, nor uniform. Certainty, consistence, predictability and uniformity are the basic characteristics of good law, see also remarks in my ruling dated 07/06/2011 in the case of **Nicholaus Outa v. Julius Outa, High Court of Tanzania, Misc. Land Case Appeal No. 86 of 2008, at Mwanza** (unreported).

The above views are supported by the "Purposive Approach" style of statutory construction. The approach requires courts to adopt such a construction as will promote the general legislative purpose underlying the statute. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it, by reading words if necessary, so as to do what Parliament would have done had they had the situation in mind. This approach is based on the English legal practice, but is also applicable in our law, see the CAT's decision in the case of Goodluck Kyando

v. Republic, Criminal Appeal No; 118 of 2003, at Mbeya (unreported), following its previous decision in Joseph Warioba v. Stephen Wassira and Another [1997] TLR 272 and the English decision in Nothman v. London Borough of Barnet [1978] 1 ALL ER. 1243 (as per Lord Denning MR).

It follows thus that, a party aggrieved by any decision or proceedings of a lower court, must first determine which forum between an appeal on one hand and a revision on the other, will avail him with a proper remedy depending on the circumstances of his case. Furthermore, that aggrieved party must first be sure whether that remedy he chooses is authorised by the law or not. In other words, if he elects for a revision, he must assure himself that the matter is legally revisable, and if he chooses an appeal he must as well guarantee himself that the matter is in fact appealable in law. For this understanding the CAT once held that a right to appeal can only be founded on the relevant statutes and any party who seeks to avail himself of that right must strictly comply with the conditions prescribed by the statutes; **Ludovick K. Mbona v. National Bank Of Commerce [1997] TLR 26** (following the Court of Appeal for Eastern Africa in the case of **Harnam Singh Bhogal t/a Harnam A. Singh & Co v. Jadva Karsan [1953] 20 EACA 17**). I would also add immediately here that a right for revision to this court under s. 44 (1) (b) of Cap. 11 can only be founded on the relevant provisions of the law and any party who seeks to avail himself of that right must strictly comply with the conditions prescribed by the law. In the **Abdu Hassan case** (supra) for instance, it was held that such right for revision is exercisable only where it appear that there has been an error material to the merits of the case involving injustice.

I also had an opportunity of going through all the authorities cited by the parties in this matter. I will however, not put much reliance upon them because, none of them considered an issue similar to the one under consideration, i. e. whether or not a right of revision under s. 44 (1) (b) of Cap. 11 is exercisable when the right of appeal exists. The **Maira,**

Sanze and Company Advocates case (supra) interpreted the Court of Appeal Rules which do not apply in the matter under discussion as rightly argued by the learned counsel for the applicant. The **Zabron Pangamaleza case** (supra), **Abdu Hassan case** (cited above) and the **Kampuni ya Uchukuzi Mwanza Limited case** (supra) mainly discussed and decided that revisional powers of this court under s. 44 (1) (b) of Cap. 11 are wider than its powers under s. 79 of Cap. 33. Furthermore, the **Southern Esso case** (supra) case discussed and decided on revisional powers of the High Court of Zanzibar the law of which does not apply in the matter at hand. Again, the remarks in Mulla, the Code of Civil Procedure, 16th Edition, Vol. 1, at pate 1222 (supra) did not specifically discuss the provisions of s. 44 (1) (b) of Cap. 11 and the right of appeal in Tanzania. As to the **Mahmud Shamte case** (cited above), I will come to it later.

Nevertheless, in other occasions this court had an opportunity of testing a similar issue. In the case of **Kenedy Kamwela v. Sophia Mwangulangu and another, High Court Misc. Civil Application No. 31 of 2004, at Mbeya** (unreported) for instance, this court (Othman, J as he then was) held that, following the existence of s. 44 (1) (b) of Cap. 11 and s. 79 of Cap. 33, a revisional right cannot exist where there is a right of appeal. In so deciding, this court distinguished its previous decision in **Lazarius Dancan Mwaisaka case, High Court Misc. Civil Application No. 31 of 2004, at Mbeya** (unreported) where this court (Mackanja J, as he then was) had held that revisional right could exist in the presence of a right of appeal. I totally agree with the holding in the **Kenedy Kamwela case** (supra) for the reasons I have given earlier.

In fact, I would go further and hold that though I agree with the applicant's argument that revisional powers of this court under s. 44 (1) (b) of Cap. 11 are wider than those under s. 79 of Cap. 33, I do not agree with him that such wideness makes a revisional right as an alternative right to the right of appeal. For this reason, I hold that a revisional right, whether under s. 44 (1) (b) of Cap. 11 or under s. 79 of Cap. 33, cannot be an alternative right to the right of appeal. This view is also supported by the following cases of this court; **Mahmud Shamte case** (cited

above), **Tanzania Railways Corporation v. Commisioner for Sales Tax High Court, Civil Revion No. 40 of 1996, at Mwanza** (unreported) and **Tarime District Council v. Wilson .E. Awour High Court Civil Revivion No. 6 of 1999, at Mwanza** (unreported). Though in these precedents it was not clear as to which provisions of the law were discussed (i. e. between s. 44 (1) (b) of Cap. 11 and s. 79 of Cap. 33), my view is that whichever provision of law was at issue in those cases the position remains the same, that a right of revision is not an alternative to a right of appeal to this court. I so decide because, these provisions (s. 44 (1) (b) of Cap. 11 and s. 79 of Cap. 33) are the only provisions of law vesting this court with revisional powers as I hinted previously.

The **Tanzania Railways Corporation case** (supra) and the **Tarime District Ocuncil case** (cited above) were decided by a single Judge of this Court (Masanche J, as he then was) following the case of **Israel Mwakalabeya v. Ibrahim Mwaijumba, High Court Misc. Civil Application No. 21 of 1991, at Mbeya** (unreported, by Mchome, J as he then was) which had held, and I quote, for a swift of reference, the pertinent part of it which was also quoted by Masanche J, in his both cases (supra);

> "The right to invoke the Courts powers for revision is not an alternative to appealing. Where the order complained against is appealable, the court will not use its powers for; the right of appeal is the remedy open to the aggrieved party. Even where the time for appealing has expired, a party has the remedy to appeal out of time."

I totally subscribe to this reasoned remark, which forms a good guidance to parties to proceedings like the applicant in the matter at hand.

Having observed as above, I answer the issue negatively to the effect that the applicant in the matter under discussion could not file the application for revision the way she did, amid the existence of her right of appeal. I thus uphold the first point of PO. In my view, the legal effect of this irregularity committed by the applicant is that, it renders the

application incompetent for being improper before this court. The remedy is thus to strike it out and not to dismiss it as proposed by the respondent. This finding thus, reliefs me from testing the rest of the points of PO since the first point is capable enough to disposing of the entire matter as I hinted earlier. I therefore, strike out the application. However, I will not order costs to follow event. Following the circumstances of this case, in which the applicant litigates for minors, and following the fact that the matter has been disposed of at its embryonic stage, I order that each party shall bear his own costs. Ordered accordingly.

JHK. UTAMWA

JUDGE

12/9/2014