



IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT BUKOBA

MISC. CIVIL APPLICATION NO. 40B OF 2018

(Arising from Bukoba RM's Court in Civil Case No. 34 of 2012)

OLAM TZ LIMITED.....APPLICANT

VRS

JOSEPHAT JONATHAN.....RESPONDENT

RULING.

31/3/2021 & 2/6/2021

KAIRO, J.

This ruling is in respect of the Preliminary Objection (hereinafter to be referred to as PO) raised by the Respondent when filing his counter affidavit into which the Applicant sought for an extension of time within which to file revision. The PO was couched as follows: -

This application is irredeemably incompetent at law and improperly before this court on account that since the Judgment and Decree in Civil Case No. 34 of 2012 was appealable, the Applicant cannot come to this court by way of revision as a substitute of an appeal and thus prayed this application be dismissed with cost.

By consensus the parties agreed to dispose this PO by way of written submission. The filing schedule was drawn and parties timely filed their submissions to which I am grateful and commend them. The Respondent was represented by Advocate Danstan Mujaki retained for document drawing only while the Applicant was being represented by Advocate Innocent Kisigiro. The Respondent's submission in support of the PO. raised argued that, it is a well settled principle of law that a party cannot invite revisional jurisdiction of the court as an alternative to the appeal and referred this court to the case of **Halais Pro-Chemie vrs Wella AG (1990) TLR 209** quoting/emphasizing specifically in the third *ratio decidendi* to which stated (iii) "*a party to proceedings in the High court may invoke the revisional jurisdiction in the court in matters which are not appealable with or without leave.*"

In further clarification, the Respondent stated that basing on the quoted decision, the judgment of the Civil Case No. 34 of 2016 given on 22/7/2010 which the Applicant seeks to be revised by this court doesn't have the conditions stated in the case of **Halais Pro-Chemie**, as such doesn't attract revision.

He argued that the Applicant had a remedy to appeal under Section 70 of the CPC Cap. 33 RE: 2019 which he didn't bother to utilize. He added that since the Applicant was aggrieved by the judgment of the trial court, it should have opted the appel route which was available, instead he decided to proceed with revision which is not proper. Supporting his argument with cases of **Moses Mwakibete vrs Editor-Uhuru & two others (1995) TLR 134 & Transport Equipment Ltd vrs Devram P. Valambhia**



(1995) TLR 161 wherein it was held that *"except under exceptional circumstances, a part to proceeding in the high court cannot invoke the revision jurisdiction of the court as an alternative to appellate jurisdiction of the court"*.

The Applicant argued that, the Respondent did not disclose any exceptional circumstance that justifies the revision proceedings he opted in his chamber summons nor in his affidavit. He concluded by praying the court to dismiss the application with cost.

In his rebuttal submission, advocate Kisigiro for the Applicant started by informing the court that the application, if it is to go on merit invites the court to extend time to call and examine the correctness, legality and propriety of the proceedings and revise the proceedings and judgment of civil case No. 34 of 2012 of the trial court due to presence of apparent errors material to the proceedings of the trial court which occasioned miscarriage of justice. he went on that, according to the prayers, the Applicant intends to challenge the propriety and legality of the trial court proceedings due to the said apparent errors on record to which he argued that even if the appeal could have been preferred, the same could not have cured the said errors.

Advocate Kisigiro further argued that not all grounds that have been raised in this application are capable of being appealed from and concluded that the preliminary objection has been misconceived and has no legal stand since appeal doesn't lie against court proceedings. He went on that the application at hand has raised some issues which were not determined by

the trial court such as the counter claim of the Applicant and no order was made to warrant exparte hearing and normally such issue would not be dealt with in an appeal.

The Advocate went on that what is being challenged in the application is the trial proceedings which resulted to illegal judgment which will be argued if the PO will be overruled, refuting the argument in the PO that it also seeks to challenge the order to set aside exparte judgment. He went on arguing that, the affidavit in support of the application plainly shows that the Applicant is complaining on the confusion of the proceeding in Civil Case No. 34 of 2012 which has caused injustice to the Applicant. He listed the errors which this court is invited to examine and revise to be: - **first** that error had been made to the changing of honorable magistrates as no reason for the changeover was assigned.

Secondly: no order was given as to why the case had to proceed exparte, **thirdly:** the counter claim of the Applicant has not been determined to date insisting that the pointed out illegalities/defects could not be cured by appeal rather by way of revision and placed reliance on the case of **James Ibrahim Manule & Another vrs Oswald Masatu Mwizarura; Rev. No. 11/2016 MZA** (unreported) wherein it was observed that, an appeal doesn't lie against court proceedings and when there are illegalities and improprieties in the proceedings, these are good grounds for revision ---"

The Advocate went on to argue that, under the doctrine of confusion in the court proceedings, the proper legal remedy to pursue is revision and not appeal as the correction of illegalities and/or irregularities are in the court



proceedings and not in the ruling or judgment clarifying that the defects found in the judgment or ruling is to appeal while those in the proceedings is to file revision application. To bolster his argument, he cited the case of **Stanbic Bank TZ Ltd vrs Kagera Sugar Ltd**; Civil app. No. 57 of 2007 CAT DSM (unreported). He concluded that the complaints in the affidavit in support of the application cannot be raised as grounds of appeal instead the averments in the affidavits fall squarely under the confusion of proceedings principle and its proper legal remedy is to seek revision as the application at hand. Advocate Kisigiro thus prays the dismissal of the objection raised with cost.

Having gone through the rival arguments, the issue to be determined in this Preliminary Objection is whether it was an appeal rather than a revision which should have been filed by the Applicant.

It is a settled law that revision is not an alternative to appeal. [Refer the case of **Halais Pro-Chemie** (supra). The court in the cited case listed circumstances under which the High court may exercise revision powers: -

- (I) Except under exceptional circumstances, the part, to the proceedings in the high court cannot invoke revisional jurisdiction of the court as an alternative to the appealable jurisdiction of the court.*
- (II) A party to the proceedings in High Court may invoke the revisional jurisdiction of the court in matters which are not appealable with or without leave.*

(iii) A party to proceedings in the High Court invokes the revisional jurisdiction of the court where the appellate process has been blocked by judicial process.

The Respondent in his Preliminary Objection has argued that, Civil Case No. 34 of 2012 which the applicant has applied revision order for, has no conditions listed in the **Halais Pro-Chemie case**, as such doesn't qualify for revision, instead the appeal would have been proper remedy under section 70 of the Civil Procedure Code Cap. 33 RE: 2019.

Besides, the Applicant didn't disclose/state any exceptional circumstance which justifies for revision application.

The Applicant on his side has argued that what is to be challenged in Civil Case No. 34 of 2012 is the proceedings of the case wherein illegalities, impropriety and confusion were observed and that correcting of the stated flaws/defects calls for revision proceedings and not an appeal [Refer **SGS Societies General De surveillance SA Vs VIP Engineering and Marketing Ltd; Civil Application No. 84 of 2000 (unreported) CAT**]. The Applicant through the affidavits of both advocates has listed what he alleged to be procedural defects and illegalities the court is invited to examine and revise. He pointed out the defects to be unavailability of an order to proceed exparte, non-determination of the Applicant's counter claim and the change of hands of various magistrates of the case file without assigning reasons.

Looking at them, I am of the view that all of the pointed-out defects are capable of being appealed against.

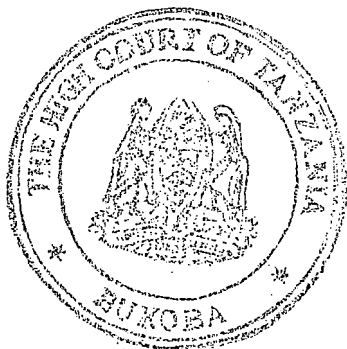


The court has further found that the cited case of **Ibrahim Manule** (supra) is a High Court case, thus not binding to this court. But further even if it would have been binding, the cited case is distinguishable as in the cited case, not all of the pointed-out defects were capable of being appealed against while in the instant case, the court has found that all of the pointed and defects can be appealed against.

The Applicant has also stated that there are exceptional circumstances whereby the trial magistrate analyzed and discussed in the judgment's terms and conditions of the agreement which wasn't tendered as exhibit in court. However, in my view I wouldn't term that to be exceptional circumstances. Again, this could be appealed against as it touches the judgment and not procedure.

The applicant has again cited the case of **James Ibrahim Maule** to which I found distinguishable with due respect since what was found to be exceptional circumstances in the cited case was jurisdictional issues while it is not the case in the present case.

All in all, I find the objection to have merit and I accordingly uphold it with cost.



L. G. Kairo

Judge

2/6/2021

Date: 02/06/2021

Coram: Hon. J. M. Minde – DR

Appellant: Mr. Mzee (P/O)

Respondent: Present

B/C: Lilian Paul

Court:

This matter was scheduled to come for ruling on 31/05/2021. However by the date I was not yet instructed to deliver the said ruling after the trial judge appointed as a Justice of Appeal. As she instructed the ruling to be delivered today, I deliver the ruling in the presence of parties this 2/6/2021.




Sgd: J. M. Minde – DR

02/06/2021