IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 21 OF 2021

DOMINICAL PAUL ..... 1ST APPELLANT

ROCK CITY TAKERS LTD ..... 2ND APPELLANT

VERSUS

SABINA YOHANA ..... 1ST RESPONDENT

PAULO APOLINARY ..... 2ND RESPONDENT

JUDGMENT

19th August, & 9th November, 2021

ISMAIL, J.

This appeal traces its origin from a matter that began as PC. Civil Case No. 199 of 2017, instituted in the Primary Court of Magu Urban in Magu. It related to a claim of the sum of TZS. 25,000,000/-, preferred by the 1st appellant, against the respondents. These were claims of special and general damages, allegedly arising out of the 1st appellant's participation in the court proceedings that he instituted for recovery of the sum of TZS. 800,000/-. This sum was advanced to the 1st respondent by the late Rahel Masalu, whose estate was administered by the 1st appellant. The trial court was

convinced that the 1st appellant had proved his claims. Consequently, the trial court awarded damages to the tune of TZS. 20,614,000/-.

This decision bemused the respondents, hence their decision to mount a challenge through Civil Appeal No. 21 of 2018, which was dismissed for want of prosecution. Subsequent efforts to restore the appeal fell through, when Misc. Civil Application No. 10 of 2019, that the respondents instituted was dismissed for want of appearance. Similar other efforts bore no desired fruits. Successive losses compelled the respondents to re-think and change tact. They surfaced with Misc. Civil Application No. 1 of 2021 in which a prayer for extension of time was sought and granted. This is the decision that is now under the cosh, through the instant appeal.

The Petition of Appeal has six grounds, paraphrased as hereunder:

1. *That the Resident Magistrate Court grossly misdirected himself to enlarge 14 days for the respondent while there were orders granted through applications both of which were dismissed for want of prosecution or non-appearance.*

2. *That the Resident Magistrate Court erred in law and fact for granting an extension of time to file revision while the respondent had lodged an appeal in the same court.*

3. *That the Resident Magistrate Court grossly misdirected itself for granting an extension of time to file revision against Civil Case No. 199 of 2017, as an alternative to appeal.*

4. *That the Resident Magistrate Court erred in law to rule that Civil Case No. 199 of 2017 ought to have been filed in the Primary Court of Ndagalu and not Magu Urban Primary Court while jurisdiction of a primary covers the district within which it is established.*
5. *That the Resident Magistrate Court erred in law to allow an extension of time to file an application for revision while orders made by the District Court in Civil Appeal No. 21 of 2018; Misc. Civil Application No. 10 of 2019 and Misc. Civil Application No. 20 of 2020 had not been set aside.*

6. *That the Resident Magistrate Court erred in law to condone the matter brought after expiry of four years without any good cause.*

Disposal of the appeal took the form of written submissions, consistent with the order of the Court made on 19th August, 2021. The appellants' submissions were preferred by Mr. Yuda Kavugushi, learned counsel, while the respondents' were drawn by Mr. Kevin Mutatina.

Arguing in on particular sequence and reference to the grounds of appeal, Mr. Kavugushi began by giving a background to the matter. He contended that the Primary Court of Magu presided over Civil Case No. 199 of 2017 which ended in the appellants' favour. Aggrieved by the decision,

the respondents instituted an appeal, vide Civil Appeal No. 21 of 2018, but it was dismissed on 15th March, 2019, for want of prosecution. Subsequent thereto, Mr. Kavugushi contended, the respondents filed Misc. Civil Application No. 10 of 2019, seeking to restore the dismissed appeal, and Misc. Civil Application No. 20 of 2020. These applications were dismissed for non-appearance on 31st October, 2019 and 20th January, 2020, respectively.

The appellants' counsel further contended that, while Civil Appeal No. 21 of 2018 was dismissed for want of prosecution, the District Court granted a 14-day extension of time to file revisional proceedings against Civil Case No. 199 of 2017. This was done through Misc. Civil Application no. 1 of 2021, and counsel was of the view that this was a flawed decision, amounting to riding two horses at one and same time. He referred the Court to the Court of Appeal's decision in ***Tanzania Telecommunications Company Ltd v. Tri Telecommunication Tanzania Ltd*** [2006] 1 E.A. 393 in which it was held:

> *"Since the appeal process was actively being pursued, it would be improper for the court to allow parties to invoke the revisional jurisdiction, while at the same time pursuing the appeal process.'*

Mr. Kavugushi held the view that, since Civil Appeal No. 21 of 2018 was not determined on merit, it would amount to an abuse of court process

if the District Court were to adjudicate on the intended appeal. He held the view that the appropriate course of action is to let the dismissed appeal and all subsequent applications revived and determined to their finality, before revision is contemplated. He argued that, dismissal of Civil Appeal No. 21 of 2018 would only be remedied through institution of an appeal and not revision as envisioned by the respondents. On this, counsel cited the decisions in ***Romulus Msunga v. Sukari Malibate***, HC-Civil Appeal No. 42 of 2017 (unreported); ***Moses J. Mwakibete v. The Editor Uhuru, Shirika la Magazeti & Another*** [1995] TLR 134; and ***Transport Equipment Limited v. D.P. Valambhia*** [1996] TLR 269. He contended that, in view of the cited decisions, the intended revision is prematurely taken.

Insisting that revision is not an alternative to appeal, the appellants' counsel sought the aid of the decision of the upper Bench's decision in ***Hassan Ngazi Khalfan v. Njama Juma Mbega & Another***, CAT-Civil Application No. 218 of 2018 (unreported).

With respect to jurisdiction of the Primary Court, the learned advocate argued that, in terms of section 3 of the Magistrates' Courts Act, Cap. 11 R.E. 2019, the District Court of Magu had jurisdiction, as the dispute arose within Magu District.

Regarding illegality, Mr. Kavugushi argued that the available remedy is to take an appeal before revision is considered as a remedy. He prayed that the appeal be allowed with costs.

In his reply submission, Mr. Mutatina argued that the important question to be determined is whether it was proper for the District Court to grant an extension of time for filing an application for revision. In his view, such decision was quite in order, considering that the decision sought to be revised is tainted with illegalities listed in the submission. One of the illegalities, contended Mr. Mutatina, is the decision by the 1st appellant to institute a claim for costs as a normal suit, instead of filing a bill of costs. He argued that, in terms of the holdings in ***Stanbic Bank Tanzania Limited v. Kagera Sugar Limited***, CAT-Civil Application No. 57 of 2007 ***Motor Vessel Sepideh & Others v. Yusuf Mohamed Yusuf & Another***, CAT-Civil Application No. 91 of 2013 (unreported), extension of time is grantable where illegality is pleaded.

Uncovering yet another irregularity, counsel argued that the proceedings preferred by the 1st appellant did not conform to the requirements set out in ***Suzana S. Waryoba v. Shija Dalawa***, CAT-Civil Appeal No. 44 of 2017 (unreported), which is to the effect that a litigant who

sues as an administrator of the estate should indicate that he is suing in that capacity.

He concluded by arguing that the question regarding the propriety of revision as a remedy should await its appropriate time as discussing it now was premature. He urged the Court to dismiss the appeal.

From these rival submissions, the sole profound question for determination is whether the appeal is meritorious. The answer to this question is in the affirmative and I shall demonstrate.

As counsel agree, the decision in Civil Case No. 199 of 2017 was appealed against through an institution of Civil Appeal No. 21 of 2018, which did not see the light of the day, owing to the respondents' non-appearance on 15th March, 2019, when the matter was dismissed for want of prosecution. Uncontested as well, is the fact that, subsequent thereto the respondents filed an application for restoration of the dismissed appeal (Misc. Civil Application No. 10 of 2019) which fell through due to the respondents' non-appearance in court. These efforts were intended to put the appeal on course and have the decision of the trial court vacated through that appeal.

The divergence by the parties arises from the decision of the respondents to pray for and be granted an extension of time to institute revisional proceedings subsequent to dismissal of the appeal, and the

application for restoration. Whereas the respondent's counsel finds nothing untoward in the steps taken, in view of the illegalities that the decision allegedly carry, his counterpart takes the view that revision would not lie where an appeal had been preferred. In my considered view, the view held by the respondents' counsel is flawed. When the District Court decided that Misc. Civil Application No. 10 of 2019 be dismissed for non-appearance or want of prosecution, the recourse that the respondents had was, subject to time limitation, to seek to show cause as to why the application should be restored after it had been dismissed for non-appearance. This is in conformity with the provisions of Order IX rule 6 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 which states as follows:

> *"Where a suit is wholly or partly dismissed under rule 8 (sic), the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit."*

It should be noted that the term suit includes applications and appeals that suffer from the same fate.

This implies, therefore, that preference of a remedy of revision, whose journey started with the grant of an extension of time was, in the circumstances of this case, an anomalous conduct which cannot go unchecked. It constitutes a procedural impropriety of a fatal effect. The respondents ought to have noted that the application for restoration of the application for setting aside dismissal of the appeal would hand the respondents the right of appeal if the same was dismissed. This means that revision as a remedy would not fit in the circumstances of this case, especially where the respondents' intention, right from the inception, was to appeal against the decision in Civil Case No. 199 of 2017.

In view of the foregoing, I find the appeal meritorious and I allow it. I quash the proceedings in Misc. Civil Application No. 1 of 2021, and set aside the ensuing ruling and order. The appellants are to have their costs.

Order accordingly.

DATED at **MWANZA** this 9th day of November, 2021.

M.K. ISMAIL

JUDGE