IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZNIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

CIVIL REVISION NO. 01 OF 2021

(Arising from Civil Appeal No. 01 of 2021 at Kilolo District Court at Kilolo, Originating from Mahenge Primary Court in Civil Case No. 01 of 2021)

VERI OSCAR ..... APPLICANT

VERSUS

ISSA CHAMBO ..... RESPONDENT

RULING

Date of last Order: *22/03/2022*
Date of Ruling: *27/07/2022*

MLYAMBINA, J.

The Applicant, VERI OSCAR filed in this Court the application for revision of the Judgement and Decree of Kilolo District Court (First Appellate Court) which was delivered on 29th April, 2021. The application was made under the provision of *sections 44 (1) (b) of the Magistrates Courts Acts [Cap 11 R. E. 2019]* and *section 68 (e) & 79 (1) (e) of the Civil Procedure Code [Cap 33 R. E. 2019].* It was supported by the affidavit sworn by the Applicant.

A brief history of the matter is that; the Applicant instituted the case against the Respondent before Mahenge Primary Court (the Trial Court) where the ex-parte Judgement was delivered in his favor. The

Respondent was aggrieved with the said decision. He successfully appealed before the Kilolo District Court. The First Appellate Court Court quashed all the proceedings before the Trial Court on ground that they were founded on a nullity proceeding and ordered the matter to be heard afresh. The Applicant was not satisfied with that decision of the First Appellate Court, hence this application to move the Court to call the record of the First Appellate Court to satisfy itself on the regularity, propriety and correctness of the Judgement and Decree thereof.

The Respondent opposed the application by filling the counter affidavit accompanied with the point of preliminary objection to the effect that:

> *This application is bad in law for being preferred as an alternative to an appeal.*

The Applicant was represented by Mr. Yohana Kilindu, learned Advocate while the Respondent appeared in person. By consent of the parties, this application was argued by way of written submission. The Respondent in support of his point of preliminary objection submitted that the law is settled that revision does not operate as an alternative of an appeal. Revision is a remedy to a person who was not a Party to a proceeding. To the contrary, the Applicant was a Party before the Trial Court. The only remedy was to appeal to this Court. He supported his

submission with the case of **Ahmed Ally Salum v. Ritha Basmali and Another**, Civil Application No. 21 of 1999.

As for the issue of illegality of the proceedings, the Respondent averred that the allegation that the trial Judgement is tainted with procedural illegality does not constitute sufficient reason to resort revision power of this Court. Therefore, he thought it was wise for the Applicant to file an appeal to challenge the decision of the First Appellate Court. He insisted that the revision is not an alternative to its appellate jurisdiction. He backed up his argument with the case of **Transport Equipment LTD v. Devram P. Valambhia** [1995] TLR 161 as it was cited with approval in the case of **Hassan Ng'anzi Khalfan v. Njama Juma Mbega(Legal representative of the rate Mwanahamisi Njama) and Another**, Civil Application No. 218/12 of 2018, where the Court held that:

> *Except under special circumstances, a party to a proceeding in the high Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court.*

The Applicant did not show any exceptional circumstance which prevent him to file an appeal as it is revealed from his deponed affidavit.

The revision can only be used by a Party under exceptional circumstance especially when a Party have no access to appeal. In the case of **Jewels Antiques (T) Ltd v. National Shipping Agencies Co. Ltd** [1994] TLR 107. The affidavit is silent on the exceptional circumstances which made the Applicant to resort to revision since the Judgement was delivered on 17th day of June, 2021 and this application was lodged on 3rd August, 2021. Thus, the Applicant was within the time prescribed by the law to lodge an appeal. He prayed this application to be dismissed with costs.

In reply, the Respondent without further elaboration, distinguished the case of Ahmed cited by the Applicant to the scenario at hand. He went further to concede that he was indeed a Party to both lower Court proceedings whose decisions were delivered ex-parte. The Respondent maintained that is a cardinal principle of the law that an ex-parte Judgement is not appealable. Thus, the only remedy thereof is to set it aside and that remedy bind a Party to a trial not a stranger or an interested party as per *Order IX Rule 9 of the Civil Procedure Code (supra).* The Respondent being aggrieved by the decision of the Trial Court, he was supposed to set aside the ex-parte Judgement instead of appealing to the First Appellate Court. He supported his assertion with

Rule 30 (1) and (2) of the Magistrates Courts (Civil Procedure in Primary Court) Rules.

Furthermore, the Applicant averred that Civil Appeal No. 1 of 2021 at the First Appellate Court and subsequent ex-parte Judgement thereof was acquired illegally because the Respondent was to set aside the Primary Court decision before opting to file an appeal. He added that, **the case of D. P. Valambhia** (*supra*) is distinguishable to the scenario of this case. He prayed this Court to invoke its revisional powers to cure the mischief found on the face of records. Thus, the Revision was aimed to clear the error on the face of record.

In his short rejoinder, the Respondent reiterated that the submission of the Counsel for the Applicant is misconceived and misdirected. A Party to the proceedings before the High Court cannot invoke the revision jurisdiction of the Court as an alternative to the appellate jurisdiction except under certain circumstance(s). It can only be used to a person who was not a Party to the proceedings or a Party under exceptional circumstance as stated in the **case of Jewels and Antiques (T) Limited** *(supra).*

After considering the submissions from both sides, the Court has noted that the issue to be determined in this application is; *whether this application for revision is an alternative to an appeal.*

It is a well-known principle of the law that a Party who is aggrieved with the ex-parte decision of the Court can lodge an application within the same Court to set aside the said decision. *Order IX Rule 9 of the Civil Procedure Code (supra),* provides that:

> *In any case in which a Decree is passed ex-parte against a Defendant, he may apply to the Court by which the Decree was passed for an order to set aside; and if he satisfies the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the Decree as against him upon such terms as to costs, payment into Court or otherwise as it think fit, and shall appoint a day for proceeding with the suit*
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> *Provided that, where the Decree is of such nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants.*

From the quoted provision of the law, it is clearly that the party aggrieved with the ex-parte decision has to apply to the same Court to

set aside the decision and not to lodge the appeal to the Appellate Court. In the case of **Pangea Minerals Limited v. Petrofuel (T) Limited and 2 Others,** Civil Appeal No. 96 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported), the Court of Appeal has this to say:

> *The remedy available to a defendant to a suit determined ex parte is to apply to the Court which passed the said order that he had sufficient reasons for his nonappearance and pray for the said order to be set aside.*

It follows, therefore, that the Appellant has to exhaust all remedy found in the trial Court before referring the matter to the Appellate Court, except to an aggrieved person who was not a Party to the proceedings or he is a Party but has an exception circumstance. The later Party can file an application for revision.

I went through the application by the Applicant, specifically the affidavit and found that the Trial Court decision was ex-parte too. The Respondent instead of setting aside the decision, he successfully appealed to the First Appellate Court. The Procedure in Primary Court is guided by special rule in which under *Rule 30 (1) (2) of the Magistrates'*

Courts (Civil Procedure in Primary Courts) Rules, G.N. No. 310 of 1964, [henceforth the CPPCR] which provides:

> *(1) where a claim has been proved and the decision given against a defendant in his absence, the defendant may, subject to the provision of any law for the time being in force relating to the limitation of proceedings, apply to the Court for an order to set aside the decision and if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause for appearing when the proceedings was called on for hearing, the Court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit.*
>
> *(2) where an application is made under this rule, the Court shall appoint a day for the hearing of the application and shall give the claimant and other parties to the proceedings, if any, notice of such hearing.*

The genesis of the decision which the Applicant calls upon this Court to call its records and satisfy itself as for its regularity, propriety and correctness is from the ex-parte Judgement delivered by the trial Court. The Respondent appealed to the First Appellate Court against the said ex-parte Judgement, and the First Appellate Magistrate entertained

the appeal as if it was a normal or inter parte Judgement contrary to *Rule 30 (1) (2) of the CPPCR.*

There is exception to the general rule to the effect that; a person who was a Party to the proceeding may file application for revision against the ex-parte Judgement if he had exception circumstances.

The point of preliminary objection raised by the Respondent could have succeeded if the decision which the Applicant want to challenge would have not been originated from the impugned unattained ex-parte Judgement of the Trial Court. If this Court is to agree with the Respondent and dismiss this application, it will set a bad precedent in which the requirement of our almighty law will be infringed. In order for the illegality of the ex-parte Judgement of the trial Court to be addressed, this application has to be heard so that this Court can cure the mischief.

In the premises, this Court is of the findings that the point of preliminary objection raised by the Respondent has no merits. Consequently, it is hereby dismissed with costs. It is so ordered.

Y. J. MLYAMBINA

JUDGE

27/07/2022

Ruling delivered and dated 27th day of July, 2022 through Virtual Court in the presence of Jonas Kajiba, Advocate holding brief of Yohana Michael for the Applicant and in the absence of the Respondent. The Applicant was stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

27/07/2022