

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 99 OF 2022

(Made under section 372 of the Criminal Procedure Act, [Cap. 20 R.E 2022] and section 43(1) of the Magistrates Courts Act, [Cap. 11 R.E 2019])

BASHIRI FENAL ABDI ALI AWALE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1STRESPONDENT

NCBA BANK TANZANIA LIMITED.....2ND RESPONDENT

RULING

Date of last Order: 24/08/2022

Date of Ruling: 23/09/2022

E.E. KAKOLAKI J.

This application for revision is preferred by the applicant under section 372(1) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA) and section 43(1) of the Magistrates Courts Act, [Cap. 11 R.E2 019] (the MCA). It is supported by the affidavit of Mr. Michael J.T Ngalo, applicant's advocate. In the chamber summons the applicant in inviting this Court to hear the application of the following:

1. An urgent Ex-parte Order suspending the 2nd respondent's compliance with or implementation of an order of the Resident Magistrate's Court of Dar es salaam at Kisutu given on 20th June 2022 in Miscellaneous Criminal Application No. 24 of 2021 pending the hearing and final disposal of inter-parties of the Applicant's application for Revision.
2. An order calling for the record of the proceedings of Miscellaneous Criminal Application No. 24 of 2021 (the Application) before the Resident Magistrate's Court of Dar es salaam and examines the same so as to satisfy itself as to the correctness, regularity, legality and propriety of the said proceedings, ruling and drawn order dated 20th June, 2022.
3. An order quashing the said proceedings, ruling and drawn order for being a nullity.
4. An order that costs of this application be in the cause; and
5. Any other relief(s) that the Hon. Court may deem just, fit and proper to grant to the Applicant in the circumstances.

Briefly in this revision application the applicant is seeking to impeach the proceedings, Ruling and drawn order of the Residence Magistrate Courts of Dar es salaam at Kisutu in Misc. Criminal Application No. 24 of 2021 dated

20th June, 2022, forfeiting all applicant's monies held in his USD and TZS accounts maintained with the 2nd respondent and transfer them in to USD and TZS accounts both in the names of Assets Forfeiture and Recovery Account maintained with BOT.

When the application was served to the respondents the 1st respondent unlike the 2nd respondent filed a counter affidavit strenuously challenging its merit and in addition to that filed a notice of preliminary objection of points of law followed by necessary particulars to the effect that:

1. The affidavit in support of the application is fatally defective for containing defective verification.
2. The application is incompetent for containing omnibus prayers for interim orders and revision.
3. The application is untenable for seeking revision while there is right of appeal under section 76(1) of the Proceeds of Crime Act.
4. The application is incompetent for wrongly joining the 2nd respondent who was not a party to the original application No. 24 of 2021 in the Resident Magistrates Court of Dar es salaam at Kisutu.

As it has always been the court's practice to dispose of first the preliminary objections whenever raised, parties were invited by the Court to address it on the raised points of preliminary objection. The applicant appeared represented by Mr. Michael J. T. Ngalo learned advocate, while the 1st respondent represented by Mr. Paul Kadushi and Mr. Shedrack Kimaro, both learned Principal State Attorney and Tilly Helela, Learned Senior State Attorney whereas the 2nd respondent enjoyed the services of Ms. Irene Luchaki, learned advocate. Before taking the floor Mr. Kadushi introduced to the Court that, he would canvass the 1st and 3rd grounds of objection while the 2nd and 4th ones would be presented by Ms. Helela and Mr. Kimaro would add if any need had arose. Addressing the Court, first Mr. Kadushi opted to submit on the 3rd ground which in his opinion would dispose of the matter as others would be argued in alternative. It was his contention of the 3rd ground of objection that, the application for revision is untenable and incompetent before the Court as the applicant had and still have a right to appeal under section 76(1) of the Proceeds of Crime Act, [Cap. 256 R.E 2022] (the POCA), which he failed to exercise, instead resorted to revision as an alternative relief to appeal. He had it that, under section 76(3) of POCA all appeal under that Act shall be brought in accordance with the provisions

of the CPA governing appeal. According to him the decision sought to be challenged in this revision emanates from the application, hearing and consequential orders that were made under POCA, which are appealable. So the applicant ought to have appealed against the trial Court's decision instead of preferring revision which is untenable hence this Court becomes incompetent to entertain the application. Mr. Kadushi echoed that, where there is a right of appeal revision cannot be preferred in alternative. He relied on the cases of **Halas Pro-chemie Industries Ltd Vs. Wella and AG** (1996) TLR 269 where the Court of Appeal held that, a party to the proceedings in the High Court could invoke revisional jurisdiction of the Court where the appeal process had been blocked by judicial process and in **Moses J. Mwakibete Vs. The editor Uhuru, Shirika la Magazeti y Chama and National Printing Co. Ltd** (1995) TLR 134, where the Court of Appeal said, the revisional powers are not meant to be used as an alternative to the appellate jurisdiction unless reasons for so doing are stated by the applicant. Other decisions cited to the Court were **D.B Shapriya & Co. Ltd Vs. Stefanutti Stocks Tanzania Ltd**, Civil Application No. 205/16 of 2018 and **Elias Manyenye Vs. R**, Criminal Appeal No. 59 of 2005 (CAT-unreported).

Mr. Kadushi argued further that, if the applicant wanted to exercise revisional powers of this Court ought to have stated reasons as to why opting for it and not appeal but he failed to discharge that duty as there is no evidence stated in his affidavit exhibiting that, his right to appeal was blocked. He rested his submission by requesting the Court to strike out the application for want of incompetence. The submission by Mr. Kadushi was heavily supported by Ms. Luchaki for the 2nd respondent with the prayers thereto.

On the applicant's side Mr. Ngalo, vehemently resisted Mr. Kadushi's submission responding that, the wording of section 76(1) of POCA, do not compel the party aggrieved by the Court's order to appeal where there is other available remedies. While subscribing to the position of the law on the authorities cited by Mr. Kadushi, Mr. Ngalo contended the reasons as to why the applicant preferred revision and not appeal is that, the proceedings before the Resident Magistrates Court of Kisumu proceeded ex-parte against the applicant. He argued since the applicant was not heard cannot challenge the decision on merit hence the only remedy for him is for this Court to call the record and revise them to satisfy itself as to whether the decision was arrived at correctly. He said the wordings of section 372(1) of the CPA in which this application is premised are similar to the ones in section 4(3) of

the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] in which the Court of Appeal interpreted and explained the circumstances under which revision jurisdiction could be invoked. He referred the Court to the decision of the Court of Appeal in the cases of **Hasmukh Bhagwanji Masrani Vs. Dodsai Hydrocarbons and Power (Tanzania) PVT Limited and 3 Others**, Civil Application No. 100 of 2013 and **Partick Magologoji Mongella Vs. The Board of Trustees of the Public Service Social Security Fund**, civil Application No. 342/18 of 2019 (both CAT-unreported). Basing on the above cited decision Mr. Ngaro, submitted that, the sought revision by the applicant is aimed at challenging the procedural aspect hence the application is properly before the Court.

In brief rejoinder made by Mr. Kimaro Principal State Attorney on this ground, he argued that, the word "may" as used in section 76(1) of POCA though used as permissive and not in mandatory terms provides for the right to appeal which is exercisable under party's will as it in other provisions of the law such as sections 379 and 378 of the CPA providing for appeals generally and by the DPP. He said that should not be interpreted to mean that the applicant is at liberty to choose whether to appeal or prefer revision under section 372(1) of CPA which has also used the word "may" too.

Regarding the two cited cases by Mr. Ngaro, he said they have no issue with the position provided therein on the circumstances under which revision may be preferred as their contest is whether the applicant was at liberty to skip preferring the appeal and go for revision in lieu of. According to him the reason of denial of the right to be heard as advanced by Mr. Ngaro for so skipping does not cover the circumstances under which revision could be preferred but rather is the ground of appeal. It was his submission therefore that under that reason the applicant could have preferred the appeal and not this revision. He thus stick to their prayer for striking out the application for want of competence.

I have taken time to consider the rival arguments of both learned counsels over this ground of objection. Both parties seem to be at one on the legal position that revision is not an alternative to appeal and that for the party to opt for revision jurisdiction of the Court must assign reasons for so doing such as no right to appeal or the same is blocked by judicial process as well explained in the cases of **Halas Pro-chemie Industries Ltd** (supra), **Moses Mwakibete (supra)** and **Elias Manyenye** (supra). See also the cases of **Transport Equipment Ltd Vs. Dervam P. Valambhia** (1995) T.L.R 161 and **Felix Lendita Vs. Michael Long'utu**, Civil Application No.

312/17 of 2017 (both CAT unreported). In the case of **Transport Equipment Ltd** (supra) the Court of Appeal held inter alia that:

"The appellate Jurisdiction and the revisional jurisdiction of the Court of Appeal in Tanzania are, in most cases, mutually exclusive; if there is a right of appeal then that right has to be pursued, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to revisional jurisdiction of the Court of Appeal."

Similarly in the case of **Felix Lendita** (supra) the Court of Appeal remarked thus:

"According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked."

Further to the above it is also not contested by both parties that, the Court can exercise its revisional powers when called upon to satisfy itself as to **one**, correctness, or legality or propriety of any finding, order or any decision made by the lower court and **second**, on regularity of any proceedings of the lower court. See the cases of The Board of Trustees of the **The National Social Security Fund (NSSF) Vs. Leonard Mtepa**, Civil Application No. 140 of 2005 (CAT-unreported), **Hasmukh Bhagwanji Masrani** (supra) and **Partick Magologozi Mongella** (supra).

In this matter Mr. Ngalo says the reason as to why the applicant preferred this application is that, the proceedings against him before the trial court proceeded ex-parte hence he cannot challenge the decision on the denial of the right to be heard by way of appeal but rather through revision jurisdiction. To the contrary Mr. Kimaro submits, denial of the right to heard is one of the ground of appeal. According to him the applicant ought to have challenged its denial by way of appeal and not through this revision application. Now the issue here is whether the denial of a right to be heard is one of the ground of appeal. In answering his issue I embrace Mr. Kimaro's proposition that it is. I hold that view as the decision or order sought to be challenged by the applicant in this revision is that of 20th June, 2022 forfeiting his monies in both USD and TZS accounts maintained with the 2nd respondent (NCBA Bank Tanzania Limited) the application which was preferred under POCA. Section 76(1) of POCA provides that any person aggrieved with any order of the Court made under that act may appeal against it. The said section 76(1) of POCA reads:

76.-(1) Any person aggrieved by the order of the Court made under this Act may appeal against that order.

Applying the above cited provision of the law to the fact of this matter, it is evidence to me that, the applicant being unhappy with the trial Court's decision for denying him of the right to be heard by proceeding ex-parte against him, the proceedings which culminated into forfeiture of his monies had a right of appeal under the provisions of section 76(1) of POCA. As rightly stated in the case of **Transport Equipment Ltd** (supra), where there is a right of appeal then that right has to be pursued, thus there cannot be resort to revisional jurisdiction, unless sufficient reason amounting to exceptional circumstances are supplied by the party. In this matter the applicant has not advanced any exceptional circumstances that prevented him from appeal instead resorted to revision, as the ground of denial of right to be heard tabled by Mr. Ngalo is appealable. In absence of any sufficient reason justifying the applicant's act of preferring this revision application, I am forced to agree with both Mr. Kadushi and Mr. Kimaro, Principal State Attorneys' submissions and hold that, the application is untenable in law, hence incompetent before the Court. The ground, I find has the effect of disposing the application for being upheld, hence I see no reason to labour much efforts on the rest of the grounds of objection as amounts to academic exercise.

In the premises and for the fore stated reasons, I sustain the preliminary objection on the 1st ground and proceed to hold that the applicant's application is incompetent before this Court, hence the same is hereby struck out.

It is so ordered.

Dated at Dar es Salaam this 23rd September, 2022.



E. E. KAKOLAKI

JUDGE

23/09/2022.

The ruling has been delivered at Dar es Salaam today 23rd day of September, 2022 in the presence of Mr. Sisty Benard and John Chuma advocates for the Applicants, Ms. Estazia Wilson, State Attorney for the 1st respondent, Ms. Irene Mchaki, advocate for the 2nd respondent and Ms. Monica Msuya, Court clerk.



E. E. KAKOLAKI

JUDGE

23/09/2022.

