IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL REVISION NO. 2 OF 2021

(Arising from the decision of Temeke District Court at Temeke in Revision No. 11 of 2021 delivered on 27th August, 2021 before Hon. Ndossy, RM)

WAMOJA MOSHI MUSTAFA..... 1ST APPLICANT

ASHA HUSSEIN.....2ND APPLICANT

VERSUS

ATHUMAN HAMIS.....RESPONDENT

RULING

Date of last order: - 24/2/2022
Date of judgment: - 29/03/2022

OPIYO, J.

This is a ruling on the preliminary objection raised by the respondent on the point of law as follow:-

1. That, this application for revision is pre-mature.
2. That, the second applicant has no cause of action against the respondent.

Wherefore, the respondent prays that the application for revision be dismissed with costs. This court on 01st December 2021 ordered this preliminary objection to be disposed of by way of written submission. Both parties complied with the order of the court by filing their respective submissions timely.

Arguing for the preliminary objection, on the first ground the respondent through his advocate, Leonard Kiwango stated that a revision is not an alternative to appeal. The applicants were supposed to file an appeal within 30 days from the date the ruling was pronounced, and if the applicants were out of the time they were to file application for extension of time to enable them pursue the appeal instead of preferring revision. The counsel cited the case of **Mansour Daya Chemical Limited vs National Bank of Commerce Limited, Civil Revision, No. 464/16 of 2014 CAT, Dar es Salaam (unreported)** to fortify her argument where the decision was that:

> *"relying on the above authorities, we find that it is a settled principle of law that if there is a right of appeal then that right has to be pursued first unless there are sufficient reasons amounting to exceptional circumstances which will entitle a party to resort to revision jurisdiction of the court"*

On the second preliminary objection, counsel stated that the second applicant was not a party to the revision No. 11 of 2021 before the District Court of Temeke before Honourable Ndossy. Instead, she was a party in the case No. 18 of 2020 before Honourable Rweikiza at the same Court. She never appealed against the said decision but decided to file an

application for revision on the case which she was not a party to. Therefore, it was irregular for the applicant making application for revision of the matter she was not a party to before appealing in a decision she was a party to. She prayed for the application to be dismissed with costs for that.

Resisting the preliminary objections, Ms. Sophia Rolya, applicants' counsel referred to section 79(1) of the Civil Procedure Code, Cap 33 R.E 2019 that the High Court may call for the record of any case which has been decided by any Court subordinate to it which no appeals lie thereto, and if such court appears to have exercised jurisdiction not vested in it by law. He contended that, the applicant filed this revision on the view that the subordinate court exercised the jurisdiction not vested to it by law.

He continued to argue that the first applicant was an aggrieved party as she was a party in Revision No. 11 of 2021 while the second party is an interested party as one of the heirs in probate cause No. 313 of 2020 which was revised by revision No. 11 of 2021. Therefore, as the 2nd applicant was not a party to the impugned decision, the only way to challenge it is by the way of revision as she is one of the heirs mentioned in probate cause No. 313 of 2020 making her an interested party to the Revision No. 11 of 2021. He cited the case of **Jacqueline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others, Civil Application No. 332/01 of 2021 (unreported)** and the case of **Attorney General v Osterbay Villas Limited & Another, Civil Application No. 299/16 of 2016 (unreported)** where the gist of the holding was that the only recourse to challenge the decision in which one

is not a party is applying for revision and not appeal. He, therefore, urged for the dismissal of the preliminary objections with costs.

The respondent through his rejoinder stated that section 79(1) of the Civil Procedure Code, Cap 33 R.E 2019 does not apply to the matter originating from Primary Court, it applies only to the matter originating at the District Court. Only the Magistrates Courts Act, Cap 11, R.E 2019 applies to the matter originating from Primary Court and referred to section 31(2) of the Magistrates Courts Act(*supra*). He emphasized that revision is not an alternative to appeal. For the second objection she insisted that, the second applicant was not even a party to probate case No. 313 of 2020 to have a foot to this application.

Parties' submissions have been dully considered. It is a settled provision of the law that if there is a right of appeal then the same has to be pursued first. Thus, except for sufficient reason amounting to exceptional circumstances, one cannot resort to the revisional jurisdiction of the court as an alternative to the appellate jurisdiction. The case of **Halais Pro-Chemie versus Wella A.G. (1996) TLR 269, CAT**, says it all in the following words:-

1. *"The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of the proceedings in the High Court*

2. *Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;*

3. *A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave.*

4. *A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process."*

Also, the case of **Moses Mwakibete v The Editor of Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd. [1995] T.L.R. 134** evolves around the principle that revisional powers conferred to the Court are not meant to be used as an alternative to the appellate jurisdiction of the Court. Thus, the circumstances to invoke revisional jurisdiction are known and guidelines have been well provided as stipulated above. Therefore, from the above holding, a person who through his own fault has forfeited his right to appeal cannot use the revisional jurisdiction as alternative route. However, the Court may, *suo motu*, embark on revision whether or not the right of appeal exists or whether or not it has been exercised in the first instance (see further holding in the case of **Halais** above).

In the case at hand, the court was moved by the party to revise the decision derived from Revision No. 11 of 2021 of District Court of Temeke at Temeke, the right to appeal was not blocked for any aggrieved party between first appellant and respondent who were both parties to the Revision No. 11 of 2021. None of them had an automatic right to file revision in this court from the decision in the said revision in absence of exceptional circumstances as a right to appeal has not been blocked. Like

error apparent on face of records was shown to warrant revision. No appellate process which has been preferred or blocked by judicial process. And by virtue of section 25(1)(b) of the Magistrates Courts Act, (*supra*) the 1st applicant had a room of filling an appeal or applying for the extension of time to lodge an appeal out of time stating the reasons for delay, but this was not done. It is also obvious that this revision was not *suo motu* initiated by this court to form an exception Court. Having said that, the first limb of objection is upheld as it is obvious this matter was wrongly brought before the court by the party who had a chance to appeal but opted not to, the first defendant.

The issue that follows is the position of the law in regard to the other party who was not a party to the impugned decision. We observed that the 2nd applicant was not a party to the impugned decision. Now, is she also bound by the above position, obviously no, because as a none party in the assailed decision the only way he could challenge that decision is by way of revision as an interested party as the decision affects probate cause No. 313 of 2020 in which she is interested. Therefore, in this revision matter, if second applicant was challenging the decision alone as an interested party, the same would stand (see **Jacqueline Ntuyabaliwe Mengi's case** referred by the applicant's counsel above). But, in this case there is a combination/joining of a parties, first applicant, with right of appeal and none party, second respondent, with no right of appeal. This combination constitutes irregularity as one party is eligible, and the other is not. This causes this matter to collapse as the objection is upheld. For the reason, the application is struck out.

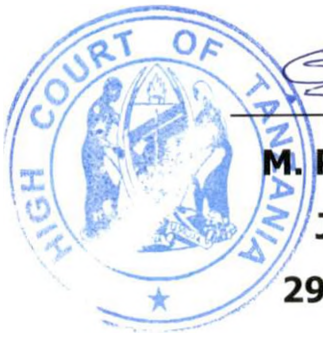
Under normal circumstances, I would have penned off here. However, the way the facts are tangled up and varied from one record to the other made me curious. I decided to ask parties to address the court on the clear and true facts relating to the matter, especially on the relationship between the parties and the deceased.

On the respondents side it was stated that the late Tatu Athumani, whose estate forms a centre of dispute in this matter and the respondent's father were step or siblings in that they were sharing a father who is Athumani Salum Mtengela and not a mother. That means the respondents father was a step-brother or half-brother to the deceased Tatu Athumani. The mother of respondent's father was called Hadija Salum Nyamwela. While the mother of the deceased Tatu Athumani was not known to the respondent because she came from a different clan unknown to the respondent, and that she was already dead by the time the grow up he did not get to know him. He therefore, does not even know the name of the said step grandmother. It was also submitted that the relatives who shared a father with the deceased are all dead by now, it has not been possible to know the name of the deceased mother. The only relative who is remaining in the respondent's side is his paternal uncle who shared a mother with his father but not a father. In other words, the said uncle cannot know the detail of the respondent's clan because he is of a different clan born by respondent's grandmother, Hadija Salum Nyamwela, after he divorced his grandfather, one Athumani Salum Mtengela. Therefore, the relationship that existed between the respondent and the deceased is that the deceased was his half aunt being a stepsister to his father.

On the applicant's side it was submitted that the second applicant's mother and the late tatu Athumani's mother were blood sisters born to the same mother and father. That the second applicant's grandmother had only two children, the deceased in question and the second applicant's mother. So, the late Tatu Athumani was a full maternal aunt to the second applicant. That, the said maternal grandmother to the applicant was originally married to a Manyama guy, whom they had two children, the late Tatu and second applicant's mother, after which they divorced and the late Tatu's mother later married the respondent's grandfather. That, she never produced any child with the respondent's father who stood as a step-father to the deceased, Tatu Athumani. At the time when the late Tatu's Mother married respondent's grandfather he found him with other wives including respondent's paternal grandmother. The first applicant is the second applicant's daughter. And that, deceased, Tatu Athumani, was always living with the applicant's side as her only blood relatives and they are the ones who took care of her in her old age and ailment and even took her to hospital where she died and arranged her burial. That, the deceased had no blood relation with the respondent. Their only relation is that her mother was once married to respondent's grandfather.

From the above narration, it is noted that the mingling of issues in this matter has been contributed by prolonged series of deceitful, misguided or mis-recorded facts the parties have been stating or recorded to have stated at different forums for the reasons best known to themselves in regard to their relationship with the deceased whose estate is under

administration. For example, the respondent in both in Civil revision no 11/2021 and 18/2020 is recorded to have identified himself as being a son of the deceased full brother which is in serious contrast with what he was made to admit before this court that his father was actually a half-brother to the deceased by sharing only a father, if at all, not a mother. If varied facts in such crucial fact for determination of administration of estate in this matter is allowed this matter is bound to reach no meaningful conclusion any sooner. I would therefore urge the courts that will deal with any issue relating to this matter to pick these straightened facts about the relation the parties hold with the deceased.



M. P. OPIYO,

JUDGE

29/3/2022