

**IN THE HIGH COURT OF TANZANIA  
(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**CIVIL REVISION NO. 03 OF 2022**

*(Originating from the Ruling of Sumbawanga District Court in Miscellaneous Civil Application  
No. 09 of 2022 dated 22<sup>nd</sup> Day of April, 2022)*

**SADRICK ENOCK MALILA@IKUWO.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**JOSEPH JOSEPH MKIRIKITI.....2<sup>ND</sup> RESPONDENT**

**RULING**

*10<sup>th</sup> February, 2023 &  
16<sup>th</sup> March, 2023*

**MRISHA, J.**

The applicant herein was the 1<sup>st</sup> respondent in Miscellaneous Civil Application No. 09 of 2022 which was determined by the District Court of Sumbawanga at Sumbawanga on 22.04.2022 against his favour, whereas the 1<sup>st</sup> respondent was the Applicant, and the 2<sup>nd</sup> respondent had the same status as he appears in the instant application.

In previous application the Attorney General (now the 1<sup>st</sup> respondent) sought the leave of the District Court of Sumbawanga (the trial court) to be joined as an interested party in Civil Case No. 02 of 2022(the main suit) which is still pending before that trial court to date.

After hearing submissions by both parties, the trial court granted the said application and proceeded to order the 1<sup>st</sup> respondent (now the applicant) to pay costs of the suit. Discounted by the ruling of the trial court, the applicant has filed the current application before this Court.

The application is made under Section 79(1)(c) and Section 95 of The Civil Procedure Code, CAP 33 R.E. 2019 (**the CPC**) read together with section 31 of the Magistrates' Courts Act (**the MCA**), and it is supported by an affidavit sworn by one Sadrick Enoch Malila@ Ikuwo (the applicant).

Through his application the applicant has requested this court to grant the following reliefs: -

- 1. That this Honourable Court be pleased to call and examine proceedings in Miscellaneous Civil Application No. 09 of 2022 so as to satisfy itself as to correctness, legality and propriety of the same and revise it by way setting aside the whole proceedings and order.*
- 2. Costs of this application be provided for, and*

3. *Any other order and/or relief(s) that the Court may deem fit and just to grant in the circumstances of this matter.*

Following the prayer by the applicant which was not objected by all the respondents, this court ordered this application to be argued by way of written submissions. Both parties were regally represented. The applicant enjoyed the legal services of Mr. Peter Kamyalile, Learned Advocate and the respondents were represented by Mr. Fortunatus Z. Mwandu, Learned State Attorney.

Before this court had to deal with the submissions in relation to the current application, the 1<sup>st</sup> respondent filed a notice of Preliminary point of objection which had three points, namely: -

- i. That, the Application for revision is incompetent for being preferred as an alternative to appellate jurisdiction of this Court,
- ii. That, the Application for revision is incompetent for being preferred against the interlocutory decision of Miscellaneous Civil Application No. 9/2022 which did not determine the main suit No. 02/2022 to its finality contrary to section 79(2) of the CPC,
- iii. That, this Application is incompetent in that the chamber summons is supported by a defective affidavit which offends the mandatory rules governing affidavits.

Submitting in support of the preliminary objection raised by the 1<sup>st</sup> respondent, Mr. Mwandu began with the first point of preliminary objection and submitted that the law and various decisions have tried to emphasize that revision is not an alternative to appeal. He cited the case of **Emmanuel Cosmas Kessy v. Frida Agapiti Kessy and Damian Antony Kessy**, Civil Revision No. 5 of 2022, HC (T) at Arusha (Unreported) to bolster his submission.

Mr. Mwandu went on to submit that the 1<sup>st</sup> respondent filed a Miscellaneous Civil Application No. 09 of 2022 in the trial court with a view of praying to be joined in the main case as an interested party so as to protect the government interest and his prayer was granted; henceforth the Applicant filed this Civil Revision whereby within the main suit there was an interlocutory decision which did not finalize the case.

According to him, that makes the application for revision to be incompetent insisting that interlocutory decision is not subject to revision, unless it has the effect of finalizing the suit. Expounding the above argument, Mr. Mwandu submitted that the remedy for revision is subject to condition that once a party opts to file revision, he must make sure that he complies with the condition and requirements stated under section 79(1) (2) of the CPC.

Mr. Mwandu also submitted that with regard to the above legal argument, a person cannot invoke revision remedy while he has not exhausted other remedies because revision is not an alternative to appeal. The counsel, also cited the cases of **Dilip Majithia vs Machumi J. Ngeze**, Revision No. 663 of 2018 HC and **Vodacom Tanzania Public Limited Company vs. Planetel Communication Limited**, Civil Appeal No. 43 of 2018, CAT to back up his arguments.

Also, arguing on the second point of objection, the counsel said the applicant was supposed to appeal against the trial court ruling and not to file an application for revision because the main suit was not yet determined to its finality hence, he argued, the applicant's remedy for revision which he preferred against is not proper because the order pronounced is not illegal nor does finalise the main suit. On that point he cited the case of **Emmanuel Cosmas Kessy vs. Frida Agapiti and Damian Kessy**, Civil Revision No. 5 of 2022 HC at Arusha.

Arguing on the third and last point of objection, Mr. Mwandu submitted that in legal arena an affidavit has status of oral evidence; hence it is the legal requirement that for the affidavit to be used as evidence in court of law it should contain matters of fact only and not argument on matters of law.

He cited the case of **Uganda vs Exparte Matovu** (1996) EA 514 and said that the applicant's affidavit is defective especially on paragraph 4 as it contains the legal arguments when the applicant said the ruling pronounced contain explanation which propose conclusion which makes it incurably defective; hence it should be expunged.

Finally, he submitted that the applicant's affidavit is defective because the applicant failed to give reasons or explanation which covers the prayers; he sought through the chamber summons. He supported his submission by citing the case of **Chadrakant Joshubhai Patel v. Republic** [2004] TLR 218 where it was held that, *"Hence looking on the applicant's affidavit its failure to dispose where is illegality, incorrectness and impropriety on the face of records it renders the applicant's affidavit to be a mere allegation as it did not disclose reasons for his averment."*

Finally, Mr. Mwandu concluded his submission by praying that this application be struck out with cost for being incompetent and being supported with a defective Affidavit contrary to the law governing the same.

In reply, Mr. Kamyalile, for the applicant began by submitting that the preliminary objection raised by the respondent has no merit; hence he prayed this court to dismiss it with costs.

While conceding that principally revision is not an alternative to appeal, Mr. Kamyalile argued it is a trite law that the right of appeal is a creation of statute as there is no automatic right of appeal. Also, he said whenever there is appeal there is a law behind which provides the right of appeal.

He continued to submit that it is a settled position that if a party does not have an automatic right of appeal, then he can use the revisional jurisdiction. He cited the case of **Kempiski Hotels S.A. Vs Zamani Resorts Limited and Another**, Civil Application No. 94 of 2018 (CAT) at Zanzibar; also, the case of **Mariam Dorina and another vs. Kisha Lugemalila**, PC Civil Appeal No. 31 of 2003, to back up his submission, and concluded that since the statute, that is the Office of Attorney General (Discharge of Duties) Act, CAP 268 R.E. 2019 (**the OAGA**) against the decision made under section 17(1)(a)(b)(2) and (3) of the OAGA, then the proper avenue is to use revisional jurisdiction as guided by the case of **Transport Equipment Ltd vs Devram Valambya**[1995] TLR 161, where it was held that,

*"If a party does not have an automatic right of appeal, then he can use the revisional jurisdiction."*

Mr. Kamyalile also submitted that the applicant has failed to show the provision which provide the right of appeal against the decision made under section 17(1)(a)(b)(2) and (3) of the OAGA.

Submitting on the second point of preliminary objection, Mr. Kamyalile said that this application is not preferred against an interlocutory decision because the trial court's ruling disposed the applicant's right when it granted leave to join the 1<sup>st</sup> respondent in the main suit and also when it awarded cost to the 1<sup>st</sup> respondent; hence it does not amount to an interlocutory decision. He cited the case of **Tanzania Posts Corporation vs Jeremiah Mwandu**, Civil Appeal No. 474 of 2020, in which the CAT applied *the nature of the order test* to determine whether the order was an interlocutory or not.

Finally, the counsel for the applicant submitted, on the third point, by arguing that the affidavit filed by the applicant in support of this application is not defective because under paragraph 4 it does not contain legal argument. He went on to submit that it is not true that their affidavit does not contain reasons to support the chamber summons; therefore, the cases cited by the first respondent are distinguishable.

He finally concluded that even if this court will agree with the counsel for the respondent still it is curable under principle of overriding objective per section 3A of the CPC. He ended his submission by praying that the preliminary objection be dismissed with cost.

In rejoinder, Mr. Mwandu strongly submitted that the applicant's reply submission is totally misconceived and it has no merit worth of being



considered by this court and it ought to be disregarded by this court. He clarified that the Applicant's counsel has failed to get the points of law raised by the 1<sup>st</sup> respondent because section 17(1)(a)(b)(2) and (3) of the OAGA is appealable and nowhere it has provided a limit.

He concluded by saying that it was a total error for the Applicant to opt for revision instead of appeal and went on to disregard all the cases cited by the applicant's counsel as being irrelevant to the matter at hand.

Submitting on the second ground Mr. Mwandu reiterated his stance by saying that the application is against an interlocutory decision as submitted on their written submission in chief. He further argued that the decision of the trial court does not dispose of the case of the applicant; rather it gave the right to the Attorney General to be joined in the main suit. Therefore, he said, the applicant's application for revision is preferred against an interlocutory decision.

He finally said that the order for costs does not in anyhow to be termed as finally disposes the right of the parties, rather costs is awarded at the court's discretion upon sufficient reasons assigned by the other party praying for costs.

As for the third ground, Mr Mwandu submitted that the applicant's affidavit contains legal arguments; hence it is defective on paragraph 4. He added that

the overriding objective cannot apply in such defects. Therefore, he prayed that the application for revision be struck out with costs.

I have carefully gone through the submissions by both counsel which, in my opinion, cut across three issues that is; **first**, *whether this application is incompetent for being preferred as an alternative to appeal*; **secondly**, *whether the trial court's ruling in Miscellaneous Civil Application No. 09 of 2022 in an interlocutory decision* and; **thirdly**, *whether it is true that the applicant's affidavit does not contain reasons for his prayers which offends the mandatory rules governing affidavits.*

Starting with the first issue, the counsel for the first respondent has strongly argued that the current application is incompetent for being preferred as an alternative to appellate jurisdiction of this court because the applicant had a remedy of filing an appeal after he was aggrieved by the trial court's ruling dated the 22<sup>nd</sup> day of April, 2022.

He has supported his argument by invoking the provisions of section 17(1)(a)(b)(2) and (3) of the OAGA to show that the said ruling and order of the trial court are appealable and nowhere such law has provided a limit that the said ruling and order are not appealable.

On the other side of the coin, the counsel for the applicant has opposed such argument saying that the cited provisions are silent meaning that the proper

avenue of the applicant is to apply for a revision not lodge an appeal. He has cited the case of **Transport Equipment Ltd vs Devram Valambia**(supra) in support of his argument.

Section 79(1)(c) of the CPC which is among the enabling provisions invoked by the applicant in lodging this application, provides:-

*"(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears...(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."*

The above provision is qualified in the sense that for a revision to be lodged to the High Court the decision of the subordinate court to it must not be appealable and secondly such court must have acted in the exercise of its jurisdiction illegally or with material irregularity.

I had enough time to go through the applicant's chamber summons as well as an affidavit and noted that he has moved this court to call and examine the proceedings of the lower court in Miscellaneous Civil Application No. 9 of 2022

to satisfy itself as to correctness, legality and propriety of the same and proceed to revise it by setting it aside. From that point, it is obvious that the applicant has complained that the said trial court's decision emanates from the proceedings which were not correct, legal and proper.

Also, my careful perusal on the provisions of the law (the OAGA) cited by the counsel for the first respondent, reveal that the same is silent as far as the right of appeal is concerned. Hence, basing on the above reasoning, I share the same view with the counsel for the applicant and proceed to overrule the first ground of objection for want of merit.

Turning to the second issue, the counsel for the first respondent has submitted that the decision of the trial court is an interlocutory which did not dispose of the main suit; hence the applicant was not supposed to bring this application; he cited the case of **Emmanuel Cosmas Kessy** (supra) to cement his point.

Such averment was opposed by the counsel for the applicant, who argued that the current application is not against the interlocutory decision of the lower court but it is against an order for the award of cost which, according to him had disposed of the rights of the parties, particularly the applicant, if I got him correctly.

He also argued that since in its ruling the trial court had granted the first respondent leave to be joined in the main suit as an interested party, then that also implies that its decision finally disposed of the rights of the parties; hence it falls short of being termed as an interlocutory decision. He supported his argument by citing the case of **Tanzania Post Corporation** (supra) in which *nature of the order test* was discussed by the Court of Appeal.

It appears to me that there are rival arguments by the counsel for both parties on the issue of interlocutory decision. There is no dispute between the learned counsel for both parties that there is still a pending main suit before the **District of Sumbawanga** which is Civil Case No. 2 of 2022, and also both parties are at one that the Miscellaneous Civil Application No.9 of 2022 which is the subject of this application, originates from the above cited main suit.

That being the case, then it is my considered view that the suit which can be said to be in a good position of disposing of the rights of the parties is the main suit, that is Civil Case No. 02 of 2022, and not the said miscellaneous civil application which in my considered opinion, was filed by the first respondent with a view of seeking leave of the trial court for him to be joined as an interested party in order to protect the government interest. Hence, it cannot be said, as wrongly submitted by the applicant's counsel, that such case finally determined the rights of the parties.

Now comes the question, does the trial court's ruling amount to an interlocutory decision? In order to answer such important question, one has to invoke the provisions of section 79(2) of the CPC to test whether the impugned decision meets the qualification stated therein. Section 79(2) of the CPC provides that:-

*"(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit".*

From the above provision it means that an application for revision can only be brought before this court by an aggrieved party, if there was any preliminary or interlocutory decision or order of the subordinate court which has the effect of finally determining the suit.

A simple understanding on that point is that once such decision or order is made, then the trial court is left with nothing more to decide on. In determining whether the decision or order is final or not resort has to be made to the case law.

Luckily, we have now plenty of authorities on such area including, but not limited to the case of **Tanzania Posts Corporation vs Jeremiah Mwandu** (supra) as which was cited by the counsel for the applicant, but also, we have the case of **Peter Noel Kingamkono Vs Tropical Pesticides**, Civil Application No. 2 of 2009 (all unreported). In the latter case, the Court of Appeal stated that, and I wish to quote, *"...it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the nature of order test". That is, to ask oneself whether the judgment or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

Also, in the case of **Commissioner General Tanzanian Revenue Authority & AG. Vs Milambo Limited**, Civil Appeal No. 62 of 2022 CAT at Dar es Salaam at page (Unreported) where it was stated that,

*"What constitutes an interlocutory order is the decision of the Court which does not deal with the finality of the case but settles subordinate issues relating to the main subject matter which may be necessary to decide during the pendency of the case due to time sensitivity of those issues".*

Thus, applying such principles of law and the given definition of what constitutes an interlocutory order, I am of the view that the decision of the trial court amounts to an interlocutory order and not as submitted by the counsel for the applicant.

This is because **first**, such ruling does not deal with the finality of the main suit that is Civil Case No.02 of 2022 which is still pending in the District Court of Sumbawanga, but it dealt with the first respondent's prayer to be joined as an interested party in such main suit which prayer was granted by the trial court; hence, under such circumstances it cannot be said that the said ruling had finally disposed of the main suit.

**Second**, with due respect to the counsel for the applicant, I cannot share his argument that an order of award of cost in Misc. Civil Case No. 09/2022 finally disposed of the rights of the parties. I think he misdirected himself on that and I am convinced by Mr. Mwandu's submission that such order of costs did not finally dispose of the main suit and/or the rights of the parties in that miscellaneous.

The award of costs is one of the reliefs which can be granted to the winning party at the trial court's discretion in order to restore his status quo which he had before filing of the case. The same can also be granted in order to



restrain the losing party from lodging hopeless cases and cause inconvenience to the other party.

The above observation can be supported by the case of **Bahati Moshi Masabile T/A Ndono Filing Station**, Civil Appeal No. 216 of 2018 (HC) at Dar es salaam in which the High Court stated,

*"Costs serve among other purposes, to bar parties from filing hopeless cases. There are two reasons: first, upon losing the case the loser will pay costs of the case. This weakens the loser financially. Second, award of costs puts the winning party at his/her financial position prior to being sued as far as costs of the case are concerned. The reason been that the winning party has to be refunded all the costs incurred during the trial of the case."*

There is no doubt that among the reasons which convinced the trial court to order the applicant to pay costs, was that the first respondent had incurred some costs in prosecuting a Miscellaneous Civil Application No. 09 of 2022. Hence, it is my view that the trial court was justified in ordering the same.

Therefore, due to the above reasons, I find the second preliminary point of objection raised by the first respondent to be meritorious, and I do not see if there is any need to proceed with the third issue of determination since it is obvious that the second point is enough to dispose of this application.

Consequently, I sustain the first respondent's preliminary objection to the extent stated above. Accordingly, the application is struck out for being incompetent. Costs to follow the event.

  
**A.A MRISHA**  
**JUDGE**  
**16/03/2023**

**Dated at Sumbawanga this 16<sup>th</sup> day of March, 2023.**



  
**A.A. MRISHA**  
**JUDGE**  
**16/03/2023**

Date - 16/03/2023

Coram - Hon. K. Saguda, Ag. DR

Applicant - Absent

1<sup>st</sup> Respondent - Represented by Ms. Mbuki Allen-Advocate

2<sup>nd</sup> Respondent - Absent


B/C - Mariam Kawawa

**Ms. Mbuki Allen- Advocate** for 1<sup>st</sup> Respondent: The matter is coming for Ruling. We are ready to receive it.

**Sgd: K. Saguda**  
**Ag. Deputy Registrar**  
**16/03/2023**

**Court:** Prayer is hereby granted and the same is delivered accordingly on this 16/03/2023.



  
**Sgd: K. Saguda**  
**Ag. Deputy Registrar**  
**16/03/2023**