IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A)

CIVIL REVISION NO. 223/17 OF 2019

MODEST JOSEPH TEMBA.....APPLICANT

VERSUS

BAKARI SELEMANI SIMBA AND

CHIKU ZUBERI SALUM (*as joint administrators of the*

Estate of the Deceased **ASHURA KONGORO).....1st RESPONDENT**

SALUM RAHIM ABDULLAH AMRENE.....2nd RESPONDENT

(Arising from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Wambura, J.)

dated the 29th day of September, 2017

in

Land Case No. 356 of 2014

.....

RULING OF THE COURT

14th June & 10th August, 2022.

FIKIRINI, J.A.:

The applicant, Modest Joseph Temba, had sued Asha Kongoro (now deceased) and Salum Rahim Abdullah Amrene (hereinafter referred to as 1st and 2nd defendants) before the High Court, in Land Case No. 356 of 2014 for declaratory orders that the contract signed between the applicant

and the 1st defendant dated 18th January, 2012 is valid, whereas the agreement dated 30th March, 2012 between the 1st and 2nd defendant is null and void; that the intended transfer of ownership of the disputed premises should stop or is ineffectual; that the defendants pay damages and cost of the suit. Both defendants filed their written statements of defence denying the claim levelled against them and prayed for the dismissal of the suit.

During the hearing of the suit, the 1st defendant passed on. The present joint administrators, who in this application would be referred to as the respondents, were appointed to represent the deceased under Order XXII Rule 4 (1) of the Civil Procedure Code, Cap. 33 R. E. 2002 [now R.E. 2022] (the C.P.C.). However, no amendment to the plaint was made to include the jointly appointed administrators as parties to the suit. This irregularity led to the suit against the 1st defendant being marked as abated under Order XXII Rule 4 (3) of the C.P.C. The suit was dismissed.

Aggrieved by the decision, the applicant initially preferred an appeal to this Court by lodging a notice of appeal on 9th October, 2017, as indicated on page 289 of the record of revision. Subsequently,

Miscellaneous Land Application No. 896 of 2017, was filed seeking leave to appeal to this Court. On 17th April, 2018, the High Court struck out the application due to variation in the names of the parties in the judgment and decree in the application. In between, as reflected on pages 293 to 294 of the record of revision, on 22nd November, 2017, the applicant wrote a letter to the Registrar requesting a change of name in the judgment and decree and entering the names of joint administrators. On 8th May, 2018, the applicant asked to withdraw the notice of appeal lodged on 9th October, 2017, and the request was granted on 16th May, 2018.

The applicant did not stop there. On 29th May, 2018 he successfully filed Civil Application No. 196/17 of 2018 for extension of time to file revision against the High Court judgment and decree in Land Case No. 356 of 2014, which was granted on 6th May, 2019, hence the present application for revision.

The respondents raised a preliminary objection on the 1st June, 2022, challenging the competence of the application for revision. On 14th June, 2022, when the application came on for a hearing, Mr. Daniel Ngudungi and Mr. Bernard Shirima learned advocates appeared for their respective

parties. In his submission, Mr. Shirima refuted the contention that the judicial process had blocked the applicant's right of appeal. He contended that the High Court correctly struck out the application for leave as the names featured were not those appearing in the judgment and decree in Land Case No.256 of 2014. In addition, he argued that even the letter written to the Registrar could not have been acted upon as the notice of appeal had already been lodged by then. To support his proposition, Mr. Shirima cited the case of **Sauda Juma Urassa v. Coca-Cola Kwanza Limited**, Civil Appeal No. 227 of 2018 (unreported). Mr. Shirima maintained that no judicial process hindered the applicant from following the correct procedures. According to him, the applicant simply preferred revision over appeal, which is not the right course.

After the striking out order, the applicant had an option of fixing the imperfection and refile the application seeking the relief intended. Or, in the alternative, the applicant could have approached this Court seeking leave. Mr. Shirima thus prayed for this application for revision to be struck out.

On his part, Mr. Ngudungi, responded by maintaining, on the one hand, that the applicant's right to appeal had been blocked by the judicial process and, on the other, that the preliminary point of objection was premature as it was, in essence, arguing the applicant's first point in the notice of motion.

He further unveiled that the 1st respondent passed on before the 1st pre-trial conference. A prayer for adjournment was made and granted as indicated on pages 402 to 403 of the record of revision, and the case was set for mention on 1st September, 2015. On the 1st September, 2015, as reflected on pages 404 to 405, the court was informed on the appointment of the administrators of the 1st respondent's estate. The court endorsed the appointment without making any orders or observing requirements under Order 1 Rule 10 (2) of the CPC. Therefore, the judgment came out reflecting the deceased's name. On 9th October, 2017, the applicant lodged a notice of appeal and applied for certified copies of the judgment, decree, proceedings, and exhibits featuring the names of the administrators.

Mr. Ngudungi questioned whether the High Court was in a position to amend the pleadings after the decision. He answered that the High Court

could not do that, and thus, the revision was the proper way rather than appeal, which has been blocked by the judicial process. Admitting that the applicant had to seek amendment at the trial stage, Mr. Ngudungi referred us to the case of **Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269 and urged us to consider that the applicant has come to us under an exceptional circumstance. The application was thus properly before us, maintained the learned advocate and emphasized that, the respondents will not be prejudiced in any way.

He was probed by us if leave was required to come to us for an appeal. His response was in the negative that no leave was needed since this was a land matter. However, he was quick to state that since the respondents were not impleaded which exercise ought to have been carried out prior to the judgment, the records as they are, the applicant could not have been accommodated by way of an appeal.

Winding up his submission, he contended that the suit against the 1st respondent had abated under Order XXII Rule 4 (1) of the C.P.C., as indicated on page 286 of the record of revision, simply because the names of the legal representatives did not feature in the record of proceedings

before the High Court, consequently blocking the applicant's right to appeal.

In a brief rejoinder, Mr. Shirima submitted all that the applicant's advocate has raised could have been presented by way of an appeal. The applicant's effort to rectify the omission could not have any effect, as by then, the pending notice of appeal was already in existence as shown on page 289 of the record of revision and the letter to the Registrar requesting the necessary documents on page 291. He concluded his rejoinder by submitting that the applicant could have opted for a review rather than the present revision at that point in time.

It is a settled principle that once there is a preliminary objection, it must be dealt with first before the application or appeal is heard. There is a plethora of decisions including **Shahida Abdul Hassanali Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999, **Bank of Tanzania Ltd v. Devram P. Valambhia**, Civil Application No. 15 of 2002, **Thabit Ramadhan Maziku and Kisuku Salum Kaptula v. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar,** Civil Appeal No. 98 of 2011 and **Issa Mahamoud Msonga v. Zakaria Stanislaus**

and 2 Others, Civil Appeal No. 21 of 2019 (all unreported), to mention a few.

It is a settled principle that the Court rarely does exercise its revisionary powers where a party's right to appeal is open. The rationale being to minimize the usurping of the revisionary powers as a substitute to appeal. A number of our decisions has clearly illustrated that, including **Mosses Mwakibete v. The Editor, Uhuru & 2 Others** [1995] T. L. R. 134, **Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269, **Augustine Lyatonga Mrema v. R** [1999] T.L.R. 273 and **Dismas Chekemba v. Issa Tanditse,** Civil Application No. 2 of 2010, and **Felix Lendita v. Michael Longido,** Civil Application No. 312/17 of 2017 (both unreported), to list a few. In **Moses Mwakibete**, the Court held *inter alia* that:

> "*The Court of Appeal can be moved to use its revisional jurisdiction under section 2 (3) (now section 4 (3) of the Appeallate Jurisdiction Act, 1979 (now R.E. 2019) (the A.J.A.) only where there is no right of appeal,* ***or where the right of appeal is there but has been blocked by judicial process,*** *and lastly, where the right of appeal existed but not*

taken; good and sufficient reasons are given for not having lodged an appeal." [Emphasis added]

Elaborating more, in the **Halais Pro-Chemie** (supra), the Court put in place four (4) tests or conditions to be passed to allow this Court and parties to exercise revisionary powers, namely: *one*, the Court can do so *suo motto* and at any time invoke its revisional powers in respect of the proceedings in the High Court; *two,* the revisional powers can be exercised where there are exceptional circumstances; *three,* revisional powers can be invoked in matters which were not appealable with or without leave; and *four*, where the appellate process has been blocked by judicial process. At this juncture, we have to pose and consider whether the applicant's right to appeal has been blocked by the judicial process as alleged.

It is evident from the record of revision that the 1st respondent was the 1st defendant in Land Case No. 356 of 2014. She, unfortunately, passed on, resulting in the present respondents to be appointed administrators of her estate. While this occurred way too early in the proceedings, the two appointed administrators were regrettably not impleaded. The judgment, which is the subject of the present application for revision, came out on

29th September, 2017, with the deceased's name appearing instead of the respondents. Initially, the applicant filed a notice of appeal and requested from the Registrar all the necessary documents. At some point, the applicant wrote to the Registrar asking to insert the changes so that the judgment and decree bore the respondents names, but the attempt was futile.

The notice of appeal was withdrawn, and the applicant successfully applied for extension of time to lodge revision. Whereas Mr. Ngudungi considers the situation falling within the ambit calling for us to exercise our rarely invoked revisionary powers, Mr. Shirima is of a different view; he disputes and challenges the position with an argument that there is no blockage in respect of the judicial process warranting a revision. He asserts that the applicant still have an appeal as the proper avenue to approach this Court. We disagree with Mr. Ngudungi that the judicial process has blocked the applicant from exercising his right of appeal. We agree with the position taken by Mr. Shirima that the applicant prematurely terminated his right to appeal, not because the judicial process blocked him, but because he preferred revision over the appeal.

After the High Court had struck out the Miscellaneous Land Application No. 896 of 2017, application for leave to appeal to this Court because the names on the application were different from those in the judgment and decree, the applicant had an option of seeking for review under Order XLII Rules 1 (1) (a) and 2 of the C.P.C. The provision provides thus:

> "1 (1)-*Any person considering himself aggrieved-*
>
> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) N/A*
>
> *And who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or* ***on account of some mistake or error apparent on the face of the record, or for any other sufficient reason,*** *desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."* [Emphasis added]

The applicant chose to file an application for revision instead of a review so that the omission or error apparent on the face of the record could be rectified. This ought to have been before or even after withdrawing the notice of appeal. We are of the position that the applicant incorrectly preferred this application for revision.

Another option would have been an application under section 96 of the C.P.C., which governs amendments of judgments, decrees, or orders. The provision states as follows-

> *"96- Clerical or arithmetical mistakes in judgments, decrees or orders, or* ***errors arising therein from*** *any accidental slip* ***or omission may, at any time, be corrected by the court either of its own motion or on application of any of the parties."*** [Emphasis added]

We are of the opinion that the applicant never exhausted all the remedies available before resorting to revision. The conclusion that the appeal remedy was blocked by judicial process is incorrect, and furthermore, no exceptional circumstance was articulated to persuade us to hold otherwise.

We conclude by saying that the present application is misconceived. In the end, we sustain the preliminary objection and strike out the application for revision with costs.

DATED at **DAR ES SALAAM** this 9th day of August, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered this 10th day of August, 2022 in the presence of Ms. Jackline Kulwa, counsel for the applicant who also holding brief for Mr. Reginald Shirima for the Respondents, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL