

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A, FIKIRINI, J.A. And KIHWELO, J.A.)**

**CIVIL APPLICATION NO. 480/17 OF 2020**

- 1. PRAKSED BARNABAS** (Legal representative of  
**HARRISON MANDALI** .....**1<sup>st</sup> APPLICANT**
- 2. MEKEFASON MANDALI**.....**2<sup>nd</sup> APPLICANT**
- 3. REHEMA R. KANGE** .....**3<sup>rd</sup> APPLICANT**
- 4. MARIAM MAGERO**.....**4<sup>th</sup> APPLICANT**
- 5. EZRA J. MATOKE**.....**5<sup>th</sup> APPLICANT**
- 6. MARY KILIAN JOSEPH MCHAU** (Legal representative  
**KILIAN J. MCHAU**.....**6<sup>th</sup> APPLICANT**
- 7. ABDALLAH J. MVUNGI**.....**7<sup>th</sup> APPLICANT**
- 8. ELIHURUMA MREMI**.....**8<sup>th</sup> APPLICANT**
- 9. RUKIA ATHUMAN**.....**9<sup>th</sup> APPLICANT**
- 10. MAJUTO RAJABU MBISA** (Administrator of the estate  
of **ABUU M. BASAI**).....**10<sup>th</sup> APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES  
OF THE ARCHDIOCESE OF DAR ES SALAAM .....RESPONDENT**  
(Application from the decision of the High Court of Tanzania Land  
Division at Dar es Salaam)  
(**Makani, J.**)

**dated the 7<sup>th</sup> day of September, 2020**

**in**

**Civil Reference No. 04 OF 2019**

.....

**RULING OF THE COURT**

16<sup>th</sup> & 29<sup>th</sup> August, 2022

**KIHWELO, J.A.:**

In this application, the applicants through a notice of motion under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the Act) as well as Rule 65 (1) and (4) of the Tanzania Court of Appeal Rules, 2009

("the Rules") are seeking to challenge the decision of the High Court of Tanzania, Land Division (Makani, J.) in Civil Reference No. 4 of 2019. They were aggrieved. So, on 6<sup>th</sup> November, 2020 they lodged the present application through the services of Mbamba & Co. Advocates. When the appeal was due for hearing, Mr. Michael J.T. Ngalo, learned advocate for the respondent, raised two preliminary points of objection notice which was filed on 23<sup>rd</sup> December, 2020 under rule 107 (1) of the Rules, to the effect:

*"(a) that the application is misconceived and unmaintainable for the reason that the applicants had a right of appeal against the High Court's decision and order dated 7<sup>th</sup> September, 2020 which right was and is still available to the applicants; and  
(b) that the application is bad in law for including or joining therein, the 1<sup>st</sup>, 6<sup>th</sup> and 10<sup>th</sup> applicants who have not been properly and formally made parties to the proceedings before the High Court hence lacking the requisite locus standi.*

As it is a customary practice of this Court that where there is a notice of preliminary objection raised in an appeal or application, the Court is first required to determine the objection before going into the merits or substance of the case or application before it. See, **Bank of Tanzania Ltd v. Devram P. Valambhia**, Civil Application No. 15 of 2002 (unreported).

Hence, we allowed the preliminary objection to be argued first, before the hearing of the application on merit.

Before proceeding, we find it imperative to briefly give a historical account of this matter, which is, ostensibly, short and not very difficult to comprehend. The applicants and the respondent had a dispute over Plot No. 31 Block "A" Kimara Matangini dating way back in 2009 when the applicants instituted Land Case No. 181 of 2009 against the respondent before the High Court of Tanzania Land Division. On 22<sup>nd</sup> July, 2016 the High Court (Mkuye, J. as she then was) declared the respondent the lawful owner of the suit land and the applicants were jointly declared trespassers. Subsequently, on 20<sup>th</sup> September, 2016 the respondent filed a Bill of Costs which upon hearing the Taxing Master taxed it at TZS. 60,242,000.00. Disgruntled, the applicants filed a reference before the High Court. Nonetheless, like the fate of their land case at the High Court, their reference to the High Court was dismissed. Undeterred, they lodged the present application before the Court.

When the application was ripe for hearing, it was, on 16<sup>th</sup> August, 2022, Mr. Samson Mbamba, learned counsel, appeared for the applicants while Mr. Michael Ngalo, learned counsel appeared for the respondent. At the outset, Mr. Ngalo intimated to abandon the second preliminary point of

objection, a prayer which was granted after not being resisted by his learned friend Mr. Mbamba.

Arguing in support of the preliminary objection, Mr. Ngalo was very brief but focused. He contended that the applicants seek to challenge the decision of the High Court of Tanzania in Civil Reference No. 4 of 2019 which upheld the decision of the Taxing Master under Order 7 (1) and (2) of the Advocates Remuneration and Taxation of Costs Order GN No. 264 of 2015. In the premises, Mr. Ngalo argued that the impugned decision is appealable in terms of section 5 (1) (c) of the Act subject to leave of the High Court. For that he referred us to the decision of this Court in **D.B. Shapriya and Company Ltd v. Stefanutti Stocks Tanzania Ltd**, Civil Application No. 205/16 of 2018 (unreported) in which without mincing words the Court decidedly restated the time-honoured principle that revision is not an alternative to appeal.

Illustrating further, Mr. Ngalo argued that, the applicants have not demonstrated that there exists good and sufficient reason to justify recourse to revision instead of appeal. To bolster his submissions, he cited to us a chain of authorities of this Court in **Olmeshuki Kisambu v. Christopher Naing'ola** [2002] TLR 280, **Regina Moshi v. The Board of Trustees of the National Social Security Fund (NSSF)**, Civil Application No. 457/18

of 2019, **Patrick Magologazi Mongella v. The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 342/18 of 2019, and **Hasmukh Bhagwanji Masrani v. Dodsai Hydrocarbons and Power (Tanzania) PVT Limited** (all unreported).

It is in light of the above submission that Mr. Ngalo urged us to uphold the preliminary point of objection.

Mr. Mbamba premised his responding submissions by arguing that the general principle is that, right of appeal is a creature of statute and not judicial pronouncement and that, there is no automatic right to appeal, whenever there is an appeal to this Court there is a law behind which gave the right to appeal. Reliance was placed on the cases of **Morris Hamza Azizi v. Angelina Simon Mhavile and Another**, Civil Appeal No. 73 of 2013 and **Paul A. Kweka and Another v. Ngorika Bus Services and Transport Co. Ltd**, Civil Appeal No. 68 of 2003 (both unreported).

Mr. Mbamba further argued that section 5 (1) (c) of the Act does not create right to appeal but rather it is a mere procedural provision and therefore he contended that the impugned decision was not amenable for appeal. To facilitate the appreciation of the proposition put forward by the learned counsel, he referred us to the case of **CRDB Bank Limited v.**

**George Kilindu and Another**, Civil Appeal No. 137 of 2008 and **East African Development Bank v. Khalfan Transport Co. Ltd**, Civil Appeal No. 68 of 2003 (both unreported). In his view the preliminary objection raised was nothing but unnecessary and improper practice meant to delay the process and increase costs upon the parties. He cited the caution we raised in **Hammers Incorporation Co. Ltd v. The Board of Trustees of the Cashewnut Industries Development Trust Fund**, Civil Application No. 93 of 2015 (unreported) in which we cited the decision of the erstwhile Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] E.A. 696 regarding the increasing trend of raising points, which should be argued in the normal manner. He rounded up his submission by praying that the preliminary objection should be dismissed for being devoid of merit.

In a brief rejoinder, Mr. Ngalo submitted that section 5(1) (a) and (b) of the Act gives an automatic right of appeal against orders from the High Court to this Court. He reiterated that revision is rarely used by this Court and that the matter before the Court was not amenable for revision and therefore the application should be dismissed. When we prompted him on whether it was proper to dismiss an incompetent application Mr. Ngalo was

quick to respond that dismissal was befitting so that the applicants could be barred from coming back to Court with the same matter.

We have dispassionately considered the submissions by the learned counsel for both the applicants and the respondent in response to the preliminary objection and we find it appropriate to digress a bit the relevant provision of section 5 (1) of the Act which provides;

*"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;*

*(b) N/A*

*(c) with the leave of the High Court or of the Court of Appeal, **against every other decree, order, judgment, decision or finding of the High Court.**"*

In the instant application, the applicants were dissatisfied by the ruling and order of the High Court that dismissed the application for Reference of the decision of the Taxing Master in Application No. 119 of 2016. A cursory and critical glance of the provision of section 5 (1), it seems clear to us that, by all standards the provision is very categorical and clear, and it leaves no

room for the counsel for the applicants' proposition that the section is procedural and therefore does not confer any right to appeal to this Court. In any event, section 5(1)(c) of the Act should not be read in isolation like Mr. Mbamba sought to convince us believe so.

In our respectful opinion, we think that, the above provision tells it all. It is, we think, apparent that the applicants ought to have preferred an appeal to this Court instead of the instant application for revision which is improper. The law is long settled and clear that revision is not an alternative to the appeal process. See, for instance, **D.B. Shapriya and Company Ltd** (supra). The two remedies are different and should not be invoked in place or in substitution of the other. Appeals to this Court are governed under section 5 and 6 of the Act whereas revisions are invoked under section 4 of the said Act. It is momentous to observe that whereas revision is at the discretion of the court, an appeal is a right of a party subject of course to other factors such as limitation, leave or a certificate on point of law as the case may be. See, for instance, **Christom H. Lugiko v. Ahmednoor Mohamed Ally**, Civil Application No. 5 of 2013 (unreported).

In the case of **Halais Pro-Chemie v. Wella A.G** [1996] TLR 269 we decidedly observed that;



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

Time without number, we have pronounced ourselves in this matter to the effect that, the appellate jurisdiction and the revisional jurisdiction of the Court are, in most cases mutually exclusive. In the case of **Transport Equipment Ltd v. Devram Valambhia** [1995] TLR 161 the Court held that;

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

Mr. Ngalo argued, and in our view, rightly so, that the applicants in the present application have not been able to demonstrate, leave alone sufficiently, that, there are exceptional circumstances warranting the instant application for revision instead of an appeal as required by law. Even the case of **East African Development Bank** (supra) cited by Mr. Mbamba himself particularly at page 29 of the typed decision it is very clear that section 5(1) of the Act provides right of appeal to the Court and that this

right is subject to the provisions of any other written law for the time being in force.

For the above reasons, we find that under the circumstances of this matter the preliminary objection has merit and the application is misconceived and we strike it out with costs.

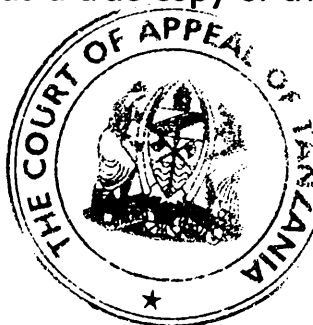
**DATED at DAR ES SALAAM this 26<sup>th</sup> day of August, 2022.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The ruling delivered this 29<sup>th</sup> day of August, 2022 in the presence of Ms. Aziza Msangi, learned counsel for the applicants and Mr. Nicasi Ladislaus Kivia, Deputy Chairman of Kimara Parish for the respondent, is hereby certified as a true copy of the original.



  
C. M. Magesa  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**