**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. 561/01 OF 2019**

**GOLDEN PALM LIMITED ..... APPLICANT**

**VERSUS**

**COSMOS PROPERTIES LIMITED ..... RESPONDENT**

**(Application for revision from the Order of the High Court of Tanzania at Dar es Salaam)**
**(Mutungi, J.)**

**Dated the 6th day of June, 2017**
**in**
**Civil Case No. 157 of 2014**
**.....**

# RULING OF THE COURT

18th August & 13th September, 2022

## NDIKA, J.A.:

The Court is moved in this matter pursuant to section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2022 ("the AJA") and rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") to revise the order of the High Court of Tanzania at Dar es Salaam (B.R. Mutungi, J.) dated 6th June, 2017 in Civil Case No. 157 of 2014 dismissing the said suit.

The application is anchored on two grounds: first, that the High Court as constituted had no jurisdiction to determine the suit whose subject matter was landed property and, on that basis, its orders were a nullity. Secondly, that the High Court erred in law by refusing to extend time for lodging an

application for review on the said question of jurisdiction even though such a question could be raised at any stage of proceedings and that it usually constitutes a sufficient ground for extension of time.

The background to this matter is fairly straightforward. Golden Palm Limited, a limited liability company incorporated in Tanzania, ("the applicant") instituted Civil Case No. 157 of 2014 in the High Court against Cosmos Properties Limited, also a limited liability company incorporated in Tanzania, ("the respondent") for a declaratory relief, permanent injunction and damages for breach of contract. The subject matter of the dispute was a multistorey modern building complex known as Plot No. 63/27, UWT Street, Upanga, Dar es Salaam of which the respondent sold to the applicant office space covering 191 square metres on the 3rd floor along with five car parking lots on the 4th floor. The sale was for the consideration of US$ 355,600.00 VAT exclusive as evidenced by a sale agreement dated 15th March, 2013.

On its part, the respondent contested the suit and counterclaimed for breach of contract and payment of outstanding purchase price and damages.

It is apparent from the pleadings that the parties had no dispute over the ownership of the landed property in dispute. The sticking point was the

payment of the outstanding portion of the purchase price and the interpretation of contractual clauses on the timing of the payment.

On 6th June, 2017, the suit came up before the High Court for hearing but neither the applicant nor its advocate appeared in court. On that basis, the court dismissed the suit for "want of prosecution." We wish to interpose here and observe that the suit was apparently dismissed for non-appearance in terms of Order IX, rule 8 of the Civil Procedure Code, Cap. 33 R.E. 2019 ("the CPC"). Being bemused, the applicant unsuccessfully applied to that court under Order IX, rule 9 of the CPC vide Miscellaneous Civil Application No. 318 of 2017 for the aforesaid dismissal order to be set aside. Undaunted, the applicant lodged Miscellaneous Civil Application No. 516 of 2018 seeking extension of time within which to apply for review of the aforesaid dismissal order of 6th June, 2017. This matter too was barren of fruit; for it was dismissed with costs for want of merit.

The applicant, then, approached this Court through Civil Application No. 208/01 of 2019 seeking extension of time for applying for revision of the High Court's order of 6th June, 2017, which a single Judge of the Court (Wambali, J.A.) granted on 19th November, 2019. Accordingly, the applicant instituted these revisional proceedings on 24th December, 2019.

When Messrs. Emmanuel Msengezi and Daniel Welwel, learned counsel for the applicant and respondent respectively appeared before us for the hearing, we prompted them to address us, at first, on the competence of this application as a threshold issue.

In his submission, Mr. Msengezi concedes, with notable forthrightness, that the application, as presented in the notice of motion and the supporting affidavit, is manifestly incompetent on the ground that the applicant ought to have pursued its grievance by way of an appeal instead of seeking revision of the impugned order. He acknowledged the settled principle that revisional proceedings cannot be instituted as an alternative to an appeal. However, the learned counsel, rather remarkably, urges us to desist from striking out the application. He contends, instead, that it would be in accord with the overriding objective enshrined in sections 3A and 3B of the AJA and in terms of rule 2 of the Rules to grant leave to the applicant to amend the application to bring it within the ambits of the law. However, he does not say how could that be possibly achieved.

On his part, Mr. Welwel, firstly, agrees with his learned friend that the matter is palpably incompetent. Elaborating, he submits that the applicant wrongly moved this Court for revision while it had the right of appeal against the High Court's order refusing to set aside the dismissal, which had the

effect of conclusively determining the rights of the parties in the suit. The said order, he contends, is appealable as is the order refusing extension of time to apply for review. He also agrees with his learned friend that revision could not be invoked in alternative or as a substitute to an appeal. To buttress his submission, he cited **Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269; **Moses Mwakibete v. The Editor – Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** [1995] T.L.R. 134; **Augustine Lyatonga Mrema v. Republic and Masumbuko Lamwai** [1999] T.L.R. 273; and **Miroslav Katic and Two Others v. Ivan Makobrad** [1999] T.L.R. 470. He made further reference to **D.B. Shapriya & Company Ltd. v. Bish International B.V.,** Civil Application No. 71 of 2003; **Dismas s/o Chekemba v. Issa s/o Tanditse**, Civil Application No. 2 of 2010; and **Modest Joseph Temba v. Bakari Selemani Simba and Chiku Zuberi Salum (as joint administrators of the estate of the deceased Ashura Kongoro) and Another**, Civil Application No. 233/17 of 2019 (all unreported).

As the regards the way forward, Mr. Welwel submits that since the revision does not fit within the parameters of law as enunciated by the Court in the cited decisions, notably **Halais Pro-Chemie** (*supra*), the matter is so

irredeemably incompetent that it cannot be improved or salvaged. He thus urges us to strike it out with costs.

We have carefully examined the record and the authorities cited in the light of the arguments of the learned counsel for the parties. As hinted earlier, while both learned counsel agree that the present matter is plainly incompetent, they part company on what should be its fate.

Before we determine the aforesaid sticking issue between the parties, it bears restating the settled position of the law that barring exceptional circumstances a party to the proceedings in the High Court cannot invoke the revisional jurisdiction of this Court as an alternative to the Court's appellate jurisdiction unless it is shown either that there are exceptional circumstances warranting that course or that the appellate process has been blocked by judicial process. Indeed, relying on its earlier decisions in **Moses Mwakibete** (*supra*) and **Transport Equipment Ltd. v. Devram P. Valambhia** [1995] T.L.R. 161, the Court, in **Halais Pro-Chemie** (*supra*) at page 272, propounded the following legal propositions on its revisional powers under section 4 (3) of the AJA:

> *"(i) The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;*

*(ii) 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;*

*(iii) 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;*

*(iv) 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."*

We are conscious that the dismissal order the subject of the instant matter is not automatically appealable as Order IX, rule 9 of the CPC provides recourse to the aggrieved plaintiff to move the trial court for the dismissal to be set aside. In this matter, the applicant rightly applied for the order to be set aside but his effort went unrewarded. As rightly argued by Mr. Welwel, since the High Court's order refusing to set aside the dismissal had the effect of finally and conclusively determining the rights of the parties in the suit so far as the applicant's claim is concerned, it was appealable to this Court in terms of section 5 (1) (c) of the AJA. Instead of appealing against the refusal to set aside the dismissal if it believed that the said dismissal emanated from

proceedings which were a nullity for want of jurisdiction, the applicant opted to pursue a futile quest for enlargement of time within which to seek review.

While it is quite apparent that the instant matter does not fall under propositions (i) and (iv) enunciated in **Halais Pro-Chemie** (*supra*), we think it also fails to fit within propositions (ii) and (iii) because there are no exceptional circumstances or justification for the applicant's failure to seek relief by way of an appeal against the refusal to set aside the impugned dismissal. Our recent decision in **Modest Joseph Temba** (*supra*) is so instructive in this matter. In that case, we declined to exercise our revisional powers in a matter that the applicant had other avenues for remedy. In the same vein, we desist from exercising our revisional jurisdiction in matter that the applicant could have sought redress by way of an appeal against the refusal to set aside the impugned dismissal. Accordingly, we find that this matter is evidently misconceived.

Coming to the fate of this application, we think we need not travel a long distance on the issue. We hasten to say that we cannot take seriously Mr. Msengezi's prayer that the applicant be allowed to rectify the anomaly. Certainly, we are conscious of our solemn duty in terms of rule 2 of the Rules, which is to give effect to the overriding objective enshrined in sections 3A and 3B of the AJA. With the advent of the overriding principle, the Court's

preoccupation is to achieve substantial justice and, within that spirit, the Court can ignore minor technical lapses instead of invoking the draconian measure of removing a litigant from the seat of justice by striking out his or her matter. But in the present circumstances, we cannot fathom how the notice of motion could be rectified or improved to bring it within the ambits of the law. We are not surprised that Mr. Msengezi does not suggest how the application could be salvaged.

In the final analysis, we find the present application misconceived. In consequence, we strike it out with costs.

**DATED** at **DAR ES SALAAM** this 12th day of September, 2022.

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

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

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

The Ruling delivered this 13th day of September, 2022 in the presence of Mr. Emmanuel Msengezi, learned counsel for the Applicant and Mr. Daniel Welwel, learned counsel for the Respondent is hereby certified as a true copy of the original.

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