IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO.332/01 OF 2018

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

JOWHARA CASTOR KIIZA .....APPLICANT

VERSUS

YASIN HERSI WARSAME .....RESPONDENT

(Revision from the decision of the High Court of Tanzania at Dar es Salaam

(Munisi, J.)

Dated the 20th day of April, 2018

in

Misc. Civil Application No. 280 of 2017

.....

RULING OF THE COURT.

24th Aug. & 30th September, 2021

MWAMPASHI, J.A:

This application for revision has a protracted background. It originates from Matrimonial Cause No. 12 of 2007 at Temeke Primary Court wherein the applicant herein petitioned for divorce against one Muzamil Shehe Hassan. In addition to the marriage being annulled on 27th April, 2007 division of matrimonial property was also ordered. Amongst the listed matrimonial property was a motor vehicle with Reg. No. T389 AMC which was later on attached by M/S Super Auction Mart by an order of the Primary Court. Following the attachment of the motor vehicle the respondent herein filed objection proceedings in the Primary

Court seeking for the release of the motor vehicle on the ground that the same belongs to him after it had been sold to him long time before the annulment of the marriage.

While the objection proceedings were still pending before the Primary Court, the respondent filed another application in the District Court at Temeke seeking revision of the decision of the Primary Court in Matrimonial Cause No. 12 of 2007 that listed the motor vehicle among the matrimonial properties. The District Court heard the application ex parte and ordered the release of the motor vehicle as prayed by the respondent. This decision by the District Court aggrieved the applicant causing her to appeal to the High Court (Civil Appeal No. 96 of 2007) whereby the High Court (Mihayo, J) on 09th July, 2008 allowed the appeal by quashing the District Court's order on the ground that the applicant was condemned unheard. Aggrieved by the High Court decision and desiring to appeal to the Court of Appeal the respondent successfully applied for leave to appeal on 17th June, 2009 (Nyerere, J) and later on 15th March, 2010, points of law were certified by the High Court (Juma, J as he then was).

Despite being granted leave to appeal and points of law being certified for him, the respondent did not appeal and the record was then returned back to Primary Court for the execution process to proceed.

The record shows that the applicant faced some difficulties and huddles in her quest to execute the decree and on 26th May, 2017 she decided to file Civil Application No. 280 of 2017 in the High Court seeking revision of proceedings and decision of the Primary Court of Temeke in Matrimonial Cause No. 12 0f 2007. The application was greeted by a preliminary objection on three points, **first**, that the application was hopelessly time barred, **second**, that the application was an abuse of court process and **lastly** that the application was made under a wrong and an inapplicable provision. The High Court (Munisi, J) on 20th April, 2018 upheld the objection on the ground of the application being time barred and dismissed the application. That is the decision the Court is being moved in the present application to revise.

This application for revision is bought by way of a notice of motion under section 4(3) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] (the Act) as well as under Rules 65(1)(2)(3)(4) and 51(1) of the Tanzania Court of Appeal Rules 2009 as amended (the Rules). The application is supported by an affidavit affirmed by the applicant whereas on his part the respondent resisted the application by filing an affidavit in reply affirmed by him.

According to the notice of motion the application is premised on the following grounds: -

1. *That the decision has contravened two Acts of Parliament.*
2. *That the decision is contrary to natural justice.*
3. *That the court below has failed to exercise two distinct jurisdictions vested in it by law.*

Whereas the applicant did also file written submission in support of the application in terms of rule 106(1) of the Rules, the respondent did not file any written submission against the application but he, on 16th August, 2021, through his counsel filed a notice of preliminary objection which sought to impugn the application on one point namely that: -

1. The applicant's application for revision is incompetent in Court for being preferred and invoked in a case where there is right of appeal.

As it is the rule of practice that a preliminary objection ought to be disposed of first, we had to hear the parties on the raised point of law first.

At the hearing of the application, the applicant appeared in person unrepresented whereas the respondent enjoyed the services of Mr. Odhiambo Kobas, learned counsel.

When called on to make his submission in support of the point of objection, Mr. Kobas, who was brief but focused to the point, urged the Court to strike out the application because it is incompetent and misconceived. He argued that the decision of the High Court sought to

be revised in this application is appealable with leave of the High Court. He further submitted that since the matter originates from Primary Court then it also needs a certification of point of law by the High Court. It was therefore insisted that there are no good grounds or exceptional circumstances for the Court to invoke its revisional powers as it is being sought by the applicant. Relying on **Transport Equipment Ltd vs. Devran P. Valambhia** [1995] TLR 164 and **Moses Mwakibete vs. The Editor-Uhuru, Shirika la Magazeti ya Chama and Another** [1995] T.L.R 134, Mr. Kobas prayed for the application to be struck out with costs.

In her brief submission in reply, the applicant asked the Court to overrule the objection on ground that the same is misconceived and misplaced. She argued that in refusing the application the High Court failed to exercise its jurisdiction and further that there are exceptional circumstances making the High Court decision revisable. The exceptional circumstances mentioned by her were **firstly** that the drawn order and the ruling of the High Court are at variance, **secondly** that the High Court did not decide on all the grounds that were raised before it and **lastly** that the decision is ambiguous. The applicant did therefore pray for the objection to be overruled.

In rejoinder it was submitted by Mr. Kobas that the High Court did not decide on all raised points because the single point on limitation sufficiently disposed of the application. He also insisted that there is no inconsistence between the drawn order and the ruling and that even if that is the case, such a defect could easily be rectified by the High Court. Mr. Kobas further argued that the High Court properly exercised its jurisdiction, that the decision is not ambiguous and also that there are no exceptional circumstances for the High Court's decision to be challenged by way of revision.

Having heard the submissions for and against the objection, we propose to begin by first restating the law that governs revision. It is trite principle of law that revisional jurisdiction of the Court under Rule 65 of the Rules, cannot be invoked as an alternative to the appellate jurisdiction except where there is no right of appeal or where such a right exists but the process of appeal has been blocked by judicial process or where there are exceptional circumstances. In **Transport Equipment Ltd** (supra) the Court held among other things that: -

> "*The appellate jurisdiction and the 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".

Again in **Augustino Lyatonga Mrema v. Republic and Masumbuko Lamwai** [1999] T.L.R. 273 the Court held that: -

"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter; the purpose of this condition is to prevent the power of revision being used as an alternative to appeal".

The above principle of law has been underscored by this Court in many other cases including **Hallais Pro-Chemie v Wella A.G** [1996] T.L.R 269, **Moses J. Mwakibete** (supra), **Balozi Abubakar Ibrahim and Another v. Ms. Benandys Limited and Two Others**, Civil Revision No. 6 of 2015 (unreported), **Mansoor Day Chemical Limited v. National Bank of Commerce Ltd,** Civil Application No. 464/16 of 2014 (unreported) and **Felix Lendita v Michael Long'idu**, Civil Application No. 312/17 of 2017 (unreported),

On the basis of the above restated principle of law, we propose to tackle the preliminary objection at hand by determining the following two simple issues; **first**, whether the impugned High Court decision is appealable or not and **second,** whether there are exceptional circumstances justifying invocation of revisional jurisdiction of the Court.

Beginning with the issue on whether the impugned decision is appealable or not, while was Mr. Kobas' argument that the decision is appealable with leave and a certificate of points of law, it was the stand by the applicant that the decision is not appealable. On our part, without even burning much energy, do agree with Mr. Kobas that as the impugned decision is on the matter originating from the Primary Court, then the decision is appealable upon certificate that a point of law is involved under section 5(2)(c) of AJA where it is stipulated as follows: -

> "5*(1) 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)[Omitted]*
>
> *(b)[Omitted]*
>
> *(c) [Omitted]*
>
> (2) *Notwithstanding the provisions of subsection (1)-*
>
> *(a) [Omitted]*
>
> *(b) [Omitted]*
>
> *(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order".*

That said, we therefore firmly find that the impugned decision is appealable. The applicant is, thus, seeking to invoke the revisional jurisdiction of the Court in lieu of an appeal which offends the law.

As on whether there are any exceptional circumstances that justify the invocation of the Court's revisional jurisdiction, this Court does not agree with the applicant that there exist any such circumstances. The fact that the High Court Judge disposed of the application on only one ground on limitation does not amount to exceptional circumstances. After all the non-determination by the High Court of the two grounds of objection could not have been a hindrance to the appeal process.

Further, the respondent's argument that the High Court ruling and drawn order are at variance lacks substance. Our examination of the record reveals no variance between the said two documents. On this, we are also of the same view with Mr. Kobas that even if there is such a variance, then the High Court is seized with powers to rectify it and it cannot therefore be said to amount to an exceptional circumstance. Lastly the argument that the High Court decision is ambiguous is also found to have no substance. Looking at the decision, we see no ambiguity and the applicant has shown or demonstrated to us no such a thing. In conclusion, we are therefore of the settled mind that

neither the grounds raised on the notice of motion which have not been substantiated at all nor the reason alluded on by the respondent in her submission, constitute or amount to any exceptional circumstances calling for the invocation of the Court's revisional jurisdiction.

In the final analysis and for the above given reasons, we find that the objection raised by the respondent has merits. The application is incompetent and misconceived and it is accordingly struck out with costs.

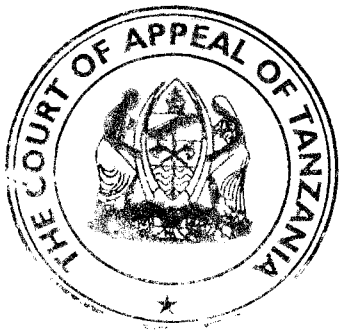
DATED at **DAR ES SALAAM** this 10th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The ruling delivered on 30th day of September, 2021 in the presence of applicant in person and Mr. Philibet Akaro, learned counsel for respondent is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL