IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CIVIL APPLICATION NO. 46 OF 1994
In the Matter of an Application for Revision

BETWEEN

TRANSPORT EQUIPMENT LTD. ..... APPLICANT

AND

DEVRAM P. VALAMBHIA ..... RESPONDENT

(An Application for the Revision of the Judgment, Decree and Order of the High Court of Tanzania at Dar es Salaam)

(Rubama, J.)

dated 12th February 1991 and 22 March, 1991

in

Civil Case No. 210 of 1989

RULING OF THE COURT

RAMADHANI, J.A.:

This is an application by the Transport Equipment Ltd. moving this Court to revise the judgment, decree and order of RUBAMA, J. in Civil Case No. 210 of 1989 dated 12th February and 22nd March 1991. The application is brought under the new powers of revision given to this Court by Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993.

At the hearing of this application, the respondent, Devram P. Valambhia, through his learned advocates, Mr. Moses Maira and Mr. Mabere Marando, came up with a preliminary objection containing two points. First, the powers of revision granted to this Court by Act

No. 17 of 1993 came into force on 24th December, 1993 (GN 908/93), so, he argued, the powers cannot operate retrospectively to affect rights which vested since 1991. He submitted that this application is incompetent and should be struck out. Secondly, the respondent argued that section 4(2) of the Appellate Jurisdiction Act, provides for revisional powers where there is an appeal pending before the Court.

It was pointed out to Mr. Marando, who started arguing the objection, that the application has been brought under sub-section (3) and not sub-section (2) of section 4. Mr. Marando conceded that error, admitted that sub-section (3) is wider and does not require an appeal to be pending. After being allowed to amend the motion by substituting sub-section (3) for sub-section (2), Mr. Marando argued that the application is still misconceived as sub-section (3) can only be invoked where there is no right of appeal.

It is our considered opinion that the second point, that is, whether or not revision under sub-section (3) of section 4 is available where there is a right of appeal, is enough to dispose of this preliminary objection. However, in order to make the ruling meaningful a brief court history of the parties is necessary. For clarity we shall use their names rather than legal labels as these have alternated a number of times. The present applicant shall simply be referred to as T.E.L. while the respondent as Valambhia.

On 22/8/1989 T.E.L. filed a plaint against Valambhia seeking monies then with the Bank of Tanzania to be paid to T.E.L. On 29/8/89 Mr. Ole Mboko, learned advocate for T.E.L., told NCHAMA, J. that he was holding a brief for Mr. Mkatte, learned counsel for Valambhia, and that the suit had been "Settled amicably out of court". The learned judge gave an order to that effect.

Valambhia filed a chamber application to set aside the order of 29/8/89 marking the suit settled out of court, alleging that fraud was used to obtain it. Mr. Mbuya, learned advocate who had taken over the case for T.E.L., was aware of the hearing date of the application but was absent on 10/12/90 and so it was heard ex-parte. On 28/12/90 RUBAMA, J. set aside the order marking the suit as settled out of court.

Valambhia, on the same day, 28/12/90, filed a written statement of defence (W.S.D.) and a counter-claim for 45% of the proceeds of the money due from the Government of the United Republic of Tanzania to T.E.L. A reply to the W.S.D. and a W.S.D. to the counter-claim were ordered to be filed by 25/1/91 and the hearing was to be on 1/2/91.

On the latter date Mr. Mbuya came with two applications: extending the time within which to file a reply and a W.S.D. to the counter-claim to 8/3/1991, and adjournment of the hearing of the suit to the second week of March, 1991. The two applications were refused, the plaint was dismissed, the counter-claim was granted

and Valambhia was declared entitled to 45% of the money as prayed. The learned judge also ordered Valambhia to prove quantum of general damages by affidavit to be filed on 5/3/1991. T.E.L. again did not file a counter-affidavit on quantum and was absent on the date set for the proof thereof. General damages were granted ex-parte.

T.E.L. being aggrieved by the above decisions filed a notice of appeal in this Court on 19/2/1991. However, a copy of that was not served on Valambhia. T.E.L. became aware of the non-service on 23/4/1991 when he received a copy of a notice of motion by Valambhia seeking to strike out that notice of appeal. Despite that discovery, T.E.L. did not file a notice of motion seeking to enlarge time within which to serve a copy of the notice of appeal on Valambhia until six months later, that is on 23/10/1991.

The matter went to MFALILA, J.A. for enlargement of time in which to serve a copy of the notice of appeal to Valambhia. That was refused and the reference from that refusal was also dismissed by three judges of this Court. T.E.L. returned again with an application for a review of the ruling of that reference relying on the inherent jurisdiction of this Court. There was a dispute as to whether or not we have inherent jurisdiction. That issue was referred to the full bench of this Court which ruled that there is inherent jurisdiction to review our decision in certain circumstances. So, the matter reverted to the three judges who, after

hearing submissions, corrected certain errors but found "no sufficient grounds for reviewing our previous ruling as asked." That was on 12th September, 1994.

This application to revise the decision of RUBAMA, J. comes to us from that background, that is, after the right of appeal was lost through the fault of the applicant himself.

As already said Mr. Marando's argument was that the door of revision is only open to a person who does not have a right of appeal and that the door is closed to the present applicant who had the right of appeal, tried to exercise it but was unsuccessful because of his failure to fulfill certain prerequisite conditions.

Mr. Marando said that the Appellate Jurisdiction Act is silent on the principle he has submitted but he contended that that is the principle governing revision in the lower courts. He cited section 79(1) of the Civil Procedure Code and also section 22 of the Magistrates Courts Act, 1984 for the revisional powers of the District Court over the Primary Courts and section 43 and 44 of the same Act for the revisional powers of the High Court.

The applicant was represented by a team of four advocates: Mr. Everest Mbuya, Mr. Shayo, Mrs. Oriyo and Mr. Rutabingwa. The first to respond was Mr. Mbuya who said that section 44(1)(b) of the Magistrates Courts Act is saved by section 79(2) of the C.P.C. He

then pointed out that section 44(1)(b) of the Magistrates Courts Act has wider powers of revision than section 79(1) of the C.P.C. Mr. Mbuya argued that section 44(1)(b) of the Magistrates Courts Act, negates the principle propagated by Mr. Marando. Mr. Mbuya pointed out further that section 4(3) of the Appellate Jurisdiction Act offers a party a choice of coming to this Court on appeal or for revision. He submitted that where a party has a good reason he can still seek revision after he has failed to prosecute an appeal. However, he did not say what is a good reason.

Mr. Shayo also took his turn to address the Court. He said that the rights of revision and appeal under section 4(3) are concurrent and simultaneous and that there is no limitation. May be we stop here and observe that we cannot pretend that we have understood what he meant by "concurrent and simultaneous".

In reply, on behalf of the respondent, Mr. Maira maintained that it is irregular for a party to choose both appeal and revision at the same time, even under section 44(1)(b) of the Magistrates Courts Act.

Section 79 of the C.P.C. restricts revision to where there is no right of appeal. Sub-section (1) of that Section provides as follows:

> "The High Court may call for the record of any case which has been decided by any court subordinate to the High Court

> and in which no appeal lies thereto ..." (emphasis is ours)

However, that limitation is absent in sections 22, 43 and 44 of the Magistrates Courts Act, contrary to what Mr. Marando submitted. In fact, as Mr. Mbuya pointed out, section 44(1)(b) of the Magistrates Courts Act provides for very wide powers of revision than what is contained in Section 79(1) of the C.P.C. That sub-section provides:

> "(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court -
>
> (a) ...
>
> (b) may, in any proceeding of a civil nature determined in a district court or a court of a resident magistrate, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit."

There is a proviso to the effect that an order shall not be made to the adverse interest of a party without being given an opportunity of being heard.

We must admit that it is difficult to reconcile sub-section (1) (b) of section 44 of the Magistrates Courts Act with section 79(1) of the C.P.C. And yet, sub-section (2) of section 79 of the latter legislation expressly saves the revisional powers of the High Court under the Magistrates Courts Act. Section 79(2) provides:

> "(2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates Courts Act, 1963".

We have not been referred to any authority which has decided on these two provisions. Any way, that is not important. The reconciliation of the two sections is not an issue before us. These enactments were cited to us by way of analogy to help us determine when the right of revision is available under section 4(2) of the Appellate Jurisdiction Act. But, as we have said earlier, we cannot find that assistance from the provisions cited to us.

The issue we have to decide, also arose in this Court in M/s Jewels & Antiques (T) Ltd. v. M/s National Shipping Agencies Co. Ltd. Revision No. 26 of 1994 (unreported). The applicant obtained an ex-parte judgment against the respondent in Civil Case No. 51 of 1984 in the High Court at Arusha. However, he found some errors in that judgment and sought a review to

correct them by filing, in the same court, Misc. Civil Application No. 14 of 1991. The errors apparent on the judgment and decree were corrected. A year later he filed Misc. Civil Application No. 57 of 1993 in the same court seeking to correct errors due to accidental slip or omission in Misc. Civil Application No. 14 of 1991. The matter went before the same judge who dismissed the application because what was complained against was not an accidental omission but was a specific finding by which the prayer was refused for lack of supporting material. The learned judge was thus functus officio.

So, the applicant sought to come to this Court to appeal against the decision in Misc. Civil Application No. 57 of 1993. He first filed a notice of appeal and then sought leave to appeal to this Court but that was refused by the High Court. The applicant then approached this Court through revision in Revision No. 26 of 1994.

At the hearing, the learned advocate for the respondent had a preliminary objection containing, inter alia, a ground that the applicant cannot use the revisional jurisdiction of this Court as he had already filed a notice of appeal in this very Court.

The preliminary objection was upheld on another ground. Nevertheless, this Court, with respect to the ground mentioned above, had this to say:

> "We are satisfied that this ground is misconceived. As we have indicated earlier in this judgment,

> the applicant resorted to the revisional jurisdiction of this Court when the appellate door was blocked by the dismissal of his application for leave."

That means: if the applicant had been granted leave to appeal, and so earned the right to appeal, then that would have barred him from the revisional jurisdiction of this Court. That is, revisional jurisdiction is exercisable only where there is no right of appeal.

It has to be remembered that in that application the applicant did not have an automatic right of appeal. He had to earn that right through leave. In the present application before us, however, T.E.L. had an automatic right of appeal but owing to his own fault he was unable to utilise it.

The appellate jurisdiction and the revisional jurisdiction of this Court are, in most cases, mutually exclusive. If there is a right of appeal then that has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of this Court. The fact that a person through his own fault has forfeited that right cannot, in our view, be exceptional circumstance. If a party does not have an automatic right of appeal then he can use the revisional jurisdiction after he has sought leave but has been refused. However, the

Court may, suo motu, embark on revision whether or not the right of appeal exists or whether or not it has been exercised in the first instance.

In the circumstances the preliminary objection is upheld. This application is misconceived and is therefore dismissed with costs for two counsel.

DATED AT DAR ES SALAAM THIS 24th DAY OF May, 1995.

R. H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M. S. SHANGALI)
DEPUTY REGISTRAR