IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

MISC. CIVIL APPLICATION NO. 40 OF 2022

(Arising out of Misc. Civil Application No. 7 of 2022 which originated from Civil Case No. 4 of 2019 both of Resident Magistrates' Court of Morogoro)

RAMADHANI MYOLELE..... APPLICANT

VERSUS

HAMADI ALI ISLAM.....RESPONDENT

JUDGEMENT

Hearing date on: 29/09/2022
Judgement date on: 24/10/2022

NGWEMBE, J:

The applicant in this revision moved this court under section 43 (3) and 44 (1)(b) of the Magistrates' Court Act (MCA) [Cap 11 R.E.2019] and section 79 (1)(b)(c) of the Civil Procedure Code (CPC) [Cap 33 R.E.2019]. The applicant is inviting this court to call upon and examine records in Misc. Civil Application No. 7 of 2022 in the Resident Magistrates' Court of Morogoro before Hon. I.G Lyatuu – SRM for the purpose of revising illegalities, irregularities and injustices thereof, quash and set aside the same.

This application is strongly resisted by the respondent Hamad Ali Islam who affirmed a counter affidavit. The Applicant's main contention

is on illegalities, irregularities and injustice comprised in the decision of the trial magistrate in Application No. 7 of 2022.

After completion of pleadings, the disputants appeared in court with their advocates, while the applicant had legal assistance of learned advocate Baraka Lweeka, the respondent likewise had legal services of learned advocate Benjamin Jonas.

Submitting in support to the application, advocate Baraka Lweeka apart from adopting his affidavit, proceeded to challenge that the ruling of the trial court, had serious illegalities and confusion to the disputants. The trial court failed to determine the application for extension of time, instead determined other issues which were not before it. Added that, the basis for the application for extension of time was illegality as was properly pleaded at paragraph five (5) of the affidavit. Also, such illegality is reflected at page 3 of the trial court's ruling, and such illegality was based on the failure of the trial court to determine its jurisdiction before entertaining the matter. He referred this court to the case of **Samwel Kobelo vs. NHC Civil Application No. 442/17/2018** (CAT DSM) at page 3-4 to the effect that, when trial court's decision is tainted with illegality and confusion, the remedy is revision.

The learned advocate, further submitted that, the trial court failed to determine the main issue of illegality, thus ended up with a decision of casting stones to the applicant that was not diligent as he failed to account for each day of delay. He emphasized that, it is trite law that jurisdiction must be determined from the beginning. He cited the case of

Moreover, he submitted that illegality itself is sufficient ground for extension of time, in the case of **Peter Mabimbi Vs. AG, Civil Application No. 88/08/2017,** the Court of Appeal extended time when there was delay of more than twelve (12) years. Concluded his submission by arguing that, before the trial court, detailed account was made on illegality (jurisdiction), therefore he prayed that the application be granted and the ruling of the trial court be set aside.

In response therein advocate Benjamin Jonas resisted the application by referring to the Application No. 7 of 2022 where the applicant sought extension of time based on the alleged illegality, but failed to point out those illegalities and irregularities. The issue was properly determined by the trial court and the appellant failed totally to point any decision of the court which has illegality to want revision.

Further submitted that the applicant did not act diligently as he failed to account for delay of two (2) years. He referred this court to the case of **Elia Andason Vs. R Criminal Application no. 2 of 2013** and **John Nyasanga Vs. A.G, Misc. Civil applicatioin No. 447 of 2018.**

Insisted that time limitation is fundamental point of law which must be complied with. Therefore, this application is misconceived, thus prayed same be dismissed forthwith with costs.

In rejoinder Mr. Baraka Lweeka maintained that, the trial court failed to determine the main ground for extension of time, that was jurisdiction of the court, and prayed the application be granted.

Having summarized the rival arguments of learned advocates and upon perusing the affidavit in support to the chamber summons, it is evident the learned advocate for the applicant lamented against the order of the trial court in Civil Case No. 4 of 2019 that was tainted with gross illegalities, irregularities and injustices. That on 6th May 2022 the applicant filed an application for extension of time with a view to file review to enable the trial court to correct those identified illegalities, irregulates and injustices. The reason is mainly based on failure of the trial court to determine the preliminary objection on point of law, that the trial court had no jurisdiction to sit and decide on Civil Case No.4 of 2019.

Before I even go further to consider the merits of the application, the question is whether the denial for extension of time is subject to revision by this court or is appealable as of right? According to the record, the purpose of seeking that extension of time was to permit the applicant to file application for review before the same Resident Magistrates Court. The question is, whether this application for revision was the right forum instead of appealing against that decision? In law refusal to extend time is appealable as of right as opposed to revision.

It is settled in our jurisdiction that; revision is not an alternative to appeal and should never be taken as alternative to appeal. An aggrieved party cannot simply choose to invoke revisional powers of this court, where there is a right to appeal.

Usually, parties in dispute are bound to follow the dictates of law. In this matter, section 79 of the **Civil Procedure Act, Cap. 33 R.E 2019** distinguishes between appeal and revision. Right to revision is

provided for when the decision is not appealable as of right. For clarity the section is quoted hereunder: -

> **Section 79- (1)** *"The High Court may call for the record of any case which has been decided by any court subordinate to it and* ***in which no appeal lies thereto****, and if such subordinate court appears: -*
>
> *a) To have exercised jurisdiction vested in it by law; or*
> *b) To have failed to exercise jurisdictions so vested; or*
> *c) To have acted in the exercise of its jurisdictions illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.*
>
> *(2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates Courts Act."*

It is clear from the above section, that revision is exercised only where there is no right to appeal. I would therefore, add that, this court may exercise its revisional jurisdiction only when the decision of the trial court or subordinate court is, **first** not appealable as a matter of right, and by operation of law; **second** the right to appeal is blocked by judicial process; **third** the right to appeal is not opted by the aggrieved person for sufficient reason; and **four** parties should always know that on revision the court does not determine evidences adduced during trial, rather determines **propriety** of records and proper application of laws.

The one who is moving this court to exercise its revisional jurisdiction must disclose in clear terms, pinpointing illegalities, irregularities, incorrectness or inappropriateness of the proceedings or

decision of the trial court. Equally important is for the applicant to disclose as to why he decided to apply for revision instead of appealing against such decision.

In this application, unfortunate, the applicant did not disclose any reason, leave alone sufficient reasons supporting this application for revision instead of appealing against the decision of the trial court. Revisional jurisdiction is not an alternative to appeal. Whoever opt to move this court to exercise its revisional jurisdiction, must disclose sufficient reasons.

In the case of **Israel Mwakalabeya Vs. Ibrahim Mwaijamba, Miscellaneous Civil Application No.21 of 1991** (Mbeya HC), amplified the following principle: -

> *"The right to invoke the Court's power of revision is not an alternative to appealing. Where the order complained against is appealable, the court will not use its revisional powers, for the right to appeal is a remedy open to the aggrieved party. Even where the time for appealing has expired, a party has a remedy of applying to appeal out of time"*

Usually, revision is not an alternative to appeal, the Court of Appeal has, in so many cases insisted that revisional jurisdiction of the High Court can only be invoked in special circumstances and cannot be used as an alternative for appeal. The said principle was illustrated in the case of **TANZANIA TELECOMMUNICATIONS CO. LTD and 3 Others Vs. TRI TELECOMMUNICATIONS TANZANIA LTD, CIVIL REVISION NO. 62 OF 2006,** the CAT quoted with approval the case of **Hallais Pro-Chemie Vs. Wella A.G.** (1996) T.L.R 269 where it was held: -

(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"

Applying the same principle to this revision, the applicant herein also was an applicant at the Resident Magistrates Court. After being dissatisfied with the decision of the trial court, he had by right an avenue to appeal against the dismissal of his application for extension of time. In his appeal he would have explained and averred all his reasons and concerns that she had advanced herein revision.

Considering the centre of this matter, that is refusal to extend time by the trial court. From the outset, extension of time is purely court's discretion. However, such discretion is exercised judiciously meaning there must be good reason upon which the court may extend time and failure to disclose sufficient reasons for delay, even for one day, the court may not invoke its discretionary powers to extend time. Always, the best reason for delay should not be caused by the applicant's inaction.

It is settled in our jurisdiction that when illegality is pleaded and shown vividly that such illegality existed on the face of record of the trial court, the appellate court has a duty to grant extension of time so that such error may be corrected.

The same position was held in a good number of cases including in the case of **Principal Secretary, Ministry of Defence and National Service Vs. Duram P. Valambhia [1992] T.L.R 387 which** held: -

"While avoiding the risk of going into the merits of the case, we think that the points raised are sufficiently weighty. They

are such that if proved they go to the root of the matter. For instance, they allege illegality of the order or orders of the Court. That is obviously a point of law. In Civil Reference No. 9 of 1991 involving the same parties as in this case, we took the view that where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance. The same applies here"

Raising illegality or irregularity generally does not confer automatic right for extension of time. This is why the Court of Appeal felt a genuine need to expound what it ruled in **Valambhia's** case when determined the application for extension of time in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010.** The Court modified the ruling at **Valambhia's** case by the following: -

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasised that such ***point of law must be that of sufficient importance*** *and, I would add that* ***it must also be apparent on the face of the record,*** *such as the*

question of jurisdiction; ***not one that would be discovered by a long-drawn argument or process"***

This has been followed in a good number of cases, including in the famous case of **Ngao Godwin Losero Vs. Julius Mwarabu, Civil Application No. 10 of 2015** that the said irregularity must be on the face of record.

In essence the doors are not closed, where there are other circumstances to add an exception to **Valambhia's** case as the Court of Appeal did in **Lyamuya's** case and **Ngao Godwin's** case, obvious will be accepted. I may clarify by repeating hereto; first be apparent on the face of the court record as against the legalistic discoveries from the court records. Second, mere allegations of illegality are not enough, the applicant has a duty to go further to show clearly that illegality. Third, the alleged illegality should be affecting the interest of justice and when left to exist causes injustice to the disputants. Mere allegations of illegality which do not affect the ends of justice may not move the court to extend time.

In this application, the learned advocate has used a lot of energy and time on allegations of illegality of the trial court's decision in Civil Case No. 4 of 2019. However, perusing the records including the disputants' affidavits, it is apparent, Civil Case No. 4 of 2019 was decided not on merits, but on parties' consent out of court process. Thus, the trial court ended up delivering consent judgement based on the executed Deed of Settlement. Thereafter, parties departed happily for more than two years. After all that time, the applicant has come up in court seeking extension of time to challenge the trial court's consent judgement by raising the issue of illegality based on jurisdiction of the

court. The trial court, found no merit on the application for extension of time, hence dismissed it forthwith.

Being dissatisfied with such dismissal, the applicant preferred this application for revision instead of appeal. What does this mean in the eyes of law?

Much as I would agree that the issue of jurisdiction is fundamental and takes precedence over every other legal issue, yet I am asking whether such illegality affected, in anyway, the interest of justice? Second who among the disputants was affected by the alleged illegality if any? The subsequent question is on sanctity of parties' agreement. Were they not agreed to end up their disputes amicably by executing a deed of settlement with a prayer to mark their suit amicably settled? These questions have no answers, neither from the affidavits of the disputants nor by the arguments from the learned advocates, neither do I wish to provide one.

In this matter, I find obliged to remind advocates on their duties, that they are officers of the court, and among their duties is to assist the court to the ends of justice, but never mislead the court. As such this application not only lacks merits, but also the learned advocate for the applicant should be reminded his duties to the court as well as to his client and to the society.

While I am about to conclude, I find obliged to clarify as follows; this application for revision cannot stand, because the applicant offended the use of revisionary powers of this court. Second, by *obiter dicta*, the applicant cannot allege illegality against his own making. Also, if any illegality, same did not affect the interest of justice of either party. Third, time has passed since the consent judgement of the trial court

was passed, obvious each party must have complied with what they consented in their deed of settlement. Whatever decision will be for academic purposes. Four, the applicant has not accounted for all that delay of two (2) years.

For those reasons, this application for revision is misconceived, misplaced and lacks merits, same is dismissed with costs.

I accordingly Order

DATED at Morogoro this 24th day of October 2022.

P.J. NGWEMBE

JUDGE

24/10/2022

Court: Judgment delivered at Morogoro in Chambers on this 24th day of October, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of Mr. Hassan Nchimbi, Advocate for the Applicant and in the presence of Mr. Ignas Punge, Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

SGD. HON. J.B. MANYAMA

AG/DEPUTY REGISTRAR

24/10/2022

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 24/10/2022 at Morogoro