

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 28 OF 2023**

(Arising from decision of the District Court of Kinondoni in Civil Case No. 238 of 2020,  
before Hon. Lakuyenda, SRM, dated 07/06/2022)

**MALMO MONTAGEKONSULT (T) LIMITED..... APPLICANT**

**VERSUS**

**FABEC INVESTMENT LIMITED.....RESPONDENT**

**RULING**

*Date of last Order: 16<sup>th</sup> May, 2023*

*Date of Ruling: 09<sup>th</sup> June, 2023*

**E.E. KAKOLAKI, J.**

This ruling is in respect of the preliminary objection taken at the instance of the respondent. The objection is intended to hinder the applicants' efforts to obtain extension of time within which to file revision application against the ex-parte judgment entered in favour of the respondent by the District Court of Kinondoni in Civil Case No. 238 of 2020 handed down on 07/06/2022. The raised grounds of objection is to the effect that, **one**, *the application is frivolous and vexatious because the extension of time sought to bring an application for revision cannot be used as an alternative to appeal. Second,*

*the affidavit is incurably defective for containing legal arguments, opinion and conclusions.*

Briefly the respondent herein before the District Court of Kinondoni in Civil Case No. 238 of 2020, had sued the applicant for breach of contract in which hearing proceeded ex-parte following appellant's default in appearance before the trial court, thus ex-parte judgment in respondent's favour. Unamused and being out of time to either appeal or file revision application, the applicant is before this Court with an application seeking among other orders extension of time to file an application for revision before this Court against the said decision in the above cited case dated 07/06/2022, in which the respondent is objecting on the grounds above stated.

As it has always been the practice of the Court to dispose it of first, whenever a preliminary objection is raised hearing of the two raised points of objection took the form of written submission as both parties were represented, as the applicant hired the services of Mr. Kheri Sanga while the respondent defended by Mr. Lucas Nyagawa, both learned counsel. In this ruling I am proposing to start with the first ground of objection and then come to the second if need be.

In support of the first point of objection Mr. Sanga argued that, the trial court having necessitated to render ex-parte judgment in favour of the respondent in based on the evidence on record in terms of the provisions of Order VIII Rule 41(b)(iii) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and the applicant being disgruntled, ought to have appealed against it as provided under section 70(2) of the CPC and not to opt for revision, as to him revision cannot be used as an alternative to appeal. And if found herself out of time to so appeal Mr. Sanga insisted the applicant ought to have applied for extension of within which to appeal against the said decision and not to opt for the present application,. He fortified his stance by citing to the Court the cases of **Dangote Industries Ltd Tanzania Vs. Warnercom (T) Limited**, Civil Appeal No. 13 of 2021, (CAT-unreported) and **Said Ali Yakut and 4 Others Vs. Feisal Ahmed Abdul (Administrator of the Estate of the late Ahmed Abdul)**, Civil Application No. 4 of 2011, where it was held revision is not an alternative to appeal. He was of the submission that, basing on the above legal stance, the application for extension of time to apply for revision as alternative to appeal is superfluous and should be struck out with costs.

In rebuttal while conceding to the trite law the revision is not an alternative to appeal, Mr. Nyawaga took a different view submitting that, in the present matter the applicant opted for revision in terms of section 79(1)(c) of the CPC, as the ground for revision is based material irregularity found in the form and contents of the judgment sought to be impugned in which its remedy is revision and not appeal. According to him where there is illegality of the decision the only option is to revise the decision as it was the position in the cases of **Agnela Lihuka Vs. Dace Seyah**, Misc. Land Appela No. 146 of 2019 and **Bagayo Saqware Vs. Salamaan Health Services and Another**, Civil Appeal No. 24 of 2022 (both HC-unreported). On the cases relied on by the respondent Mr. Nyagawa argued that, the same are distinguishable to the circumstances of the present matter as in those case unlike in the present case the issue of illegality of the judgment was not at issue and secondly, the same were interpreting the provision of Rule 65 of the Court of Appeal Rules, 2009, while the provision under discussion in this matter is section 79 of the CPC and section 44 of the Magistrate Courts Act, [Cap. 11 R.E 2019]. He therefore implored the Court to dismiss the objection with costs.

In brief rejoinder Mr. Sanga was insistent that, revision is not an alternative to appeal as if aggrieved with ex-parte judgment had an option of setting it aside or appeal against the decision as an automatic right as it was held in the case of **Dangote Industries (T) Ltd** (supra) and **Herman Omary Mganga** (supra). As regard to the cited case of **Agnela Lihuka** (supra) he said the court did not say that revision should be preferred where there is defect in form of the judgment by exercised its discretion to revise the same. And regarding the case of **Bagayo Saqware** (supra) he contended the same is distinguishable and inapplicable as well. He insisted this application should fail on this ground of objection.

I have dispassionately considered the fighting submission by the parties and took time to peruse the law related to both appeal and revision in a bid to disentangle parties' dispute as to whether the application seeking extension of time to apply for revision is superfluous on contention that, revision is not an alternative to appeal. It is settled law and both parties are at one on the said principle of law that, revision is not an alternative to appeal. See the case of **Transport Equipment Ltd Vs. Dervam P. Valambhia** (1995) T.L.R 161, **Said Ali Yakut and 4 Others** (supra), **Dangote Industries Ltd Tanzania** (supra). In the present matter Mr. Nyagawa relying on section

79(1)(c) of the CPC and the cases of **Agnela Lihuka** (supra) and **Bagayo Saqware** (supra), tried to impress upon the Court that, much as the defect sought to be revised upon grant of extension of time is based on material irregularity of the judgment sought to be impugned in its form and contents, the only remedy to rectify it is through revision and not appeal. Mr. Sanga is of the contrary view that, even the alleged defectiveness on the form and contents of judgment can constitute one of the ground of appeal and since that remedy is not exhausted first, this application is superfluous hence should be struck out. I subscribe to Mr. Sanga's proposition that, illegality of the judgment on its form and content is not as exception for the party to exhaust his right to appeal, which is my profound view in an automatic right under section 70(2) of the CPC, more so when an ex-parte judgment is issued against any party. Section 70(2) of the CPC reads:

*(2) An appeal may lie from an original decree passed ex parte.*

The Court of Appeal also in the case of **Dangote Industries Ltd Tanzania** (supra) had opportunity of deliberating on the application of the above cited provision when had this to say:

*"...an ex-parte judgment is appealable under section 70(2) of the CPC which provides that, "an appeal may lie from an original*

*decree passed ex-parte.” Section 70(2) of the CPC, unambiguous as it is, does not impose any condition for appealing against an ex-parte judgment.”*

Much as the provision of section 70(2) of the CPC does not impose any condition for appealing against ex-parte judgment, I distance myself from Mr. Nyagawa’s proposition that, whenever there is material irregularity in the form and contents of the judgment the only remedy is to apply for revision. I so do as defectiveness of the judgment in my profound view constitute a ground of appeal and therefore it is not an exceptional circumstance in which the party can resort to revision. A party can resort to revision to resolve his grievances only where there is no right of appeal or he has been blocked by the process of law as he has to exhaust all remedies available to him before the revisional jurisdiction is invoked by the Court. See the cases of **Halais Pro Chemie Industries Ltd. versus A. G. Wella** (1996) TLR 269 and **Said Ali Yakut and 4 Others** (supra).

In this matter since the applicant had the option to appeal as an automatic right and therefore apply for extension of time within which to appeal against the decision of the District Court of Kinondoni in Civil Case No. 238 of 2022 date 07/06/2022, but failed to exhaust that right, I am convince and

therefore agree with Mr. Sanga that, the present application is superfluous and ought to be struck out. The decision of this Court in of **Agnela Lihuka** (supra) and **Bagayo Saqware** (supra) relied on by Mr. Nyagawa, I hold are distinguishable and inapplicable to this application as there is nowhere stated therein that, when the judgment is defective in form and content then the remedy is revision and not the appeal. In view of the above deliberation the issue is answered in affirmative that this application is superfluous. And since it has the effect of disposing of the matter I see no justification in pursuing the rest of the ground as that will amount to academic exercise.

In the premises I sustain the first preliminary objection and hold that, the application is incompetent before the Court and is hereby struck out with costs.

It is so ordered.

DATED at Dar es salaam this 09<sup>th</sup> June, 2023.



E. E. KAKOLAKI

**JUDGE**

09/06/2023.



The Ruling has been delivered at Dar es Salaam today 09<sup>th</sup> day of June, 2023 in the presence of Mr. Lucas Nyagawa, advocate for the applicant, Mr. Innocent Mwelelwa, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
09/06/2023.

