IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVISION No. 22 OF 2021

(Original Civil Case No. 74 of 2018 of the RMs Court of Arusha)

HENRICK WILLEM TIMMER.....APPELLANT

VERSUS

ANNA KEMILEMBE BAHIGANA .....RESPONDENT

RULING

TIGANGA, J.

This matter has a chequered history. It first started as Civil Case No. 74 of 2018 before the Court of Resident Magistrate of Arusha where the applicant was successfully sued by the respondent, claiming for judgment and decree for payment of Tsh 300,000,000/= being compensation for breach of contractual obligation, general damage, and the interest at a commercial rate of 30% per annum. The interest was to be based on the amount to be ordered as compensation as well as the general damage.

After a full trial, the applicant was condemned to pay the respondent Tsh. 300,000,000/= as compensation for breach of contract and Tsh 10,000,000/= as general damages.

The suit was heard and determined *ex parte* following the failure of the applicant to appear and defend it. The execution process of the resultant decree was at first done without the involvement of the applicant allegedly that he was nowhere to be seen as he was out of the Country. However, he was later arrested as a civil prisoner before both parties had entered into an agreement titled settlement out of Court or compromise agreement which adjusted the decree from Tsh. 300,000,000/= to Tsh. 200,000,000/= the amount which was immediately paid by the applicant.

Dissatisfied by whatever went on, the applicant filed this application for revision. The applicant has moved this court under section 44(1)(b) of the Magistrate's Courts Act, [Cap 11 R.E 2019], and section 79(1)(c) of The Civil Procedure Code [Cap 33 R.E 2019). It was through a chamber summons supported by the affidavit sworn by the applicant himself which contained the grounds and the factual background of the application.

The following are the reliefs sought. This court be pleased to call for and examine the records, proceedings, judgment, and decree including subsequent execution proceedings in Civil Case No. 74 of 2018 before Hon. Baro RM and Hon. Mushi. RM respectively, to satisfy itself of its propriety and the legality for there being an error material to the merits of the case which occasioned injustice on the part of the applicant.

The court was also asked to order that, the decretal sum amounting to Tsh 200,000,000.00 allegedly illegally schemed and paid by the applicant to the respondent be refunded to the respondent herein. He also asked for the costs of the application and any other relief that this Court may deem fit and just to grant.

At first, the application was heard *exparte* following the fact that the applicant did not show up to defend it. In the end, the court found the application merited and declared the proceedings and the decision of the trial court to be the outcome of irregularities that are intolerable in the dispensation of justice. It proceeded to quash the decision of the trial Court and set aside all the orders. It consequently ordered the trial to start *de novo* before another magistrate with competent jurisdiction. The court also ordered the respondent to return with immediate effect, Tsh. 200,000,000/= accrued from the execution and deed of settlement allegedly entered between the parties.

The respondent filed Misc. Civil Application No. 98 of 2022 in which he applied to set aside the *exparte* ruling on the ground that the respondent was not served with the application. After the hearing of the said application on merit, the court was satisfied that the application was merited, it consequently allowed it, the ruling which was earlier on issued

in this application was set aside, and the matter was ordered to be re-heard inter-partes.

Consequent to that order, the respondent was allowed to file the counter affidavit in opposition to the application. When the counter affidavit sworn by the applicant was filed, it was accompanied by the two points of preliminary objections on points of law which in its first limb challenged the competence of the application on the ground that the decision in Civil Case No. 74 of 2018 is appealable and not revisable, while in the second limb, it challenged the application on the ground that, the same is incurably defective for being supported by the argumentative affidavit with provisions and arguments.

For purposes of expeditious determination of the merits of the matter, the parties agreed and the court ordered, the preliminary objection and the merits of the application to be argued together and by way of written submissions. To make this ruling unnecessarily long, I will deal with the grounds in the affidavit in support of the application together with the arguments in the submission.

The grounds for revision have been categorically deposed in the affidavit filed in support of the application as follows;

i. That, the trial court's proceedings, judgment, resultant decree, and execution application were marred with gross illegality and impropriety and at worst a carefully executed extortion scheme executed against him.

ii. That, the entire proceedings were a sham orchestrated by the counsel for the plaintiff (the respondent in this application) and a person who had identified himself as the defendant's appointed counsel in the original matter.

iii. That, he was never made aware of the proceedings and was never served with a summons to appear neither in the course of hearing nor during the execution proceedings.

iv. That, he was illegally detained as a civil prisoner without being given an opportunity if he could satisfy the decree.

v. That, upon completion of the matter before the trial court, he was lured into this country where he was forthwith arrested and forced to settle the matter at Tsh 200,000,000/=

vi. That, he was never afforded the right to be heard contrary to the principles of natural justice.

vii. That, the summons for hearing was received by one person stating that he was instructed so by the applicant, whereas he has never instructed anyone in respect of these proceedings.

viii. That, the said person only appeared long enough to initiate the matter and disappeared thereafter to ensure the matter proceeded ex parte and then resurfaced on execution and oversaw the culmination of the illegal proceedings and later luring the applicant into the country to extort him as evidenced by annexure HWT – 5

ix. That, the summons for execution was published in the local newspaper whereas he is a foreign national and at the time he was residing in Netherlands the fact which was proved by a copy of his passport with VISA, attached to the affidavit in support of the application.

On the other hand, the counter affidavit filed in opposition to the application noted the fact that the applicant was a defendant in Civil Case No. 74 of 2018. She deposed that the rest of the facts in the affidavit are false and without legal base. He also said that the proceedings, judgment, Decree, and execution application are not tainted or marred with any illegality and or impropriety as they were conducted according to the law. She further deposed that the lamentation about an unnamed Advocate is an afterthought and by all standards has never caused any prejudice to the applicant as had that been true the applicant would have filed a complaint against that Advocate.

Also, the respondent was served the plaint vide his Advocate Mruma Shabibu and there is proof of service to that effect but the applicant neither filed his defence nor appeared to defend the case. In her further view, that is also the position in the execution proceedings in which he was represented by an Advocate who did not raise any concern. Therefore, raising that concern now is nothing but an afterthought.

Furthermore, she deposed that the applicant was not forced to settle and that the payment of Tsh. 200,000,000/= was made in the execution of the decree and under the guidance of the Advocate. He insisted that the applicant promised to marry her and an N.G.O has nothing to do with their love relationship. Also, there is no evidence to prove that the respondent was employed by the applicant. He said the applicant is not always staying abroad but in Tanzania doing his daily activities in his N.G.O.

She disclosed further that, she has never written any SMS, therefore the screenshots SMS are not hers. In her further deposition, she admitted to having chosen a mode of execution of the decree by arrest of the judgment debtor as a civil prisoner. She insisted that the money was paid freely under the guidance of the applicant's Advocate, and the amount was reached after the agreement was entered freely by the parties and

the applicant was free which is why he even managed to communicate with his daughter.

In her further evidence, she said the summons and the plaint were served to the Advocate after the applicant had instructed that it be served to that Advocate which is why he used the same Advocate during the execution proceedings. That, in her view, proves that the applicant was afforded the right to be heard but decided not to use it.

He also said that the applicant instructed the advocate to represent him which is why he had never complained against that Advocate to the respective authority regarding such an Advocate receiving the plaint and summons without his instruction. Concerning the mode of service by publication, she reiterated that, the applicant resides in Tanzania and does his daily activities here in Tanzania, therefore the publication of the summons was made while he was in Tanzania. She urged the court to refuse the application for lack of sufficient grounds. In her view, even the application for extension of time was erroneously granted for the court was *functus officio* to entertain the application while the applicant had the right to appeal which he did not pursue.

She, in the end, deposed that there was no injustice caused to the applicant as all the procedures for trial in Civil Case No. 74 of 2018 and

its execution proceedings were complied with. He prayed for the dismissal of the application with costs.

The submission filed by the applicant in support of the application was to the effect that, Civil Case No. 74 of 2018 was filed and heard *exparte* following the person who identified himself as the Advocate for the applicant had exited from the proceedings on the grounds of lack of instructions from the applicant. The counsel is of the view that the exit was designed to perfect the illegal scheme hatched to the applicant's detriment.

He said there is no record proving that the applicant was served or informed personally of the existence of the case in which he was sued. Furthermore, he said the applicant had never instructed Mr. Shabibu Mruma to represent him in Civil Case No. 74 of 2018 and there is no evidence to prove that. In his further submission, he said the plaintiff was also acting through a self-identified defendant's Advocate and justified that by referring to paragraph 15 of the affidavit with annexure HWT-4 which renders the credence to this assertion, as it contains an extract of a WhatsApp chat from phone number 0767126797 registered in respondent's names.

The Counsel for the applicant further submitted that the judgment of the trial court was delivered on the 21st of January 2019 without the applicant being informed of the date of judgment. Thereafter, in a calculated move, the respondent enforced the said order by arresting and detaining the applicant as a civil prisoner, but that was done without first serving the applicant with the summons to show cause as required by law. He said that is evidenced by the summons which was returned unserved by Mr. Allan Mollel, the Court Broker, with an affidavit stating that the applicant was not found at his last known address.

He said the affidavit of service made in respect of the execution application was dated 27th March 2019 while the summons was dated 28th March 2019, this means the Court Broker served the summons a day before it was issued. Further contending the whole process, he submitted that the notice to show cause was published in a local newspaper as per annexure HWT-4, notwithstanding the applicant being outside the country, which means that he was out of the reach of the newspaper and the respondent knew that.

He said the records are unclean on what transpired from 28th March 2018 to 23rd October 2019, (more than a year and a half), but abruptly, on 23rd October 2019 the respondent's Advocate appeared on record

informing the court that, the applicant herein is a foreigner and has not been found for a long time, but that, at the material time he was in police custody hence, they were there to hear from him.

He submitted further that, the records do not indicate that, there was any order of arrest, and there was no affidavit filed alongside the execution form stating that there was no other mode for execution to satisfy the decree by the applicant except for arrest and detention.

According to him, the record shows that the settlement agreement was entered on the 24th of October 2019 in which the decretal sum was adjusted from Tsh. 300,000,000/= to Tsh. 200,000,000/= the amount that the applicant painfully remitted to purchase his liberty. He submitted that it was the settlement that altered the decretal sum as there is no decree which was made therefrom.

He also submitted that the applicant had the option of applying for revision only, since he was outside the country at the time when the proceedings were conducted. Hence, he did not know what was going on. According to him, the deed of settlement which implies a consent judgment, indeed barred him from appealing. He cited the case of **Yusuph Seleman Kimaro vs Administrator General**, Civil Appeal No. 266 of 2020 CAT – DAR, (unreported) on page 20 where it was observed

that, a fraudulent judgment, order, or decree can be avoided without necessary having recourse to setting it aside and that a judgment, order or decree obtained by fraud will be treated as a nullity by any court be it an inferior or a superior court.

He proceeded to submit that, the right of the applicant to be heard was infringed because the records clearly evidence that, there was no summons issued to the applicant. Expounding the complained illegality, he said, there was the absence of notification of the date of *ex parte* judgment and improper or absence of service of the notice to show cause, as well as an illegal arrest carried out in the absence of arrest warrant order of the court in the Court proceedings. He also complained of the absence of elements proving neither the alleged contract as admitted by the trial magistrate in the last paragraph of the judgment, nor the alleged children who were said to be deserted.

In his view, the proceedings are confusing as to the nature of the cause of action or claim. It is not clear as to whether it was a breach of commercial agreement or a family dispute. Also, the presence of depravity of freedom of movement and coercion of the applicant into executing an illegal deed of settlement under duress. He raised the concern that even the execution was done by another Magistrate Hon. A. L. Mushi, RM who

was not the Magistrate in charge as required by the well-established practice that applications for execution are done by the Magistrate in charge.

He further submitted that the absence of summons served to the applicant in the original suit, and the resultant irregular execution proceedings, demonstrate that the applicant was deprived of his right to be heard. It is also evident that the applicant was also illegally arrested as a means of enforcing the court decree. He was not issued with the notice to show cause why the execution should not proceed and an arrest warrant or an order to arrest the applicant as a civil Prisoner. That proves the illegality of the execution process. Thus, conditions for detaining a judgment debtor as a civil prisoner were not met as provided by Order XXI, Rule 39 (2) of the Civil Procedure Code (supra).

He also submitted that there are two judgments of the court in the same matter. That, the amount decreed in the judgment is not the one which was paid in the deed of settlement. This, in his view, contravenes Order XXI Rule 39 (2) of the Civil Procedure Code (**supra**).

He concluded his submission by praying for the court to quash the trial court's proceedings and the resultant decree and order the amount

of Tsh. 200,000,000 illegally obtained by the respondent from the applicant is to be refunded to the applicant with immediate effect.

In the submissions filed in reply to the submission in chief in respect of the application, the respondent also filed the submission in support of the two preliminary objections raised. In the opening remarks, Mr. Gwakisa Kakusulo Sambo, an Advocate who represented the respondent invited this court to find that, the application is baseless and meritless as it was made as an afterthought after the execution of the decree had been smoothly completed and in compliance with the law. He thus prayed for the application to be dismissed with costs. Mr. Sambo asked for the court to adopt the affidavit as part of his submission.

He said the applicant is using revision as an alternative to appeal. Which is not permitted by law and practice. He said there is no judicial process that has been demonstrated to have prevented the applicant from appealing. He reminded the court that an appeal may be filed against the *exparte* judgment in terms of section 70(2) of the Civil Procedure Code.

He further submitted that there was no evidence to prove that the applicant was out of the country and he has even not proved the same by tendering his passport showing that he was out of the country. Alternatively, he submitted that, even if the applicant was outside the

country, that was not a sufficient reason as to why he failed to file an appeal as filing an appeal or application for setting aside does not require the physical presence of the appellant, or the applicant as the case may be. He could engage the Advocate to do that for him.

He said the deed of settlement which was entered during the execution process, does not at all block the applicant from filing his appeal or the application. He submitted that the applicant did not demonstrate how the settlement prevented him from filing the appeal or application to set the decree aside. He said the deed of settlement entered in settling execution is not the consent judgment which would prevent him from appealing. According to him, no law bars the parties amicably during the execution. He said that the decision of **Moses Mwakibete vs The Editor, Uhuru & 20 Others** (1995) TLR 134 is not and is distinguishable to the case at hand because the fact of the case differs and in the application at hand has not been blocked by any judicial process to file an appeal, neither has adduced any of the sufficient ground as to why he has not appealed as the law requires.

He also said the case of Yusuph Kimaro vs Administrator General, Civil Appeal No. 266 of 2020 is also distinguishable.

He said further that the applicant was not denied his right to be heard by the court by the court but he opted not to appear, therefore the court cannot be faulted at all. Therefore, the allegation that the applicant was notified and or was not given of the date of delivery of the *exparte* judgment is an afterthought because the same was not raised in the affidavit in support of his application. That in his view is contrary to the established principle that submission can't be used to introduce new evidence as held in the case of **Joao Oliveira and Another vs IT Started in Africa Limited and Another,** Civil Appeal No. 186 OF 2020 Court of Appeal of Tanzania at Arusha. He submitted that the evidence proved there was a contract between the parties and the applicant breached it. He said when the applicant became aware of the proceedings, he was duty-bound to process an appeal and failure to do so subject him to the principle of estoppel from complaining.

He said the applicant was not deprived of his freedom of movement; he was arrested in the process of execution of the procedure which is provided by law. He cited the decision in the case of **Eurafrican Bank (Tanzania) Ltd vs Tina and Company Limited,** Commercial Case No. 80 of 2006. High Court of Tanzania Comm. Div. in which it was held that

arrest and detention as a civil prisoner is one of the modes of execution which entails loss of freedom.

He also said that the settlement reached was under the guidance of the Advocate. He said there is no evidence to prove that Ho. A. Mushi was barred to preside over the execution proceedings. He said that the application for execution was properly conducted and it cannot be faulted.

Further to that, he submitted that the proposition that, the applicant was denied the right to be heard is devoid of merits because the applicant was present and in the Company of his Advocate Shaibu Mruma. It also defeats the allegation that the Advocate was not his, because had he been not engaged, he would not have used him during execution and would have filed a complaint against him. He said the case of **National Housing Corporation vs Tanzania Shoes and Another and Cosmas Construction Co. Ltd vs Arrow Garment LTD,** (1992) TLR 127 is distinguishable in the case at hand.

He said the warrant of arrest was issued and signed by the Court, and so was the notice to show cause, therefore the allegations that the was no such a warrant and notice are devoid of merit as the same was attached in the Counter affidavit as exhibit A-2 as provided under Order XXI Rule 37 of the CPC.

He submitted that the allegation that the applicant signed the deed of settlement under duress is not substantiated by evidence, he said it did not take a single day to discuss and settle, it took several days, and all that time the applicant was not in custody he was a free person who was under the guidance of the Advocate. He said the applicant did not demonstrate any peculiar circumstances which would have warranted revision. Thus, all the grounds raised are devoid of merit. He prayed that the same be dismissed.

In the alternative, he submitted in support of the two preliminary objections raised by the respondent;

i. The application is incompetent for the impugned proceedings, judgment, and decree in civil Case No. 74 of 2018 is appealable

and not revisable

ii. That the application is incurably defective for being supported by the argumentative affidavit with provisions and argument.

He submitted that the court can only invoke its revisionary powers in the following circumstances, **one,** on its own motion *suo motu*, where it notes that there is something to correct, **two,** where there are exceptional circumstances, **three,** in matters which were not appealable

with or without leave of the court, and **four,** where the appellate process has been blocked by judicial process. See the case of **Ramadhan Mikidadi vs Tanga Cement Company Limited**, Civil Application No. 275/01 of 2019 CAT -DSM (Unreported). He said in the case at hand, the raised grounds of revision suit much to be grounds of appeal than the grounds for revision. He said the applicant has never deposed in the affidavit any evidence suggesting that the right to appeal was blocked by any judicial process taking into account that even the *exparte* judgment and decree are appealable under section 70 (2) of the CPC, and no exception circumstances which prevented him from appealing which would have allowed the court to invoke its revisionary powers.

In his view, as the right of appeal was available, it was wrong the file an application for revision as held in the case of **Golden Palm Ltd vs Cosmas Properties Limited,** Civil Application No. 561/01 of 2019. He asked the court to strike the application for being preferred in the alternative of appeal.

On the second ground, it is the stand of the law, that an affidavit for use of the court should not contain arguments and prayers. In support of the said contention, he cited the case of **Uganda vs Commissioner of Prison Expater Matovu,** a (1969) EA 514. He submitted that

paragraphs 2, 2.1,2.2, 2.3, and 2.4 both contain prayers contrary to the rule stated above. While paragraphs 17, 18, 19, 20, and paragraphs 21, 21.1, 21.2, 21.3, 21.4, 21.5, and 23 both contain prayers and legal arguments contrary to the principle cited above.

He submitted that even if the law permits the offending paragraphs in the affidavit to be expunged from the records, in the instant application if the mentioned paragraphs are expunged, a prayer he is asking, the remaining paragraphs cannot support the application, thus rendering the whole application incompetent and be liable to be struck out with costs. He thus prayed both points of preliminary objection be upheld and dismiss the application with costs.

The rejoinder submission filed by the applicant's counsel also contained the reply to the submission in chief in respect of the preliminary objection. In that he submitted rejoining the argument that the fact that the judgment debtor was not served with the notice of exparte judgment was not deposed in the affidavit filed in support of the application, he submitted that the allegation is not true. This is because, throughout the proceedings, the affidavit makes it clear that the applicant was not made aware of the case. However, even if the same was not made clear in the affidavit, which is not a case, that is not a factual but a legal issue that

could be raised at any time, a non-compliance of which renders proceedings to be set aside. He implored this court to be guided by its decision in the case of **Chausiku Athuman vs Atuganile Mwaitege**, Civil Appeal No.122 of 2007 HC -DSM in which the reason for failure to give the notice alone was enough to set aside the *exparte* judgment which was delivered without notice to the other party. Also, the Case of **Stephen Ngalambe ve Onesmo Ezekia Chaula and Another**, Misc. Land Application No. 05 of 2022, HC -Dar, Mlyambina, J, was also relied upon.

Replying on the first limb of the preliminary objection he reiterated his submission in chief, on the argument that there was no deed of settlement and that the deed of settlement was not a consent judgment to bar the applicant from appealing. He reiterated the position in the case of **Victoria Real Estate** case in which the deed that was signed at the execution stage was nullified.

Regarding the argument that the execution was proper, he said the record does not show when the notice to show cause was served to the applicant, who delivered and served it, and at which address the said Notice was served to the applicant. He said the available evidence is that the process server returned the notice unserved and stated that the

applicant was not found at his last known address. He insisted that the applicant was coned and trapped into walking into choreographed proceedings aimed at extorting him.

On the issue that the presence of Advocate Mruma at execution is proof that he did appear for the applicant, he said that is a lie as if the respondent is confident, she would have summoned Advocate Mruma to swear an affidavit on this issue. He rhetorically asked the question, how did the Address of the counsel for the respondent appear on a plaint which he was yet to be served – How was he appointed as the Advocate before he was appointed as such? Lack of answers to these questions in his view, proves that the Advocate was part of the plan to extort the applicant.

He disputed the argument that the decision passed by the trial Court was based on the sound principles of law, he argued that that was not the case as the trial judge did not filter, or evaluate the evidence and eventually pronounced the judgment by abdicating the role of the court, the omission which renders the judgment not to stand. He cited the decision of the case of **Standard Chartered Bank (T) Ltd vs Samwel Nyalla Nghuni,** Civil Appeal No. 45 of 2020 CAT-Mwanza unreported on page 11 where it was held that,

"Where the suit proceeded exparte against the defendant, the ***trial judge or Magistrate does not assume the role of an umpire as to act as a conduit pipe for the plaintiff's averments to flow freely throughout and formally endorse them in the judgment****. We are saying so because it appears to us that, in the present case the learned trial judge endorsed the respondent's claim without subjecting his evidence to scrutiny as required by law."*

He in the end asks the court to find the application to be meritorious and allow it as such. Justice will prevail by permitting the case to be heard inter partes. Responding to the 1st preliminary objection he said it is not a true position of the law that the application for revision is not maintainable simply because the applicant was supposed in law to move the court by way of appeal as opposed to the revision. He recited the position in the case of **DPP vs Salum Alli Juma,** Criminal Application No. 02 of 2005, (Unreported) as cited in the case of **Ismail Abdallah Limbega vs Victor Nyoni,** Civil Revision No. 33 if 2020 HC-DSM (Unreported) where it was observed that

"Revisional jurisdiction can be exercised only where there is no right to appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly where the right of appeal exists but was not taken and good and sufficient reasons are given for not having lodged an appeal."

He also said that the decision in **Halais Pro-Chemie Industries Ltd vs Wella A.G** [1996] TLR 296 in which the case cited and relied on the case of **Moses Mwakibete** and the case of **Transport Equipment Ltd vs D.P Valambhia** the Court of Appeal held inter alia that;

> *"We think that Mwakibete's case read together with the case of Transport Equipment Ltd are authorities for the following legal propositions concerning the revisional jurisdiction of the Court under section 4(3) of the Appellate Jurisdiction Act, 1979:*
>
> *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 revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court.*
>
> *iii. A party to the proceedings in the High Court may invoke revisional jurisdiction of the court in matters which are not appealable with or without leave of the Court.*
>
> *iv. A party to the proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by the judicial process."*

He also cited the decision of **Arcopar (O.M) S.A VS Harbert Marwa and Family and Three Others**, Civil Application No. 2013

(unreported) which insisted that revision may be pursued if sufficient reasons are advanced for not pursuing an appeal. He submitted that in all instances the applicant qualifies to invoke the revisional jurisdiction of this court. He submitted that by the presence of the deed of settlement whether correct or not, section 70(3) of the Civil Procedure Code bars the filing of an appeal.

He submitted that in this case there exists exceptional circumstances. He said the applicant could not appeal because he was outside the country when the case was heard and decided exparte and that was presented as one of the grounds when he was applying for extension of time.

Further to that he submitted that the proceedings have judicial errors that need to be corrected by this court and which cannot be left without being corrected. He cited a number of cases where the Court of Appeal *suo motu* moved and commenced revision proceedings for the sole purpose of correcting the error or illegality in the proceedings or decision reached. In the case of **Tryphone Elias @ Ryphone Elias and Another vs Majaliwa Daudi Mayaya**, Civil Appeal No. 125 of 2020 where the court intervened because there was illegality in the proceedings of the High Court. He invited the court even if it found that the matter was

amenable to appeal, then it invoke its revisionary jurisdiction and rectify the errors for the sake of justice.

On the second point of preliminary objections, he submitted that that does not qualify to be a preliminary objection within the meaning of the decision of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] E. A 696 as it was not a pure point of law, but a factual issue which needs to be ascertained by evidence. He thus asked preliminary objection to be overruled consequently the application to be granted, and the proceedings to be revised objection.

In the rejoinder submission in respect of the preliminary objections, Mr. Sambo submitted that reading between the lines of the submission in reply it is evident that the applicant has conceded to the PO that the application was wrongly preferred due to the fact that the decision was supposed to be challenged by way of appeal as opposed to revision. He said the applicant was not served by the decision in the case of **Halais Prochemie Industries Ltd vs Wela A.G** (supra) because that case is distinguishable. After all, while in that case, the revision was *suo motu* by the Court, in the case at hand, it is by the application by the applicant, secondly, there are no exceptional circumstances for the revision *suo motto,* further in this case the applicant has a right to appeal but opted

to pursue revision, also that filing the deed of settlement in execution did bar an appeal for execution is never a bar to appeal and that the applicant right of appeal has never been blocked by any of the judicial process.

He said further that the concern that he was out of the country was supposed to be a ground for application for extension of time to appeal out of time, it cannot be a ground to prefer revision in the alternative of appeal. He said the decision in the case of **Arcopar (O.M) S.A VS Harbert Marwa and Family and Three Others**, (supra), does not apply to the application at hand because no sufficient reasons have been adduced by the applicant for him, not to appeal to this court against Civil Case No. 74/2018 neither has adduced any of the judicial progress which has prohibited him not to appeal. He submitted that, the deed of settlement at execution is not a consent judgment to prevent the applicant from appealing.

He said the call that the court should take judicial notice is highly objected to for doing so is to preempt the preliminary objection something forbidden by law. To support his argument, he cited the decision in the case of **Meet Singh Bhachu vs Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018 that once a preliminary objection has been raised, it

must be heard first and the other party is precluded from doing anything to pre-empt it.

He said the case of **Tryphone Elias @ Ryhone** and other cases cited with it is not applicable in those cases at hand because those cases there was no preliminary objection.

He says that the law section 79 of the CPC allows the appeal even where the case was heard and determined exparte therefore revision is not open to the applicant.

Submitting in support of the second point of preliminary objection, he said the same is a pure point of law as the affidavit offends the principle governing the affidavit. He invited the court to rely on the case of **Magreth Lotha Roland Purker vs Lothor Roland Purker,** Misc. Commercial Case No. 20 of 2022, High Court of Tanzania Commercial Division at DSM. He said the preliminary objection is in line with the principle in the **Mukisa Biscuit case** (supra) he prayed the Preliminary Objection to be upheld with costs.

Having summarized the submissions by both parties. It is worth noting that the substantive part of the application was argued simultaneously with the preliminary objection raised by the respondent in

opposition to the application. The court ordered the two to be argued together to serve time.

Now that the two were argued together, it is trite law that where in any motion before the Court a preliminary objection is raised, it should, as a matter of procedure be argued and disposed first before going to the substantive part of the application. See. **Meet Singh Bhachu vs Gurmit Singh Bhachu**, (supra) as cited by the counsel for the respondent.

In that spirit, in this application, I will resolve the two preliminary objections before going to the merits of the application. The raised preliminary objections are two as follows:

(a) The application is incompetent for the impugned proceedings, judgment, and decree in civil Case No. 74 of 2018 is appealable and not revisable.

(b) That the application is incurably defective for being supported by the argumentative affidavit with provisions and argument.

Starting with the first point, as already pointed out, the application at hand is challenging the decision that was passed exparte following the non-appearance of the applicant who was the defendant before the trial Court. He opted to challenge the decision by way of revision. The respondent is challenging him on the ground that he was supposed to

challenge the same by way of appeal for where there is a remedy of appeal, a party cannot challenge the judgment by way of revision.

The right to appeal and what decree can be appealed against before this Court is provided under section 70 of the Civil Procedure Code [Cap. 33 R.E 2019]. For clarity and easy reference but not to make this issue unnecessarily long, I will paraphrase what the provision provides with some emphasis added on some of the matters. Section 70(1) provides that an appeal may lie to the High Court in from ***every decree passed by a Court of Resident Magistrates Court or a District Court exercising original jurisdiction***. Under subsection (2) ***an appeal may also lie to this court from an original decree passed exparte before a Court of Resident Magistrates Court or a District Court***, while under subsection (3) ***bars only an appeal against the decree passed by a Court of Resident Magistrates Court or a District Court passed by the consent of the parties***.

In this case, the decree subject of this revision was passed by the trial Court exercising original jurisdiction and it was passed *ex-parte, it is* therefore within the meaning of section 70 (1) and (2) appealable before this Court.

Revisional jurisdiction of this court has been provided under section 79(1) of the Civil Procedure Code (supra) in the following terms:

> *"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 not vested in it by law,*
> *b. To have failed to exercise jurisdiction so vested, or*
> *c. To have acted in the exercise of its jurisdiction illegally or with material irregularity."*

The general principle regarding the revisional jurisdiction of this Court is that it is exercisable in matters where no appeal lies. That means, generally, where there is a remedy of appeal, revision cannot be opted in the alternative of appeal. From the above position of the law, a party who is aggrieved by the decision of the lower court where there is a remedy of appeal, cannot challenge it by way of revision.

However, that general principle has an exception as correctly held in the decision of the Court of Appeal in the case of **DPP vs Salum Alli Juma,** Criminal Application No. 02 of 2005, (Unreported) as cited in the case of **Ismail Abdallah Limbega vs Victor Nyoni,** Civil Revision No. 33 if 2020 HC-DSM (Unreported) where it was held inter alia that:

"Revisional jurisdiction can be exercised only ***where there is no right to appeal,*** *or* ***where the right of appeal is there but has been blocked by judicial process,*** *and* ***lastly where the right of appeal exists but was not taken and good and sufficient reasons are given for not having lodged an appeal.*** *"*

Mr. Sambo in his arguments subscribes to the above legal position, by submitting that, is of the court can only invoke its revisionary powers on its own motion *suo motu*, where it notes that there is something to correct, or where there are exceptional circumstances, or in matters which were not appealable with or without leave of the court, and or where the appeal has been blocked by judicial process. He cited the case of **Ramadhan Mikidadi vs Tanga Cement Company Limited**, Civil Application No. 275/01 of 2019 CAT -DSM (Unreported).

Now the question is whether the application at hand has met one or more of the above cited criteria.

The counsel for the applicant insists that his application for revision falls under the category of non-appealable simply because there is a deed of settlement settling and adjusting the decree of Tsh. 300,000,000/= to Tsh. 200,000,000/=. He submitted that by the presence of the deed of

settlement whether correct or not, section 70(3) of the Civil Procedure Code bars the filing of an appeal.

He also insists that in this case there exists exceptional circumstances. He could not have appealed because he was out of the country when the case was heard and decided exparte and that was presented as one of the grounds when he was applying for extension of time. Further to that he submitted that the proceedings have judicial errors that need to be corrected by this court and which cannot be left without being corrected. He cited a number of cases where the Court of Appeal *suo motu* moved and commenced revision proceedings for the sole purpose of correcting the error or illegality in the proceedings or decision reached. In the case of **Tryphone Elias @ Ryphone Elias and Another vs Majaliwa Daudi Mayaya**, Civil Appeal No. 125 of 2020 where the court intervened because there was illegality in the proceedings of the High Court.

He invited the court even if it found that the matter was amenable to appeal, then it invoke its revisionary jurisdiction and rectify the errors for the sake of justice. He also cited the decision of **Arcopar (O.M) S.A VS Harbert Marwa and Family and Three Others**, Civil Application No. 2013 (unreported) which insisted that revision may be pursued if

sufficient reasons are advanced for not pursuing an appeal. He submitted that in all instances the applicant qualifies to invoke the revisional jurisdiction of this court.

On the other hand, the counsel for the respondent is of the view that, in the case at hand, the raised grounds of revision are much more the grounds for appeal than the grounds for revision. Further to that, he said the applicant has never deposed in the affidavit any evidence suggesting that the right to appeal was blocked by any judicial process taking into account that even the exparte judgment and decree are appealable under section 70(2) of the CPC, and no exception circumstances which prevented him from appealing which would have allowed the court to invoke its revisionary powers.

In his view, as the right of appeal was available, it was wrong the file an application for revision as held in the case of **Golden Palm Ltd vs Cosmas Properties Limited,** Civil Application No. 561/01 of 2019. He asked the court to strike the application for being preferred in the alternative of appeal.

Answering the above question, I will start with the issue that the presence of the deed of settlement which was entered at the execution stage bars the appeal. That according to the counsel for the applicant is

based under section 70(3) of the CPC. The counsel for the respondent countered that argument on the ground that, the deed of settlement entered at the execution stage does not bar an appeal. This issue will not detain me much as the answer is not farfetched, it is contained in the provision of section 70(3) of the CPC as it bars only an appeal against the decree passed by a Court with the consent of the parties.

In the case at hand the decree subject to this revision was not passed with the consent of the parties, it was passed exparte in the absence of the defendant. What was adjusted was the amount to be paid at the execution process at the time when the decree had already been passed. That said this matter does not fall under the category of the decree for which the appeal is barred. That said, I find merit in the argument advanced by Mr. Sambo that the case is appealable.

The next question is whether the right of appeal is there but has been blocked by judicial process. That question is a matter of fact to be proved by evidence which could have shown in the affidavit filed in support of the application proving that his effort to appeal was blocked by any judicial or even administrative process that prevented him from appealing, consequent of which he was to resort to revision as an alternative. I have traversed the affidavit filed in support of the

application, there is no fact alleging that he was so prevented. The lack of that evidence proves that the applicant had no concrete reasons for not exhausting the remedy of appeal provided by law.

Further to that, there are no exceptional circumstances that have been demonstrated to prove that the circumstances prevented him from appealing. That said I find the first ground of objection merited; it is thus upheld because the applicant has failed to prove that the application at hand falls in the category of the matter which is exceptional to entitle him to file revision instead of appeal.

Regarding the second point of objection that the application is incurably defective for being supported by the argumentative affidavit with provisions and argument. The same will not bother me much because even the respondent counsel himself did not elaborate on the said argument as contained in the said affidavit. I have passed through the affidavit, and what I see are the facts that according to the respondent can prove. That being the case I find the second point without merits, it is thus overruled.

Now having upheld the first point of preliminary objection, I was asked and invited by the applicant that, even if I find that the matter was amenable to appeal, then I invoke my revisionary jurisdiction and rectify

the errors and illegality for the sake of justice. That move was strongly objected to by the counsel for the respondent that to do so would amount to pre-empting the already raised objection. I entirely agree with the counsel for the respondent that moving myself will amount to rendering the raised preliminary objection one of which I have sustained, nugatory and inconsequential. On that base, I reject that proposition as presented by the counsel for the applicant.

Before I pen off, and having given due consideration to the facts and circumstances of the case at hand. These are the fact that the case was heard exparte, the complaint of how the case was heard, and execution conducted, also the fact that the applicant sought and obtained leave to file this application out of time, and that since when he was given leave, he has been in court prosecuting the application for revision. I find in the interest of justice to invoke the powers I have under the provision of sections 95 and 93 of the Civil Procedure Code [Cap 33 R.E 2019] which provides as follows;

Section 95 of the CPC

"Nothing in this code shall be deemed to limit or otherwise affect the inherent powers of this court that the court to make such orders as may be necessary for the end of justice or to prevent the abuse of the court process."

While Section 93 of the CPC

> *"Where any period is fixed or granted by the court for doing of any act prescribed or allowed by this code, the court may, in its discretion from time to time, enlarge such period originally fixed or granted may have expired."*

The time within which to appeal has already expired, while the applicant was in court pursuing revision, as pointed earlier that the circumstances of the case demand this court invoke its inherent powers under the above-quoted provision and enlarge the time for the applicant to file an appeal. That said I struck out this application with the leave to file an appeal within 14 days from the date of this order. No order as to costs is made.

It is accordingly ordered.

DATED and delivered at **ARUSHA** on the 27th day of February 2024

J.C. TIGANGA

JUDGE.