IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 275/01 OF 2019

RAMADHANI MIKIDADI ..... APPLICANT

VERSUS

TANGA CEMENT COMPANY LTD ..... RESPONDENT

(Application for revision of the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Aboud, J.)

dated the 24th day of May, 2019
in
Revision No. 25 of 2019

.....

RULING OF THE COURT

18th July, & 26th September, 2022

KOROSSO, J.A.:

This is an application for revision, lodged by Ramadhani Mikidadi, the applicant by way of notice of motion pursuant to Rule 65 (1), (2), (3), and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules) against the decision of the High Court of Tanzania Labour Division at Dar es Salaam in Revision No. 25 of 2019 delivered on 24/5/2019. The notice of motion is supported by the affidavit avowed by the applicant himself. The respondent has resisted the application through the affidavit in reply sworn by Nuhu Mkumbukwa, advocate for the respondent, filed on 19/8/2019. For reasons that will come to light herein, we find no pertinent need to reproduce the background to the application.

On the day the application came for hearing before us on 18/7/2022, the applicant appeared in person, unrepresented whereas, the respondent enjoyed the services of Mr. Ruben Sadiki Robert, learned Advocate.

Before us, was a notice of preliminary objection filed by the respondent on 15/8/2019 fronting six points of objection as follows:

i. *The application is incompetent for the impugned decision is appealable and not revisable.*
ii. *The application is incompetent and an abuse of Court process as the applicant has already preferred appeal against the same decision.*
iii. *The application is incurably defective for being supported by improperly verified affidavit.*
iv. *The application is incurably defective for being preferred under wrong provision of the law.*
v. *The application is incurably defective for being supported by argumentative affidavit with legal provisions and arguments.*
vi. *That the application is incompetent for failure to comply with Rule 65(1) of the Tanzania Court of Appeal Rules, 2009.*

Taking into account the importance of determining the points of objection before going to the merits of the application, we called upon the parties to submit on them.

Mr. Robert submitted that the application has a lot of problems both in the notice of motion and the supporting affidavit. He argued that the averments in the paragraphs in the affidavit supporting the notice of motion do not support the prayers in the application nor the impugned decision subject of the revision. In addition, apart from the averments in the affidavit supporting the application containing prayers, submissions and legal arguments, the verification of the affidavit is improper. In short, the applicant has verified only a few paragraphs of the affidavit leaving the others hanging for not being substantiated.

He stated further that apart from the invalid verification, the major concern is that the application is incompetent because the applicant has a right of appeal and has in fact already lodged a notice of appeal to challenge the impugned decision of the High Court. He added that even the grounds of the application are aimed at arguing the appeal and not an application for revision in which the Court is concerned with satisfying itself with the propriety, correctness and legality of the finding of the High

Court. He concluded by urging the Court to find the application to be incompetent and thus subject to being struck out.

In response, the applicant being a lay person had nothing substantive to reply except to say that having heard the respondent counsel there is nothing he can respond to and thus left it to the Court to determine the merit or demerit of the points of objection raised. Essentially there was no rejoinder from the respondent's counsel, apart from his insistence that the application was incompetent, and that it should be struck out for reasons expounded.

Considering the submissions on the points of objection raised by the respondents, certainly, the main issue for determination is the competence of the application.

Having revisited the record of revision, particularly the notice of motion and the supporting affidavit thereof, and clearly, as expounded by the learned counsel for the respondent, the affidavit deponed by the applicant himself is engrained with various defects. These include the complaint that the averment in the affidavit supporting the application does not support the prayers sought and that at the same time the applicant only verified the contents of a few paragraphs therein.

Having revisited the affidavit deponed by the applicant, there is no question that the verification is only for paragraphs 1-8 out of the 128 paragraphs in the said affidavit. In the circumstances, we are settled that the verification clause by the applicant is defective for verifying only 8 paragraphs out of 128 as correctly submitted by the counsel for the respondent. We are aware that a defective verification is amenable to amendment by the applicant upon being granted leave by the Court. For this stance see the decisions of this Court in the case of **DDL Invest International Limited v. Tanzania Harbours Authority and Two Others,** Civil Application No. 8 of 2001 and **Sanyou Service Station Ltd v. BP Tanzania Ltd (Now Puma Energy (T) Ltd**, Civil Application No. 185/17 of 2018 (both unreported).

However, before we consider the said remedy, we need to determine the first point of preliminary objection on the competence of the application before us. There is no dispute that the complaints engrained in the affidavit supporting the application do fit more as grounds of appeal as opposed to supporting or grounding the current application for revision. We are alive to the fact that it is now settled that, the Court's revisional power is exercised under exceptional circumstances. The fact that revisional powers of the Court can only be exercised where there is no right of appeal is well settled as expounded in various decisions

of the Court including **Moses J. Mwakibete v. The Editor, Uhuru, Shirika la Magazeti ya Chama and Another** [1995] T.L.R 134, **Halais Pro-Chemie v. Wella A. G.** [1996] T.L. R. 269, **Kezia Violet Mato v. National Bank of Commerce and 3 Others**, Civil Application No. 127 of 2005 (unreported). In the case of **Transport Equipment Ltd. v. Devram** [1995] T. L. R 161, this Court particularly held 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."*

Clearly, being aggrieved the applicant had the right to appeal against the decision of the High Court and according to him, his filing the revision was just as a reference so that the respondents will give him his rights which he has been sitting on since 1995.

As alluded to herein above, the Court has had an opportunity to introduce tests or conditions to be considered when determining whether it can invoke its revisionary powers as set in the case of **Halais Pro-Chemie** (supra). These are as follows: **one**, by the Court *suo motu,* where the Court at any time may invoke its revisional powers in respect of the proceedings in the High Court; **two**, where there are exceptional

circumstances; **three**, in matters which were not appealable with or without leave; and **four**, where the appellate process has been blocked by judicial process.

Applying the above conditions to the present case, clearly, test number one is not applicable, since the application does not fall there. With regard to test number two, we have failed to discern from the application any exceptional circumstances to warrant us to hold that this case should fall within the test. The cases of **Halais Pro-Chemie** and **SGS Societe Generate De Surveillances S.A** (supra) in which grounds on which an applicant may resort to revisional jurisdiction of the Court instead of appealing are relevant. However, the grounds referred to in the two cases as discussed above are wanting in the instant application to warrant us invoking our revisionai powers. The right of appeal is available for the applicant and its open for him to pursue if he is so inclined. We thus find the first point of objection meritorious and hereby sustain it.

In the foregoing, we find the application to be incompetent and we do not need to consider the remaining points of objection as the first suffices to dispose of the application.

In the end, having found the application to be incompetent, the available remedy is to strike it out. Consequently, the application is struck out and we order that each party bears its own costs.

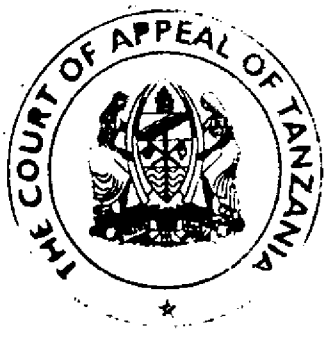
DATED at **DAR ES SALAAM** this 16th day of September, 2022.

F.L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 26th day of September, 2022 in the presence of applicant in person and Mr. Ally Hamza, learned counsel for Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL