A

B

C

D

E

F

NATIONAL BANK OF COMMERCE

v.

SADRUDIN MEGHJI

G

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Kisanga, Ramadhani and Lubuva, JJ.A.)

H

(From the decision of the High Court of Tanzania at Dar es Salaam, Kyando,J., dated 6 February 1996, in Civil Case No. 224 of 1994)

I

Court of Appeal – Revisional Powers – Decision of trial court falls under the provisions of s.5(2)(a)(i) of the Appellate Jurisdiction Act 1979 – Whether powers of revision and not an appeal may be invoked to challenge the decision

A *Civil Practice and Procedure – Change of Advocates – Whether change of advocates in handling case constitutes sufficient cause amounting to special circumstances under s.3(4) of the Appellate Jurisdiction Act 1979 as amended by Act No. 17 of 1993*

B *Civil Practice and Procedure – Appeal – Right to appeal – Decision made under order XV rule 1 of the Civil Procedure Code 1966 – Whether the decision is appellable*

C *Civil Practice and Procedure – Limitation of time – Application for revision filed 14 months after decision – Whether or not the application is time barred*

D By Notice of Motion, the applicant requested the Court to grant an order of "revision of the High Court decision and remit the case to the High Court for trial on merits." One ground for the revision was that the High Court erred in entertaining the suit which was time-barred. In the counter affidavit opposing the E application was a preliminary objection seeking to strike out the application on the grounds that it was misconceived, incompetent, and an abuse of the court process, and that it was time-barred.

F **Held:**

(i) In the matter before the Court no appeal was instituted and the revisional powers of the Court cannot be invoked for purposes of and incidental to the G determination of an appeal that was not before the Court; the application, therefore, was filed under an inapplicable provision of the law;

(ii) Counsel's inadvertence, inaction or lapse that goes to the root of the matter is a serious matter amounting to negligence; such a mistake by counsel that H affects the client's right of appeal is fundamental and cannot be regarded as exceptional circumstances warranting the court's exercise of its revisional powers;

I (iii) Under s.5(2)(a)(i) of the Appellate Jurisdiction Act 1979 appeals lie to the Court of Appeal with leave of the High Court; therefore, the claim that the appeal process was blocked by law is untenable;

(iv) Under the provisions of s.3 of, and paragraph 21 of the First Schedule to, the Law of Limitation Act 1971, the application should have been filed within two months [60 days] from the date of delivery of the decision sought to be revised.

Application struck out

Cases referred to:

(1) *Halais Pro-Chemie Industries Ltd v. Wella A.G.,* [1996] T.L.R. 269

(2) *Moses Mwakibete v. The Editor of* ***Uhuru*** *and Two Others,* Court of Appeal, Civil Application No. 8 of 1994 (unreported)

(3) *Transport Equipment Ltd v. Devram P Valambhia,* [1995] T.L.R. 161

(4) *Kighoma Alli Malima v. Abbas Yusuf Mwingamno,* CA – Civil Application No. 5 of 1987 (unreported)

(5) *Institute of Finance Management v. Simon Manyaki,* CA – Civil Application No. 15 of 1987 (unreported)

Mr. Maira, for the Applicant

Mr. Kesaria, for the Respondent

RULING OF THE COURT

(Dated 1 April 1998)

Lubuva, J.A.: By notice of motion filed by the National Bank of Commerce, the applicant in this application, the Court is requested for an order of "revision of the High Court decision and remit the case to the High Court for trial on merits." Among others, the ground advanced for the revision was that the High Court erred in entertaining the suit which was time-barred. The application is supported by an affidavit deposed to by Mr. T.C. Kapinga, counsel to the applicant's bank in the Legal and Trustee Services Department. In reply, a counter affidavit deposed to by

D. Kesaria, learned counsel for Sadrudin Meghji, the respondent, was filed. Then, a notice of preliminary objection was filed under rule 100 of the Court's Rules, 1979. The preliminary objection sought to have the application struck out on the following reasons:

1. The application is misconceived and or incompetent.
2. The application is an abuse of the process of the Court.
3. The application is time-barred.

When the application was called on for hearing, Mr. D. Kesaria raised the preliminary objection. In the light of the affidavits filed and the submissions by the learned counsel for both parties on the preliminary objection, the following are the undisputed facts which gave rise to this matter. The judgment in favour of the respondent in this application in High Court Civil Case No. 244 of 1994 was delivered on 6.2.1996. In terms of the provisions of Order XV Rule 1 of the Civil Procedure Code, the judgment was entered following the filing of a memorandum of agreed issues by the applicant and the respondent before the learned trial judge. It is apparent that since the time when the judgment was delivered, apart from the filing of Application No. 43 of 1996, for stay of execution of the decision dated 6.2.1996, no attempt was made to file an appeal to this Court. On 9.4.1997, this application was filed, fourteen (14) months after the judgment, the subject of this application, was delivered (6.2.1996). This is the application in which a preliminary objection has been raised by Mr. D. Kesaria, learned counsel.

The central issue in this matter is the competence of the application. Mr. Kesaria, learned counsel for the respondent was of the settled view that it is incompetent and misconceived. In his submission, he stated that as the decision of the High Court (Kyando, J.) dated 6.2.1996 falls under the provisions of section 5(2)(a)(i) of the Appellate Jurisdiction Act, 1979, an appeal lies to this Court with the leave of the High Court. However, in this case, Mr. Kesaria went on in his submission, the right of appeal was not exercised; instead, this application for revision has been

filed. This, he urged, is an improper use of the revisional powers of the Court. The reason, he said, was that under the Appellate Jurisdiction Act, 1979, the powers of revision were not meant to be used as an alternative to the appellate jurisdiction of the court. Furthermore, Mr. Kesaria stated, from 6.2.1996 when the decision was delivered, the applicant did not take any steps in instituting the appeal or applying for extension of time in which to seek leave to appeal. In these circumstances, Mr. Kesaria concluded, as the right of appeal was not pursued for no sufficient reason, it was an abuse of the court process for the applicant to resort to revisional powers. In the alternative, Mr. Kesaria prayed for the application to be struck out because it was hopelessly time barred. In support of his submissions, Mr. Kesaria referred us to the decisions of this Court in: *Halais Pro-Chemie Industries Ltd. v. Wella Ag. (1)*, *Moses Mwakibete v. The Editor of Uhuru and Two Others (2)*, and *Transport Equipment Limited v. Devram P. Valambhia (3)*.

Mr. Maira, learned counsel for the respondent, strongly opposed the preliminary objection. He advanced the following reasons: First, that there was no right of appeal against the judgment of 6.2.1996. He took the view that as the judgment, the subject of this application was delivered pursuant to Order XV Rule 1 of the Civil Procedure Code, 1977, it was a consent judgment. In that situation, he maintained, the decision was not open to appeal. For that reason, Mr. Maira insisted, in August 1996 when he took over the conduct of the case and became aware of the error in the judgment, he pursued the matter promptly by way of revision and not by way of appeal. Furthermore, the change of advocates handling the case which accounted for the time lost in pursuing the matter promptly after the judgment, Mr. Maira stressed, was sufficient reason amounting to exceptional circumstances warranting the Court's exercise of its powers of revision. Relying on the decision of this Court in *Halais Pro-Chemie Industries Ltd. (1)* Mr. Maira urged that the mater before us fits on all fours with proposition (ii) in that case in which it was stated that under exceptional circumstances, the revisional jurisdiction of the Court can be invoked as an alternative to the appellate jurisdiction. On the other

hand, Mr. Maira invited the Court to deal with the matter on revision *suo motu* in case the Court comes to the view that it was not properly moved to exercise its revisional jurisdiction. This is in order to do justice in the case, Mr. Maira pointed out.

We have closely and anxiously given consideration to these submissions. We will first deal with the issue of the competence of the application. On this, we have no hesitation in stating that we are in agreement with Mr. D. Kesaria, learned counsel, that the Court has not been properly moved in this application. It is to be observed that the matter has been filed in this Court by a notice of motion under Section 4(2) of the Appellate Jurisdiction Act, 1979. Sub-sections 2 and 3 of Section 4 of the Act, as amended by Act No. 17 of 1993, vest the Court with powers of revision for purposes of and incidental to the hearing and determination of any appeal. That is, the revisional jurisdiction is exercised in the course of hearing an appeal in regard to an aspect in the appeal in which no appeal has been preferred. In the matter before the Court, no appeal was instituted and so, the revisional powers cannot be invoked for purposes of and incidental to the determination of an appeal which was not before the Court. It follows therefore that the application has been filed by notice of motion under an inapplicable section of the law. Consequently, as the Court was not properly moved the application is, likewise, incompetent.

On the other hand, granted that the Court was appropriately moved under sub-section (3) of Section 4 of the Act, what are the circumstances that would warrant the exercise of the Court's powers of revision? Mr. Maira strongly contended that the change of advocates in the handling of the case is sufficient reason amounting to special circumstances to justify the exercise of the revisonal powers for the Court. In support of this proposition, he referred the Court to its decision in the case of *Halais Pro-Chemie Industries Ltd. v. Wella A.G. (1).* Dealing with circumstances under sub-section (3) of Section 4 of the Act, the Court stated inter alia:

(i) ... ...

(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.

With great respect to Mr. Maira, we do not think that a change of counsel in the conduct of the respondent's case constitutes such special circumstances as to warrant the court to invoke its powers of revision as an alternative to the appellate jurisdiction. This is so because, in the first place, and as conceded by Mr. Maira, no steps were taken soon after the delivery of the decision which is sought to be revised for instituting an appeal due to the inadvertence, laxity and or lapse on the part of the respondent's counsel who had the conduct of the case until sometime in August 1997 when he, Mr. Maira, took over the conduct of the case. It was not until then that Mr. Maira became aware o the error in the decision, the subject of this application. It is common knowledge and elementary too that counsel's inadvertence, inaction or lapse which goes to the very root of the matter is a serous mater amounting to negligence on the part of counsel. This, in our view, would not constitute sufficient reason to warrant the exercise of the revisional powers of the Court. In somewhat similar situation involving laxity and lapse on the part of counsel, in the case of *Kighoma Alli Malima v. Abas Yusuf Mwingamno (4)* the Court stated:

> Sufficient reason has been considered in a number of cases. Sometimes a slight lapse by an advocate might be overlooked, but not a lapse of a fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time.

In another case, *Institute of Finance Management v. Simon Manyaki (5)* the Court again stated as follows:

> The point to stress here is that counsel's mistake may amount to sufficient

A reason only where the mistake involves a minor or slight lapse, but not where it involves a lapse of a fundamental nature.

B In this case it beats our imagination that Mr. Maira urges us to accept that counsel's failure to initiate the institution of an appeal for a period of 14 months since the delivery of the judgment on 6.2.1996 was a slight lapse. In our considered view, such a mistake by counsel which affects C the client's right of appeal is fundamental.

It cannot by any stretch of the imagination be regarded as an exceptional circumstance envisaged in *Halais Pro-Chemie* case warranting the court's exercise of its revisional powers.

D There is yet another feature of the mater. Mr. Maira had valiantly urged that as the decision of 6.2.1996 was made under Order XV Rule I of the Civil Procedure Code, 1966, it was a consent judgment in E which case, he stressed, it was not appeallable. That is, the appeal process was blocked by law in which case, in his view, the matter could only be brought up to this Court by way of revision. With this perception of the law, Mr. Maira charged, counsel for the applicant deemed it unnecessary F to take any steps towards the institution of an appeal. Consequently, Mr. Maira stated, the matter has now been lodged in the Court seeking revision. We find this submission attractive but, with respect, are unable to accept it. This is for the obvious reason that if, as urged by Mr. Maira, G the decision for which revision is sought was a consent judgment, the matter would fall under section 5(2)(a)(i) of the Appellate Jurisdiction Act, 1979. In part it provides:

H

> 5(2) notwithstanding the provisions of subsection (1) –
> (a) except with the leave of the High Court, no appeal shall lie against –
> (i) any decree or order made by the consent of the parties.

I

It is common knowledge that under this section appeals lie to the court with leave of the High Court. With a little diligence on the part of counsel, this would have been obvious. As it happened in this case, no appeal

was instituted and not even an attempt was made to apply for extension of time in which to appeal. Therefore, the ground raised that the appeal process was blocked by law is to our minds, untenable. If anything at all, it is a further reflection on counsel's negligence. We reject this ground.

Finally, we will deal with the question of limitation. Granted that the application for revision was properly founded in law, still we think, it would be rendered incompetent. We agree with Mr. Kesaria that the application is time barred. Under the provisions of section 3 and paragraph 21 of the First Schedule to the Law of Limitation Act, 1971, the application should have been filed within two months (60 days) from the date of its delivery on 6.2.1996. The application before us was lodged on 9.4.1997, a period of about 14 months since the delivery of the decision. This, in our considered opinion is very much out of time. This ground alone, we think would be sufficient to dispose of this application.

Before concluding this matter, we wish to observe that Mr. Maira's alternative plea from the bar that the Court may wish to deal with the matter on revision *suo motu* is equally unfounded. The matter is already before the Court by a notice of motion filed by Mr. Maira. It has therefore to be dealt with in the manner the Court was moved and not otherwise. This, the Court has endeavoured to do in this application.

For the foregoing reasons, the preliminary objection raised by Mr. Kesaria is sustained. Consequently, the application, being misconceived and incompetent, is struck out with costs.