IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPLICATION NO. 48 OF 2000

BETWEEN

THE REGISTERED TRUSTEES SOCIAL
ACTION TRUST FUND & ANOTHER. . . . APPLICANTS

AND

MESSERS HAPPY SAUSAGES LTD.
& 10 OTHERS. . . . . RESPONDENTS

(Application for Revision from the decision of the High Court of Tanzania at Arusha)

(Mushi, J.)

dated the 26th and 27th June, 2000

in

Misc. Civil Case Nos. 73 And 27 of 2000

R U L I N G

KISANGA, J.A.:

This is an application for revision of the decision of the High Court at Arusha (Mushi, J.) in Civil Case No. 27 of 2000 dated 27.6.2000, granting injunction order against the applicants herein. Before us the applicants were unrepresented by counsel; they appeared and argued the application in person while the respondents had the services of Mr. D'Souza, advocate.

Before the application could proceed to hearing, Mr. D'Souza took a preliminary objection, the notice of which he had duly given in terms of rule 100 of the Court of Appeal Rules. The objection is threefold, but counsel

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abandoned the third ground and argued grounds (1) and (2) only. By and large the objection hinges on the first ground which is to the effect that the applicants cannot invoke the revisional jurisdiction of the Court because they have the right of appeal open to them. Mr. D'Souza submitted that the ruling of the High Court, the subject of the intended revision, is appealable with leave under section 5 (1) (c) of the Appellate Jurisdiction Act. Once the applicants had such right, but did not wish to exercise it, counsel went on, they cannot invoke the revisional jurisdiction conferred on this Court by the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 unless they can show good and sufficient reasons, amounting to exceptional circumstances, for doing so. In support of this submission the learned counsel referred to a number of decisions of this Court including Halais Pro-Chemie Industries Ltd. v. Wella A.G. /1996/ TLR 269, Miroslav Katic Vesra and Another v. Ivan Makobrad Civil Application No. 66 of 1998 (unreported) and Fahari Bottlers Ltd. and Another v. The Registrar of Companies and Another Civil Revision No. 1 of 1999 (unreported). Mr. D'Souza contended that the applicants' notice of motion and the accompanying affidavit do not dislclose any exceptional circumstance which would warrant granting the application, and therefore the application should be dismissed.

In response to that Mr. C. Ngalo contended that there were peculiar circumstances in this case which merited invoking the revisional jurisdiction of the Court. First, the High Court made the order complained of without first

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revoking its earlier order relating to the matter. Elaborating on this, counsel said that on 14.6.2000 the respondents filed a suit in the High Court at Arusha and simultaneously filed an application for temporary injunction against the applicants. The application for temporary injunction was set down for hearing on 6.7.2000, but before that date was reached the court on 27.6.2000 heard the said application and granted the temporary injunction prayed for without first revoking its earlier order which had set the hearing date on 6.7.2000, and worse still it made that order in the absence of the applicants. Mr. Ngalo seriously attacked the trial judge saying that the way he handled the matter was not only improper but amounted to an abuse of process. He also charged that the learned judge was biased.

Mr. Ngalo then, in support of his submission, referred to the case of Miroslav Katic Vesra cited above where this Court found peculiar circumstances which warranted invoking its revisional powers. The peculiar circumstances there consisted first, in the trial judge purporting to nullify a previous order of that court and, secondly in purporting to overrule an order of this Court. The Court found this to be an impropriety "bordering closely on a traversty of justice", and a peculiar circumstance which warranted invoking the revisional jurisdiction of the Court. But that situation appears distinguishable from the case at hand. Here, unlike there, the trial judge did not purport to nullify any previous order of that court. Indeed, he did not purport to nullify his order which set the hearing date of the application on 6.7.2000; on the contrary he did

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honour that order. For, he did convene the court on 6.7.2000 as appointed, but deferred hearing the application inter-partes because the applicants had already referred the matter to this Court. Again in this case, unlike in the Miroslav Katic Vesra's case, there was no question of the trial judge purporting to overrule the decision of a higher court. Therefore the decision relied on by Mr. Ngalo does not really help advance his case. The alleged irregularity here concerns an order of a judge which does not affect any previous order of the same court or of a higher court. We can find nothing peculiar or exceptional in this. It was, in our view, an ordinary situation the remedy of which lay in the normal appeal process.

Mr. Ngalo further cited the decision of this Court in the case of Abdalahamani Mponzi v. Daudi Mlwilo Civil Revision No. 1 of 1999 (unreported) in support of his contention that the hearing of the application and the granting of temporary injunction ex-parte by the trial judge, thereby denying the applicants the opportunity to be heard, was incurably defective and constituted an exceptional circumstance warranting this Court to exercise its revisional jurisdiction. In the case cited by counsel this Court noted that the record of the proceedings had revealed serious irregularities in the three courts below. One of the serious errors so found was the hearing of an application ex-parte by the High Court on the ground that the application involved technicalities which the respondents would not be able to understand. The Court, emphasizing the need to accord a

litigant the right to be heard, stated that deprivation of that right "makes the proceedings concerned incurably diffective." But apart from this there were further serious errors and irregularities committed not only by the High Court but also by the District Court and the Primary Court. This then distinguishes the case from the one at hand where the alleged error involved one court, one judge, and one decision only. This was a situation which was capable of reddress through the normal appeal mechanism and we can see nothing exceptional about it. The case, therefore is of no assistance at all to Mr. Ngalo.

In his tireless effort to persuade us, Mr. Ngalo yet referred us to the Fahari Bottlers case, already cited above, to support his argument that the matter is one of urgency. In this respect he said that the case involved a commercial dispute with sensitivity. It involves goods of a perishable nature with little or no possibility of continuing their production in future, hence the need to dispose of the business urgently. But once again this case is distinguishable from Fahari Bottlers case. In that case the proceedings in the High Court were afflicted by confusion, almost amounting to chaos, arising from the various orders and decisions given by not less than three judges of that court on different occasions. Some orders were obviously erroneous while others were conflicting and incomprehensible. There were yet other irregularities. The High Court judges had failed to observe and apply the mediation process in handling the particular case, and an advocate had been improperly appointed provisional liquidator in circumstances which placed him in a position of

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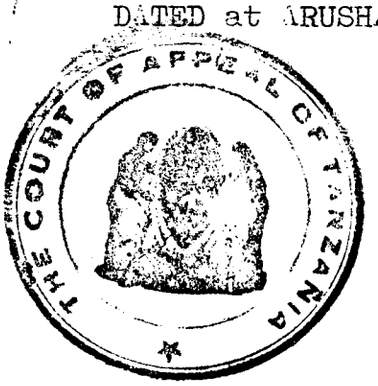
conflict of interest. Obviously the situation here is different from one in the instant case where the alleged irregularity is a straight-forward one involving only one judge and only one order made by him. Such a situation could easily be remedied through the normal process of appeal and there is nothing exceptional about it to justify invoking the revisional jurisdiction of the Court. It is true that in revising the proceedings in Fahari Bottlers case the Court said that it took into account that that was "a commercial case deserving to be treated with sensitivity for the needs of the commercial community both within and outside Tanzania." However, it is apparent that that was only an additional consideration taken into account after the Court found a substratum of material to justify invoking the revisional jurisdiction. We could find no such substratum of material in this case. Therefore Mr. Ngalo cannot rely on the Fahari Bottlers case to support his submission, and with that we find that the applicants have failed to show exceptional circumstances which would justify invoking the revisional powers of the Court when the right of appeal with leave was or is open to them. Therefore the first ground of Mr. D'Souza's preliminary objection succeeds.

His second ground of objection is that the applicants' prayer that the case be transferred to another judge or to the commercial division of the High Court is baseless. This ground need not detain us, and it may be disposed of very quickly. As Mr. D'Souza quite rightly observed, an application for revision presupposes there being in existence an order of the lower court. In the instant case, however, the trial

judge made no order respecting this aspect of the matter. He was not asked to disqualify himself from hearing the matter or to transfer the case to the commercial division, and he refused. Therefore, there can be no peg on which to hand a revision order of this Court, as it were. That ground also succeeds.

In the result and for the reasons we have endeavoured to set out above, we uphold Mr. D'Souza's preliminary objection. Accordingly the application for revision is dismissed with costs.

DATED at ARUSHA this 26th day of October, 2000.



R.H. KISANGA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR