IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CIVIL REVISION NO. 62 OF 2006

1. TANZANIA TELECOMMUNICATIONS CO. LTD.
2. TANZANIA REVENUE AUTHORITY
3. TANZANIA COMMUNICATIONS REGULATORY AUTHORITY ..... APPLICANTS
4. VIP ENGINEERING AND MARKETING LIMITED

VERSUS

TRI TELECOMMUNICATIONS TANZANIA LTD. ..... RESPONDENT

(Application for revision from the decision of the High Court of Tanzania – Commercial Division at Dar es Salaam)

(Kimaro, J.)

dated the 12th day of June, 2003
in
Commercial Case No. 6 of 2003

RULING OF THE COURT

11 & 26 July 2006

LUBUVA, J.A.:

Before us are revision proceedings. For proper appreciation of the circumstances in which the Court was prompted to take this course of action it is convenient to set out the background of the matter briefly.

By letter dated 21.3.2006 from Nyalali, Warioba and Mahalu Law Associates, information was received by the

Hon. Chief Justice in relation to Misc. Civil Case No. 6 of 2003 in the High Court, Commercial Division. The matter involved a petition for winding up of the Respondent company, Tri-Telecommunications Tanzania Ltd. by Tanzania Telecommunications Co. Ltd. (1st Petitioner), Tanzania Revenue Authority (2nd Petitioner), Tanzania Communications Regulatory Authority (3rd Petitioner) and VIP Engineering And Marketing Limited (4th Petitioner). The application was based on the provisions of the Companies Ordinance (Cap. 112) and the Winding Up Rules, 1929. The petition which was not objected to was allowed and the proposed Liquidator, Mr. Peter Clever Bakilana appointed.

On 12.6.2003 the ruling of the learned trial judge (Kimaro, J.) was delivered. The petition was allowed and several consequential orders made. Among such orders is the following:

> (e) That any of the Creditors that the Liquidator will prove to have carried out any business of the Respondent with intent to defraud other creditors of the Respondent or Creditors of any other person, whether past or present, such

> creditors, who were knowingly parties to the carrying on the business in such manners, shall be personally responsible, without any limitation of liability for all or any debts or other liabilities of the Respondent as mandated by Section 269 (1) of the Companies Ordinance, Cap. 212.

Apparently, this order was the immediate cause for the aforementioned information communicated to the Hon. Chief Justice. The central issue raised in the information is that there is a statutory error in the proceedings of the High Court. That in dealing with the winding up proceedings, the learned trial judge invoked the provisions of section 269 (1) of the Companies Ordinance (Cap 112) which it is claimed still retains uncorrected statutory error.

It is further claimed in the information that while Parliament had not made any amendment to the Companies Ordinance (Cap 212), for the first time, a change in section 269 (1) of the Ordinance appeared in the 1987 revision of the laws which had many typographical errors. Some of these errors were later corrected but others including section 269 (1) escaped the attention of the intended law revision of 1987 as well as the Revised Edition of 2002. As a result of

the error which was not corrected in relation to section 269 (1) of the 1987 version of Cap. 212 and the Revised Edition of 2002, the word “creditors” has been inserted in place of the word “directors”.

For this reason, it was urged in the information to the Hon. Chief Justice that had this error been pointed out to the trial judge in the Commercial Division of the High Court, the order (e) shown above relating to the duties of the liquidator would have been different.

On the basis of this information, on 17.5.2006, the Hon. Chief Justice was prompted to order that a revisional file be opened for revising High Court, Commercial Division Misc. Civil Case No. 6 of 2003. Hence these revision proceedings.

In this application, Mr. Nyanduga, assisted by Mr. Kesaria, Mr. Mujulizi and Mr. Nyange, learned counsel, appeared for the Citibank Tanzania Ltd. On the other hand, Mr. Msuya, Mr. Lugaiya and Mr. Tenga, learned counsel, respectively appeared for the first, second and fourth petitioners. The third petitioner, Tanzania Communications Regulatory Authority, though duly served was absent. For the liquidator, Professor Luoga, leaned counsel, appeared.

At the commencement of hearing this matter, the Court

suo motu raised the issue whether the Court was properly seized with this application. This is particularly so when it transpired that proceedings in High Court Commercial Division Misc. Civil Case No. 6 of 2003, subject of this application were also subject of application No. 112 of 2003 for revision in this Court. On 10.3.2004 the Court dismissed the application on the ground that the applicant, Citibank Tanzania Limited, had the right to appeal with leave.

Messrs Nyanduga, Kesaria and Mujulizi, learned counsel for Citibank Tanzania Limited, in turn addressed the Court on this issue. Essentially, their submissions boil down to the following. That the Court has been properly moved because in Civil Application No. 112 of 2003 in this Court, the complaint by the applicant Citibank Tanzania Limited, was that it had been condemned by the High Court without the opportunity of being heard. In this application the situation is different. First, Citibank Tanzania Limited, is not a party to the application which the Court initiated *suo motu.* Second, the complaint is that there is a serious error in the law, namely the Companies Ordinance which was applied by the trial court adversely affected Citibank Tanzania Limited. For this reason, counsel maintained, the matter in this application being different, the Court was properly moved.

For the first, second, fourth petitioners and the

Liquidator, Messrs Msuya, Lugaiya, Tenga and Professor Luoga, respectively also made submissions. The thrust of their submissions was that the application was not properly before the Court. The same proceedings having been before the Court and was decided on 10.3.2004 in Civil Application No. 112 of 2003 in revision that was the end of the matter.

It was also urged that if the law under the Companies Ordinance had not been amended by Parliament it is improper for the Court to be moved to effect the amendment to the law by way of revision. Furthermore, Professor Luoga contended that in order to safeguard the integrity of the judicial process it would be improper for the Court to entertain this application. The Court having struck out the application on the ground that it was incompetent, it would be a contradiction in terms for the Court to decide otherwise and accept it as competent, Professor Luoga stressed.

Under the provisions of section 4 (3) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993, proceedings for revision may be initiated either by any interested party moving the Court to exercise revisional jurisdiction or by the Court *suo motu.* In exercising the revisional jurisdiction the Court has established circumstances in which the Court exercises such jurisdiction.

This is evident from the decision of the Court in a number of cases. For instance, in **Hallais Pro-Chemie v Wella A.G.** (1996) TLR 269 the Court *inter alia* stated:

> (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.

In this case, the application for revision relates to the proceedings in High Court Commercial Division Misc. Civil Case No. 6 of 2003. it is also common knowledge that the same proceedings were subject of revision in this Court in Civil Application No. 112 of 2003. Applying circumstance (ii) in **Hallais** (supra), the Court struck out the application as being incompetent because the applicant had a right of appeal with leave. That is, the Court took the view that if it was open for the applicant to appeal, there was no exceptional circumstance shown to warrant the applicant to move the Court to exercise its revisional jurisdiction as an alternative to the appellate jurisdiction. In this light we do not think that it is proper for the matter to be brought to the

Court by way of revision. The same reasons applied in Civil Revision No. 112 of 2003 would likewise be applicable in the instant application which as said earlier was initiated by the Court *suo motu* upon information received.

The argument raised by Messrs Nyanduga, Kesaria, Mujulizi and Dr. Fauz Twaib is attractive but with respect, we are unable to accept it. In this application the Court is called upon to correct a statutory error with regard to section 269 (1) of the Companies Ordinance which was not brought to the attention of the learned judge, Kimaro, J. at the trial. Whether or not there is merit in this contention, we need not go into its details at this stage. This aspect, if at all, would be relevant at the appeal stage. Suffice it for us to rest the matter here lest we prejudge the Court's decision on appeal. If as said before, the party, Citibank of Tanzania Limited has the right of appeal to this Court, the same issue could be raised among other grounds of appeal.

Incidentally, with regard to the prospects for pursuing the appeal to this Court Mr. Kesaria conceded that the appeal process was in progress. He said that following the Court's decision in Civil Revision No. 112 of 2003, counsel for the Citibank Tanzania Limited are actively following the matter in the High Court, Commercial Division.

Upon our perusal of the documents laid before us in this application and the original record, the following facts are discernible: First, in Civil Application No. 103 of 2005, on 10.4.2006 Munuo, J.A. extended the time in which Citibank Tanzania Limited is to file notice of appeal and apply for leave to appeal within 14 days from the date thereof. Second, on 20.4.2006, an application by Chamber summons for leave to appeal to this Court against Kimaro, J.'s decision of 12.6.2003 was filed. Massati, J. has reserved ruling on the application until 18.8.2006. Therefore these facts confirm Mr. Kesaria's indication that the appeal process is actively being pursued. In that light, to entertain this application would not only be in violation of the guiding principle (ii) in **Hallais** (supra) but would also amount to riding two horses as it were, at the same time. That is by invoking the revisional jurisdiction while at the same time pursuing the appeal process. This, the Court cannot allow, it is improper.

Furthermore, there is another dimension of the matter which we desire to touch upon briefly. It is common knowledge that revisional proceedings whether initiated by an interested party or by the Court *Suo Motu,* is exercisable in relation to the record of any proceedings before the High Court.

In this case, it is also not disputed that the proceedings of the High Court Commercial Division in Misc. Civil Case No. 6 of 2003 were subject of revision in this Court in Civil Application No. 112 of 2003. The Court having examined the proceedings of the High Court and finally determined it, the Court may well be *functus officio* to entertain the same matter again on revision.

With regard to when does a court become *functus officio,* this Court had occasion to express its views in the case of **John Mgaya And Four Others v Edmundi Mjengwa And Six Others,** Criminal Appeal No. 8 (A) of 1997 (unreported). In the **Edmundi Mjengwa** case, (supra) although the Court held that the principle of *functus officio* did not apply in the circumstances of the case, nonetheless, the Court quoted with approval the principle laid down by the Court of Appeal for Eastern Africa in **KAMUNDI V R** (1973) EA 540. The Court of Appeal for Eastern Africa among others, stated:

> A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not

> guilty or by passing sentence **or making some orders finally disposing of the case** (emphasis added).

In the case before us, we think the order of the Court of 10.3.2004 in Civil Revision No. 112 of 2003 dismissing the application finally disposed of the application for revision of the High Court proceedings. At this stage, to bring back the same proceedings seeking revision, could, we think, render the Court *functus officio.*

In recapitulation, after due consideration of all the circumstances of the case, the emerging position is that the information from Nyalali, Warioba and Mahalu Law Associates, in their letter dated 21.3.2006 to the Hon. The Chief Justice did not furnish all the relevant facts of the case. As a result, the whole picture of the matter was not given. For instance, among other matters, the following were not clearly brought out. First, that the proceedings in High Court, Commercial Division Civil Case No. 6 of 2003 had been dealt with and decided by this Court in Civil Application No. 112 of 2003. Second, the Court had granted the application for extension of time in which to file notice of appeal and the application for leave to appeal was to be filed. Third, the appeal process was actively being pursued

in the High Court.

Had these facts been brought out fully in the information, we think with respect, these proceedings for revision would not have been entertained.

In the event, the application is struck out. No order as to costs.

DATED at DAR-ES-SALAAM this 20th day of July, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR