IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., MJASIRI, J.A., And JUMA, J.A.)

CIVIL APPLICATION NO. 100 OF 2013

HASMUKH BHAGWANJI MASRANI ..... APPLICANT

VERSUS

1. DODSAL HYDROCARBONS AND POWER (TANZANIA) PVT LIMITED
2. DODSAL RESOURCES AND MINING ITILIMA BUSILILI (TANZANIA) PVT LIMITED
3. DODSAL RESOURCES AND MINING ITINGI (TANZANIA) PVT LIMITED
4. RAJEN ARVIND KILACHAD ..... **RESPONDENTS**

(An Application from the decision of the High Court of Tanzania at Dar es Salaam)

(Makaramba, J.)

dated the 17th day of May, 2013

in

Commercial Case No. 42 of 2011

RULING OF THE COURT

10th & 20th September, 2013

JUMA, J.A.:

Before us is an application for revision. The applicant, Hasmukh Bhagwanji Masrani brought it by Notice of Motion and supporting affidavit under section 4 (3) of the Appellate Jurisdiction Act, Cap 141, hereinafter

referred to as the Act, and Rules 65 (1), (2), (3) and (4) of the Tanzania Court of Appeal Rules, 2009, (hereinafter, the Rules). Dodsal Hydro Carbons and Power (Tanzania) PVT Limited; Dodsal Resources and Mining Itilima Busilili (Tanzania) PVT Limited; Dodsal Resources and Mining Itinga (Tanzania) PVT Limited; and Rajen Arvind Kilachad are the 1st, 2nd, 3rd and 4th respondents in this application. In joint response to the motion, respondents filed a notice of Preliminary Objection challenging the competence of the application for revision and specifically claimed:

i) *That the application for revision filed by the applicant is omnibus and ambiguous.*

ii) *Orders made in Commercial Case No. 42 of 2011 are interlocutory and hence an application for revision cannot lie against the respondents.*

The background events, which provide the backdrop to this application, took place in the Commercial Division of the High Court. As narrated in the affidavit of the applicant, it all begun on 20/5/2011 when the 1st, 2nd and 3rd respondents instituted a suit, Commercial Case No. 42 of 2011, against Hasmukh Bhagwanji Masrani (the applicant herein). Makaramba, J., the learned Judge-in-Charge assigned to himself the

conduct of the suit, and heard its initial stages. He delivered several Rulings during that course.

On 3/8/2011, Mr. Dilip Kesaria, learned Advocate, filed a notice of preliminary objection on behalf of the applicant. The learned Advocate objected the competence of the respondents' pleadings and affidavits. Makaramba, J. sustained the objection. He, on 29/8/2011 found the respondents' pleadings and affidavit in support of temporary injunction, defective. On 12/9/2011 the three respondents lodged an application to amend their Plaint. They were met with yet another setback. This was when on 6/10/2011, their application was found defective and was struck out by Makaramba, J. Still undaunted, on 10/10/2011 they returned to the same trial court this time with another application for leave to amend their Plaint. Makaramba, J. duly obliged their application on 23/12/2011. He allowed the respondents to amend their Plaint and to use their signed signatures in their verification clause instead of using their scanned signatures.

Believing that they had carried out the appropriate amendments of their Plaint, on 24/1/2012 the respondents filed their amended Plaint which

they followed it up with a fresh application for injunctive orders of the High Court. But, rounds of preliminary objections continued when Mr. Kesaria once again filed notices of preliminary objections to contend that despite the amendments, the pleadings that were filed after rectification of defects were in fact still defective. In his Ruling on 1/6/2012, Makaramba, J. upheld the objection. He ordered the interlocutory application, the amended Plaint, a Reply to the Written Statement of Defence and Written Statement of Defence to the Counter Claim to be struck out, with costs. Aggrieved with the turn of events, the respondents filed their Notice of Appeal to this Court and at the same time applied for leave of the High Court to appeal to this Court. The respondents' Civil Appeal No. 93 of 2012 did not move far in this Court, for it was struck out on 21/12/2012 because of defective record of appeal.

Following the striking out of Civil Appeal No. 93 of 2012 by this Court, the respondents returned to the High Court on 24/12/2012 to seek an extension of time to file their Reply to the applicant's Written Statement of Defence and a Written Statement of Defence to the applicant's Counterclaim to the still pending Commercial Case No. 42 of 2011. It was at this juncture when the 4th respondent applied to be joined as a

defendant in the applicant's Counterclaim. This time, it was Nyangarika, J. who heard these two sets of applications before duly granting the same on 15/4/2013 but gave his reasons on 08/05/2013. Last event narrated in the applicant's affidavit was the intervention by Makaramba, J. following a letter of complaint from M.R.M. Lamwai & Co. Advocates. The learned Judge heard the parties on the complaint and on 17/5/2013 delivered a "Ruling on Directions."

When the respondents' points of objection finally came up for hearing on 10/9/2013, Dr. Masumbuko Lamwai, learned Advocate, assisted by Mr. Amour Said Khamis, learned Advocate, submitted in support of the objections. Mr. Dilip Kesaria learned Advocate opposed the objection on behalf of the applicant.

The central theme cutting across Dr. Lamwai's submission on the first point of objection is; the notice of motion is so generalized, omnibus and ambiguous that it makes it impossible for this Court to know what exactly in the proceedings of the High Court or Ruling of the High Court the applicant would specifically like this Court to call for revision. He elaborated this theme by several examples. As an example, Dr. Lamwai submitted that

Rule 65 (1) which relates to the format of application for revision requires the applicants to state specifically the grounds of the application for revision. The applicant opted to state the grounds generally but not specifically. Further, the learned Advocate submitted that although sub-rule (3) of Rule 65 expected the applicant's affidavit which he filed in support of his motion to give factual reasons for the motion, the supporting affidavit which the applicant preferred, merely highlighted major events and their corresponding dates. This narration of events, submitted Dr. Lamwai, infringes Rule 65 (3).

Dr. Lamwai believes that the grounds shown in the notice of motion are also omnibus and ambiguous in so far as they expect this Court on its own, to fish through the entire record of the proceedings of Commercial Case No. 42 of 2011, from 24th December 2012. And that after scrutinizing the record, this Court is expected to find for itself what the applicant describes as the serious irregularities and illegalities in the said proceedings and the Rulings, decisions and orders made therein amounting to exceptional and irregular manner in which the said proceedings are being conducted. It is not for this Court to look for grounds of revision, submitted

the learned Advocate. It is the duty of the applicant to disclose these grounds in his notice of motion and supporting affidavit.

Dr. Lamwai submitted that the generalized way the applicant couched his grounds of motion creates unnecessary uncertainties. According to Dr. Lamwai, it is not clear from the way the ground is phrased to know whether the applicant is asking for revision of entire proceedings of the HC Commercial Case No. 42 of 2011 from its filing on 20th May 2011 right up to the date of when this motion was lodged in the Court. It is similarly not clear whether the applicant through the so called grounds, would like this Court to call for revision all the Orders and Rulings which the Commercial Division of the High Court delivered on 15/4/2013 (by Nyangarika, J.), 8/5/2013 (by Nyangarika, J.) and 17/5/2013 (by Makaramba, J.). In any event, the learned Advocate submitted that at the stage of the filing of notice of motion, this Court and respondents should not be left to guess the grounds that form the basis for a call for revision.

From the perspective of section 4 (3) of the Act, Dr. Lamwai contended that the generalized grounds of motion were ambiguous and omnibus. He submitted that this provision which invokes the revisional

jurisdiction of the Court when the Court is being moved by the parties; has two distinct limbs. The applicant's grounds paid no regard to the distinction when he generalized the applicant's grounds of motion. According to Dr. Lamwai, the first distinct limb is the call for revision for purposes of satisfying the Court on correctness or legality or propriety of any specific finding or order or any specific decision of the High Court. The second limb, he submitted, is when this Court is moved to call the proceedings to satisfy itself of regularity of the proceedings concerned. Dr. Lamwai is adamant on his submission that the applicant infringed section 4 (3) of the Act in as much as the grounds of motion were generalized, ambiguous and failed to indicate whether the complaints were either about the (i) correctness or legality or propriety of any specific finding or order or any specific decision of the High Court; or (ii) they were about regularity of proceedings.

According to Dr. Lamwai, even if we assume that the notice of motion was concerned with any Order or Ruling of the High Court, the application will still be ambiguous and omnibus because the applicant has neither specified in his grounds the nature of incorrectness or illegality or impropriety of any Order nor related any such incorrectness, or illegality to

any specific Ruling of the High Court. Without such grounding in the motion, submitted Dr. Lamwai, it has become difficult to determine whether the application for revision has complied with the limitation prescribed under Rule 65 (4). This sub-rule requires applications for revision to be filed within the prescribed sixty days (60) from the date of the decision sought to be revised.

It is in light of these shortcomings that Dr. Lamwai urged us to uphold his first ground objection.

Mr. Kesaria premised his responding submissions on the principles governing preliminary points of objection which were set down in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** and later accepted by this Court as providing guidance to courts in Tanzania. The learned Advocate submitted that a preliminary point of objection should consist of a pure point of law which if argued as a preliminary objection should be capable of disposing of the present application without going into the merits of the application. Mr. Kesaria has stoutly argued that the respondents' objections do not meet the laid down threshold of pure points of law. The learned Advocate submitted that in as

much as this application for revision is a matter for judicial discretion, no pure point of law exists for purposes of preliminary objection. The learned Advocate observed that the application for revision by its very nature involves judicial discretion attracting no pure point of law.

Responding to the objection on sixty days (60) period prescribed for applications seeking revision, Mr. Kesaria contended that the application is neither omnibus nor is it ambiguous. He observed that the grounds in the Notice of Motion were lifted from the language under section 4 (3) of the Act. The learned Advocate noted that Dr. Lamwai's complaint is unwarranted because the grounds in the Notice of Motion were elaborated and expounded by the applicant in his written submissions which he filed under Rule 106.

Mr. Kesaria does not agree with Dr. Lamwai's understanding that the way the applicant's grounds of motion are crafted it would suggest that the applicant is moving the Court to revise all the proceedings of the High Court in Commercial Case No. 42 of 2011 right from inception on 20/5/2011 to 13/6/2013 when the motion seeking revision was filed in this Court. The learned Advocate submitted that the words "***specifically the***

proceedings and Ruling made on 15th April 2013, 8th May 2013 and 17th May 2013" employed in the Notice of Motion restrictively inform the Court what the applicant is subjecting for revision.

On the two distinct limbs in section 4 (3) suggested by Dr. Lamwai, Mr. Kesaria regards this suggestion as trying to split the hairs! Mr. Kesaria does not believe this provision required the applicant to attune the grounds of motion to any specific aspect of incorrectness or illegality or impropriety in any decision of the High Court. Similarly, the learned Advocate does not believe that the applicant was expected to specify in his notice of motion the specific grounds constituting irregularity in the proceedings of the High Court. According to Mr. Kesaria, by uplifting or adopting the wording of section 4 (3) of the Act as his grounds, the applicant complied with the law requiring notice of motion to contain stated grounds for revision.

In his rejoinder, Dr. Lamwai picked up on the question whether the revisional jurisdiction of this Court is a judicial discretion not amenable to preliminary points of objection. The jurisdiction conferred under section 4 (3) of the Act is not discretional, he submitted. There are no facts to be ascertained in so far as the preliminary point of objection is concerned. At

this stage of hearing of the preliminary objection, Dr. Lamwai urged us to restrict ourselves to looking at the Notice of Motion in light of section 5 (2) (d) prohibiting revisions where matters are preliminary or interlocutory. According to him, there is no room to look at written submissions in order to clarify what are otherwise ambiguous grounds of motion.

The two learned Advocates made extensive submissions to support their respective positions regarding the format which the grounds in the notice of motion should take. Mr. Kesaria has maintained that the grounds in the notice of motion generalized as they are, are sufficient for purposes of Rule 65 (1) as long as they were lifted from the wording of section 4 (3) of the Act. This section states:

> *4.-(3). Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.*

It is appropriate to reproduce the grounds which the applicant included in his notice of motion. They read as follows:

"...Mr. D. Kesaria, Advocate for the above named applicant will move this Hon. Court to call for and to examine the record of the proceedings in the High Court of Tanzania, Commercial Division, Dar es Salaam in Commercial Case No. 42 of 2011 for the purpose of satisfying itself as to the correctness, legality and propriety of the said proceeding and the Rulings, Orders and decisions made therein specifically the conduct of all proceedings from 24th December 2012 to the date hereof and the Rulings, Orders, Reasons for decision and Ruling on Directions made on 15th April 2013, 8th May, 2013 and 17th May, 2013 respectively, ***upon the grounds that there exist serious irregularities and illegalities in the said proceedings and the Rulings, decisions and orders made therein amounting to exceptional and irregular manner in which the said proceedings are being conducted and which requires the intervention of this Court to call for, examine and to satisfy itself as to the legality and correctness of the said proceedings, rulings, decisions and orders..*** [Emphasis provided].

There is no doubt in our minds that not every ground can be a basis for revisional jurisdiction of this Court. Section 4 (3) of the Act provides a statutory basis for an application for revision where a revision is NOT initiated by the Court *suo motu*. It provides the scope and parameters within which the applicants are to fit their grounds of motion to move the Court on revision. Rule 65 on the other hand prescribes the procedure to be complied with where a party applies for a revision. We agree with Dr. Lamwai that the above-cited section 4 (3) of the Act provides two distinct

avenues through which applications seeking revision by this Court may ground their respective notice of motions.

The first distinct scope and parameters are grounds which call upon this Court to satisfy itself on correctness, or legality or propriety of any finding, order or any other decision made by the High Court. The second distinct scope and parameters are grounds calling this Court to satisfy itself of the regularity of any proceedings of the High Court. Existence of these two distinct avenues for moving this Court on revision have been tangentially confirmed in **The Board Of Trustees Of The National Social Security Fund (NSSF) Vs. Leonard Mtepa,** Civil Application No. 140 of 2005 (unreported) where we suggested a difference between on one hand, revision for purposes of satisfying ourselves of regularity of the proceedings which were pending in the High Court; and on the other hand, revision for the purposes of considering the legality and correctness of orders of the High Court. While referring to **VIP Engineering and Marketing Ltd Vs. Mechmar Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004 (unreported) we said:

> *"...In the **VIP** case supra this Court was being asked to consider the **regularity of the proceedings which were pending in the High Court**, whereas in the present*

application the Court is being asked to consider the ***legality and correctness of orders of the High Court*** *which were not before us." [Emphasis Added].*

With due respect, the generalized way the applicant preferred his grounds of motion has ignored the existence of the two distinct avenues available for revision under section 4 (3). The so called grounds the applicant has preferred in his notice of motion do not show whether he is seeking revision over any identifiable aspect of a decision, a ruling or an order of the High Court. Similarly, the so called grounds do not show whether the applicant's call for revision is over any irregularity of the proceedings, and if so, what in particular is that irregularity? Without so much as showing grounds constituting "serious irregularities and illegalities," it is not enough without any semblance of particularity to merely invite us to revise the Rulings/Orders/Reasons for Decision/Ruling on Directions made on 15th April 2013 (by Nyangarika, J.), 8th May 2013 (by Nyangarika, J.) and on 17th May 2013 (by Makaramba, J.).

It is common ground that applications for revision under section 4 (3) require the grounds to be stated in the notice of motion as mandated by Rule 65 (1). The Rule provides:

> *65.-(1) Save where a revision is initiated by the Court on its own accord, an application for revision shall be by notice of motion which shall state the grounds of the application.*

The words **"shall state the grounds of the application"** appearing under sub rule (1) of Rule 65 means that stated grounds are a mandatory part of the notice of motion and failure to state the ground(s) is a non-compliance with the law rendering the application for revision incompetent. Where a party initiates a revision proceeding in this Court, the party concerned shall do so by notice of motion which shall state the grounds of application. We have emphasized as much. We did so in **Gerald Kasamya Sibula Gerald Kasamya Sibula Vs. R.,** Criminal Application No. 5 of 2010 (unreported), where we said:

> *"...It is abundantly clear therefore from the above-cited Rule 65, an application for revision initiated by a party like the present one is, must be initiated by filing a Notice of Motion under Rule 65, stating the grounds of the application (Rule 65 (1)."*

With due respect, it is not enough as grounds of motion, to merely allege that *"there exist serious irregularities and illegalities in the said proceedings and the Rulings, decisions and orders made therein amounting to exceptional and irregular manner in which the said proceedings are*

being conducted and which requires the intervention of this Court." We also do not think this Court should wait to read written submissions presented under Rule 106 (1) in order to appreciate the grounds which precipitated the application for revision.

We cannot but conclude that neither the grounds of motion nor the applicant's supporting affidavit have come up with grounds within Rule 65 (1). The applicant's supporting affidavit has merely recounted the salient events without so much as furnishing grounds of motion or expounding on any such grounds. As correctly pointed out by Dr. Lamwai, it is not for this Court at the level of notice of motion, to fish out grounds of motion from Rulings or Orders or proceedings of the High Court. An application by a party seeking revision by this Court is not a voyage seeking discovery of grounds supporting the application. In so far the notice of motion was filed without stated grounds in conformity with the mandatory provisions of Rule 65 (1), the notice is incurably defective and cannot sustain an application to this Court for revision under section 4 (3) of the Act.

Without prejudice to our conclusion with regard to the first point of objection, the second point of objection is as meritorious in so far as it

contends that the Rulings and Orders arising from Commercial Case No. 42 of 2011 are interlocutory and hence outside the purview of revisional jurisdiction of the Court in light of section 5 (2) (d) of the Act. On this, Dr. Lamwai premised his submissions on the proposition that the matter are still preliminary since there is a Counter Claim as a cross-suit that is still pending at the High Court. Dr. Lamwai invited us to go along with our decision in **Karibu Textile Mills Ltd Vs. New Mbeya Textile Mills Ltd & 3 Others,** Civil Application No. 27 of 2006 (unreported). This is a decision where we were called upon to deal with a preliminary point of objection contending that the application for revision which the **Karibu Textile Mills Ltd** (supra) had earlier filed was incompetent because it arose from interlocutory orders which did not finally and conclusively determine the matter between the disputing parties. In Karibu Textile Mills Ltd, we agreed that section 5 (2) (d) of the Act is designed to prevent unnecessary delays where interlocutory orders of the High Court do not finally and conclusively determine the rights of the parties concerned. We sustained the objection when we held that the revision was barred by section 5 (2) (d) because it arose from interlocutory orders of the High Court.

Mr. Kesaria placed reliance on our decision in **Vidyadhar Girdhar Chavda Vs. Dr. (Mrs.) Indira P. Chavda, Civil Appeal No. 99 of 2012** (unreported) as an authority to the proposition that after all section 5 (2) (d) does not bar applications for revision against interlocutory decisions of the High Court. Mr. Kesaria submitted that the clear language of this decision has the support of several other decisions of this Court including: **1. Fahari Bottlers Ltd, 2. Southern Highlands Bottlers Ltd. Vs. 1. The Registrar of Companies, 2. The National Bank of Commerce**, Civil Revision No. 1 of 1999 (unreported); **VIP Engineering and Marketing Ltd Vs. Mechmar Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004 (unreported); and **Jing Lang Li Vs. 1. National Housing Corporation, 2. Lars Eric Hulstrom**, Civil Revision No. 1 of 2013 (unreported).

We have revisited our decisions which Mr. Kesaria cited in opposition to the second ground of objection. With due respect, we do not think that these decisions will change our interpretation of the scope of section 5 (2) (d) of the Act as amended by ACT No. 25 of 2002. There is no ground in the Notice of Motion to show that this Court can overlook prohibitions under section 5 (2) (d). Again, neither Dr. Lamwai nor Mr. Kesaria disputes

the fact that Commercial Case No. 42 of 2011 from which this application for revision arose, is still pending at the Commercial Division of the High Court.

Section 5 (2) (d) of the Act as amended by Written Laws (Miscellaneous Amendment) (No.3) Act, 2002 ACT NO. 25 of 2002 states:

> *5 (2) Notwithstanding the provisions of subsection (1)–*
>
> *..*
>
> *(d)* ***no appeal or application for revision shall*** *lie against or be made in respect of* ***any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit.*** *[Emphasis Added]*

The provision employs the word "shall," to prohibit applications for revision over matters that are still interlocutory or preliminary. It now casts a duty upon the applicants who seek revision under section 4 (3) to *prima facie* show in their notice of motion that their respective applications are not in any way barred by prohibitions of revisions over preliminary or interlocutory decisions of the High Court. We also think that section 5 (2) (d) now expects this Court to determine at the very outset the question of

its jurisdiction where the matters calling for revision are still preliminary and pending in the High Court. As we found with respect to the first ground of objection, the generalized grounds of motion are not helpful to show that this Court has the jurisdiction to intervene on revision despite the mandatory wording of section 5 (2) (d).

In the final result, we uphold Dr. Lamwai on his two points of preliminary objection. We hold that the application is incompetent and we inevitably strike it out with costs.

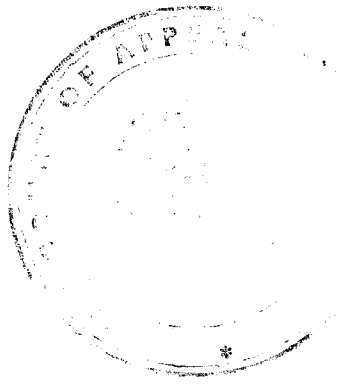
DATED at DAR ES SALAAM this 16th day of September, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



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