IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MUSSA, J.A., And JUMA, J.A.)

CIVIL APPLICATION NO. 151 OF 2013

AMI TANZANIA LIMITED..... APPLICANT

VERSUS

1. OTTU ON BEHALF OF P. L. ASSENGA & 106 OTHERS
2. SUPER AUCTION MART & COURT BROKERS
3. THE ROYALE ORCHARD INN LTD
4. AMIKAN VENTURE LIMITED **...RESPONDENTS**

(Application for a Review of the decision of the Court in Civil Application No. 35 of 2011 contained in Application for Review- Civil Application No. 44 of 2012)

(Luanda, Mussa and Juma, JJJ.A)

Dated the 8th day of July, 2013

RULING

25th September & 19th November, 2013

JUMA, J.A.:

I have read the reasons for the Ruling written by my brother, Mussa, J.A. and I am in full agreement with his reasoning and conclusion on two points. **First**, the respondents had contended in their preliminary objection that our decision in Civil Application No. 44 of 2012 is not open to any further review under the terms of Rule 66

(7) of the Tanzania Court of Appeal Rules, 2009 (The Rules). I agree with Mussa, J.A. that this objection ought to be dismissed. **Secondly**, I share his conclusion that the Civil Application No. 35 of 2011 which was reviewed by the Court in Civil Application No. 44 of 2012 should be heard afresh in terms of Rule 66(6).

I have some comments to add by way of supporting the Ruling of my brother, Mussa, J.A.

This Civil Application No. 151 of 2013 presented us with a novel question which invited us to interpret the scope of Rule 66 (7) of the Rules, which states that where this Court has made a decision on an application for review, that decision on review "*shall be final and no further application for review shall be entertained in the same matter.*"

Rule 66 (7) states:

(7) Where an application for review of any judgment and order has been made and disposed of, a decision made by the court on the review shall be final and no further application for review shall be entertained in the same matter.

I regard the question to be novel because the jurisdiction of this Court to review is neither constitutional nor statutory: [Civil Application No. 21 of 2012, **BLUELINE ENTERPRISES LIMITED VS. EAST AFRICAN DEVELOPMENT BANK** (unreported). It is inherent jurisdiction which the Court enjoys by virtue of being a final Court of justice in Tanzania. In that capacity, the power of review enables the Court to correct errors or illegalities which if left standing, may occasion injustice to a party. In essence, the respondents through their preliminary objection are contending that Rule 66 (7) limits that inherent jurisdiction of the final Court of justice, even where the applicant can bring an application under any of the grounds enumerated under Rule 66 (1).

Two decisions of this Court, in Civil Application No. 35 of 2011, and in Civil Application No. 44 of 2012; provide the background to the determination of the scope of application of Rule 66 (7). Civil Application No. 35 of 2011 was an application urging us to exercise our power of revision. OTTU ON BEHALF OF P. L. ASSENGA & 106 OTHERS, SUPER AUCTION MART & COURT BROKERS, THE ROYALE

ORCHARD INN LTD and AMIKAN VENTURE LIMITED were the applicants who moved the Court to revise the decision of Twalb, J. in High Court Civil Appeal No. 96 of 1998. On 9/2/2012, this Court (Munuo, J.A., Luanda, J.A. and Massati, J.A.) obliged the request and exercised the power of revision of the Court under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 (the Act) to nullify all the execution proceedings, Proclamations of Sale made in the High Court. In addition, the Ruling and Order of Twaib, J. was also nullified.

The applicants in Civil Application No. 35 of 2011 were still aggrieved by the revision by this Court. They filed what the respondents consider to be **"the first application for review by the Court"** in Civil Application No. 44 of 2012, urging this Court (Luanda, J.A., Mussa, J.A. and Juma, J.A.) to exercise its power of review under Rule 66 (1) (a), (b) and (c) of the Rules. The applicants were particularly dissatisfied by our decision in Civil Application No. 35 of 2011 wherein we directed that the Decree of the High Court arising from the matter should be executed by the Labour Division of the High Court as stipulated under Rule 48 of the Labour Court Rules,

2007. The applicants for review in Civil Application No. 44 of 2012 contended further that the Court did not give them any opportunity to submit on applicability of the Labour Court Rules. They pointed out that the Court should not have directed the use of the Labour Court Rules *suo motu* while composing its Ruling and without hearing the parties.

On 8/7/2013 this Court delivered its Ruling in Civil Application No. 44 of 2012 by granting the application for Review and vacated its decision in Civil Application No. 35 of 2011. The Court went further and exercised its power of revision as provided for under section 4 (3) of the Act. The Court quashed the proceedings of the High Court and declared that the auction of decretal property to have been properly carried out and buyers as *bona fide* purchasers for value. We directed the High Court to finalize the process as required by Rules 90 (1), 92 and 93 of Order XXI of the Civil Procedure Code (CPC).

AMI TANZANIA LIMITED, who was the respondent in Civil Application No. 44 of 2012, was aggrieved. The company came back

to this Court with present application, Civil Application No. 151 of 2013 for what the respondents herein have described to be a **"second application for review over the first review"**. The Notice of Motion in the present application is made under Rule 66 (1) (a) (b) and (c) applying for what the motion describes as an application ***"for Review of the decision in Civil Application No. 35 of 2011 contained in Application for Review No. 44 of 2012 (Hon. Luanda, Mussa and Juma JJJ.A. dated 10th July 2013)."***

When the Civil Application No. 151 of 2013 (i.e. **second application for review**) came up for hearing, parties proposed, and we agreed that we would deal with the jurisdictional issue raised in the preliminary objection together with the main application for review. Mr. Richard Rweyongeza, assisted by Mr. Amour Said Hamis and Mr. Abdon Rwegasira learned Advocates, represented the AMI Tanzania Limited (applicant). Mr. Rosan Mbwambo, learned Advocate appeared for the **OTTU on behalf of P.L. Assenga & 106 Others** (1st respondent). Mr. Mpaya Kamara and Mr. Martin Matunda learned

Advocates represented the **Super Auction Mart & Court Brokers** (2nd respondent). Mr. Erasmus Buberwa learned Advocate represented the **Royale Orchard Inn Ltd** (3rd respondent) while Mr. Sylvester Shayo, learned Advocate, appeared for **AMIKAN VENTURE LIMITED** (4th respondent).

On issue of jurisdiction Mr. Kamara submitted that this Court lacks jurisdiction to review its own earlier decision on review (i.e. Civil Application No. 44 of 2012) through another review (i.e. Civil Application No. 151 of 2013). He submitted that in terms of Rule 66 (7), the decision of this Court in Civil Application No. 44 of 2012 which reviewed the Civil Application No. 35 of 2011 was final. Once a review is done on an application, it is final and no other application can be brought by the same parties. The word "SHALL" has been used twice, Mr. Kamara noted. It is couched in a mandatory language, implying that it is not discretionary, he added. Mr. Kamara referred us to our decision where section 70 (2) (a) of the Interpretation of Laws Act, Cap. 1 the word "SHALL" had been interpreted to imply imperative requirement: **Mabibo Beer Wines**

and Spirits Ltd vs. 1. Lucas Mallya @ Baraka Stores, 2. Commissioner for Customs Tanzania Revenue Authority, Civil Application No. 160 of 2008 (unreported).

Mr. Kamara further warned that granting the Civil Application No. 151 of 2013 will create a bad precedent that will make Rule 66 (7) meaningless thereby creating endless litigation.

On his part, Mr. Rweyongeza did not agree with Mr. Kamara. The decision of this Court in Civil Application No. 44 of 2012, Mr. Rweyongeza pointed out, has two limbs. Mr. Rweyongeza does not dispute or challenge the way this Court reviewed and vacated its earlier decision (Civil Application No. 35 of 2011). His grievance is restricted to the second limb of the Ruling in Civil Application No. 44 of 2012; where this Court went on to exercise its power of revision, without hearing the parties. According to Mr. Rweyongeza, Rule 66 (7) which forms the basis of preliminary objection does not prohibit a review where this Court goes beyond what is essentially a review, and embarks on the new jurisdictional of revision without giving the parties an opportunity to be heard. According to Mr. Rweyongeza,

the main complaint behind the present application is that parties were not heard on jurisdiction of the executing court. The learned Advocate concluded by observing that this Court in Civil Application No. 44 of 2012 (Luanda, Mussa and Juma, JJJAs) should have resorted to Rule 66 (6) to rehear the parties before embarking on a revision while composing its Ruling.

From submissions of Mr. Kamara and Mr. Rweyongeza, I would very much hesitate to interpret the scope of Rule 66 (7) in a way limiting the scope of the inherent jurisdiction of the Court to correct its own errors through Review where failure to do so may occasion injustice to a party. I am therefore inclined to agree with Mr. Rweyongeza that for particular circumstances of the present application, Rule 66 (7) cannot prevent the Court from conducting a review with regard to the second limb of the Ruling this Court in Civil Application No. 44 of 2012 where the Court *suo motu* made a decision on executing court without hearing the parties. The present application presented us with very exceptional circumstances. My brother Mussa, J.A. and myself did not sit in the panel that heard the

parties' arguments and submissions in Civil Application No. 35 of 2011. So, when the two of us sat Civil Application No. 44 of 2012, we were not privileged to read the submissions which the parties before us presented in Civil Application No. 35 of 2011 before the panel of Munuo, Luanda, and Massati, JJJ.A.

In the **first limb** of our decision in Civil Application No. 44 of 2012 we rightly agreed with the application for review of our Ruling Civil Application No. 35 of 2011 because In the latter decision we did not hear the parties when we *suo motu* decided that it was the Labour Division of the High Court applying Rule 48 (3) of the Labour Court Rules, 2007 which should execute the Decree. I am of the decided opinion that after we had reviewed the Civil Application No. 35 of 2011 the prevailing circumstances expected us to address ourselves on the requirements of Rule 66 (6) by either rehearing the matter, or reverse or modify its decision. This sub-rule (6) provides:

> *"(6) Where the application for review is granted, the court may rehear the matter, reverse or modify its former decision on the grounds stipulated in sub-rule 1 or make such other order as it thinks fit."*

The basis of our Ruling in Civil Application No. 44 of 2012 to grant the application and review Civil Application No. 35 of 2011 was because, without so much as hearing the parties, we directed the application of Rule 48 (3) of the Labour Court Rules, 2007 in execution proceedings in the Labour Division of the High Court. I think, we should not, like we did in the second limb of our Ruling in Civil Application No. 44 of 2012, have directed that the High Court should in execution process be guided by Rules 90 (1), 92 and 93 of Order XXI of the CPC should guide the execution process. We should have paused and hear the parties.

The Court in Civil Application No. 44 of 2012 should have heard the parties on the question which, between Rule 48 (3) of the Labour Court Rules, 2007; and Rules 90 (1), 92 and 93 of Order XXI of the CPC, should guide the decretal execution process. It seems to me that after raising the possibility that Labour Court Rules, 2007 may be applicable, it was not appropriate for us, in the **second limb** of our Ruling to **"direct the High Court to finalize the process as per**

the dictate of Rules 90 (1), 92 and 93 of Order XXI of the CPC."

It is now well settled that since this Court is the final court sitting at apex of the court system, it enjoys inherent jurisdiction to review its own previous decision in the circumstances falling under Rule 66 (1). The settled law is also trite that this inherent jurisdiction is neither constitutional nor statutorily conferred, but it is jurisdiction that is inherent to this Court as a final court with a duty to do justice: [**BLUELINE ENTERPRISES LIMITED VS. EAST AFRICAN DEVELOPMENT BANK** (supra)]. It seems to me that when this Court is faced with circumstances falling under Rule 66 (1) calling for correction of errors that are likely to occasion injustice, this Court should not be prevented by Rule 66 (7) from correcting such errors. And this inherent jurisdiction of the Court is not unique to Tanzania. It is well established in other Commonwealth jurisdictions. For instance, in **Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte** (No. 2) [2000] 1 A.C. 119, Senator Pinochet petitioned the LORDS OF APPEAL (House of Lords)

to set aside its earlier order dated 25/11/1998. The Senator had contended that there was a link between Lord Hoffmann one of the members of the Appellate Committee who heard the appeal, and the Amnesty International. This link according to the petition, gave the appearance that Lord Hoffmann might have been biased against Senator Pinochet. On 17 December 1998 the Lords of Appeal set aside their order of 25/11/1998. Lord Browne-Wilkinson who delivered the leading judgment of the House of Lords had no doubt about the power of final courts in appropriate cases, to rescind or vary its earlier order to correct injustice:-

> *"In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Co. Ltd. v. Broome (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.*

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

I will respectfully disagree with Mr. Kamara that Rule 66 (7), in the circumstances of the present application where the parties were not heard on an important question of jurisdiction of the court with responsibility to execute the Decree, can oust the inherent jurisdiction of this Court as a final Court of justice to correct injustice where a party shows that he was wrongly deprived of an opportunity to be heard in terms of Rule 66 (1) (b).

Mr. Kamara has expressed his fears that granting of this review will open flood gates of applications for review over matters that have already been subjected to review. With respect, my greatest fear is not so much about floodgates of applications for review, as it

is about situations where this Court as a final Court of justice declines to seize up its inherent jurisdiction of review even where the applicants show existence of any grounds for review set down under Rule 66 (1). I am acutely aware that our laws recognize two important sides of a coin which ensure that the Court is not flooded with unmerited litigation. One side recognizes the dangers of endless litigation when this Court as a final Court in Tanzania has made its decision. Sections 5 and 6 of the Act provides avenue for appeals to this Court and impliedly restricts unmerited appeals. Similarly, section 4 (2) and (3) provide parameters for revision, thereby restricting unwarranted applications for revision by this Court. Much as finality of decisions is desirable, there is an equally important flip side of the coin where the law recognizes the inherent jurisdiction of this Court to review its previous decisions in order to remove errors from this Court's decisions. As we said **Peter Kidole vs. R.,** Criminal Application No. 3 of 2011, this Court by being a final court, is not prevented from conducting a review to correct errors or illegalities that are likely to occasion injustice. In **Peter Kidole** (supra), we referred to important principles in the case of **Autodesk Inc v**

Dyson (No. 2) 1993 HCA 6; 1993 176 LR 300 where the following principles were set forth:-

> *"(i) The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment it has proceeded on a misapprehension as to the facts or the law.*
>
> *(ii) As this court is a final Court of Appeal there is no reason for it to confine the exercise of jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from same miscarriage in its judgment.*

From the two sides of the coin, the Court has the means to contain floodgates of litigation.

With Mr. Kamara's concern over possible floodgates of litigation out of the way, I agree with my brother Mussa, J.A., that after we had in Civil Application No. 44 of 2012 rightly reviewed and vacated our previous decision in Civil Application No. 35 of 2011, we should have first heard the parties under Rule 66 (6), instead of embarking on revision, or nullifying all execution proceedings, proclamation of

sale and the Ruling and Order of the High Court. On the same token, we should have heard the parties on the applicability of Rule 48 (3) of the Labour Rules. We should finally not have directed the use of the CPC without giving the parties an opportunity, to address the Court on applicability of the Labour Court Rules, 2007.

In the result, I shall order that the Civil Application No. 35 of 2011 be heard afresh in terms of Rule 66(6). Each party shall pay own costs.

DATED at **DAR ES SALAAM** this 13th day of November, 2013.

I. H. JUMA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL