

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 304/01 OF 2016

THE COMMISSIONER OF INSURANCE.....APPLICANT

VERSUS

MWANANCHI INSURANCE CO. LTD.....RESPONDENT

(Application from the decision of the High Court of Tanzania

at Dar es Salaam)

(Mwambegele, J.)

dated the 3rd day of August, 2016

in

Misc. Commercial Revision No. 1 of 2016

RULING OF THE COURT

21st & 30th November, 2016

MUSSA, J.A.:

In the High Court of Tanzania (Commercial Division), the applicant herein instituted a Miscellaneous Commercial Case No. 240 of 2014 through which she sought an order of winding up the respondent herein under the provisions of the Companies Act, No. 12 of 2002 (the Act).

Upon the submissions of the learned counsel from either side, the winding

up petition was adjudged premature and incompetent for failure by the applicant to abide by the procedure laid down by the Act. In the result, the petition was, accordingly, struck out with costs. It is noteworthy that the decision of the High Court was handed down by Mwarija, J., as he then was, on the 5th day of October, 2015.

Almost four months later, more precisely, on the 2nd day of February, 2016 the applicant instituted a Miscellaneous Commercial Review No. 1 of 2016 in the same court, through which she sought the indulgence of the court to relook, review and vacate its October 5th decision on account that the same was undermined by an apparent error on its face. This particular quest was, *inter alia*, predicated under the provisions of section 78 and Order XLII Rule 1(b) of the Civil Procedure Code, Chapter 33 of the Revised Laws (CPC). A remark is, perhaps, well worth that the CPC does not specifically prescribe a period within which to lodge an application for review in the High Court. Nonetheless, in terms of item 21 of part III of the schedule to the Law of Limitation Act (Chapter 89 of the Revised Laws), an application under the CPC for which no period of limitation is provided has to be lodged within sixty days from the date of the impugned decision. Be what as may have been the case,

we will be loath to have to reopen the issue of limitation which was, seemingly, not raised in the proceedings below. At the height hearing of the application on the merits, the High Court (Mwambegele, J.) was not persuaded that its October 5th decision was fraught by an apparent error on its face. Accordingly, the application for review was dismissed with costs. As it were, the dismissal Ruling was pronounced on the 3rd day of August, 2016.

A little later, on the 30th day of September, 2016 the applicant instituted the present application through which she seeks to move the Court to call, examine and revise the August 3rd Ruling and Drawn Order of the High Court. The application is by way of a Notice of Motion which was taken out under the provisions of Section 4(3) as well as Rule 65 of, respectively, the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA) and the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit, duly sworn by Mr. Vicent Tangoh, a learned Principal State Attorney. In addition, the applicant has lodged written submissions to buttress her application.

~~Incidentally, the application is being resisted by the respondent~~
through an affidavit in reply, duly sworn by Mr. Ephraem Christopher

Manase Mrema who happens to be the majority shareholder and a Director of the respondent. Additionally, the applicant lodged a Notice of Preliminary points of objection to the following effect.

"(i) That the application for revision is incompetent and unmaintainable for being res judicata in terms of the provisions of Rule 77(1) of the Court of Appeal Rules, 2009; and, in the alternative,

(ii) That the application for revision is incompetent and unmaintainable for containing prayers that are not within the perview of Section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002."

When the application was called on for hearing before us, the applicant was represented by Messrs Sylvester Mwakitalu and Ntuli Mwakaheya, both learned Senior State Attorneys. On the adversary side, the respondent had the services of Mr. Hussein Peter Mlinga, learned Advocate. To begin with, Mr. Mwakitalu raised a complaint to the effect that the applicant was belatedly served with the Notice of Preliminary

points of Objection and, for that reason, he prayed for an adjournment so as to brace himself for a counter argument, if need be. To this prayer, Mr. Mlinga had no objection.

Nonetheless, quite aside, the Court noted, *suo motu*, that the application at hand is not accompanied with the Drawn Order of the decision of the High Court which is desired to be impugned. We, accordingly, invited counsel from either side to comment on the shortcoming and its effect thereof.

For his part, Mr. Mwakitalu was of the view that the non-attachment of the Drawn Order is innocuous inasmuch as the Ruling has been availed and that the mishap could easily be remedied by putting the Drawn Order upon record through a supplementary record. Speaking from the adversary side, Mr. Mlinga held a contrary view that the impairment would have the effect of rendering the application incompetent.

Having heard the rival learned arguments, we need not be unnecessarily detained by this issue which, upon numerous decisions, is well settled. In this regard, we need only pay homage and reiterate what we observed in the unreported Civil Application No. 140 of 2005 – **The**

**Registered Trustees of the National Social Security Fund (NSSF)
vs Leonard Mtepa:-**

*"... this Court has made it plain, therefore, that if a party moves the Court under section 4(3) of the Appellate Jurisdiction Act, 1979 to revise the proceedings or decision the High Court, he must make available to the Court a copy of the proceedings of the lower Court or Courts as well as the ruling and, it may be added, **the copy of the extracted order of the High Court.** An application to the Court for revision which does not have all those documents will be incomplete and incompetent. It will be struck out."*

[Emphasis supplied.]

To say the least, to the extent that the application at hand is not accompanied by the Drawn Order of the High Court, the same is incompetent and, accordingly, we strike it out. As the issue of

incompetence was raised by the Court, *suo motu*, we give no order as to costs.


DATED at **DAR ES SALAAM** this 24th day of November, 2016.

B.M. LUANDA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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



B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL