IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A, MMILLA, J.A And MUGASHA, J.A)

CIVIL REVISION N O 192 OF 2016

KONDO JUMA BUNGO ..... APPLICANT

VERSUS

1. **ISSA ALLY MANGUNGU**
2. **RETURNING OFFICER MBAGALA CONSTITUENCY**
3. **ATTORNEY GENERAL**

..... RESPONDENTS

(Civil Revision from the proceedings of the High Court of Tanzania at Dar es Salaam)

dated at the 27th day of June, 2016
(Kibela, J.)
in
Civil Case No. 01 of 2015

RULING OF THE COURT

25th November & 5th December, 2016

MMILLA, J.A.:

This is an application for revision. It is brought by way of notice of motion and is made under section 4 (3) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The complaint is basically that the proceedings of 31.5.2016, 2.6.2016, and 13.6.2016 in Misc. Civil Cause No. 1 of 2015, an election petition for Mbagala constituency in the 2015 National Elections pending in the High Court of Tanzania at Dar es Salaam (Kibela,

J), is tainted with procedural irregularities. The application is supported by the affidavit of the applicant, Kondo Juma Bungo who, before us enjoyed the services of Mr. Juma Nassoro, learned advocate.

The respondents in this matter are Issa Ally Mangungu, the Returning Officer for Mbagala Constituency, and the Attorney General. On 25.11.2016, Ms Alice Mtulo and Ms Helen Rwijage, learned State Attorneys, appeared for the second and third respondents, but the first respondent was absent though served. Since no information was availed for his failure to appear in Court, Mr. Nassoro urged the Court to hear the application ***ex parte*** in terms of Rule 63 (2) of the Rules, a position which was supported by Ms Mtulo. We accordingly granted the prayer.

The respondents filed notices of preliminary objections to the application. The first notice was filed by the advocates for the second and third respondents on 19.8.2016. It raised a single ground to the effect that *"the applicant's application is untenable for contravening section 5 (2) (d) of the Appellate Jurisdiction Act [Cap.141, R.E.2002] as amended by Act No. 25 of 2002."*

The second notice of preliminary objection was filed on 13.9.2016 by the first respondent. The ground raised was in all respects similar to that raised by the advocates for the second and third respondents. However,

since the first respondent did not appear in Court as already pointed out, we struck out his preliminary objection in terms of Rule 63 (1) of the Rules.

At the commencement of the hearing of the application, Mr. Nassoro suggested for the Court to hear both, the preliminary objection raised by the second and third respondents as well as the main application. The request was not objected to by Ms Mtulo. We granted it. We called upon Ms Mtulo to submit on the said preliminary objection.

The submission of Ms Mtulo was very brief. She stated that in terms of section 5 (2) (d) of the AJA, the orders which are targeted for revision are interlocutory because the matter is still pending before the High Court, thus not subject to revision. She cited the cases of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa North Constituency and two Others,** Civil Application No. 80 of 2016, CAT and **Mahendra Kunar Govindji Monani t/a Anchor Enterprises v. Tata Holding (T) Ltd and the Official Receiver,** Civil Application No. 50 of 2003, CAT (both unreported). She urged the Court to strike out the application with costs.

In response to the submission by Ms Mtulo, Mr. Nassoro readily appreciated the fact that section 5 (2) (d) of the AJA bars appeals and revisions resulting from interlocutory decisions. However, he contended that the complaint which is the subject of the present revision centers on

procedural irregularities in respect of the proceedings of the High Court conducted on 31.5.2016, 2.6.2016, and 13.6.2016, and not the orders. He submitted that in terms of section 4 (3) of the AJA, the power of the Court includes the calling of any proceedings before the High Court for the purpose of satisfying itself **as to the regularity of any proceedings before that court.** He stressed that their application targets the irregularity of the proceedings rather than the orders of the High Court in the mentioned diverse dates. He relied on the cases of **Tanzania Railways Corporation v. Aljabri Company Ltd**, Civil Application No. 5 of 2003, CAT and **Stanbic Bank Tanzania Ltd v. Kagera Sugar Ltd**, Civil Application No. 57 of 2007, CAT (both unreported). He contended that in those cases, the Court discussed about the effect of confusion in the proceedings. On the basis of that, he said, the respective applicants successfully applied for revision under section 4 (3) of the AJA.

Clarifying the position in the instant application, Mr. Nassoro submitted that Rule 21A (5) of National Elections (Election Petitions) (Amendment) Rules, 2012 G.N. No. 106 of 2012 (herein to be referred to as G.N. No. 106 of 2012) is explicit that a witness whose affidavit is found to be defective may, with leave of the court, still be given chance to orally testify. In this

case however, Mr. Nassoro went on to submit, the High Court disqualified the three witnesses on the respective dates, thus denying the three witnesses to reap the advantage under that sub rule. In his view, it was irregular for the trial judge to have disqualified those three witnesses from testifying even before allowing their respective affidavits to form part of the record and reading them, which is why he is seeking this Court's indulgence to correct the irregular proceedings, a situation contemplated by section 4 (3) of the AJA. He prayed the Court to overrule the preliminary objection.

As regards the main application, we deem it convenient to shade light that the applicant was one of the contestants in the 2015 National General Elections in respect of the Mbagala Constituency. He was sponsored by Civic United Front (abbreviated as CUF). He lost to the first respondent, the said Issa Ally Mangungu, who contested for that seat on the ticket of Chama Cha Mapinduzi (CCM). Aggrieved, he lodged a petition to challenge the said results in the High Court of Tanzania at Dar es Salaam.

Among the witnesses ear-marked to testify in support of the petition were Salum Sudi, Ndonge Said Ndonge and Muhidin Thabit. On diverse dates, those witnesses were disqualified from giving evidence on the ground that their respective affidavits which ought to have been part of the evidence in the case in terms of Rule 21A (1) G.N. No. 106 of 2012 were found to be

defective and rejected, leading to their disqualification as witnesses. It was on the basis of this that they filed this application.

To begin with, Mr. Nassoro prayed to adopt the affidavit in support of the application as well as the written submissions he filed in that regard. However, he made a response to salient parts of the submission by counsel for the second and third respondents.

In the first place, Mr. Nassoro refuted the contention that the present application intends to oppose G.N. No. 106 of 2012. While stressing that there is no problem with this law, Mr. Nassoro was express that the problem is on interpretation of, and implementation of the provisions of Rule 21A (1), (2), (3), (4) and (5) of G.N. No. 106 of 2012. He clarified that for an affidavit of a witness to be part of the record, the following steps have to be observed:-

(1) The affidavit has to be delivered at the office of the Registrar not less than forty eight hours before the time fixed for trial of the petition;

(2) The sealed envelope containing the affidavit shall be opened by the court when the witness is called to give evidence;

(3) The affidavit shall be read by or on behalf of the witness.

He emphasized that the opposite party will be invited to cross examine any such witness after the affidavit of such witness forms part of the record. The fact that the trial court asked the parties whether or not to admit those affidavits before they formed part of the record, he went on to submit, was unprocedural and constituted a misdirection resulting into injustice. This was compounded by the fact that the trial court disqualified the witnesses to give evidence in fragrant violation of sub rule (5) of Rule 21A of G.N. No. 106 of 2012 because after such disqualifications, the court became functus officio. It is on this basis that they filed this application with a view of asking the Court to correct the irregular proceeding which have occasioned miscarriage of justice.

In expounding the point that it was unjustified to disqualify those witnesses from testifying in that petition, Mr. Nassoro submitted that, after all, in terms of sub rules (3) and (5) of Rule 21A of G.N. NO. 106 of 2012, the law did not take away the right to give oral evidence upon the condition under sub rule (5) thereof. He relied on the case of **Zella Adam Abrahaman and two Others v. The Attorney General and six Others**, Consolidated Civil Revisions Nos. 1, 3 and 4 of 2016, CAT (unreported).

In a brief rejoinder, Ms Rwijage insisted that the proceedings from 31.5.2016 to 13.6.2016 refer to the orders. In the orders which ensured, the

trial court rejected the affidavits of those three witnesses on the ground that they were defective. She refuted Mr. Nassoro's allegation that the proceeding were tainted with confusion. She added that that is an indirect attempt by Mr. Nassoro of asking the court to revise those orders.

While admitting that the case of **Stanbic Bank Tanzania Ltd** (supra) involved confusion which required resolve because the court purported to record a settlement order while the parties were still negotiating, Ms Rwijage maintained that that was distinguishable to the present matter on the basis that there is no confusion here. She reiterated that the application is incompetent for being interlocutory under section 5 (2) (d) of the AJA and prayer for the Court to dismiss the application with costs.

Coming to the main application, she asked to adopt their affidavit in reply as well as the submissions they filed.

Ms Rwijage's strong point is that the trial court did not misinterpret Rule 21A of G.N. No. 106 of 2012, nor that it contravened that Rule in admitting those affidavits. She contended that those affidavits were received, opened and read. At that stage, she added, the adverse parties sought to satisfy themselves if the respective affidavits were proper, and that they raised preliminary objection on realizing that they were defective. On being satisfied that they were defective, she contended, the trial court

rejected them and disqualified the respective witnesses to testify. She explained that sub rule (5) of Rule 21A of G.N. No. 106 of 2012 refers only to those witnesses whose affidavits may not have been submitted, and not to those whose affidavits may have been found defective and rejected.

When she was probed by the Court to comment on what the Court said in the case of **Zella Adam Abrahaman** (supra) concerning Rule 21A (3), and (5) of G.N. No. 106 of 2012, Ms Rwijage stressed that those sub rules refer only to those witnesses whose affidavits may not have been submitted, and not to those whose affidavits may have been found defective and rejected. He urged the Court to dismiss the application with costs.

In response, Mr. Nassoro repeated that the revision sought focuses on the irregular proceedings of the trial court in relation to disqualifying the three witnesses from testifying even before allowing their respective affidavits to form part of the record and reading them as required by the law on the allegation that they were defective. He admitted though, that they could affect the said orders if their application succeeds.

Mr. Nassoro contended that his learned sister misinterpreted the application of Rule 21A (5) of G.N. No. 106 of 2012 when she said it applies only to those witnesses whose affidavits may not have been submitted, but not to those whose affidavits may have been found defective and rejected.

He challenged that anything rejected by the court is as good as something which never existed. As such, sub rule (5) of the said Rule could still apply. He emphasized that to reject an affidavit without first reading it denied the witnesses from reaping the application of Rule 21A of G.N. No. 106 of 2012. He repeated his prayer for Court to allow the application.

As already hinted, we will begin with the preliminary objection after which, if need be, we will proceed to tackle the main application on merit.

After carefully considering the rival submissions of the counsel for the parties, we think that the starting point is section 5 (2) (d) of the AJA on which the preliminary objection is based. That provision explicitly bars appeals and revisions in matters which are interlocutory. It provides that:-

> *"(2) Notwithstanding the provisions of subsection (1) –*
>
> *(a) . . .*
>
> *(b) . . .*
>
> *(c) . . .*
>
> *(d) no appeai 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"*

It is certain that when one reads the provisions of section 4 (3) of that same Act, the two scenarios pointed out by Mr. Nassoro are apparent. It implies that the Court may call record of any proceedings before the High Court for dual purposes:

(1) for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon; and

(2) for the purpose of satisfying itself as to the regularity of any proceedings of the High Court.

The immediate issue is whether the proceedings in present matter were tainted with procedural irregularities as Mr. Nassoro implies.

Mr. Nassoro capitalized on the scenario concerning procedural irregularities. He relied on the case **Stanbic Bank Tanzania Ltd** (supra).

On our reading of that case, we noted that several other cases were cited in that case involving the aspect of irregular proceedings based on confusion. Among those cases were **Miroslav Katic v. Ivan Makobrad,** Civil Application No. 66 of 1998, CAT, **SGS Societe Generale De Survailance S. A. v. VIP Engineering & Marketing Ltd,** Civil Application

No. 84 of 2000, and **Fahari Bottlers** and **Another v. The Registrar of Companies** and **Another,** Civil Revision No. 1 of 1999.

In the first case of **Miroslav Katic v. Ivan Makobrad,** the Court stated that in situations where there were illegalities and impropriety in the proceedings, that could be exceptional circumstances calling for correction through revision jurisdiction. The Court repeated the same stand in 1998 in **Fahari Bottlers'** case. After finding that failure to follow the procedure by the High Court caused confusion, the Court stressed that unexplained failure to observe the procedure was certainly irregular, and that since those irregularities and the accompanying confusion was not amenable to the appellate process remedy, they were amenable to revisional process.

In 2000, the Court was faced with a similar situation in the case of **SGS Societe Generale De Survailance S. A** (supra). The case of **Miroslav Katic v. Ivan Makobrad** was quoted with approval.

As will be noted, all these cases were decided prior to the amendment of section 5 (2) (d) of the AJA in 2002 vide Act No 25 of 2002 which declared that no appeals or applications for revisions could lie against or be made in respect of preliminary or interlocutory decisions or orders of the High Court.

No doubt, the intention of the Parliament was to bar floodgates of appeals and revisions from preliminary or interlocutory decisions. See the case of **Mahendra Kunar Govindji Monani** (supra) in which, while dismissing the application for revision, the Court emphasized that:-

> " *One of the pertinent reasons for paragraph (d) of section 5 (2) of the Appellate Jurisdiction Act, 1979 is* ***to stop irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals against interlocutory decisions or orders"***
> [Emphasis provided].

Notably, the case of **Stanbic Bank Tanzania Ltd** (supra) was decided after the 2002 amendment to section 5 (2) (d) of the AJA. In that case, the Court was moved to examine and revise the proceedings subsequent to the order of the High Court (Commercial Division) regarding settlement of the suit on 11.9.2006 in Commercial Case No. 51 of 2006. The respondent filed a preliminary objection in which one of the grounds raised was that the revisionary proceedings offended the provisions of section 5 (2) (d) of the AJA as amended by Act No. 25 of 2002 in that it targeted an interlocutory decision.

In allowing the application, the Court considered the two orders which were in that record; the first one staying the suit to give the parties chance

to conduct negotiations for restructuring the loan and interest payment schedule, and the other one endorsing that the matter was marked settled. The court found, rightly so in our view, that the proceedings were tainted with confusion. However, the order which indicated that the matter was settled portrayed finality of the case. That being the position, the case of **Stanbic Bank Tanzania Ltd** (supra) is distinguishable from the present one which is still pending before the High Court.

Indisputably, the proceedings in the present application from 31.5.2016 to 13.6.2016 did not finally determine the petition to its finality, meaning, as admitted by Mr. Nassoro, it is interlocutory. The main complaint by Mr. Nassoro is that the High Court Judge did not comply with the provisions of Rule 21A of G.N. No. 106 of 2012, and terms it as a procedural defect because it created confusion.

With great respect, we do not see any confusion in these proceedings. What is obvious is that the High Court judge gave a series of orders between those dates which aggrieved Mr. Nassoro and his client. As such, the nature of complaint in the present case does not draw this case any closer to the case of **Stanbic Bank Tanzania Ltd** (supra) because, as already pointed out, the confusion in that case was obvious, there having been two orders which did not mean one and the same thing. That being the position, the

case of **Stanbic Bank Tanzania Ltd** (supra) is distinguishable from the present which is still pending before the High Court.

That said and done, we hold firm that the present application is incompetent for being interlocutory. We accordingly dismiss it with costs.

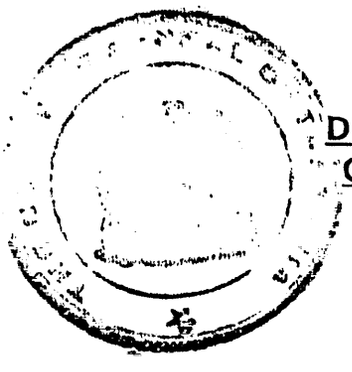
DATED at **DAR ES SALAAM** this 29th Day of November, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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



B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL