IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 3 OF 2016

NUNDU OMARI RASHID ..... APPLICANT

VERSUS

1. **THE RETURNING OFFICER TANGA CONSTITUENCY IN TANGA CITY ..... 1ST RESPONDENT**
2. **ATTORNEY GENERAL 2NDRESPONDENT**
3. **MUSSA BAKARI MBAROUK ..... 3RD RESPONDENT**

(Application for revision of the high Court of Tanzania Tanga Registry at Dar es Salaam.)

(Msuya, J.)

dated the 2nd day of May, 2016
in
Misc. Civil Cause No. 1 of 2015
.....

RULING OF THE COURT

23rd November & 1st December, 2016

MUGASHA, J.A.:

This is an application for revision brought by Notice of Motion under section 4 (3) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**] and Rule 65(1) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The applicant is seeking orders that, the striking out of the applicant's petition in High Court in Misc. Civil Cause No 1 of 2015 which was

instituted by the applicant against the respondents be examined, revised, quashed and set aside on following grounds:-

i. *The order striking out the petition on ground that the same did not cite the law that was complained to have been breached in the process of election and that paragraphs, 7.1, 7.2, 7.3, 7.5 and 7.8 of the petition were vague and unspecific, was not in consonance with the law.*

ii. *The petition being a pleading did not have to plead the law.*

iii. *Paragraphs 7.1, 7.2, 7.3, 7.5 and 7.8 were not vague and unspecific and if so, could not lead to the striking out of the petition because there were remedies available at law, to wit, supply of further and better particulars and amendment, in terms of Rule 32 (1) and (2) of the National Election (Election Petition) Rules, 2010 as amended by GN 106 of 2012.*

The application is supported by the affidavit of **NUNDU OMARI RASHID**, the applicant. The application is opposed by the respondents through the affidavits in reply of **SILYVESTER A. MWAKITALU**, learned Senior State

Attorney and **MUSSA BAKARI MBAROUK,** the 3rd respondent. Parties have filed written submissions in support of their arguments for and against the application.

The applicant was represented by Mr. Samson Mbamba learned counsel whereas Mr. Silyvester A. Mwakitalu and Mr. Ntuli Mwakahesya learned Senior State Attorneys represented the 1st and 2nd respondents. The 3rd respondent was represented by Mr. Mashaka Ngole, learned counsel.

In order to have an appreciation of what underlies this application, a brief background is imperative as gathered in the respective affidavits and the proceedings before the High Court. In the General Election of 2015, five political parties namely, **ACT, ADC, CCM, CHADEMA** and **CUF** each sponsored a candidate to contest for parliamentary election of Tanga Urban constituency. The declaration of election results were that, the applicant who was vying under the **CCM** ticket lost and the 3rd respondent who was sponsored by **CUF** won the election. Dissatisfied with the election results, the applicant filed a petition to the High Court seeking to have the

election results annulled. Following a preliminary objection raised by the 3rd respondent to the effect that the petition was sought under repealed statutes, on 17/12/2015 the trial court permitted the applicant to amend the petition within seven days from the date of the order. The amended petition was on 23/12/2015 confronted with another preliminary objection raised by the 1st and 3rd respondents who challenged the petition to be suffering from among others things, material insufficiency. On 11/2/2015, the trial court determined the preliminary objection and the applicant was given 14 days to amend the petition. However, the subsequent amended petition was also objected to by the respondents on a similar previous defect of material insufficiency and that it had raised new grounds relating to campaign which did not feature in the first petition. The preliminary objection was sustained and on 2/5/2016 the petition was struck out. Aggrieved, the applicant initially lodged a notice of appeal seeking to challenge the impugned decision but the notice of appeal was later withdrawn. On 27/6/2016, the applicant filed the present Notice of Motion.

When the application was called for hearing, we had to satisfy ourselves if the application for revision was properly before the Court. As

such, we required parties to address us on a point relating to the competence of the application which lacks the extracted drawn order sought to be revised as spelt out in the applicant's Notice of Motion.

Mr. Mbamba conceded that, the record of the revision is not accompanied by the drawn order but he viewed the omission not fatal because it does not have adverse effect to the application.

On the other hand, Mr. Mwakitalu argued that, the lacking drawn order renders the application incompetent and the remedy is to strike it out. He referred us to the case of **THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND (NSSF) vs. LEONARD MTEPA**, Civil Application No. 140 of 2005 (unreported). Mr. Ngole learned counsel, submitted that, in the absence of the Drawn Order there is nothing to be revised which renders the application incompetent and the remedy is to strike it out.

In rejoinder, Mr. Mbamba argued that, unlike in appeals, an application for revision need not include in the record the drawn order. He contended that, as long as the record of revision encompasses the ruling, the application can be determined on the basis of such record. In the

alternative, he added, if the Court finds the application incompetent due to the lacking order, it can still return it and proceed to determine the legality of the proceedings instead of striking it out. To back his argument he relied on the cases of **CHAMA CHA WALIMU TANZANIA vs. AG,** Civil Application No. 151 of 2008 and **DIRECTOR OF PUBLIC PROSECUTIONS vs. ELIZABETH MICHAEL KIMEMETA @ LULU,** Criminal Application No. 6 of 2012 (unreported).

From the submission of counsel, it is not in dispute that, the record does not contain the Drawn Order extracted from the Ruling of Msuya, J. which was delivered on 2/5/2016 after the determination of the preliminary objection which resulted into the striking out of the election petition.

The position of the law is now settled that, copies of proceedings, judgments/ruling and decree/order are vital documents to be included in an application seeking to invoke the revisional jurisdiction of the Court (See **AMOS FULGENCE KAKUNGULA vs. KAGERA CO-OPERATIVE UNION (1990) LTD,** Civil Application No. 2 of 2013 (unreported).

In **CHRISOSTOM H. LUGIKU vs AHMED NOOR MOHAMED ALLY,** Civil application no. 5 of 2013 (unreported), a decree was not in the record of application for revision. Giving a rationale on the essence of having before it the entire requisite documents before exercising its power of revision, the Court said:-

> *"...we are unable to say anything meaningful in relation to Land Application No. 25 of 2007 because we are not seized with all the proceedings relating to the said application. As such, we cannot step in and make an order for revision over something we do not have the full picture."*

Moreover, in the **BOARD OF TRUSTEED of NSSF vs. LEONARD MTEPA** (*supra*) the Court addressed the issue whether it could exercise revisional jurisdiction in an application for revision which lacked the complete record of proceedings of the High Court. We said:-

> *"...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 of 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."

It is thus settled law that, in an application for revision made under section 4 (3) of AJA, like the present one, it is the applicant who is duty bound to place entire proceedings of the High Court before the Court is properly moved to exercise its revisional jurisdiction. We agree with the respondents that failure to include the drawn order in the present application is incurably fatal.

The cases of **CHAMA CHA WALIMU TANZANIA vs. AG and DIRECTOR OF PUBLIC PROSECUTIONS vs. ELIZABETH MICHAEL KIMEMETA @ LULU CHAMA CHA WALIMU** (supra) relied upon by Mr. Mbamba are distinguishable from the present application. In **CHAMA CHA WALIMU TANZANIA,** the Court was confronted with an application to revise the decision of the High Court Labour Division which granted injunction to restrain a strike on the basis of the application which was incompetent. That Labour Court acted without jurisdiction was among the grounds in the Notice of Motion on which revision was sought. The competency of that

application was challenged in a preliminary objection raised by the respondents and it was upheld by the Court. However, the Court did not proceed to strike out the incompetent application as it is ordinarily the case because of a fatal illegality patent on the face of the Labour Court record and we said:

> *"..... Since the proceedings were a nullity even the order made therein including the court's ruling and final order was a nullity. ... Because the proceedings before the Labour Court were a nullity, that's why we felt constrained not to strike out this application. We did so in order to remain seized with the Labour Court's record and so be enabled to intervene suo motu to remedy the situation.... "*

The Court thus concluded that:

> *".....in this particular case we are strictly enjoined by law to do what the learned trial judge in the Labour Court failed to do. Failure to do so would be tantamount to perpetuating illegalities, and in particular the injunction order which is admittedly a nullity. Acting under s.4 (3) of the Act we hereby revise the incompetent proceedings in the labour Court."*

The Court quashed and set aside all the orders including the impugned injunction granted therein.

The Court was faced with a similar scenario relating to an incompetent application for revision in **DIRECTOR OF PUBLIC PROSECUTIONS vs. ELIZABETH MICHAEL KIMEMETA @ LULU (*supra*).** Apart from making a finding that the application for revision was not competent, the Court did not strike out the application in order to address the illegality on the face of the record of the High Court due to the following reasons where the Court said:

> *"We did so for a purpose. The purpose is that we remain seized with the High Court's record so as to enable us intervene on our own to revise the illegalities pointed out by invoking section 4(3) of the Appellate Jurisdiction Act CAP 141 RE.2002, otherwise the High Court record will remain intact"*

It is clear that, in the above two cases , the Court was confronted with a situation where the applications for revision though incompetent, emanated from illegal proceedings of the High Court and thus, striking

them out on ground of incompetence would be tantamount to perpetuating illegalities.

In the circumstances, the cases of **DPP vs. ELIZABETH MICHAEL KIMEMETA @ LULU (supra)** and **CHAMA CHA WALIMU** referred to us by Mr. Mbamba, are of no significance in the present application, because the missing extracted order is not an off shoot of illegal or incompetent High Court proceedings. Besides, there is no such indication be it in the Notice of Motion or the applicant's affidavit. In this regard, there is nothing to be corrected in the proceedings of the High Court necessitating salvaging the incompetent application and determining its merits as suggested by Mr. Mbamba. Moreover, in the Notice of Motion the applicant has admittedly pointed out that, what is sought to be revised is the Order striking out the petition which is apparently not on the record.

In the premises, we agree with the respondents that the missing extracted order in the record of the revision application is fatal rendering the application not competent to be heard by the Court in the exercise of its revisional jurisdiction under section 4 (3) of Appellate Jurisdiction Act.

In view of the aforesaid, the application is not competent and we accordingly strike it out. We make no order as to costs because the anomaly was raised *suo motu* by the Court.

DATED at **DAR ES SALAAM** this 28th 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