IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CIVIL APPLICATION NO. 190 OF 2013

MECHMAR CORPORATION (MALAYSIA) BERHAD (IN LIQUIDATION).....APPLICANT

VERSUS

1. **VIP ENGINEERING AND MARKETING LIMITED**
2. **INDEPENDENT POWER TANZANIA LIMITED (IPTL) .....RESPONDENTS**
3. **THE ADMINISTRATOR GENERAL**
4. **PAN AFRICA POWER SOLUTIONS (T) LIMITED**

(Application for a Revision from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Utamwa, J.)

Dated the 5th September, 2013
in
Consolidated Misc. Civil Cause No. 49 of 2002 and
Misc. Civil Cause No. 254 of 2003

RULING OF THE COURT

24th May & 21st June, 2016

MUSSA, J.A.:

The applicant seeks to move the Court to invoke its revisional jurisdiction and revise the ruling and order of the High Court (Utamwa, J.) in consolidated Miscellaneous Civil Cause No. 254 of 2003. The application is by way of a Notice of Motion which has been taken out

under the provisions of section 4(3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA), as well as Rules 4(1), 4(2) (a), 4(2) (b), 4(2) (c) and 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice of Motion is accompanied by an affidavit duly sworn by Mr. Seni Songwe Malimi who held himself to be counsel for the applicant.

The application has been resisted by the first respondent through an affidavit in reply duly sworn by Mr. James Burchard Rugemalira. The second and fourth respondents have also resisted the application through an affidavit in reply duly sworn by Mr. Melchisedeck Sangalali Lutema who happens to be counsel for the second and fourth respondents. The respondents have additionally enjoined several preliminary points of objection which we will address at a later stage of our ruling. In the meantime, we deem it opportune to explore the factual background giving rise to the application as is discernible from the affidavital pleadings.

Mechmar Corporation (Malaysia) Behard is a Malaysia company incorporated on the 19th December, 1972 under the laws of Malaysia. It

is noteworthy that the applicant holds herself by the same title save for an addition, in brackets, of the words "in liquidation". To distinguish the applicant from the original company, we shall henceforth refer the latter to simply as "Mechmar".

Upon incorporation, Mechmar commenced its business operations in Malaysia and worldwide including Tanzania. As it were, the company invested in the second respondent by holding 70% of the latter's shares. The other investor was the first respondent who held the remaining 30% of the shares. Following a dispute between Mechmar and the first respondent, the latter instituted proceedings in the High Court at Dar es Salaam, for the winding up of the second respondent in Miscellaneous Civil Cause No. 49 of 2002. In turn, Mechmar also instituted Miscellaneous Civil Cause No. 254 of 2003, as against the first respondent, in the same court.

The two causes were later consolidated but, whilst the consolidated cause was pending before the High Court, there was a new development in Malaysia. According to the affidavit in support of the application, following a petition lodged by Mechmars' creditors, on the

18th May, 2012 the High Court of Malaya in Malaysia ordered that Mechmar be wound up under the supervision of the said court. In the upshot, Messrs Heng Ji Keng and Michael Joseph Monteiro were appointed as the joint liquidators of Mechmar. Upon their appointment, the joint liquidators assigned Mr. Seni Songwe Malimi, learned Advocate, to represent them in the consolidated cause which was pending in the High Court of Tanzania.

On the 24th April, 2013 Mr. Malimi entered appearance in the consolidated cause and, *inter alia*, informed the High Court that Mechmar was under liquidation in its country of incorporation; that the joint liquidators were the sole legal representatives of Mechmar; and that he (Mr. Malimi) had instructions to take over the conduct of the proceedings in the consolidated cause for and on behalf of Mechmar. The claim was countered by Mr. Lutema who, until then, had the conduct of the proceeding for and on behalf of Mechmar. As it turned out, the learned counsel insisted that he was still representing Mechmar. Faced with the representation quandary, the High Court ordered Mr. Malimi to file a formal application to enable the court to determine the issue. Thus, on the 3rd May, 2013 the applicant herein lodged a formal

"representation application", whereupon on the 9th July, 2013 the High Court ordered the application be argued by way of written submissions as per scheduled timetable. The submissions were duly lodged and as of the 13th August, 2013 what remained was a ruling on the matter.

On the 27th August, 2013 the first respondent lodged, in the High Court, a notice withdrawing the winding up proceedings along with all ancillary applications. The withdrawal notice was predicated upon a Share Purchase Agreement (SPA) between the first respondent and the fourth respondent through which the former transferred its shares in the second respondent to the latter. The withdrawal notice was deliberated on the 3rd September, 2013 whereupon Mechmar, through Mr. Lutema consented to the withdrawal. Conversely, Mr. Malimi who appeared for the applicant did not object the withdrawal but countered the consequential orders prayed by the first respondent. Eventually, on the 5th September, 2013 the High Court granted the withdrawal of the first respondent's winding up petition along with the accompanying prayers. The applicant is aggrieved hence the application at hand.

After filing the application at hand on the 4th November, 2013 which was registered as Civil Application No. 190 of 2013, on the 27th November 2013, the applicant lodged Civil Application No. 206 of 2013 seeking to amend the Notice of Motion. The quest was greeted with a notice of preliminary objection from the first respondent which sought to impugn the application upon three points, namely: -

> *"1. That the applicant has no "locus standi" in the Independent Power Tanzania Ltd. (IPTL).*
>
> *2. That it is a continuation of abuse of the court process by the applicant to purport to amend an incompetent Application which in the eyes of the law never existed.*
> *3. That under section 269(1) of the companies Ordinance Cap. 212 the applicant shall be responsible for all the liabilities of the 2nd Respondent and accordingly it cannot have cause of action against the respondent."*

It is, perhaps, pertinent to observe, at this stage, that in the substantive Civil Application No. 190 of 2013, the first and fourth respondents also gave notice of a litany of preliminary points of

objection. To begin with the first respondent, on the 28th March 2014, she filed a notice of preliminary points of objections as follows: -

> *"1. That the Application is incompetent for failure to seize the Court with the complete essential record including Misc. Civil Application No. 92 of 2014 and the originating Civil Case No. 45 of 2014 in which Hon. Twaib, J. entered on 20th March 2014 that had the effect of setting aside the consent drawn order of his brother Judge Hon. Utamwa, J. dated 17th January 2014 in Consolidated Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003.*
>
> *2. That the Court be pleased to call Suo Mottu the original record at the High Court of Tanzania Dar es Salaam District Registry in Civil Case No. 45 of 2014 and Misc. Civil Case No. 92 of 2014 in order to examine and satisfy itself as to the regularity and legality of the whole Proceedings, Rulings and Orders made therein by Hon. Dr. Fauz Twaib, J.*

3. *That the Application for Revision of the Ruling and order of the High Court of Tanzania at Dar es Salaam dated 5th September 2013 Utamwa, J. in Consolidated Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003 which has been followed by institution by the same Applicant of Misc. Civil Application No. 92 of 2014 and the originating Civil Case No. 45 of 2014 is an abuse of Court process.*

4. *That the Applicant has no locus standi in Independent Power Tanzania Ltd (IPTL) to be entitled to apply for, let alone to be granted any orders based on his purported claims in interest in IPTL.*

5. *That the Applicants' originating High Court Civil Case No. 45 of 2014 claiming damages against VIP currently pending before Hon. Dr. F. Twaib, J. be Consolidated with VIP's case for damages against the Applicant in High Court Civil Case No. 229 of 2013 currently pending before Hon. Utamwa, J. to avoid the risk of the High Court of Tanzania making conflicting Decisions over the same*

subject matter and involving the same parties in the case the Honourable Court is not minded to strike it off the High Court Record."

For her part, the fourth respondent lodged two sets of preliminary points of objections. The first set which was filed on the 28th January, 2014 was couched as follows: -

"1. *That the Applicant, having failed to join as a party in the stead of MECHMAR CORPORATION (MALAYSIA) BERHAD which was already a party in all proceedings that were already underway in Consolidated Miscellaneous Civil Cause Number 49 of 2002 and Miscellaneous Civil Cause Number 254 of 2003 as well as in Miscellaneous Civil Cause Number 112 of 2009; which were pending contemporaneously before Honourable Utamwa, J in the High Court of Tanzania at Dar es Salaam, does not have the legal standing to prosecute this application for revision before this Honourable Court for and on behalf of or in*

lieu of or in the stead of MECHMAR CORPORATION (MALAYSIA) BERHAD.

2. *That, since the parties in the trial court are no longer at issue because Consolidated Miscellaneous Civil Cause Number 49 of 2002 and Miscellaneous Civil Cause Number 254 of 2003 as well as Miscellaneous Civil Cause Number 112 of 2009; which were pending contemporaneously before Honourable Utamwa, J in the High Court of Tanzania at Dar es Salaam, have already been withdrawn by the respective parties, there is therefore nothing left pending before the trial court to be revised by this Honourable Court and, ipso facto, this application for revision is a futile academic exercise for purposeless orders and is thus an abuse of the court process. The Counsel for the 4th Respondent will thus pray for dismissal or striking out of the application for revision, with costs."*

Then, on the 10th April, 2015 the fourth respondent lodged the second set of preliminary points of objection as follows: -

"1. The application for revision is incompetent and bad in law for being preferred as an alternative to appeal.

2. The application for revision is an abuse of the court process."

If we may now revert to Civil Application No. 206 of 2013, having heard the parties either in support or in opposition to the preliminary points of objection raised, the Court (Kimaro, J.A., Mbarouk, J.A., And Juma, J.A.) overruled the preliminary points and granted the requested leave to amend the Notice of Motion.

As it were, the amended Notice of Motion with respect to Civil Application No. 190 of 2013 was duly lodged on the 18th December, 2014. When the matter was called for hearing before us, the applicant was represented by Mr. Charles Morrison, learned Advocate who was being assisted by Mr. Gaspar Nyika, also learned Advocate. The first respondent had the services of Mr. Michael Ngalo and Mr. Respicious Didace, both learned Advocates. The second and fourth respondents were advocated for by Mr. Melchisedeck Lutema who had the assistance of Mr. Kay Mwesiga.

As he stood to argue the preliminary points of objection, Mr. Ngalo abandoned the second, third, fourth and fifth preliminary points of objection which he had filed on behalf of the first respondent on the 28th March, 2014. The learned counsel retained the first point which complains that the application is undermined by being accompanied by an incomplete record. The learned counsel informed us that the abandonment has been necessitated by the fact that those grounds were canvassed and determined by the Court in Civil Application No. 206 of 2013. As regards the retained preliminary point of objection, Mr. Ngalo submitted that the application is incompetent for failure to seize the Court with the complete essential record including Miscellaneous Civil Application No. 92 of 2014 and the originating Civil Case No. 45 of 2014. To buttress his submission, the learned counsel referred us to the unreported Civil Application No. 1 of 2002 – **Benedict Mabalanganya Vs Romwald Sanga.**

For his part, Mr. Lutema abandoned the first ground comprised in the first set of preliminary points of objection which were filed on the 28th January, 2014. He however retained the second ground and the other set of preliminary points of objections which were lodged on the

10th April, 2015. Arguing the second ground which is comprised in the first set of preliminary points of objection, Mr. Lutema submitted that the consolidated Miscellaneous Cause Nos. 49 of 2002 and 254 of 2003 have been effectively determined by the High Court. In the result, he urged, there is nothing left in the court below for this Court to revise. In his submission, for section 4(3) of AJA to come into play, the record desired to be revised must still be before the High Court. Thus, he concluded, to the extent that the High Court is no longer seized of the Miscellaneous causes, the application at hand is misconceived and, for that matter, it is incompetent. To fortify his submission, Mr. Lutema referred us to the unreported Civil Application No. 67 of 2014 – **Kitinda Kimaro Vs Anthony Ngoo and Another**.

As regards the first limb of the second set of preliminary points of objection, the learned counsel for the second and fourth respondents contended that the application is similarly incompetent for being preferred as an alternative to an appeal. Mr. Lutema contended that the decision desired to be impugned is comprised in winding up proceedings which were, at the material times, governed by the defunct Companies Ordinance, Chapter 212 of the Laws. A decision on it was

appellable under the provisions of section 220 of the Ordinance. To buttress his position, the learned counsel referred us to two decisions: Civil Application No. 180 of 2012 – **Milo Construction Company Ltd Vs Mary Florents Mtetemela and Two others** (unreported); and **Halais Pro-Chemie Vs Wella A.G.** [1996] TLR 269 (CA). Mr. Lutema urged that the application at hand does not yield any exceptional circumstance as laid down by the latter case so as to qualify itself to revision.

The complaint which is comprised on the second limb of the preliminary points of objection is, with respect, ambiguous. Through it, the second and fourth respondents generally impute that *"the application for revision is an abuse of the court process"*. Elaborating on it, Mr. Lutema submitted that he had in mind ground (b) (vii) of the amended Notice of Motion which goes thus: -

> *"The Share Purchase Agreement (SPA) between 1st Respondent and the 4th Respondent which was the basis of the Notice of Withdrawal of the petition for Winding up of the 1st Respondent is a sham and is fraught with irregularities in that the 3rd Respondent (then the Provisional*

Liquidator of the 2nd Respondent) was involved in the preparation and/or approval of the same and as such counsel for the said 3rd Respondent acted in the preparation of the same (purportedly acting for and on behalf of the 1st Respondent and the 3rd Respondent colluded and/or conspired to defeat the claims and/or interests of the Applicant and hence Justice has not seen (sick) to be done."

Mr. Lutema complains that the applicant is inappropriately seeking to impute fraud in these revisional proceedings. In this regard, the learned counsel suggested that if her desire was to challenge the compromise decree on the ground of fraud, the applicant should have appropriately filed a suit for setting aside the said decree. To fortify his position, Mr. Lutema referred us to the unreported decision in Civil Application No. 33 of 2012 – **Mohamed Enterprises (T) Ltd Vs Masoud Mohamed Nasser**. In that decision, the Court approvingly adopted an extract from Mulla on the Code of Civil Procedure (16th Edition) where it is stated at pg. 653: -

"...the only remedy of a person who wishes to challenge a compromise decree on the ground

of fraud is to file a suit for setting aside the said decree."

Thus, it was Mr. Lutema's suggestion that inasmuch as the applicant did not raise the ground of fraud at an appropriate forum, the application at hand should be treated as an abuse of the court process.

In reply to the preliminary objection raised by Mr. Ngalo, Mr. Morrison submitted that the applicant has appended, in the Notice of Motion, the decision desired to be revised as well as the proceedings giving rise to that decision. The learned counsel further urged that the duty imposed by case law on an applicant relates specifically to the record and decision desired to be impugned and not ancillary proceedings or orders as appears to be the suggestion of the learned counsel for the first respondent. In any event, Mr. Morrison contended, the same argument was advanced by Mr. Ngalo and rejected by the Court in the referred Civil Application No. 206 of 2013. He, accordingly, submitted that it will be unfortunate if the Court re-entertains the issue which has been conclusively adjudicated upon by this same court.

As regards Mr. Lutema's contention on the inapplicability of section 4(3) of AJA, the learned counsel for the applicant deplored the

proposition as extraordinary. He urged that the unfettered jurisdiction of the Court cannot be ousted by the mere fact that the proceedings of the High Court have been finalized. He distinguished the case of **Kitinda Kimaro** *(supra)* on account that, in that case, the applicant had simultaneously lodged an appeal, hence the order that the High Court was no longer seized with those proceedings.

Coming to the complaint about the application being preferred as an alternative to an appeal, Mr. Morrison contended that the applicant, who was not a party to the consolidated causes, did not have a right to appeal. Additionally, given the fact that Mr. Lutema consented the withdrawal decree, an appeal by Mechmar would have been barred by section 70(3) of the Civil Procedure Code, Chapter 33 of the Revised Laws (CPC). To that extent, he concluded, the applicant's route to the appeal process had been blocked.

With respect to the complaint about a claim of fraud being inappropriately sought in the application, Mr. Morrison took the position that the complaint does not, after all, qualify to a preliminary point of

objection. In sum, Mr. Morrison submitted that the preliminary points of objection raised were bereft of merits and should be overruled.

In a brief rejoinder, Mr. Ngalo submitted that he did not, in the first place, raise the complaint of the incompleteness of the record in Civil Application No. 206 of 2013. For his part, Mr. Lutema reiterated his position and further informed us that section 70 of the CPC is inapplicable to appeals before the Court. Rather, the applicable law is section 5(2)(a)(i) which, incidentally, makes provision for appeals originating from consent decree with leave of the High Court.

Having heard the lucid submissions from counsels on either side, we propose to first address Mr. Ngalo's contention to the effect that the applicant did not avail a complete record of the proceedings desired to be impugned. To begin with and, with respect, Mr. Ngalo's bold claim that he did not raise the issue of incompleteness of the record in Civil Application No. 206 of 2013 is frowned by his own written submissions in support of the preliminary points of objections raised there. In paragraph 19 of the written submissions, the learned counsel stated thus: -

"19. It is very clear that inasmuch as the applicant annexed to the Application requesting for Revision various documents to the application but up to the time of writing these submissions it has completely ignored providing to the Court the complete record of the proceedings complained to have been irregularly conducted by Hon. Utamwa, J. after the Court of Appeal of Tanzania with essential record for revision that is being complained against to fault Hon. Judge Utamwa renders the application for Revision of the said proceeding and orders to be incompetent."

To fortify the foregoing contention, the learned counsel for the first respondent referred the Court to the celebrated case of **Benedict Mabalanganya** *(supra)*. As we have already hinted upon, all the three points of preliminary objection raised by the first respondent, including the complaint alleging incompleteness of the record, were overruled by the Court. As correctly pointed out by Mr. Morrison, it will be inordinate for us to entertain the preliminary point of objection which was conclusively determined by the Court in the Civil Application No. 206 of

2013. We accordingly, refrain from re-entertaining the point of objection.

We will, next, address the contention by Mr. Lutema that section 4(3) of AJA cannot come into play inasmuch as the High Court proceedings have been concluded. To begin, with, we wish to distinguish the case of **Kitinda Kimaro** *(supra)* which was decided on the basis that the applicant there had lodged an appeal simultaneously with an application for revision. Accordingly, the Court made the following observation: -

> *"In our case, we have seen that the respondents have already filed Civil Appeal No. 33 of 2013 in the Court. It goes without saying that the High Court is no longer seized with those proceedings. It follows therefore that section 4(3) of the Act is not applicable. So the Court is not properly moved."*

Of recent, the Court had to grapple with a preliminary objection similar to the one raised by Mr. Lutema. That was in the unreported Civil Revision No. 1 of 2015 – **The Attorney General and Two others Vs. Opulent Ltd.** where the Court observed: -

"This power to inspect and correct can be exercised by the court, on its own motion and at any time, even after the proceedings in the High Court have been finalized, because it has not always been easy or practicable for the Court to learn of these illegalities, irregularities, errors, improprieties, etc. before the proceedings in the High Court are concluded."

Thus, in the light of the foregoing elaborate position of the Court, we are unable to accommodate the contention of Mr. Lutema. This particular preliminary point of objection is, accordingly, overruled.

Coming now to Mr. Lutema's suggestion that the applicant seeks to inappropriately impute fraud in these revisional proceedings, we should express at once that the complaint does not qualify to a preliminary point of objection. In this regard, we need only pay homage and reiterate what was stated by the defunct Court of Appeal for Eastern Africa in. **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** [1969] E.A. 696: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all

facts are correct. It cannot be raised if any fact has to be ascertained or if what is sought Is the exercise of judicial discretion."

Going by the complaint by counsel for the second and fourth respondents, it will require the Court to first ascertain whether or not the first and third respondents colluded so as to qualify as fraud the applicant's allegation in ground (b)(vii) of the amended Notice of Motion. To that extent, we entirely subscribe to the view taken by Mr. Morrison to the effect that the complaint raised does not meet the benchmark set for a preliminary point of objection. The preliminary point of objection is, just as well, overruled.

That, finally, brings us to Mr. Lutema's contention that the application is similarly incompetent for being preferred as an alternative to an appeal. The law on the subject is well settled. In this regard, the case of **Halais Pro-Chemie** *(supra)* meticulously laid down the following governing legal propositions: -

"(i) The court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;

(ii) Except under special circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;

(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;

(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked."

In making the foregoing legal propositions, the Court was guided by two earlier decisions comprised in the cases of **Transport Equipment Ltd Vs D.P. Valambia** [1995] TLR 161 (CA); and **Moses Mwakibete Vs The Editor – Uhuru and Two others** [1995] TLR 161 (CA). In the latter case, the Court made the following observation: -

"In our view, this Court can be moved to use its revisional jurisdiction under ss(3) only in cases where there is no right of appeal or where there is, it has been blocked by judicial process.

> ***Lastly where such right exists but was not taken, good and sufficient reasons are given why no appeal was taken.*** [Emphasis supplied].

We have supplied emphasis to the last portion of the above extract to underscore the point that a party to proceedings in the High Court can invoke the revisional jurisdiction even in matters which are appealable where such right was not taken for good and sufficient reasons.

In the matter under our consideration, given the fact that the decree sought to be impugned resulted from the consent of the parties, we accept Mr. Lutema's formulation that the order is appealable under the provisions of section 5(2)(a)(i) of AJA. Nonetheless, even upon accepting that the order is appealable, a question looms large: Appealable at whose option? The question is triggered by the unresolved dispute as to who, in between Mr. Lutema and the joint liquidators, was the authorized legal representatives of Mechmar. Thus, in the light of the obtaining confusion as to who was the authorized representative of Mechmar, we are fully satisfied that the applicant has

yielded good cause for not taking the appeal option. The preliminary point of objection similarly stands to be overruled.

In the sum, we overrule all the preliminary point of objection raised with an order that costs to follow the event in the main cause. Hearing of the main application will be fixed by the Registrar. Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of June, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL