

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MUSSA, J.A. And MMILLA, J.A.)

CIVIL REVISION NO. 8 OF 2016

D.B. SHAPRIYA & CO. LTD.....PLAINTIFF/DECREE HOLDER

VERSUS

- |  |   |                                   |
|--|---|-----------------------------------|
| 1. LEIGHTON OFFSHORE PTE LIMITED (T) BRANCH                            | } | ..... DEFENDANT / JUDGMENT DEBTOR |
| 2. TANZANIA PORTS AUTHORITY  | } | .....NECESSARY PARTY              |
| 3. PERMANENT SECRETARY MINISTRY OF WORKS, TRANSPORT AND COMMUNICATIONS | } | .....INTERESTED PARTY             |
| 4. HON. ATTORNEY GENERAL   | } |                                   |

(Revision from the decision of the high Court of Tanzania  
(Commercial Court) at Dar es Salaam)

(Mansoor, J.)

Dated the 11<sup>th</sup> day of May, 2016

In

Commercial Case No. 22 of 2015 and  
Misc. Commercial Appl. No. 147 of 2016

-----

RULING OF THE COURT

31<sup>st</sup> August & 12<sup>th</sup> October, 2016

MUSSA, J.A.:

These revisional proceedings were opened by the Court *suo motu*, at the instance of a complaint letter from the Attorney General who is captioned herein as one of the two interested parties. The factual background giving

rise to the proceedings may briefly be recapitulated from the availed documents.

On the 30<sup>th</sup> September, 2010 the Tanzania Ports Authority, which is herein captioned as a necessary party, sealed a contract with the plaintiff/decree holder for the replacement of Single Point Mooring (the SPM contract) at Ras Mji Mwema, Dar es Salaam. We shall hence forth refer to the two parties as, respectively, "the TPA" and "the decree holder". The decree holder did not physically execute the SPM contract, rather, she sub-contracted the execution to the above named defendant/Judgment debtor whom we shall refer to as "the judgment debtor".

Apparently there was a misunderstanding between the decree holder and the judgment debtor and, as a result, the former sued the latter in the High Court of Tanzania (Commercial Division) to realize a sum of USD 3,427,017.90 which allegedly arose from non-performance of the sub-contract. The suit which was titled as Commercial Case No. 22 of 2010 was not contested by the judgment debtor who defaulted appearance and, consequently, on the 27<sup>th</sup> April, 2015 the trial court (Songoro, J.) handed down a default judgment and decree in favour of the decree holder.

In the aftermath, the decree holder initiated execution proceedings in an attempt to realise the decretal sum from the judgment debtor. Her efforts were futile, seemingly, on account of the unavailability of the judgment debtor. As an alternative, the decree holder applied to the executing court to realize the decretal sum from the TPA under Order XXI Rule 10 of the Civil Procedure Code, Chapter 33 of the Revised Laws (the code). It was claimed that the TPA, held some proceeds belonging to the judgment debtor which arose from the SPM contract. Thus, the mode of assistance requested by the decree holder was for the executing court to require the TPA to show cause why a portion of the debt held by it as proceeds of the SPM contract should not be paid to the decree holder to settle the decretal amount

As it turned out, the TPA refuted the debt upon an affidavit of its officer but, after a hearing, the executing court was satisfied that no good cause was shown and thus, on the 11<sup>th</sup> May, 2016 the executing court (Mansoor, J.) ordered and decreed the TPA to pay the decree holder a sum of USD 3,856,970.27 in satisfaction of the decretal amount. In the final event, the executing court issued a *garnishee order nisi* attaching the TPA account.

Discontented, the Attorney General, who took over the conduct of the matter, unsuccessfully urged the executing court to vacate its order by way

of a review and, having lost the quest, hence the proceedings at hand which, as hinted upon, were initiated by the Court *suo motu* at the instance of the Attorney General.

For her part, the decree holder has lodged a notice of preliminary objections which she enjoins three points of grievance:-

- "(a) That the Honourable Court does not have Jurisdiction to entertain and revise execution matters in compliance with section 38(1) of the Civil Procedure Code, Cap. 33 R.E. 2002;*
- (b) That the decision sought to be revised is interlocutory and therefore contravenes the provisions of section 5(2) (d) of the Appellate Jurisdiction Act, 1979 as amended by the Written Laws (Miscellaneous Amendments) Act No. 25 of 2002; and*

*(c) That the present Revision /Application is not maintainable as there is an alternative remedy under Rule 62 of Order XXI of the Civil Procedure Code, Cap. 33 R.E 2002.*

At the hearing before us, the decree holder was represented by Mr. George Kilindu who was being assisted by Mr. Roman Masumbuko, both learned Advocates. The judgment debtor had the services of Mr. Gaudiousus Ishengoma and Mr. Abdon Rwegasira who are also learned Advocates, whereas Mr. Gabriel Malata, learned Principal State Attorney was representing the TPA and the two interested parties.

Mr. Masumbuko, who argued the preliminary points of objection, fully adopted the written submissions which were lodged by the decree holder in support of the points raised. As regards the first point of objection, the learned counsel sought to rely on the unreported decision of this Court comprised in Civil Application No. 74 of 2010 – **CRDB Bank Limited Vs George Kilindu and Another**. He also paid homage to section 38(1) of the Code which stipulates:-

*"All questions arising between the parties to the suit in which the decree was passed, or their*

*representatives, and relating to the execution, discharge or dissatisfaction of the decree, shall be determined by the court executing the decree and not by separate suit."*

Coming to the second point of preliminary objection, Mr. Masumbuko referred to Miscellaneous Commercial Application No. 147 of 2016 which was filed in the High Court (Commercial Division) seeking for two orders, namely, lifting the garnishee order nisi and stay of execution pending the main cause which was comprised in Miscellaneous Commercial Application No. 146 of 2016. The learned counsel for the decree holder submitted that the Commercial Court has not even determined the Miscellaneous Application No. 147 and it was, thus, premature for this Court to seek to revise what is still pending in the Court below.

On the third point of preliminary objection, the learned counsel for the decree holder sought reliance on the provisions of Rule 62 of Order XXI of the Code which goes thus:-

*" Where a claim or objection is preferred, the party against whom an order is made may institute a suit*

*to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."*

Mr. Masumbuko contended that in the wake of the high Court order this Court cannot intervene by way of revision since the TPA has an alternative remedy of instituting a regular suit. To buttress his position, the learned counsel for the decree holder referred us to two decisions of the Court: Civil Application No. 127 of 2005 – **Kezia Violet Mato Vs The National bank of Commerce and Three others**; and **Mohamed Enterprises (T) Ltd Vs The Tanzania Investment Bank Ltd and Others** [2012] 1 EA 173.

In reply, Mr. Malata contended that all the preliminary points of objection raised are without a semblance of merit. Addressing the first point of objection, the learned Principal State Attorney urged that the revisional jurisdiction of this Court is conferred upon wide terms under the provisions of section 4(2) and (3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA). To that extent, he submitted, the revisional jurisdiction of the Court cannot be said to be excluded by the provisions of section 38(1) of the Code. To fortify his contention, Mr. Malata referred us to the

unreported Civil Revision No. 6 of 2015 – **Balozi Abubakari Ibrahim and Another Vs Ms. Benandy's Ltd and Two others.**

On the second point of preliminary objection, the learned Principal State Attorney deplored the complaint raised as totally misconceived the more so as the decision by Mansoor, J. which is sought to be impugned conclusively, determined the liability of the TPA with respect to the decretal amount. To that end, Mr. Malata refuted his friend's contention that these proceedings seek to revise an interlocutory decision contrary to the provisions of section 5(2) (d) of AJA.

As regards the third point of preliminary objection, Mr. Malata urged that Rule 62 of Order XXI of the Code is inapplicable to the situation at hand much as no objection proceedings were constituted before the High Court as contemplated by the Rule. Thus, in sum, the learned Principal State Attorney submitted that the three preliminary points of objection be overruled and the revisional proceedings should be allowed to proceed on the merits. For his part, Mr. Ishengoma joined hands and fully supported the submissions of Mr. Malata.



We have anxiously considered the issues raised in the Notice of preliminary objection. To begin with, the first point of objection need not unnecessarily detain us as we are far from being persuaded that the revisional jurisdiction of the Court is ousted by the provisions of section 38(1) of the Code. With respect, the case of **CRDB Bank Ltd Vs George Kilindu and Another** (supra) should not be taken to have propounded that the revisional jurisdiction of the Court is ousted by the referred provision. Far from it, all what the Court did in that case was to decline to invoke its revisional jurisdiction for the reason that, under the provisions of the referred section 38(1), the applicant had an option to present her grievance before the court executing the decree. As it were, that was not to say that the revisional jurisdiction of the Court was ousted by that provision. In the case of **Balozi Abubakari Ibrahim** (supra) which was referred to us by both Mr. Malata and Mr. Ishengoma, the Court made the following observation:-

*"Execution of court decrees and orders is an inherent component of the administration of civil justice. It is, indeed, the culmination of the entire process and cannot escape public scrutiny and comment, leave*

*alone judicial interventions where the interests of justice so demand.”*

All said, we find no grain of merit in the first point of preliminary objection which we, accordingly, overrule.

As regards the second point of preliminary objection, we entirely subscribe to Mr. Malata’s submission to the effect that the backbone of the matter before us is the decision pronounced by Mansoor, J. on the 11<sup>th</sup> May, 2016. As correctly formulated by the Principal State Attorney, that decision conclusively determined the liability of the TPA with respect to the decretal amount. To us, Miscellaneous Commercial Application No. 147 of 2016 was not, so to speak, the gist of the complaint which initiated these proceedings. In any event, we were informed from the bar that Application No. 147 which was pending before the Commercial Court was eventually withdrawn by the Attorney General. To this end, we similarly find the second point of preliminary objection to be without a semblance of merit and overrule it.

Finally, with respect to the third preliminary point of objection, it is on record that, the TPA was given an opportunity by the Court executing the decree to show cause as to why the decree should not be executed against

her. The TPA refuted liability but after a hearing, the executing court pronounced the order which is sought to be impugned. The decree holder urges that the Court should refrain from invoking its revisional jurisdiction given the fact that the TPA has an alternative option to institute a suit under Rule 62 of Order XXI of the Code. If we may express at once, in our view, there is force in the decree holder's argument. Faced with a corresponding situation in the unreported Civil reference No. 4 of 2002 – **Bank of Tanzania Vs Desram Valambia**, this Court drew inspiration from two Indian cases and observed as follows:-

*"In Indian cases of Phoman Singh Vs AJ Wells AIR 1923 Rangoon 195 and Mang SA Ha V SM RM Firm AIR 1934 Rangoon 230 availed to us, the Rangoon High Court in India had occasion to address the issue while exercising revisional jurisdiction. Dealing with a similar situation based on an order made under Order XXI, rule 21 of the India Code of Civil Procedure, the equivalent of Order XXI, rule 62 in Tanzania, before the 1976 amendment in India, the Court stated inter alia:-*

***"In my opinion where the order in question has after proper investigation, been properly passed under Order XXI, rules 59-63 of the***

*Civil procedure Code, this should not, even though the order is erroneous, interfere in revision since there is a remedy by suit. "*

Similar remarks were made in **Mohamed Enterprises (T) Ltd Vs Tanzania Investment Bank and others** (supra) and thus, by a parity of reasoning, we refrain from invoking our revisional jurisdiction since the TPA has an alternative remedy by way of instituting a suit. That is to say, this matter is left to lie where it was immediately before the opening of these proceedings. We make no order as to costs as the matter was raised by the Court *suo motu*. Order accordingly.

**DATED at DAR ES SALAAM** this 4<sup>th</sup> day of October, 2016

S. MJASIRI  
**JUSTICE OF APPEAL**

K.M. MUSSA  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

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



E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**