IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MUGASHA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 168/16 OF 2017
ATTORNEY GENERAL ..... APPLICANT

VERSUS

1. **OYSTERBAY VILLAS LIMITED**
2. **KINONDONI MUNICIPAL COUNCIL ..... RESPONDENTS**

[Application for revision of the judgment of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Nchimbi, J.)

dated the 11th day of March, 2014
in
Commercial Case No. 88 of 2011

RULING OF THE COURT

5th & 31st October , 2017

MWAMBEGELE, J.A.:

Against this application for revision filed by the Honourable the Attorney General, the first respondent; Oysterbay Villas Limited, through the services of a law firm going by the name IMMMA Advocate, filed the following paraphrased four-point preliminary objection:

1. That the application for revision is incompetent and not maintainable in law for being made contrary to the provisions of section 17 (1) and (2) of the Office of the Attorney General (Discharge of Duties) Act, 2005, Act No 7 of 2005;
2. That the application is incompetent and unmaintainable in law for being made as an alternative to the right of appeal enjoyed by the second Respondent and the Applicant in violation of the position set by various cases of this Court including **Halais Pro-Chemie v. Wella A.G.** [1996]TLR 269;
3. That the application is incompetent for want of complete proceedings and pleadings in Commercial Case No. 88 of 2011 which is the violation of the requirement set in several decided cases of the Court of Appeal including **Benedict Mabalanganya v. Romwald Sanga,** Civil Application No. 1 of 2003 and **Brittania Biscuits Limited v. National Bank**

of Commerce Limited & Doshi Hardware (T) Limited, Civil Application No. 195 of 2012; and

4. That the affidavit in support of the application is incurably defective for containing a defective jurat.

When the application was called on for hearing on 11.10.2017, Mr. Ponziano Lukosi, learned Principal State Attorney, appeared for the applicant. Mr. Gaspar Nyika, learned Advocate, appeared for the first respondent. Mr. Hussein Ughulum, learned Solicitor, appeared for the second respondent. As the practice of the Court has it, we had to order the disposal of the preliminary objection first ahead of hearing the substantive application.

But before we could allow Mr. Nyika, address us on the preliminary points of objection, Mr. Lukosi rose to intimate to the Court that he was conceding to the third point of the preliminary objection. The learned Principal State Attorney, exhibiting the qualities of a true officer of the Court, conceded that the record of appeal lacked pleadings and exhibits tendered at the trial

which made it incomplete and hence an incompetent application. He thus had no qualms if the application would be struck out. However, the learned Principal State Attorney was quick to urge us make no order as to costs because of his concession at the very outset.

Mr. Ughulum for the second respondent, joined hands with the concession of Mr. Lukosi as well as his prayer to have costs dispensed with.

On his part, Mr. Nyika, had no problem with the concession to the third point of the preliminary objection and its resultant wrath of the application being struck out for that reason. However, he pressed for costs.

Mr. Nyika did not stop there. Seemingly not contented with the concession and the outcome, he pressed to argue the first and second points of the preliminary objection as well. He predicated his course of action on what he called "for completeness of the matter" and to bar the applicant to come to

this Court again on the reasons encapsulated in the first and second points of objection. Having adequately deliberated on the matter, the Court felt it prudent to allow Mr. Nyika quench his thirst by submitting on the first and second preliminary points of objection despite the applicant's concession on the third point.

With leave of the Court, Mr. Nyika argued the first and second points together. However, we wish to point out at this juncture that Mr. Nyika, as shown above, had filed four points of preliminary objection but did not say anything in respect of the fourth point. In the premises, we take it that Mr. Nyika abandoned it and, accordingly, mark it as abandoned.

Submitting on the first and second preliminary points of objection, as consolidated, Mr. Nyika was brief but to the point. He submitted that under the provisions of section 17 (1) and (2) of the Office of the Attorney General (Discharge of Duties) Act, 2005 (the Act); the Attorney General was not legally justified to institute a fresh matter in the Court as there was no pending matter in the Court. What the Attorney General ought to have

done in the circumstances was to join the suit. However, the suit having been finalized in the High Court and there being no proceedings in this Court stemming from the matter sought to be revised, the course taken by the applicant was not backed by law.

Mr. Nyika added that the Attorney General is an advocate for the Government; he does not have cases of his own. In the case at hand; he argued, the Attorney General's client is the second respondent. As such, he argued, it was surprising that the Attorney General is suing the second respondent who opted not to appeal and whose interests he seeks to protect. He argued that since the second respondent had recourse to the Court by way of appeal but opted not to exercise that right, she, in essence, is "appealing" through the Attorney General, against the decision of the High Court through the back door. He asserted that if this practice will be entertained, the Attorney General, being a legal representative of the Government and

therefore has no case of his own, will always have a second bite and that will be tantamount to an abuse of the court process.

On his part, Mr. Lukosi responded that the second respondent is a legal person who could enter into contracts and sue and/or be sued in her own name. This is not a fresh suit as Mr. Nyika would want this Court to believe, he argued, and added that the Attorney General had a right to intervene by way of revision in any proceeding whenever he thought public interest was at stake. This, he submitted, is the gist of sections 7 (1) (b), 8 (1) (f), 14 (a) and (d) and 17 of the Act. Mr. Lukosi added that that was not the first time the Attorney General intervened in incidences of this nature. The learned Principal State Attorney promised to bring a decision in which such a course of action was resorted to by the Attorney General and, indeed, he walked the talk by later availing the Court with its unreported decision of **the Attorney General v. Tanzania Ports Authority**, Civil Application No. 87 of 2016. The course of action taken by the

Attorney General in the present case was therefore justified by law, he argued.

Mr. Ughulum, joined hands with the submissions of the learned Principal State Attorney.

Rejoining, Mr. Nyika submitted that all the provisions cited by Mr. Lukosi referred to the duties of the Attorney General and that those duties must be discharged in conformity with section 17 (1) and (2) of the Act; which allow him to join proceedings not to institute fresh proceedings. There were no proceedings in the Court in which the Attorney General could join, he stated. On the authority referred to by Mr. Lukosi, the learned counsel doubted if there was one to that effect and if so, he argued that it might have been decided *per incuriam*.

We have subjected the arguments by the learned counsel for the parties to proper scrutiny. We must confess at the outset to our finding difficult to comprehend Mr. Nyika's argument of having proceedings in Court which the Attorney General could

join to make the present application appropriate. Our surprise hinges on a string of decisions by the Court on the point. We have held, times without number, that the only recourse to a person who was not a party to the suit that has affected his interests is challenging that decision by way of revision – see: **Ahmed Ally Salum v. Ritha Baswali and another**, Civil Application No. 1 of 1999, **Chief Abdallah Said Fundikira v. Hillal A. Hillal**, Civil Application No. 72 of 2002, **Arcopar (O.M.) S.A v. Harbert Marwa and Family & 3 others**, Civil Application No. 94 of 2013 and **Attorney General v. Oysterbay Villas Limited & another**, Civil Application No. 299/16 of 2016 (all unreported). In all those cases, we did not put as a condition precedent that there should be proceedings in the Court to justify a party to seek recourse by way of revision against a case which has been finalized and has adversely affected its interest. In **Oysterbay Villas** (supra) we observed that the Attorney General, in such circumstances, was entitled to intervene by way of an application for revision.

Regarding Mr. Nyika's argument to the effect that the second respondent, through the Attorney General, is coming through the back door to challenge the decisions she was comfortable with from the outset as she did not challenge it, and that the applicant cannot legally make Kinondoni Municipal Council a respondent while at the same time he seeks to protect his interest, we are of the view that the assertion, though sounds enticing at first sight, cannot be legally correct in the circumstances of this case. What transpired in the matter under scrutiny as far as the point is concerned, was aptly summarized by a single justice of the Court in **Oysterbay Villas** (supra) in which leave to bring the present application was sought and successfully obtained in the following passage which we think merits citation for a better understanding of the background to the present matter before us:

> *"On 14th July 2016, the Applicant became aware of the legal dispute between the Respondents after it*

received a letter referenced as number CB.98/235/02/44 of 8th July 2016 from the Permanent Secretary, President's Office, Regional Administration and Local Governments. In that letter, the Applicant was informed of the pending appeal initiated by the First Respondent before this Court and then requested to intervene so that the decision of the High Court, Commercial Division decreeing that the First Respondent be registered the owner of the suit properties could be challenged on the ground that the said respondent, being a non-citizen, could not legally own land in Tanzania in its own name."

Thus the applicant became aware of the contract and suit between the respondents which adversely affected his interests after having been requested to intervene by the Permanent Secretary of the Ministry responsible for Local Government Authorities which oversees the activities of the second respondent. That suit had already been finalized in the High Court. On the authorities cited above, we think, the only recourse open to the applicant was to file an application for revision.

With due respect to Mr. Nyika, we do not think the provisions of section 17 (1) and (2) of the Act are applicable in instances of revision like the present one. The provisions are, in our considered view, applicable in situations where there is a pending matter in court in which the Attorney General wants to intervene on grounds of public interest. That is to say, the provisions deal with situations when the Attorney General seeks audience in a "suit, inquiry or any other proceedings [which] is pending before the court, tribunal or any other administrative body" as per subsection (3) or in "proceedings of any application,

suit, appeal or petition in Court, or inquiry on administrative body" as per subsection (1).

The true import of the provisions of section 17 of the Act, as amended by section 15 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2017, can be deciphered from the ordinary and natural meaning of the wording used by the legislature. Let the provisions speak for themselves:

> *"17 – (1) Notwithstanding the provisions of any written law to the contrary,* ***the Attorney General shall have the right of audience*** *in proceedings of any application, suit, appeal or petition in court, or inquiry on administrative body which the Attorney General considers-*
>
> *(a) to be of public interest or involves public property; or*

(b) to involve the legislative, the judiciary or an independent department or agency of the Government.

(2) In the exercise of the powers vested in the Attorney General with regards to provisions of subsection (1), the Attorney General shall:

(a) notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and

(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other

administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office of the Attorney General.

(3) Where a suit, inquiry or any other proceedings is ***pending before the court, tribunal or any other administrative body*** *to which the Law Officer or the State Attorney do not have a right of audience, it shall be sufficient for such Law Officer or State Attorney to file a certificate of the intention of the Attorney General to be joined and the court, tribunal or any such administrative body shall immediately forward the record of the proceedings to the nearest court,*

tribunal or administrative body for purposes of enabling such Law Officer or State Attorney to appear."

[Emphasis ours].

By the use of the words "pending before the court, tribunal or any other administrative body" in subsection (3) and "the right of audience in proceedings of any application, suit, appeal or petition in court, or inquiry on administrative body" in subsection (1) presupposes existence of or pending proceedings which the Attorney General, by virtue of section 17 of the Act, has the right of audience.

We think it is important to distinguish situations when there are proceedings pending before the court, tribunal or any other administrative body which the Attorney General thinks it is in public interest to have audience in and situations when proceedings have been finalized in court which adversely affects the interests of the Attorney General. In the former, the Attorney General would seek audience under section 17 of the Act and in

the latter he would seek to have those proceedings revised under section 4 (3) of the Appellate Jurisdiction Act. Cap. 141 of the Revised Edition, 2002 (the AJA). The present case falls under the latter situation.

For the avoidance of doubt, we are aware that the applicant has relied upon both provisions to move the Court. However, we think the proper provisions to move us should have been those of the AJA. As the applicant moved the Court under the proper provisions as well as purporting to move the Court under improper provisions, we still think the application had enough legs on which to stand in Court.

As rightly submitted by Mr. Lukosi, that is not the first time the Attorney General sought to have proceedings he thought adversely affected his interests revised. The Court allowed the Attorney General to have that recourse in **Tanzania Ports Authority** (supra); a case relied upon by the applicant and in **Oysterbay Villas** (supra) which cases we think were not decided *per incuriam* as Mr. Nyika would want us to hold.

To recap, we are of the firm view that any person, including the Attorney General, who was not a party to the court proceedings which has adversely affected his interests and therefore could not have appealed against it, revision is the only remedy through which he can challenge that decision. The course of action adopted by the applicant in the present application is therefore legally apposite.

We therefore are of the considered view that Mr. Nyika's argument is misplaced and incorrect and is tantamount to locking the doors of justice. Thus it cannot be left to stand. In the premises, we find the first and second points of objection wanting in merit and dismiss them.

Regarding costs, the general rule is that, unless there are special reasons, they must follow the event. We do not see any special reasons herein to deprive the second respondent of costs. It is evident that the respondent incurred costs in terms of time and resources to prepare for the hearing including appearance in Court.

The foregoing said and done, for the concession by the applicant on the third point of the preliminary objection, we strike out the application with costs to the first respondent.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of October, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL