IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 473/16 OF 2016

1. JUNACO (T) LTD
2. JUSTIN LAMBERT ..... **APPLICANTS**

VERSUS

HAREL MALLAC TANZANIA LIMITED ..... **RESPONDENT**

[Application for Revision from the Ruling and Orders of the High Court of Tanzania (Commercial Division) at Dar es Salaam]
(Mruma, J.)

dated the 10th day of October, 2016
in
Miscellaneous Application No. 144 of 2016

RULING OF THE COURT

2nd & 19th October, 2018

MWAMBEGELE, J.A.:

Against the present application for revision lodged by a Notice of Motion taken out under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA), the respondent lodged a notice of preliminary objection predicated upon the point that this application for revision is

misconceived for being based on interlocutory orders contrary to section 5 (2) (d) of the AJA. Thus when the application was called on for hearing on 02.10.2018 we had to allow the parties argue the preliminary objection first and thereafter argue the main application. It was agreed by the counsel for the parties – Mr. Michael Ngalo, learned Counsel and Ms. Stella Manongi, learned Counsel, for, respectively, the applicants and respondent - which agreement was blessed by the Court that in the course of composing the Ruling, if the preliminary objection would be meritorious, it would be sustained and the application would be dismissed. But if the same would be found to lack merit, it would be overruled and the Court would proceed to compose the Ruling on the merits of the application.

Before getting down to the nitty-gritty of the determination of the matter, we find it appropriate to narrate the factual background to the present application for revision before us. The factual background is, ostensibly, short and not very difficult to comprehend. It goes thus: the respondent Harel Mallac Tanzania Limited is a decree holder in Commercial Case No. 159 of 2014 in which JUNACO (T) Limited is a

judgment debtor. That suit was decided by the Commercial Division of the High Court in favour of the respondent upon a Deed of Settlement signed by the parties. On 04.07.2016 the respondent recommenced execution proceedings to realize the fruits of litigation [the first attempt was through Execution No. 159 of 2014 against JUNACO (T) Limited filed on 10.12.2015 – see pp. 30 – 31 of the record]. The recommenced execution proceedings comprised two applications; the first one which appears at pp. 39 – 40 of the record was made by a chamber summons supported by an affidavit and was against JUNACO (T) Limited as "1st Defendant/Judgment Debtor" and Justin Lambert as "2nd Defendant". The Chamber Summons indicates to seek the following orders:

1. This Honourable Court be pleased to lift the veil of incorporation of the Judgment Debtor;
2. This Honourable Court be pleased order for the arrest and detention of the 2nd Defendant, the Managing Director of the 1st Defendant/Judgment Debtor;
3. In the alternative this Honourable Court be pleased to order the 2nd Defendant to surrender title deeds of

properties equals to the amount decreed by this honourable court in favour of the Decree Holder;

4. Costs of the application be provided for; and
5. Any other orders and relief as this honourable Court shall deem fit to grant."

The second one appears at pp. 46 - 48 of the record and was for execution of the decree taken out under Order XXI rule 10 (2) (j) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter referred to as the CPC) seeking the assistance of the court in the execution. It was also against JUNACO (T) Limited as "1st Defendant/Judgment Debtor" and Justin Lambert as "2nd Defendant". The mode in which the assistance of the court was required was couched thus:

> *"Arrest and detention to prison as a civil prisoner of the 2nd Defendant (Mr. Justine Lambert), the Managing Director of the Judgment Debtor".*

Against the two applications, the first appellant lodged a five point preliminary objection. For easy reference, we take the liberty to reproduce them hereunder:

a) That the application is bad in law and or incompetent for want of citation of any provision of law for the first relief applied for;
b) that the application is bad in law and or incompetent for naming the parties as **Plaintiff** and **1st and 2nd Defendants** instead of **Applicant** and **Respondents** respectively;
c) that the application is bad in law for joining and or citing therein the name of the alleged **2nd Defendant** who was not made and has never been a party to any proceedings involving **Harel Mallac Tanzania Limited** and **Junaco (T) Limited.**
d) that the application is bad in law and or incompetent for being supported by an affidavit which contain falsehoods, arguments, speculation or conjecture and a prayer; and
e) that as brought, the application is malafide and constitutes an abuse of the court process in that application for execution with similar mode as applied for in the form attached to the supporting affidavit had also been filed and

disallowed by this Court (**Mruma, J.**) by a ruling delivered on **4 May 2016** copy of which is attached hereto marked **NCA-1.**

In a Ruling handed down on 10.10.2016 (appearing at pp. 55 – 72 of the record), the High Court (Mruma, J.) overruled the five points of preliminary objection with costs and the applications were therefore to proceed to hearing on their merits. However, that was not practically possible as the respondents, displeased, preferred the present application for revision on 17.11.2016.

In arguing for the preliminary objection, Ms. Manongi was very brief but focused. She submitted that the applicants seek to move the Court to revise the orders of the High Court (Commercial Division) in a ruling which was predicated upon a five-point preliminary objection which was overruled by the court. That preliminary objection was essentially against the application in which the respondent herein was seeking to lift the veil of incorporation of the judgment debtor so that the decree holder could proceed to execute the decree against Justin Lambert, he stated. That application, she submitted, is still pending in

the Commercial Division of the High Court; it has not been decided on its merits because the applicants preferred the present application. In the premises, she argued, the present appiication is misconceived as it is predicated upon interlocutory orders. She urged the Court to dismiss it with costs. To buttress her arguments she referred us the Court's decision in **21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association & 2 others** [2005] TLR 1.

Arguing against the preliminary objection, Mr. Ngalo was equally brief and to the point. He submitted that the impugned Ruling of the Commercial Division of the High Court was based on a five-point preliminary objection but it was conclusive on some matters and denied them the right to be heard. For instance, he charged, they were not heard on the meaning of "any person" in Order XX rule 10 (2) (j) (iii) of the CPC on which the court made a finding conclusively. He also submitted that the two applications were confusing; a party which was not a party to the suit was added and referred to as "2nd Defendant" and that, he argued, did not depict the truth but only brought confusion. Had the High Court heard the applicants on the

point, he argued, the applicants would have referred it to the decision of the Court in **Transport Equipment and another v. Devram P. Valambhia**, Civil Appeal No. 44 of 1994 (unreported) which held that officers of a company should not be arrested on money decrees.

Mr. Ngalo added that the exceptional circumstances of the case need not bring into play the provisions of section 5 (2) (d) of the AJA. In situations when there are confusions like in the instant case, the Court may intervene by way of invoking its powers of revision. To buttress this proposition, the learned counsel referred us to our decision in **Fahari Bottlers Limited v. Registrar of Companies** [2002] TLR 102 and **Stanbic Bank Tanzania Limited v. Kagera Sugar Limited**, Civil Application No. 57 of 2007 (unreported).

On the basis of the above, the learned counsel for the applicants submitted that the preliminary objection was without merit and urged us to dismiss it with costs.

In a short rejoinder, Ms. Manongi submitted that it was no gainsaying that there still are pending proceedings in the Commercial Division of the High in which the veil of incorporation is sought to be lifted. The present application is therefore inappropriate. Regarding the two authorities cited by Mr. Ngalo, she submitted that they were distinguishable in that in those cases, unlike in the present, there were no pending proceedings for lifting the veil of incorporation and arresting any person as a civil prisoner was not at issue. She reiterated that the arguments brought to the fore by Mr. Ngalo were premature; they should have waited the final determination of the matter.

So much for the background facts of the matter and the arguments of the learned counsel for both sides. The ball is now in our court to determine the crucial point of controversy; the subject matter of the preliminary objection. That is, whether or not the present application for revision is incompetent for being predicated upon interlocutory orders.

At this juncture, we find it appropriate to begin with a brief resume on the law relating to appeals or applications for revision on interlocutory orders. The law as it stands now, by virtue of section 5 (2) (d) of the AJA as amended by the Written Laws (Miscellaneous Amendments) Act, 2002 – No. 25 of 2002 prohibits an appeal or application for revision on interlocutory decision or order of the High Court. For easy reference, we take the liberty to reproduce the section. It provides:

> *"no appeal 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."*

Two questions emerge from our reading of the above excerpt; one, whether the proceedings subject of the revision before us amounted to a suit and, two, whether or not the orders therein were interlocutory. Admittedly, there were no dispute between the learned

counsel for the parties on whether or not the execution proceedings now pending in the Commercial Division of the High Court amount to a suit so as to bring or not to bring into play the provisions of 5 (2) (d) of the AJA. Because there was no such dispute, we will not dwell into the question but only wish to state in brief that the proceedings amount to a suit because the term has generally been defined to be "a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding is a suit" – see: **Blueline Enterprises Limited v. East African Development Bank**, Civil Application No. 103 of 2003 and **Tanzania Motor Services Ltd & another v. Mehar Sing t/a Thaker Singh** Civil Appeal No. 115 of 2005 (both unreported).

On the second question as posed above, we find it appropriate, at this stage, to define what an interlocutory order entails. As good luck would have it, the Court has traversed the point before. In **Tanzania Motor Services** (supra), the Court quoted the statement of

Lord Alverston in **Bozson v. Altrincham Urban District Council** [1903] 1 KB 547 at p. 548 which statement, we think, merits recitation here:

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order".*

Likewise, in **Murtaza Ally Mangungu v. The Returning Officer for Kilwa & 2 Ors**, Civil Application No. 80 of 2016 (unreported) the Court recited the above statement and referred to it as "the nature of the order test" – see also: **Peter Noel Kingamkono v. Tropical Pesticides Research,** Civil Application No. 2 of 2009 (unreported).

In view of above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply

"the nature of the order test". That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.

Reverting to the present case, the orders sought to be challenged, essentially, refused the preliminary objections by the applicants and ordered the applications to proceed to hearing on their merits. Those applications are still pending in the Commercial Division of the High Court. Given the circumstances, we are inclined to agree with Ms. Manongi, that those orders were but interlocutory as they did not finally dispose of the matter which was to lift the veil of incorporation of the judgment debtor so as to execute the decree against Justin Lambert. We are disinclined to agree with Mr. Ngalo on the point that the Ruling of the High Court finally determined some of the matters therein. The wording of section 5 (2) (d) of the AJA is to finally determine "the criminal charge or suit"; not some of the matters in that suit. It is our view that an order or decision is final only when it finally disposes of the rights of the parties in the suit. In that line of

reasoning, we think, as the veil of incorporation, which was the subject of the first application, was not lifted so as the decree could be executed against Justin Lambert, and as the mode of assistance required, which was the subject of the second application, was not granted, the orders complained of were but interlocutory in nature and therefore any application for revision of such decision is barred by the provisions of section 5 (2) (d) of the Act reproduced above. We are not convinced, on a preponderance of probabilities, that the facts of the case are such that the provisions of section 5 (2) (d) of the Act are not applicable as Mr. Ngalo would like us to hold. Neither are we convinced that there was a serious violation of the right to be heard which could not wait the final determination of the applications. Likewise, we are not even convinced that there are confusions in the proceedings of the High Court that would warrant the intervention of the Court by way of revision.

In the upshot, we find and hold that the orders sought to be challenged by way of revision were but interlocutory and therefore not revisable. We advise the applicants to load their guns and wait to fire

at an opportune moment if they so wish. The present application is therefore misconceived. We, accordingly, strike it out with costs. Consequently, we order that the record be remitted to the Commercial Division of the High Court to proceed with the hearing of the two applications on their merits.

Order accordingly.

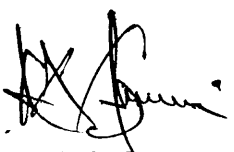
DATED at **DAR ES SALAAM** this 15th day of October, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL