

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)**

**CIVIL APPLICATION NO. 255 OF 2015**

**HAMOUD MOHAMED SUMRY.....APPLICANT**

**VERSUS**

<b>1. MUSA SHAIBU MSANGI 2. SUMRY HIGH CLASS LTD 3. SUMRY BUS SERVICES LTD</b>	}	.....RESPONDENTS
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**(Application for revision from the Decision of the High Court of Tanzania,  
Commercial Division at Dar es Salaam)**

**(Songoro, J.)**

**dated the 30<sup>th</sup> day of October, 2015**

**in**

**Commercial Case No. 20 of 2012**

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**RULING OF THE COURT**

14<sup>th</sup> September & 5<sup>th</sup> October, 2020

**KWARIKO, J.A.:**

This is an application for revision taken under section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (now R.E. 2019) (the AJA) and Rule 65 (1) (2) and (3) of the Tanzania Court of Appeal Rules, 2009, as amended (the Rules). The application has been preferred against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (Songoro, J) in Commercial Case No. 20 of 2012 on the following grounds:

- "(i) The order lifting the corporate veil was made unceremoniously without any application and grounds thereof being proved to the satisfaction of the High Court.*
- (ii) The applicant has never been a party to Commercial Case No. 20 of 2012 to order him to pay the decretal sum.*
- (iii) The procedure adopted by the High Court in dealing with the application for execution is wholesomely questionable".*

The application is supported by the affidavit of Salim Abubakar, advocate for the applicant. On the other hand, the application has been opposed by the respondent through an affidavit sworn by Butamo K. Phillip, advocate. The respondent's advocate also filed a notice of preliminary objection against the application on the following three points:

*"(a) The applicant has wrongly invoked the jurisdiction of the Court of Appeal Powers of Revision Under Section 4 (3) of the Appellate Jurisdiction Act, CAP 141 R.E. 2002 as well as Rule 65 (1) (2) and (3) of the Court of Appeal Rules, 2009 as amended by GN No. 362 of 2017 and GN No. 344 of 2019.*

*(b) The contents of paragraphs 9 and 10 of the affidavit of the learned counsel, Mr. Salim Abubakar, filed in support of the application are incurable defective for containing extra nears matters by way of arguments, conclusions and prayers, which are legally not allowed for use in courts of law.*

*(c) The applicant, who is not a party in Commercial Case No. 20 of 2020, cited in the Notice of Motion, but only surfaced during execution proceedings, has not made out a case to move this court to exercise its revisionary jurisdiction under the provision of section 4 (3) of the Appellate Jurisdiction Act, CAP 141 R.E. 2002 as well as Rule 65 (1) (2) and (3) of the Court of Appeal Rules, 2009 as amended by GN No. 362 of 2017 and GN No. 344 of 2019”.*

It is opportune now to state the background which resulted to this application. It is as follows: the first respondent won a case against the second and third respondents in Commercial Case No. 20 of 2012 but he failed to execute that decree for the allegations that the applicant being the Managing Director of the respondents was hiding properties for attachment and sale to satisfy the decree. Following that failure, the

first respondent applied for arrest and detention of the applicant as a civil prisoner in execution of the decree. Thereafter, the applicant was summoned to appear and show cause why he should not be arrested and detained as a civil prisoner in execution of that decree. In response, he filed an affidavit to oppose the application. Upon hearing the parties, the High Court granted the application. It lifted the judgment debtors' corporate veil and ordered the applicant to pay the decretal sum within thirty days from 30<sup>th</sup> October, 2015 failure of which the first respondent was at liberty to file the application afresh. The applicant was aggrieved by that decision hence this instant application.

At the hearing of the application, Mr. Augustino Ndomba, learned advocate appeared for the applicant, whilst Mr. Deogratius Ogunde, learned advocate appeared for the first respondent. The second and third respondents were represented by Mr. Emmanuel Nkoma, learned counsel.

As is the practice of the Court, we found it appropriate to dispose of the preliminary objection first. When he took the stage to argue the objection, Mr. Ogunde abandoned the second and third points of objection and argued the first ground only. He submitted in respect of the first point that the applicant being the Managing Director of the

second and third respondents was summoned vide a notice appearing at page 37 of the notice of motion to show cause why he should not be arrested and detained as a civil prisoner in execution of the decree against the second and third respondents. The learned counsel went on to submit that on receipt of that notice, the applicant filed an affidavit opposing the execution of the decree in the stated mode.

The learned counsel submitted further that the applicant was heard on 20<sup>th</sup> August, 2015 through his advocate Mr. Abubakar as shown at page 82 of the notice of motion. According to him, the stated sequence of events proves that the applicant was a party to the impugned proceedings and if he was aggrieved by the ruling therefrom he ought to have appealed against it after obtaining leave from the High Court or the Court as per section 5 (1) (c) of the AJA and not challenging that decision before the Court by way of revision.

It was Ms. Ogunde's further argument that revision is not an alternative to appeal save for very few exceptions, such as, where a right of appeal has been blocked by judicial process. He argued that the applicant has not stated in the notice of motion that his right of appeal has been blocked by judicial process anyhow. To fortify his proposition, Mr. Ogunde cited the Court's decisions in **Moses J Mwakibete v. The**

**Editor, Uhuru & Two Others** [1995] T.L.R 134, **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R 269 and **Augustino Lyatonga Mrema v. Republic & Another** [1999] T.L.R 273. Others include: **Said Aly Yakuti & 4 Others v. Feisal Ahmed Abdul**, Civil Application No. 4 of 2011 and **Ms. Farhia Abdallah Noor v. Advatech Office Supplies Limited & Another**, Civil Application No. 261/16 of 2017 (both unreported). Mr. Ogunde concluded his submission by urging the Court to uphold the preliminary objection and strike out the application with costs.

On his part, Mr. Nkoma did not have anything to say in relation to the preliminary objection.

For the applicant, Mr. Ndomba argued that the applicant was not a party to the case, and thus he had a right to seek revision and not an appeal. He submitted that in the application for execution the applicant was not a party but he was issued with a notice to appear to show cause why execution should not be carried out by his arrest and detention as a civil prisoner that is why he filed an affidavit to oppose the same.

The learned counsel argued that being the Managing Director of the second and third respondents did not make the applicant a party to that case. Further, he submitted that the ruling of the High Court did not show that the applicant was a party to the case but it ordered him to pay the decretal amount.

Distinguishing **Ms. Farhia Abdallah Noor's** case (supra) from the instant case, Mr. Ndomba argued that the applicant in that case was a party from the beginning while in the instant case, the applicant was only involve in the execution proceedings. For these submissions, Mr. Ndomba prayed that the preliminary objection be overruled with costs.

In his rejoinder, Mr. Ogunde argued that the appearance of names in the title of the application/ruling is immaterial because the application was for the arrest and detention of the applicant as a civil prisoner. He added that, even if it is said that the applicant was not a party to the case, he was heard through his advocate and so he ought to have appealed against that decision.

We have considered the counsel's submissions on the issue for our determination that is to say, whether the application is properly before the Court. The Court's power of revision at the instance of any party is vested by section 4 (3) of the AJA which stipulates:

*"Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

According to this provision, the Court has jurisdiction to call for and examine any proceedings of the High Court for the purpose of satisfying itself as to its correctness, legality or propriety of any finding or order made therefrom. The circumstances upon which a party may apply for revision has been explained by the Court in various decisions some of them are; **Moses Mwakibete, Halais Pro-Chemie** and **Augustine Lyatonga Mrema** (supra). In **Moses Mwakibete**, the Court held inter alia that:

*"The Court of Appeal can be moved to use its revisional jurisdiction under s. 2 (3) of the Appellate Jurisdiction 1979 (**now section 4 (3) of the Rules**) only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not*



*taken, good and sufficient reasons are given for not having lodged an appeal”.*

In the instant case, the applicant has maintained that he preferred revision because he was not a party to the impugned proceedings. Mr. Ndomba insisted that although the applicant was heard before the impugned decision was given but he was only a subject of the execution proceedings and not original party to it.

It is our considered view that although the applicant was not party to the execution proceedings, he was duly heard before the decision was made. Before the hearing, the applicant was summoned to appear to show cause why the decree should not be executed by his arrest and detention as a civil prisoner. The applicant appeared in court through his advocate on 23<sup>rd</sup> July, 2015 and filed an affidavit opposing the mode in which the decree holder had applied to execute the decree. In response to that affidavit, the first respondent filed a counter-affidavit and the matter was heard on 20<sup>th</sup> August, 2015 whereby the applicant was represented by Mr. Abubakar, learned advocate. The ruling was delivered on 7<sup>th</sup> October, 2015 in the presence of the same advocate for the applicant. In the circumstances, the claim that the applicant's name was not in the title of the application is immaterial as the important

thing is that he was duly heard. In the case of **Ms. Farhia Abdullah Noor** (supra), faced with similar situation, the Court said thus:

*"From the arguments made by the counsel for the parties, it is undisputable that the applicant was a party to the proceeding which gave rise to the ruling sought to be revised. According to the record, the High Court gave the ruling after it had considered the affidavit filed in support of the application and the counter affidavit affirmed by the applicant on 10.11.2016. Furthermore, at the hearing, the applicant had the opportunity of being represented..."*

The claim by Mr. Ndomba that the cited decision is distinguishable from the instant case lacks merit since the applicant herein was also heard before the impugned decision was given. As such, the remedy available to the applicant was to appeal to the Court against the decision and not by way of revision. The impugned order which is related to arrest and detention as a civil prisoner in execution of the decree is appealable with the leave of the High Court or the Court as provided under section 5 (1) (b) (viii) and (c) of the AJA, which provides thus:

*"(1) In civil proceedings, except where any other written law for the time being in force provides*

*otherwise, an appeal shall lie to the Court of Appeal–*

*(a) N/A*

*(b) against the following orders of the High Court made under its original jurisdiction, that is to say–*

*(i)- (vii).... N/A*

*(viii) an order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, except where the arrest or detention is in execution of a decree”.*

*(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court”.*

Plainly, the applicant has not shown that he had no right of appeal, or that right was blocked by judicial process. He has not disclosed exceptional circumstances warranting the Court to invoke its revisional jurisdiction. Reiterating on this principle in the case of

**Augustino Lyatonga Mrema** (supra), the Court stated thus:

*"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter; the purpose of this condition is to prevent*

*the power of revision being used as an alternative to appeal”.*

[See also the case of **Ms Farhia Abdullah Noor** (supra)].

We accordingly find that the preliminary objection has merit and we uphold it. It follows that the application is incompetent before the Court and we strike it out with costs to the first respondent.

**DATED at DAR ES SALAAM** this 24<sup>th</sup> day of September, 2020.

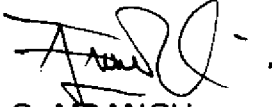
A. G. MWARIJA  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

Ruling delivered this 5<sup>th</sup> day of October, 2020 in the presence of Mr. Augustino Ndomba, learned counsel for the Applicant and in presence of 1<sup>st</sup> Respondent who appear in person and Mr. Augustino Ndomba who hold brief for Mr. Emmanuel Nkoma for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, is hereby certified as a true copy of original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**