IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 106 OF 2016

SIEMENS LIMITED ..... 1ST APPLICANT
SIEMENS (PROPRIETARY) LIMITED ..... 2ND APPLICANT

VERSUS

MTIBWA SUGAR ESTATES LIMITED ..... RESPONDENT

(Application for Revision of the decision of the High Court of Tanzania at Dar es Salaam)

(Mwambegele, J.)

dated the 18th day of February, 2016
in
Misc. Commercial Cause No. 247 of 2015
.....

RULING OF THE COURT

17th August, & 15th October, 2020

LEVIRA, J.A.:

The applicants, Siemens Limited and Another move the Court by notice of motion made under the provisions of Section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, Rule 65(1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to call for and examine the record of the proceedings of the High Court of Tanzania (Commercial Division) at Dar es Salaam (the High Court) in Miscellaneous Commercial Cause No. 247 of 2015 so as to satisfy itself as to the correctness, legality or propriety of the findings and order

given in the ruling dated 18th February, 2016. The notice of motion is supported by an affidavit duly deposed by Mario Ricardo Stevens, the Principal Officer of the first applicant.

A brief background of this matter is to the effect that, on 6th September, 2011 the parties herein entered into a written agreement for electrification works. It was an agreed term of the agreement that matters arising from the agreement which would not be settled by negotiation or through mediation would be referred to arbitration which was to be held in accordance with expedited rules of the Arbitration Foundation of Southern Africa, in English and at Johannesburg. A dispute arose within the terms of the Agreement and pursuant to the said terms, the matter was referred to the Arbitrator. On 13th February, 2015, the Arbitrator passed the Final Award. By letter addressed to the Registrar of the High Court, the Arbitrator requested the Registrar to file the Award in Court. On 30th September, 2015 the notice to appear was issued to the parties by the High Court. It is noteworthy, that at the time the said notice to appear was issued, there was no petition seeking for any relief filed by the applicants before the High Court.

On 23rd October, 2015 the applicants filed a petition to the High Court seeking among others, an order to register the Award dated 13th

February, 2015 as a decree of the court and for the enforcement thereof. In reply to the petition, the respondent filed preliminary points of objection on the grounds that:-

1. *The filing of the Award in court was time barred as it was filed after six months from the date it was made contrary to the mandatory provision of Item 18 of the First Colum of Part III of the First Schedule to the Law of Limitation Act, Cap 89 R.E. 2002.*
2. *That copies of the proceedings and an Award annexed to the petition has not been certified by the petitioners or its advocate.*

As it is required, at first, the High Court determined the points of preliminary objection raised by the respondent. In its Ruling on the said preliminary points of objection raised, the High Court sustained the objections and dismissed the applicants' petition and hence, the current application. The current application is resisted by the respondent who filed an affidavit in reply duly deposed by Sylivatus Sylivanus Mayenga, learned advocate on behalf of the respondent.

The applicants' application is predicated on the following grounds:-

1. *That, the respondent had objected the applicants' petition on two grounds-*

a) *That the award was filed after six months from the date it was made on 13th February, 2015.*

b) *The documents annexed to the applicants' petition were not certified in contravention to the Arbitration Rules but the Judge faulted or more properly ignored the applicants submissions when he held that the applicants' arguments were as if the Respondent had challenged the propriety of the filing of the award, which according to the Judge was not the case – this was erroneous but it led the Judge dismissing the applicants' petition for being filed out of time while the Applicants' petition was filed on 23rd October, 2015 within 23 days of receiving the court's notice of filing of the award.*

2. *The learned Judge wrongly treated Arbitrator request to file the award as the applicants' application to the High Court and held that time started to run against the applicants from the day the award was made thereby dismissing the petition. Time could not start running against the applicants before the award was filed in court.*

3. *The learned Judge committed a grave error in treating the Arbitrator's request as an application under the Civil Procedure Code, which was not - for the Arbitrator's Letter was merely a request by a letter which request complied with the Arbitration Act and the court correctly issued the notice to appear under the Arbitration Rules. Item 18 of Part III of the Scheduled to the Law of Limitation Act was not*

applicable to Arbitration for filing awards for the reason that requests for filling awards are not in the nature of applications which contemplate proceedings between parties. An arbitrator is never a party to a proceeding when he requests the High Court to file an award.

4. *The learned Judge ought to have held that the Respondent could not attack the filling of the award by objecting the applicants' enforcement petition. The Respondent should have filed its own petition to challenge the filing of the award. Because of the way the learned Judge had confused himself he ended up wrongly treating the Arbitrator's request to file the award as the applicants' application to the court and holding that time started to run against the Applicant from the day the award was made thereby dismissing the petition.*

Therefore, the applicants are praying the Court to set aside the Ruling and Order of the High Court, costs and any other relief, which the Court may deem fit to grant.

At the hearing of this application, the applicants were represented by Mr. Wilbert Kapinga, learned advocate, whereas the respondent had the services of Mr. Sylivatus Sylvanus Mayenga also learned advocate. It is noteworthy that counsel for both sides did not make oral submissions

for and against this application. They preferred to adopt and rely on written submissions they filed in different occasions.

For the reasons that will shortly become apparent, we shall not at the moment reproduce parts of the counsel's written submissions for and against this application. We find it apposite to address the issue concerning the propriety of the application before us. As it can be glanced through the grounds of revision presented in the notice of motion, the main contentious issue is based on time limitation as decided by the High Court. The applicants' argument in the written submissions is that the High Court erred in dismissing the applicants' petition for being filed out of time. Therefore, according to the applicants' supporting affidavit, the only remedy is to challenge the said decision by way of revision. On its part, the respondent submitted that the issue on time limitation is a pure point of law which takes precedent over all matters and the learned Judge rightly determined it at the earliest possible opportunity. Therefore, the respondent argued that this application cannot be granted by the Court.

It is common knowledge that, time limitation is an issue that touches on the jurisdiction of the court as a matter of law as correctly, in our view, argued by the counsel for the respondent. In the instant matter, the High Court having satisfied itself that the petition to file the

award was filed out of time, dismissed it for being time barred. The applicants were not satisfied with the decision of the High Court as a result they decided to come to the Court by way of revision. In the circumstances, the vital question to be determined is whether it was proper for the applicants to challenge the said decision of the High Court by way of revision?

The law is settled, that revisional powers of the Court are exercised under exceptional circumstances including, where there is no right to appeal and/ or by the Court *suo motu*. Some of the said circumstances are stated in a number of decisions including, in **Halais Pro-Chemie v. Wella A. G.** (1996) TLR 269 at 272 and in **Transport Equipment Ltd v. Devram P. Valambia** (1995) TLR 161 where the Court held that:-

> *"(i) The appellate jurisdiction and revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive;* ***if there is a right of appeal then that right has to be pursued*** *and except for sufficient reason amounting to exceptional circumstances there cannot be resort to the revisional jurisdiction of the Court of Appeal;*
>
> *(ii) The fact that a person, through his own fault, has forfeited his right of appeal cannot amount to exceptional circumstances;*

(iii) ***If a party does not have an automatic right of appeal then he can use the revisional jurisdiction*** *after he has sought leave to appeal but has been refused;*

(iv) *The Court of Appeal, may "suo motu" embark on revision whether or not the right of appeal exists, and whether or not it has been exercised in the first instance."*

[Emphasis added].

In the light of the established position of the law in the excerpt above, we shall determine whether the application at hand falls within any of the stated circumstances. Under paragraph 13 of the supporting affidavit, the deponent, Mario Ricardo Stevens stated as follows:-

> *"I have been advised by Dr. Wilbert Kapinga, one of the advocates of the applicants whose advice I verily believe to be correct account of Dr. Kapinga's professional standing* ***that the said ruling and order are kind of rulings and orders that are appealable to the Court of Appeal*** *and that the Applicants' only remedy is to seek for revision."*
>
> [Emphasis added].

In reply to the above assertions and the application in general, the respondent through her counsel, Mr. Mayenga stated in paragraph 13 of the affidavit in reply that:-

"The facts deposed in the entire affidavit of Mr. Ricardo have not revealed any reason to enable the Honourable Court to grant the orders sought in the Notice of Motion."

Having closely scrutinized the depositions of the parties, grounds of application and the written submissions by the parties, the immediate question that follow is, if the counsel for the applicants advised his clients that the Ruling of the High Court could be challenged by way of an appeal, why then have they preferred the current application? And if the intention was to say that the Ruling is *not* appealable, the said intention was not disclosed. Instead, the applicants sought for revision against the decision of the High Court. Therefore, we need to consider whether it was a proper cause to take.

We are settled, that circumstances of this application do not fall under any of the situation elaborated in the excerpt from the cases of **Halais Pro-Chemie v. Wella A.G.** (supra) and **Transport Equipment Ltd v. Devram P. Valambia** (supra). We shall explain.

First, the applicants' petition before the High Court was dismissed for being time barred. In their written submission the applicants challenged the decision of the High Court Judge that having made his

analysis on the raised preliminary objections, came up with findings and the following conclusion:-

> *"In the instance case the Final Award was issued on 13.02.2015 and the Arbitrator forwarded the same to the Deputy Registrar of this Court vide a letter bearing Ref. No. S. 197 dated 03.09.2015 and, given the ERV, received on 17.09.2015. the present application was filed on 23.10.2015.* ***All these endeavours were being made when it was already out of time as time within which the Final Award could legally be filed had expired on 12.08.2015; six months after the Final Award was made.*** *Time started to click against the petitioners' right on 13.02.2015 when the Final Award was pronounced. The present application having been filed out of time is incompetently before me and thus deserves the wrath of being dismissed in terms of section 3 of the Law of Limitation Act."* [Emphasis added].

Looking at the above observation made by the High Court, we do not find anything suggesting that there was illegality in reaching that conclusion. The learned Judge having considered that time started to run from the date of award and the time of filing the petition, he was firm that the petition was filed out of time. Whether the counting was or was not supposed to start from the date of award, we think, is not a matter calling for revision. We note, however, that the applicants claimed that by the time the notice to appear was issued, there was no

petition seeking any relief. This fact, in our considered opinion does not make the matter at hand to be peculiar to the extent of necessitating invoking revisional jurisdiction of the Court in the present application. Whether or not the petition was filed out of time was a matter of law which could be appealed against. We thus find that, the reason advanced by the applicants that before that decision they had no pending matter in the High Court is unfounded.

We hold so because the basis of the impugned decision was on the institution of the petition to file an award and not otherwise. Therefore, we entertain no doubt that the reason advanced by the applicants does not amount to an exceptional circumstance to warrant resort to revisional jurisdiction and hence, the decision of the High Court for lacking jurisdiction because the application was time barred is appealable. In **Dismas s/o Chekemba v. Issa s/o Tanditse**, Civil Application No. 2 of 2010 (unreported) the applicant's application for revision was struck out for failure to exercise his right to appeal, equally the application at hand deserves the same outcome.

Second, since we have ruled out that this matter does not fall under exceptional circumstance, the applicants' preference to revision application is nothing but forfeiture of their right to appeal as provided by the law under section 5(1)(c) of the Appellate Jurisdiction Act, cap

141 RE 2002 (the AJA). For clarity the above provision provides as follows:

> *5(1) "In civil proceedings, except where any other law provides otherwise, an appeal shall lie to the Court of Appeal–*
> *(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."***
> [Emphasis added].

In terms of the above provision of the law, there is no doubt that the applicants ought to have appealed against the decision of the High Court. Therefore, at any stretch of imagination, the applicants' forfeiture of their right to appeal cannot amount to exceptional circumstance deserving invocation of revisional jurisdiction of the Court.

Third, the application at hand does not fall under the third condition because the applicants had an automatic right of appeal against the Ruling of the High Court. This is due to the fact that, they were the petitioners in Miscellaneous Commercial Cause No. 247 of 2015 wherein, the impugned Ruling subject of this application was pronounced. Therefore, if they were not satisfied with the decision of the High Court in that petition, they ought to have appealed against it and not otherwise. Besides, it is not stated in this application that the

applicants had sought leave of the High Court to appeal to this Court, but the same was refused. In the circumstances, it is our considered opinion that the applicants were not justified to resort to the revisional jurisdiction of the Court.

Fourth, circumstance number four does not apply in the current application because this is not a revision *suo motu.* In **Moses J. Mwakibete v. The Editor-Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** (1995) TLR 134 it was held that:

> *"The revisional powers conferred by section 4(3) of the Appellate Jurisdiction Act, 1979, are not meant to be used as an alternative to the appellate jurisdiction of the Court of Appeal; accordingly,* ***unless acting on its own motion****, the Court of Appeal cannot be moved to use its revisional powers under section 4(3) of the Act in cases where the applicant has the right of appeal with or without leave and has not exercised that right."* Emphasis added].

In the current application, it is the applicants who filed the application for revision having been dissatisfied with the impugned decision of the High Court, which we say, was appealable. In the circumstances, the Court is not acting *suo motu* to justify invocation of its revisional powers under section 4(3) of the AJA which is also indicated in the applicants' notice of motion.

For the reasons stated above, we find that the application before us is misconceived. The applicants ought to have appealed against the decision of the High Court instead of coming to the Court by way of revision application. In other words, the present revision application seems to be an appeal through the backdoor which cannot be condoned by the Court in the wake of the appeal process not being blocked. For that reason, we shall not consider the grounds of revision and written submissions thereof. Consequently, we hereby strike out this application with costs.

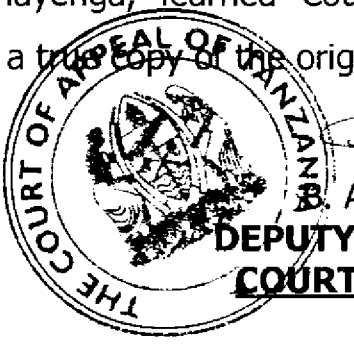
DATED at **DAR ES SALAAM** this 12th day of October, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 15th day of October, 2020 in the presence of Ms. Bertha Mwarija, learned Counsel for the Applicants and Mr. Sylivatus Sylvanus Mayenga, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL