IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)

CIVIL APPLICATION NO. 383/13 OF 2018

AUGUSTINO MASONDA ..... APPLICANT

VERSUS

WIDMEL MUSHI ..... RESPONDENT

(Application for revision from the decision of the High Court of Tanzania at Iringa)

(Feleshi, J.)

dated the 22nd day of August, 2018
in
Land Case No. 7 of 2015
.....

RULING OF THE COURT

4th & 7th May, 2020

MWANDAMBO, J.A.:

This ruling addresses a narrow but significant issue, that is to say; whether a litigant has a room to prefer an appeal or revision from a non-conclusive interlocutory decision of the High Court notwithstanding the prohibition from doing so under section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA).

To appreciate the essence of the issue, a brief background will be necessary. It runs as follows. Before the High Court sitting at Iringa, the respondent instituted a suit against the applicant namely; Land Case No. 7 of 2015. The applicant resisted that suit in his written statement of defence raising a notice of preliminary objection in points of law amongst others, that the suit was partly *res sub judice* and partly *res judicata*. For reasons which are not directly relevant to this ruling, the applicant abandoned the said objections. Subsequently, he filed a notice of preliminary objection(s) on the same points he had abandoned earlier. Not amused, the High Court (Feleshi, J.) found the filing of the notice without the court's leave irregular and an abuse of the Court process and had it struck out vide ruling delivered on 22nd August, 2017. It is that ruling which has culminated into the instant application for revision made under rules 48 (1), 65 (1) of the Rules and section 4 (3) of the AJA. The application is supported by the applicant's own affidavit.

When the application was called on for hearing on 4th May, 2020, Mr. Erick Nyato, learned advocate entered appearance representing the applicant. The respondent did not appear despite being served with notice of hearing. Considering that we did not see fit to adjourn the hearing, we

proceeded in the respondent's absence pursuant to rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Before Mr. Nyato took the floor to submit on the merits of the application, we invited him to address the Court whether the application was competently before us having regard to the dictates of section 5 (2) (d) of the AJA. That section, as already hinted at the beginning of this ruling, prohibits appeals and applications for revision from interlocutory orders of the High Court which do not have the effect of finally and conclusively disposing of matters before that court.

Addressing the Court, Mr. Nyato readily conceded that the impugned order was indeed an interlocutory one which did not finally and conclusively dispose of the suit before the High Court. That notwithstanding, Mr. Nyato forcefully contended that the application was properly before the Court because the impugned order involves a jurisdictional issue in the High Court. According to the learned advocate, the order striking out the notice of preliminary objections had the effect of continuation of the suit in which the High Court had no jurisdiction and that is why the applicant invoked the revisional jurisdiction of the Court regardless of the prohibition under section 5(2) (d) of the AJA. However, the learned advocate did not cite any

authority to support his line of thinking in the course of hearing. Neither did he do so thereafter on being asked to provide one during the hearing.

It is not in dispute that the order of the High Court the subject of the application was, but interlocutory which, as conceded by Mr. Nyato had no effect of finally and conclusively disposing of Land Case No. 7 of 2015. That means, as matters stand today, that suit is still pending before the High Court awaiting the determination of this application. We have keenly considered the argument by Mr. Nyato forceful as it were but with respect, we do not see any merit in it. We say so having regard to the mandatory provisions of section 5(2) (d) of the AJA which stipulate:

> *"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 Count unless such decision or order has the effect of finally determining the charge or suit."*

Contrary to the submission by the learned advocate, we are unable to read anything from the cited section exempting non conclusive interlocutory orders from the prohibition merely because they involve the jurisdiction of the High Court.

We have no doubt that the learned advocate is fully aware that section 5(2) (d) of the AJA has been a subject of the Court's consideration in various cases including; **Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2006; **Murtazar Ally Mangungu v. The Returning Officer for Kilwa North Constituency & 2 Others,** Civil Application No. 80 of 2016, **JUNACO (T) Ltd & Another v. Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 and **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018(all unreported).

In **Murtaza Ally Mangungu** (supra) the Court underscored two tests in determining whether an application for revision is caught under section 5(2) (a) of the AJA that is to say; the order sought to be revised is interlocutory and whether that order has the effect of finally and conclusively disposing of the matter before the High Court. Apparently, Mr. Nyato conceded on both tests. In **Vodacom Tanzania Limited Public Company** (supra), the Court referred to various decided cases on the issue including; **Britania Biscuits Limited v. National Bank of Commerce Limited and Doshi Hardware (T) Limited,** Civil Application No of 195

of 2012 (unreported) in which the Court was confronted with a similar issue. As can be seen at page 15 of the typed ruling in **Vodacom Tanzania Limited Public Company** (supra), the Court sustained a preliminary objection in an application for revision predicated under section 5((2) (d) of the AJA and stated:

> *"....We are of the opinion that the Ruling and Order of the High Court sought to be revised is an interlocutory order... because in that order nowhere it has been indicated that the suit has been finally determined ..."*

The position in the instant application is no better. All in all, since the learned advocate has conceded that the impugned order was neither final nor conclusive and in the light of the settled legal position on the application of section 5(2) (d) of the AJA and there being no contrary authority supporting the line of thinking by Mr. Nyato, we are unable to accede to his argument that the application is exempted from the prohibition under the section.

In the light of the foregoing, we have no hesitation in holding as we do that the application before us is incompetent having been preferred in

violation of section 5(2) (d) of the AJA. Being incompetent, we strike it out and order that the matter before the High Court proceeds from the stage it had reached before the filing of this application. Since the respondent neither filed any affidavit in reply nor entered appearance during hearing, we make no order as to costs.

It is so ordered.

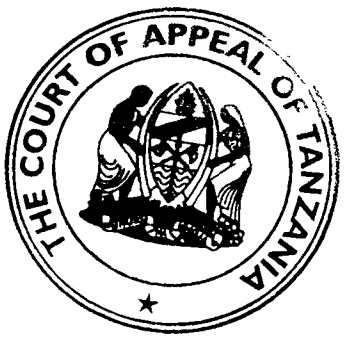
DATED at **IRINGA** this 6th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 7th day of May, 2020 in the presence of Mr. Erick Nyato, learned counsel for the Applicant and absent of the Respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL