IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANGESI, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 230 OF 2015

NATIONAL INSURANCE CORPORATION (T) LTD ..... APPLICANT

VERSUS

SHENGENA LIMITED ..... RESPONDENT

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

(Makaramba, J.)

dated the 14th day of June, 2010
in
Commercial Case No. 75 of 2005
.....

RULING OF THE COURT

7th & 27th May, 2020

LILA JA:

This is an application for revision of the ruling of the High Court of Tanzania (Commercial Division) in commercial case No.75 of 2005 dated 14/6/2010. The Notice of motion is taken out under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 RE: 2002 (AJA) and Rule 65 (1) of the Tanzania Court of Appeal Rules (the Rules). The applicant seeks the Court to exercise its revisional powers by calling the record of the High Court and examine the legality and propriety of the decision and revise, quash and set it aside.

The applicant's Assistant Corporation Secretary, Ted Mwakifuna is the one who deposed the affidavit to support this application

The major grounds upon which the application is based are:-

a) *There was denial of natural justice on the part of the applicant in that the merits of the application were determined without calling upon the parties to be heard.*
b) *The High Court Judge did not make appropriate order commensurate with the decision he made and in consonance with the law. In both dismissing and striking out the same application the hon. Judge blocked the applicant from taking the necessary next remedy available at law and as per the Constitution. To that extent the decision is illegal.*

The material facts that lead to this application are set out in more elaborately in the affidavit of Mr. Mwakifuna. However, relevant to the matter under our consideration are that; initially the applicant unsuccessfully filed Commercial Case No. 75 of 2005 against the respondent. Dissatisfied, the applicant lodged two applications, that is an application for review and an application to set aside the rejection order all in vain. Taking up the direction given in the decision in the application for setting aside the rejection that the proper forum was to lodge an

appeal to the Court against the High court decision in Commercial Case No. 75 of 2010 and having realized that it was late, the applicant lodged an application to the High Court seeking extension of time within which to lodge a notice of appeal out of time in order to challenge the decision in the above said commercial case.

The respondent raised four points of preliminary objections to the effect that:-

> *"1. The application is hopelessly time barred under the Law of Limitation Act, [cap. 89 R.E. 2002], clause 21 of the Schedule to the Act.*
> *2. That the affidavit in support of the chamber summons is incurably defective for it raises arguments, opinions and conclusions contrary to the law on affidavits.*
> *3. That the affidavit in support of the chamber summons is incurably defective for having been verified by an advocate for the applicant in lieu of a deponent contrary to the law on affidavits.*
> *4. Paragraph 4 of the reply to counter affidavit be struck out with costs as it raises new matters by way of rejoinder."*

Similarly, the applicant lodged a four point notice of preliminary objection that: -

"(i) Paragraphs 3, 5 and 6 of the affidavit contain arguments and opinion and not facts.

(ii) That depositions of paragraph 6 of the Counter affidavit, so long as they are based on information and not facts the deponent is able to prove himself, offends Order XIX Rule 3 of the Civil Procedure Code [Cap. 33 R.E. 2002].

(iii) The affidavit raised is bad in law for swearing false depositions.

(iv) That the contents of paragraph 6 point to conclusion and make counter affidavit incompetent at law."

Regarding how the application for extension of time and the two notices of preliminary objection raised by the parties were dealt with by the court, we find it compelling to reproduce the proceedings dated 17/11/2009 as hereunder: -

*"**17/11/2009***

***Coram**: Honourable R.V. Makaramba, Judge*

For the Applicant: Mr. Mbamba, Advocate

For the Respondent: Mr. Kitururu Advocate

C.C. Maurice

***Court**: Ruling delivered on Chambers in the presence of Mr. Mbamba, Advocate for the Applicant and Mr. Kitururu, Advocate for the Respondent.*

***Mr. Mbamba**: My Lord, I am praying for leave to file supplementary affidavit in order to bring further to the court some additional facts upon who to base my application for extension of time.*

***Mr. Kitururu**: My Lord, I do not have objection to that application only that for the attention of the court there were objection from both sides, from the Applicant as well as from the Respondent. I should seek the direction of the court whether they should wait for filing of supplementary affidavits or they should be dealt with simultaneously.*

***Court:** In the circumstances, given that there was a preliminary Objection filed in this court on 16/10/2009 against the affidavit, it is wise to dispose of this first before determining the application for supplementary affidavit.*

Order: *(1) Respondent to file submissions by or on 01/12/2009*
(2) Applicants by or on 15/12/2009
(3) Rejoinder (if any) by or 18/01/2010
(4) Mention on 10/2/2010 with view to set date for ruling.

Sgd. R. V. Makaramba
JUDGE
17/11/2009"

The Ruling which is the subject matter of this revision was rendered on 14/6/2010.

In compliance with the provisions of Rule 106(1) of the Rules, the applicant filed written submission in support of the application on 7/1/2016. The Respondent, on the other hand, did not file either a reply affidavit or reply submission in opposition to the application.

At the hearing of the application before us, Mr. Samson Mbamba, learned counsel, appeared for the applicant whereas the respondent had the services of Mr. Ndanu Emanuel, also learned counsel.

Before proceeding with the hearing on the merits of the application, we asked Mr. Emanuel to comment on the respondent's failure to file both the reply affidavit and reply submission in opposition of the application and whether or not he was not resisting the application. He was point blank that he was not resisting the application. That concession to the application narrowed down our responsibility in this case in that we are now obliged to deliberate whether the applicant's complaints are founded.

We need not strain our mind so much for the answer to the above issue is clearly in the positive. The applicant's submission in respect of the first ground was briefly that while the matter for deliberation before the learned judge was whether the preliminary points raised were meritorious, the judge after finding that the application was filed out of time went ahead to determine the application for extension of time for which the

parties were not accorded an opportunity to argue on. That, according to the applicant denied them the right to be heard.

It is easily discernible from the ruling that the learned judge made a finding on whether the application was time barred. However, a sober reading of the ruling makes it plain that the judge did not find the application for extension of time was time barred. This is what he stated:

> *"...I do not see therefore how even with a stretch of imagination can the argument by learned counsel for the respondent that an application for extension of time cannot be lodged without seeking extension of time after the lapse of the first fourteen days and not before the expiry of 60 days can be brought to bear in the present application."*

The learned judge then went further to state that:-

> *"...As I stated earlier, Rule 76 of the Court of Appeal Rules has to be read together with section 11(1) of the Appellate Jurisdiction Act, which allows an applicant to file an application for extension of time to file notice of appeal after the initial prescribed period of fourteen days has expired..."*

With the above words, it cannot be said that the learned judge sustained the respondent's first point of preliminary objection that the

application for extension of time was lodged out of time. In our view, it did not occur to the learned judge that there can be an application for extension of time to file an application for extension of time. We share the same view with the learned judge and reiterate that is the correct position of the law. [See **Tanzania Rent A Car Limited vs Peter Kimuhu**, Civil Application No. 226 of 2017 (unreported)]. It is logical that had he deliberated that particular point of objection in the affirmative he would have not proceeded to consider the application for extension of time on merit which now forms the crux of the applicant's first ground of complaint. That was just for keeping the record clear and proper.

The applicants ground one of complaint hinges on the course taken by the learned judge to adjudicate on the substantive application after disposing of the preliminary points of objection. According to the applicant, and we entirely agree with, that was irregular and denied the parties the right to be heard.

It is in record, and as hinted above, that the learned judge on 17/11/2009 decided to determine the parties' notices of preliminary objection and gave a schedule of filing the submissions in their respect. The ruling was rendered on 14/6/2010. In that ruling the learned judge after deliberating on the preliminary points of objection stated:-

"The issue now becomes whether in the present application the applicant has assigned such good reasons to justify this court to exercise its discretionary powers to extend time to file notice of appeal. In the affidavit in support of the application the advocate for the applicant has stated only generally that is due to the reasons appreciated by Hon. Werema J., in both his rulings, the one setting aside the rejection order, and the other declining to review the decision of Hon. Kimaro, J (as she then was), as being the reason for preferring this application so that the legal propriety of the judgment dated 28/9/2005 can be determined by the Court of Appeal. I do not find this to be a reason good enough to the satisfaction of this court as explaining the delay in filing the application for this court to be able to exercise its discretion to grant extension of time to file notice of appeal...."

In the end the learned judge concluded:-

"In the event and for the foregoing reasons the preliminary objections raised by the Respondent succeeds to the extent indicated above. The application is hereby struck out with costs..."

From the above excerpt, it is indeed clear that the learned judge proceeded to deliberate on the substantive application for extension of

time for which parties had neither orally nor by written submissions argued. If the learned judge minded to determine both the points of preliminary objection and the substantive application he then ought to have had ordered the parties to file submissions for both the application and the points of preliminary objection. Since that was not the case and the parties filed submissions in respect of the points of preliminary objection only, the learned judge was not justified to determine the substantive application. There were no material facts from the parties in support and in opposition to the application upon which to adjudicate upon. In other words, the judge in the application under focus took it by himself without hearing the parties to determine the application.

The legal consequence of failure to afford a hearing before any decision affecting the rights of any person is given is now settled. In **I.P.T.L. vs STANDARD CHARTERED BANK**, Civil Revision No. 1 of 2009 (unreported), it was with lucidity stated by the Court that:-

> *"no decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties* ***so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*** (Emphasis added)

It is trite law that a decision reached in breach or violation of this principle, unless expressly or impliedly authorized by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard. (See **ABBAS SHERALLY & ANOTHER v. RABDUL SULTAN H.M. FAZALBOY,** Civil Application No.33 of 2002 (unreported) and **I.P.T.L. v. STANDARD CHARTERED** (supra). This principle has been applied where the person condemned unheard was a party to the impugned proceedings.

In the present application, the learned judge did not afford the parties the opportunity of being heard before deciding on the merit or otherwise of the application for extension of time. It cannot, therefore, be said with any degree of certitude that there was a fair hearing. The only remedy available is to nullify the ruling the subject of this application.

We now turn to consider the second ground upon which this application is based. In essence, the crux of the matter is that since the learned judge seemed to have determined the application on merit and found that no good cause for extending time was shown, he ought to have dismissed the application instead of striking it out. That, according to the applicant, would have paved way for the applicant to come to the

Court with a similar application on *second bite*. But, the applicant contended, the order striking out was not in consonance with law.

Following the quashing of the ruling, consideration of the above issue turns out to be a mere academic exercise. For that matter we wish to remind the learned judges that orders of dismissal and striking out a matter have different legal consequences. As rightly submitted by the applicants, while the former order presupposes that the matter has been heard on merit and finally determined hence hampers the appellant from pursuing the same matter before the same court, the later does not for it presupposes that the matter is not heard on merits but for certain causes it is found incompetent. The distinction was well elaborated in the case of **Ngoni Matengo Cooperative Marketing Union Ltd vs Alimahomed Osman** [1959] EA 577 at page 580, which was rightly cited by the applicant in the submission, in these words:-

> *"...In the present case therefore...when the appeal came before this court, it was incompetent for lack of the necessary decree...this Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this Court ought to have done in each case was to "strike out" the appeal as being incompetent, rather than to have dismissed it; for the later phrase implies that a competent appeal has been*

disposed of while the former phrase implies that there was no proper appeal capable of being disposed of..."

We, in the circumstances, assuming that the learned judge was right to determine the application on merit, and then having found no sufficient reasons for the delay were advanced, the appropriate order ought to have been dismissal of the application instead of striking out the application as he did. To that extent, we agree with the applicant that the final order striking out the application was not proper.

For the foregoing reasons, we grant the application and invoking the powers of revision bestowed to us under section 4(3) of the AJA, we hereby revise by quashing the ruling of the High Court dated 14/6/2010 and set aside the order striking out the application. The matter reverts to the position that obtained on 17/11/2009. In the result, we direct the record be remitted back to the High Court for it to determine the preliminary points of objection based on the submissions that were filed in accordance with the court's order dated 17/11/2009 and, in the event the application survives the preliminary points of objection, thereafter proceed to hear and determine the merit of the application for extension of time.

In the circumstances of the case, we order that each party shall bear its own costs.

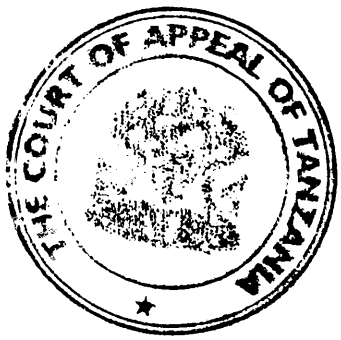
DATED at **DAR ES SALAAM** this 26th day of May, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 27th day of May 2020, in the Presence of Ms. Aziza Msangi Counsel for the Applicant and in the absence of the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL