IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., AND SEHEL, J.A.)

CIVIL APPLICATION NO. 261/16 OF 2017

MS. FARHIA ABDULLAH NOOR ..... APPLICANT

VERSUS

1. ADVATECH OFFICE SUPPLIES LIMITED
2. BOLSTO SOLUTIONS LIMITED } ..... RESPONDENTS

(Application for Revision of the proceedings and Ruling of the High Court of Tanzania at Dar es Salaam)

(Mruma, J.)

dated the 3rd day of May, 2017
in
Commercial Case No. 167 of 2014

.....

RULING OF THE COURT

22nd July & 5th August, 2020

MWARIJA, J.A.:

This application arises from the ruling of the High Court of Tanzania (Commercial Division) dated 3/5/2017 (Mruma, J.). In that ruling, the High Court granted the application filed by the 1st respondent under Order XXI rule 28 of the Civil Procedure Code [Cap. 33 R.E. 2002] (now R.E. 2019) (hereinafter "the CPC"). The 1st respondent had moved that court seeking

an order of arrest and detention of the applicant herein, Ms. Farhia Abdullah Noor as a civil prisoner. The order was sought with a view of compelling her, in her capacity as the Director of the 2nd respondent, to satisfy the decree passed in Commercial Case No. 167 of 2014 in which, the 1st respondent was the plaintiff while the 2nd respondent was the defendant. The decree arose from a default judgment entered under rule 22 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012, GN. No. 250 of 2012, following the 2nd respondent's failure to file written statement of defence.

Having obtained the decree, the 1st respondent applied for execution but it became difficult to serve the 2nd respondent. As a result, the 1st respondent sought and obtained an order requiring the applicant to appear and show cause why, being the Director of the 1st respondent, she should not be detained as a civil prisoner. On 15/6/2016, after having heard Messrs Kikuli and Mkuki, advocates for the applicant and the 2nd respondent respectively, the High Court ordered that the applicant be arrested and detained in prison for six months as a civil prisoner unless she satisfied the decree.

That order triggered holding of dialogue between the applicant and the 1st respondent resulting into an adjustment of the decree and the mode of its satisfaction by the applicant. The 1st respondent waived the amount of TZS. 63,424,000.00 thus leaving the remaining part of the decree, USD 160.000.00 as decretal amount payable by the applicant. According to the deed of compromise, which was filed in the court, the applicant was to settle that amount by instalments. She did not however, abide by the agreement thus causing the 2nd respondent to file the proceedings which gave rise to the impugned ruling.

In this application, which was brought under s. 4 (3) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (now R.E. 2019), the applicant has moved the Court for an order revising the impugned ruling on the following grounds:

> *"(i) On 3rd May, 2017 the High Court (Commercial Division) issued a ruling ordering for arrest and detention of the Applicant as a civil prisoner.*
>
> *(ii) that the order is based on the apprehension that the Applicant is a director of the 2nd Respondent*

and must satisfy a decree which was issued ex parte in favour of the 1st Respondent.

(iii) That the Applicant was not a director of the 2nd Respondent at the time the suit was instituted and during the time when the ex parte judgment was passed against the 2nd Respondent.

(iv) That the order for arrest and detention of the Applicant as a civil prisoner for satisfaction of the decree passed against the 2nd Respondent is unjust since the Applicant is and was not a director of the 2nd Respondent and was also not a party to the suit between the 1st and 2nd Respondents.

(v) That the advocates for the 1st Respondent have collected part payment of the decretal amount based on the first order for civil imprisonment from the High Court which were paid under duress in trying to execute the order of the High Court.

At the hearing of the application, the applicant was represented by Mr. Deogratius Kiritta, learned counsel while the respondents were

represented by Mr. Ndurumah Mjembe assisted by Mr. David Ndossi, learned advocates.

Apart from hearing the oral arguments of the learned counsel for the parties highlighting their respective written submissions, we also heard them on the point of law raised by the Court *Suo motu*. As stated above, the decision sought to be revised was made by the High Court in the application in which, the 1st respondent sought and obtained an order of arrest and imprisonment of the applicant as a civil prisoner. We thus required the counsel for the parties to address the Court on the issue whether it was proper for the applicant to prefer an application for revision instead of appealing against the ruling.

In his response, Mr. Kiritta argued that the applicant properly invoked the Court's revisional jurisdiction because she was not a party to the main case, Commercial Case No. 167 of 2014 which gave rise to the impugned ruling. He conceded however that, with regard to the application from which the impugned ruling arose, although her name does not appear on the title of the ruling, the applicant was a party to the proceedings thereto. The learned counsel argued however, that it is the nature of the

irregularities complained of by the applicant that the application for revision was preferred instead of an appeal. He stressed that, since from the application, the applicant implores the Court to consider the grounds raised therein with a view of satisfying itself as to the correctness, legality and propriety of the proceeding and the ruling, it was proper to move the Court by filing this application for revision.

The learned counsel submitted further that, the ruling is erroneous for two main reasons; first, that the same contravenes the provision of O.XXIII r.4 of the CPC because the learned Judge allowed the decree to be adjusted at the execution stage. Secondly, he went on to argue, the learned Judged had acted under misapprehension of the evidence when he found that the applicant was the Director of the 2nd respondent. It was his submission therefore that for these reasons, the errors can only be corrected by way of revision.

On his part, Mr. Majembe opposed the arguments made by the applicant's counsel. He submitted that the impugned ruling is appealable because the applicant was a party in the proceeding giving rise to the

ruling. He argued further that, the grounds upon which the applicant seeks to fault the ruling can be addressed in an appeal.

From the arguments made by the counsel for the parties, it is undisputable that the applicant was a party in 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. She had the services of three advocates, Dr. Kibuta, Messrs Amandus Swenya and Wilson Mukebezi, learned advocates.

In terms of s. 5 (1) (viii) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019 (the AJA), an order made by the High Court under the CPC in the exercise of its original jurisdiction, is appealable as of right except where, like in this case, the arrest or detention is ordered with a view of executing a decree. Section 5(1) (b) (viii) of the AJA provides as follows:

> *"5 – (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) .... N/A

(viii) an order under any 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."

Since in this case, the ruling was in relation to execution of the decree, it is not appealable as of right. It is however, appealable with leave of the High Court or of the Court of Appeal under paragraph (c) of s.5 (1) of the AJA. That provision states that an appeal lies:-

"(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."

Clearly therefore, because the applicant had a right of appeal, she should not have invoked the revisional jurisdiction of the Court. We are, with respect, unable to agree with Mr. Kiritta's argument that the errors

complained of by the applicant cannot be resolved in an appeal. It is instructive to state here that, invocation of the Court's revisional jurisdiction is not dependant on the nature of the grounds upon which a party seeks to challenge a decision or order of the High Court.

The Court's power of revision may be resorted to only where there is no right of appeal or where such right exists but has been blocked by a judicial process. A party may also invoke the revisional jurisdiction of the Court where, although he has a right of appeal, sufficient reason amounting to exceptional circumstance exists or where a person was not a party to the relevant proceedings of the High Court. – See for example, the cases of **Moses Mwakibete v. The Editor, Uhuru and 2 Others** [1995] TLR 134, **Transport Equipment Ltd v. Devram P. Valambhia** [1995] TLR 161 and **Halais Pro-Chemie v. Wella A.G** [1996] TLR 269.

We have found above that in this case, the applicant had a right of appeal subject to the leave of the High Court or of the Court. We have also found the argument that the grounds raised by the applicant can only be entertained in an application for revision to be lacking in merit. On the basis of these findings, the application is glaringly incompetent. In the

circumstances, the need for considering the rival arguments of the counsel for the parties in respect of the application does not arise.

In the event, we hereby strike out the application with costs.

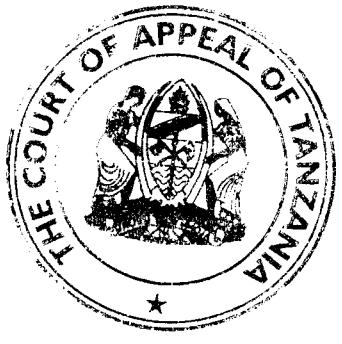
DATED at **DAR ES SALAAM** this 3rd day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Ruling delivered this 5th day of August, 2020 in the presence of Mr. Deogratius Lyimo Kisita, learned counsel for the Applicant and Mr. David Ndosi and Mr. Elibariki Zacharia, learned counsel for the 1st Respondent and in the absence of the 2nd Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL