IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 296/16 OF 2017

PRIME CATCH (EXPORTS) LIMITED.....1ST APPLICANT
NADIR AZIZAL JESSA also known as
NADIL AZIZ HAIDERALI JESSA.....2ND APPLICANT
FIROZ HAIDERALI JESSA.....3RD APPLICANT
NASIR HAIDERALI JESSA.....4TH APPLICANT
SALIM HAIDERALI JESSA.....5TH APPLICANT
ZULFIKAR HAIDERALI JESSA.....6TH APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED.....RESPONDENT

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

(Sehel, J.)

Dated 10th May, 2017

In

Misc. Commercial Cause No. 319 of 2016

RULING OF THE COURT

22nd July & 5th August, 2020

MUGASHA, J.A.

The applicants were defendants in Commercial Case No. 93 of 2016 before the High Court of Tanzania (Commercial Division) in a matter instituted by way of 'summary suit' on a claim of TZS. 466,591,656.33 being an outstanding amount on overdraft facility and USD 237,389.27

being outstanding amount on term loan and overdraft facility. Having received a court summons notifying them on the right to apply for leave to appear and defend the summary suit, they obliged and filed a respective application vide Miscellaneous Commercial Cause No. 319 of 2016 predicated under Order xxxv rule 3 (1) (b) of the Civil Procedure Code [CAP 33 R.E.2002] (the CPC). Following a preliminary objection raised by the respondent's counsel on the competence of the application on ground of non- citation of proper enabling provisions, the application was struck out in a Ruling which was handed down on 10/5/2017. On the very day, the applicants' counsel prayed the court to enter summary judgment on account of there being no application for leave to appear and defend from the applicants' side. To the same effect, the learned Judge made a Ruling which was delivered on 15/5/2017.

It is against the said backdrop, the applicants brought this application seeking revision of the proceedings, ruling and order of the High Court in the said Commercial Cause. The application is by way of Notice of Motion brought under section 4 (3) of the Appellate Jurisdiction Act [CAP 141 RE.2002] (the AJA), Rule 65(1), (2), (3), (4) and (7) of the Tanzania Court

of Appeal Rules, 2009 (the Rules) and the grounds of motion are as follows:

"1. *That, there are material irregularities in the conduct of proceedings occasioning injustice to the applicants.*

2. *That, the trial court grossly erred in law by ruling that Misc. Commercial Cause No. 319 of 2016 was preferred under wrong provisions of the law, in the circumstances of Commercial Cause No. 93 of 2016.*

3. *That the trial court grossly erred in law and fact by assuming that in all Summary Suits concerning mortgages, the only enabling provision of the law for leave to defend is O. XXXV Rule 3 (1) (c) of the Civil Procedure Code (Cap 33 RE, 2002) unknowingly that even O.XXXV Rule 1 (b) of the same law can be applicable in similar cases, as in Commercial Case No 93 of 2016.*

4. *That the trial court grossly erred in law and fact by failing to treat the circumstances of the case as unique and therefore falling under the provision of Order XXXV Rule 3 (1) (b) of the Civil Procedure Code (Cap 33 RE. 2002).*

5. *That the trial court grossly erred in law and fact by failing to appreciate the Applicants' line of defence, as enunciated in the affidavit supporting the application for leave to defend, and consequently misdirected itself as to the applicable enabling*

provisions of the law in application for leave to defend by the applicants.

6. *That the trial court grossly erred in law in entering summary judgment against the applicants while the time to file an application for enlargement of time within which to file a fresh application was still intact hence occasioning injustice to the applicants; and*

7. *That the trial court grossly erred in law in striking out the application against all the applicants while the suit involved partly mortgage and partly guarantors who were not parties to the mortgage hence unlawfully depriving the 2nd, 3rd, 4th, 5th and 6th applicants their fundamental right to be heard."*

The application is accompanied by an affidavit sworn by **RUBEN ROBERT** the applicants' advocate.

The hearing of the application was confronted with the Notice of preliminary objection challenging the competence of the application on the following grounds:

"1. The rival Skeleton Arguments filed by the Parties and acted upon by the Hon. Judge in the determination of Misc. Commercial Cause No. 319 of 2016 leading to the Ruling and Order of 10th May, 2017 sought to be revised in these proceedings are not included in the application currently before the Court. This therefore renders the

application incompetent for want of a complete record of the lower court which is the subject for revision in these proceedings.

2. *This application for Revision against the ruling and order of the High Court of Tanzania, Commercial Division dated 10th May, 2017 in Misc. Commercial Cause No. 319 of 2016 is barred by section 5 (2) (d) of the Appellate Jurisdiction Act CAP 141 as amended by written laws (Misc. Amendments) (No. 3) Act 2002; and*

3. *The applicants have failed to exhaust ail remedies available in the lower court before resorting for revision to this Court."*

In arguing the preliminary objections, Mr. Kesaria pointed out that the skeleton arguments and the basis of the impugned Ruling sought to be revised are omitted in the record. He further contended that, it is evident in the proceedings that, learned counsel for the parties informed the court that the skeleton arguments were already filed and the same are referred in the impugned Ruling. Mr. Kesaria argued this to be irregular because the Court in its several decisions has emphasized on the essence of completeness of the record in order to have a meaningful revision. To support the proposition, he cited to us the case of **VIP ENGINEERING AND MARKETTING LIMITED VS MECHMAR CORPORATION**

(MALAYSIA); Civil Appeal No. 163 of 2004; **AFRITOKI ENTERPRISES CO. LTD VS PACIFIC INTERNATIONAL LINES (T) LIMITED,** Civil Application No. 193 of 2012 and **BRITANIA BISCUITS LIMITED VS NATIONAL BANK OF COMMERCE AND ANOTHER,** Civil Application No. 195 of 2012 (all unreported).

In respect of the 2nd ground of the preliminary objection, Mr. Kesaria submitted that in the present application, revision is sought against an interlocutory order and that offends the provisions of section 5 (2) (d) of the AJA because the impugned Ruling did not finally determine the suit against the parties and instead, the application was struck out on account of incorrect citation of the enabling law. In this regard, Mr. Kesaria argued that, following the striking out of the application which gave no judgment or decree, it was open to the applicants to exhaust the available remedy by lodging a fresh application instead of lodging the present application for revision before the Court. Mr. Kesaria further pointed out that, while the applicant is seeking revision of the impugned Ruling, annexed to this application include the proceedings in the main suit a subject of judgment of the High Court and an appeal is already filed in Court. On this account, Mr. Kesaria urged the Court to strike out the application with costs. To back

up his propositions, he referred us to the cases of **KARIBU TEXTILES MILLS LIMITED VS NEW MBEYA TEXTILE MILLS LIMITED AND THREE OTHERS,** Civil Application No. 27 of 2007; **BRITANIA BISCUITS LIMITED VS NATIONAL BANK OF COMMERCE LIMITED AND ANOTHER** (supra) and **MINJINGU MINES FERTILIZERS LIMITED VS MONTERO TANZANIA LIMITED,** Civil Application No. 110 of 2003 (unreported).

On the other hand, Ms. Mlemeta opposed the preliminary objection arguing the same to be baseless. In her submission, she was of the view that, it was not necessary to attach skeleton arguments of the parties because they are contained in the Ruling of the High Court. She contended that the cases cited by the respondent's counsel are distinguishable from this application which bears different facts. When probed if the applicants sought leave from the Registrar not to include the skeleton arguments, on a reflection, she submitted that, if the Court finds the skeleton arguments crucial then the applicants may be granted leave to file supplementary record so as to include the skeleton arguments.

In relation to the 2nd preliminary point of objection on the revision being sought on the interlocutory order, Ms. Mlemeta was of the view that the Ruling finally determined the rights of the parties because after

the striking out the application for leave to appear and defend, two days later, a summary judgment was entered against the applicants. When asked if the revision sought is against the Ruling or Summary Judgement she claimed the present application to be peculiar and that focus should be on propriety of the striking out of the application for leave to appear and defend in the summary suit. As such, she urged the Court to dismiss the preliminary objection in order to pave way for the hearing of the application for revision on merit. To support her arguments, she referred us to the cases of **MABIBO BEER, WINES AND SPIRITS LTD VS LUCAS MALLYA AND COMMISSIONER FOR CUSTOMS TANZANIA REVENUE AUTHORITY,** Civil Application No. 160 of 2008; **JOMO KENYATTA TRADERS LIMITED AND 5 OTHERS VS NATIONAL BANK OF COMMERCE PLC,** Civil Appeal No. 48 of 2016 (both unreported).

In a brief rejoinder, Mr. Kesaria reiterated that the present application is not against the summary judgment which is a subject of the pending appeal in Court but rather, the Ruling which did not finally determine the suit. On the missing skeleton arguments, he contended that, apart from the skeleton arguments not being replicated in the Ruling, it is not for the parties to choose what should not be included in the record without the prior permission of the Registrar. Moreover, he argued that, after the preliminary objection has been raised, it is

improper for the applicants to seek leave to bring omitted documents as this would be tantamount to pre-empting the preliminary objection. Furthermore, Mr. Kesaria pointed out that, since the summary judgment was entered two days after the striking out of the application, it was open for the applicants to lodge another application in two days and as such, the present application is not peculiar as viewed by the applicant's counsel. He also contended that, the principles in the cases cited by the respondent are relevant despite the difference of facts with the case at hand. Finally, he added that the case of **MABIBO WINE** (supra) is distinguishable with the present case because in that case, the Court had to intervene and revise a decision which was made on the basis of a letter without giving the applicant a right to be heard.

Having carefully considered the submissions of counsel and the record before us, the initial threshold issue for our determination is whether the Ruling and Order made on the interlocutory issue had the effect of finally determining the main suit before the High Court.

In the present matter, it is not in dispute that, after the striking out of the application to apply for leave to appear and defend, a summary judgment was entered against the applicants. The question to be addressed is whether or not the Ruling and the order of the High Court

which did strike out the application can be revised by the Court. This takes us to the provisions regulating revision against the interlocutory orders, whereby section 5 (2) (d) of the AJA categorically states as follows:

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

[Emphasis supplied]

In the light of the cited provision of the law, an interlocutory order qualifies to be a subject for revision only if it has the effect of finally determining the charge or suit. As none of the parties disputed that the impugned Ruling and Order are interlocutory which we agree, however, parties locked horns on the effect of finally determining the suit which was pending before the High Court.

The Court had the opportunity of expounding on the effect of an injunction which had the effect of finally determining what is before the trial court in the case of **CHAMA CHA WALIMU TANZANIA VS THE ATTORNEY GENERAL,** Civil Application No.151 of 2008 (unreported). In that case, the applicant had declared a trade dispute with the Government and it issued a

strike notice of sixty days which was to commence on 15th October, 2008. The notice was pursuant to section 26 (2) (d) of the Public Service (Negotiating Machinery) Act No. 19 of 2003. Subsequently, the Attorney General successfully instituted and was granted a permanent injunction restraining members of the applicant from calling for and or participating in the planned strike. Having considered if the temporary injunction carried the Hallmarks of finality the Court held as follows:

> *"We have dispassionately read the ruling of the Labour Court and the order extracted there from in the light of the order sought in the chamber summons.* ***We are of the firm view that the order was not interlocutory. It had the effect of conclusively determining the application.***
>
> *The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant and its members were unequivocally restrained from "calling for and /or participating in the planned strike".* ***There was no other issue remaining to be determined by the Labour Court. Both in form and substance the issued injunction order carries the hallmarks of finality, as it was not granted pending any further action being taken in those proceedings****... The applicant therefore had an*

automatic right of appeal to this Court under section 57 of the Labour Institutions Act..."

[Emphasis supplied]

In **TANZANIA MOTOR SERVICES LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION (PSRC) VS MEHAR SINGH t/a THAKER SINGH,** Civil Appeal No. 115 of 2005 (unreported), the Court had the opportunity of considering if the interlocutory order which was a subject of an appeal had the effect of finally determining the rights of the parties in a suit which was before the trial court. In so doing, the Court adopted the test in the case of **BOZSON VS ARTINCHAM URBAN DISTRICT COUNCIL** (1903) 1 KB 547 wherein Lord Alverston stated as follows:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order."

Having concluded that, the test adopted in Bozson case is in accordance with the language used in section 5 (2) (d) of the AJA as amended, thus the Court in **TANZANIA MOTOR SERVICES LTD AND PSRC VS MEHAR SINGH t/a THAKER SINGH** (supra) finally held as follows:

> *"the decision of the learned judge refusing to stay proceedings in Civil Case No 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration.* ***The decision closed the doors to arbitration rendering provisions in contracts for arbitration meaningless..."***

[Emphasis supplied]

On the other hand, where an appeal or revision is sought against an interlocutory order which does not have the effect of determining the suit, the Court has not been hesitant to hold the same incompetent on ground that, it offends the provisions of section 5 (2) (d) of the AJA. The cases to that effect include **KARIBU TEXTILES MILLS LIMITED** (supra) where the Court made the following observation:

> *"it is further noted, as section 5 (2) (d) (supra) provides, that an interlocutory decision may be appealed against if it brings the matter to its finality before the High Court."*

In **BRITANIA BISCUITS LIMITED** (supra), the applicant had applied for revision against the order to deposit TZS. 100,000,000/= as security for costs by the High Court. The application was confronted with a preliminary objection challenging its competence that it did not have the effect of

finally determining the suit which was pending before the High Court. In upholding the preliminary objection, the Court found the application incompetent in terms of section 5 (2) (d) of the AJA and observed as follows:

> *"... 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... We uphold the 2nd preliminary objection raised by the advocate for the respondent as well and find this application incompetent having arisen from an interlocutory order which is prohibited by section 5 (2) (d) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 25 of 2002."*

In the light of the settled position of the law, it is clear that a remedy of revision before the Court is not tenable on an interlocutory ruling or order save where it has the effect of finally determining the charge, suit or petition.

In the present matter as earlier stated, having heard the parties on the preliminary objection challenging the competence of the application on

account of non- citation of the proper enabling provision, the learned High Court Judge held as follows:

> *"As I have shown herein, the applicants in their application for leave to appear and defend summary suit on mortgage cited Order XXXV Rule 3 (1) (b) of the Act and not Order XXXV Rule 3 (1) (c) of the Act that empowers the court to grant the prayers sought. Since the applicants have failed to cite the proper provision of the law then I find their application incompetent. I proceed to strike out with costs the application for being incompetent..."*

Although Ms. Mlemeta did not dispute that the Ruling by the High Court was on interlocutory orders, she persistently maintained that the present application is peculiar and it had the effect of finally determining the suit because subsequently, summary judgment was entered against the applicants. With respect, we found the argument wanting and shall give our reasons. **One,** there is nowhere in the Ruling or Drawn Order the learned High Court Judge determined the reliefs sought in the main suit as suggested by Ms. Mlemeta**. Two,** this application is sought to revise the impugned Ruling which did strike out the applicants' application to apply

for leave to appear and defend in a summary suit. **Three,** the application at hand is not seeking revision against the summary judgment which is a subject of a pending appeal before the Court as between the parties herein and as such, we cannot venture to sit on an appeal which is not before us.

In this regard, we do not agree with what Ms. Mlemeta on this being a peculiar application considering that the law categorically prescribes that a revision can be sought against an interlocutory order which has the effect of finally determining the rights of the parties and not otherwise. Thus, the peculiarities if any, must fall within the four corners of what is stipulated under section 5 (2) (d) of the AJA and we found none.

Therefore, the Ruling and the Drawn Order apart from being interlocutory in nature did not at any rate have the effect of finally determining the pending suit. We therefore, agree with Mr. Kesaria that the present application contravenes the provisions of section 5 (2) (d) of the AJA which regulates appeals and revisions against the interlocutory orders. The cases cited by the Ms. Mlemeta cannot salvage the predicament of the applicants because, in our considered view, with respect, they were indeed cited out of context because as earlier pointed out, the Ruling on the interlocutory application did not have the effect of finally determining the pending suit before the High Court.

In view of the nature of this application for revision against the Ruling on an interlocutory application in Misc. Commercial Cause No. 319 of 2016 which arose from Commercial Case No. 93 of 2016 whose judgment is subject of a pending appeal in Court between the parties herein, we found this to be an abuse of court process. We say so because **One,** section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 was amended purposely to give effect to the provisions of Article 107 A (2) (b) of the Constitution of the United Republic of Tanzania, 1977 to enable the courts to deliver decisions in civil and criminal matters in accordance with the laws of the land and not to delay dispensation of justice without reasonable ground. See - **KARIBU TEXTILE MILLS LTD** (supra). **Two,** section 5 (2) (d) of the AJA was enacted to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals/revisions against interlocutory decisions or orders. See: - **MAHANRAKUMAR GOVINDJI MOMANI t/a ANCHOR ENTERPRISES VS TATA HOLDINGS (TANZANIA) LTD AND ANOTHER,** Civil Application No. 50 of 2002 (unreported).

We found this to be among the applications aiming at flooding the Court with unnecessary applications which adversely impacts on the timely dispensation of justice. In future this should not be condoned.

In view of the aforesaid, as the first limb of the preliminary objection is merited we are satisfied that, the present application is not competent because it is barred by the provisions of section 5 (2) (d) of the AJA. Thus, we shall not determine the second and third limbs of the preliminary objection. Finally, we proceed to strike out the incompetent application with costs.

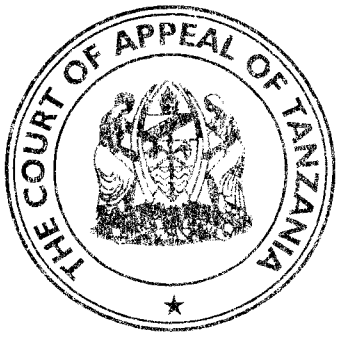
DATED at **DAR ES SALAAM** this 3rd day of August, 2020

S.E.A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

Ruling delivered this 5th day of August, 2020 in the presence of Ms. Elizabeth Mlemeta, learned counsel for the Applicant, and Ms. Jasbir Mankoo, learned counsel for the Respondent, is hereby certified as a true copy of original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL