IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA , J.A., WAMBALI, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 561/16 OF 2018

NIC BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

HIRJI ABDALLAH KAPIKULILA ..... RESPONDENT

(Arising the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Sehel, J.)

dated the 11th day of October, 2018
in
Commercial Case No. 61 of 2018

.....

RULING OF THE COURT

29th October, 2019 & 3rd January, 2020

MUSSA, J.A.:

The applicant seeks to move the Court to exercise its revisional jurisdiction by calling, examining and to revise the proceedings and decision of the High Court (Commercial Division) dated the 11th October, 2018 in Commercial Case No. 116 of 2018.

The application is by way of a Notice of Motion which is taken out under the provisions of section 4(3) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (the AJA) as well as Rules 65(1), (2), (3) and (4)

of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit sworn by Mr. Makarious Tairo who held himself as the applicant's Advocate.

The application is resisted by the respondent through an affidavit in reply as well as a subsequent supplementary affidavit in reply which was lodged on the 21st October, 2019. The latter affidavit in reply was accompanied by a Notice of a preliminary point of objection which goes thus:-

> *"The Applicant's act of litigating this application for revision before this Court while being aware that the subject matter, the motor vehicle Registration Nos. T988 CRP make Yutong bus; T662 DBV make Yutong bus; and T278 DFA make Dragon have been sold by the Applicant without a lawful order is an abuse of the court process. The Applicant's Notice of Motion is thus contrary to Rule 4(2)(b) and (c) of the Tanzania Court of Appeal Rules, 2009 as amended."*

Before we address and determine the foregoing so-called preliminary point of objection, we think it is necessary to explore, albeit in a nutshell, the background giving rise to the application at hand.

As it were, the matter at hand was triggered off by the above referred Commercial Case No. 116 of 2016 which was instituted by the applicant against the respondent in the High Court (Commercial Division) on the 8th September, 2016 at Dar as Salaam. In the suit, the applicant, a banking institution, claimed that on several occasions, she extended credit facilities to the respondent amounting to a total sum of Tshs. 392,500,000/=. She further claimed that as of 6th September, 2016 the respondent had not fully serviced the facilities leaving an outstanding amount of Tshs.160,562,539.53/= which remained unpaid despite persistent demands. Thus, the applicant was seeking to recover from the respondent the outstanding loan amount; payment of general damages; payment of interest at the rate of 20% per annum on the principal amount from 6th September, 2016 until full payment; payment of interest on the decretal amount at the court's rate of 12% from the date of judgment till full payment; costs and any other relief which the Court could deem fit and just to grant. In the alternative, the applicant, sought the sale of the

respondent's motor vehicles registration Nos. T988 CRP and T662 DBV, make Yutong buses.

The plaint was resisted by the respondent in a written statement of defence as well as a counter claim. Upon the completion of the pleadings, the suit passed through mediation which did not produce any fruitful results. Thereafter, pursuant to the obtaining Commercial Court procedure, either party lodged a single witness statement to be relied upon in their respective cases. More particularly, the applicant lodged a statement of a certain Michael Clement Benedict Kimwaga, whereas the respondent filed his own statement.

When the matter was called on for hearing, Mr. Makarious Tairo, learned Advocate, who was representing the applicant, informed the court that the intended witness for the applicant had absconded from work and that all effects to trace him proved futile. In the circumstances, the learned counsel subsequently filed a formal application to substitute the witness.

Upon due consideration, the court (Sehel, J., as she then was) did not find merit in the application which was dismissed with costs and, hence the present application for revision.

When the application was placed before us for hearing, the applicant had the services of the already referred Mr. Tairo, learned Advocate, whereas the respondent was represented by Messrs Martin Rwehumbiza and Octavian Mushukuma, also learned Advocates.

Having regard to the referred Notice of Preliminary Objection, it was no surprise that the proceedings began with the consideration of the raised point of concern. Mr. Mushukuma who argued the so-called preliminary point commenced his address to us with the submission that the application has been overtaken by events for the reason that the two motor vehicles, Nos. T988 CRP and T662 DBV which were the subject matter of the suit below had been sold. The learned counsel predicated his contention on the respondent's supplementary affidavit from which he concluded that since the sale was without a lawful order, it follows that the applicant's Notice of Motion was an abuse of the Court process in contravention of Rule 4(2) (b) and (c) of the Rules. In the premises,

Messrs Rwehumbiza and Mushukuma unprecedentedly urged us to "*dismiss*" the Notice of Motion with costs.

In reply, Mr. Tairo resisted the preliminary point of objection for being misconceived. To begin with, he said, the preliminary point raised does not, after all, qualify to a preliminary point of objection. Elaborating, the learned counsel for the applicant contended that the preliminary point is based on facts which have to be ascertained by evidence. In any event, he further submitted, the two motor vehicles are not the subject matter of the application at hand, rather, substantially the applicant desires to recover the outstanding loan and interest. In sum, Mr. Tairo urged us to overrule the preliminary point of objection with costs.

Having heard the competing arguments on the preliminary point raised we added our own point of concern on whether or not the applicant appropriately seeks to move the Court in revision instead of preferring an appeal.

In response to our querry, Mr. Tairo was quick to contend that the suit was dismissed under Order XVII Rule 3 which is not appealable. Upon a further dialogue with us the learned counsel for the applicant rejoined

that, in any event, the matter at hand involved peculiar circumstances which called for remedial revisional measures, more particularly, since it contained a counter claim which was lodged by the respondent and which remains undetermined. To buttress his contention, Mr. Tairo referred to us the unreported Civil Application No. 160 of 2008 – **Mabibo Beer, Wines and Spirits Ltd V. Lucas Maiya a.k.a Baraka Stores and Another.**

On his part, Mr. Rwehumbiza countered that the application is incompetent the more so as the order sought to be impugned is appealable under section 5(1) (c) of the AJA and, for that matter, the applicant inappropriately seeks to invoke the revisional jurisdiction of the Court in lieu of an appeal. To fortify his stance, the learned counsel for the respondent referred to us the unreported Criminal Application No. 2 of 2002 – **Dausen Anael Munisi and Another V. The DPP.**

We have dispassionately considered and weighed the lucid submissions from either side on both the preliminary point raised by the respondent as well as our point of concern on the sustainability of this application. We propose to first determine whether or not the point raised in the notice of preliminary objection qualifies to be a preliminary point of

objection, if at all. As our take off, we shall restate the principle in the case of **Mukisa Biscuits Manufacturing Company Ltd V. West end Distributors Ltd**, [1969] EA 696 which, in our view, not only defines what a preliminary objection is, but also prescribes when it can be raised and when it should not be raised. The relevant excerpt goes thus;

> *"A preliminary objection is in the nature of what used to be a* ***demurrer****. It raises a pure point of law which if argued on the assumption that all the facts pieaded by the other side are correct.* ***It cannot be raised if any fact has to be ascertained*** *or if what is sought is the exercise of judicial discretion".* [Ephasis ours]

From the above statement, a preliminary objection is like a demurrer. The latter word comes from the word "demur" which is defined in Black's Law Dictionary, 8th Edn at pg 465, as;

> *" To object to the legal sufficiency of a claim alleged in a pleading* ***while admitting the truth of the facts stated".*** [Emphasis ours].

And "demurrer" which in some jurisdiction is termed as "*a motion to dismiss*" has been defined in Black"s Law Dictionary as;

> *"A pleading stating that although the fact alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer."*

The same definition is given by STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, 6TH Edition, Sweet and Maxwell, 2000, page 645.

It is therefore expected that a matter raised as a point of preliminary objection should conform to and have qualities of what used to be a demurrer. The foregoing definition even gives us an instance of a preliminary objection, in our view, such as when a plaint does not disclose a cause of action to enable the plaintiff state his claim and the defendant prepare his defence. In **Karata Ernest and Others V. The Attorney General** – Civil Revision No. 10 of 2010 (unreported) more examples were listed down, and we reproduce the relevant part;

"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arise by clear implication out of the pleadings". Obvious examples include, objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal has been lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc".

With that principle and examples in mind, can it be said that the point of preliminary objection raised by the respondent in the notice at hand meets the definition and requirements stated above? Certainly, it does not, because there is still a dispute as regards factual matters,

specifically, whether or not the sale of properties alleged in the supplementary affidavit is true. What we have is a mere contention of the respondent which needs ascertainment. To this end, we find the raised point does not meet the requirements of a preliminary point of objection and for that reason we proceed to overrule the same.

Coming now to the point of our concern, we should express at once that the order of the High Court which the applicant seeks to impugn is appealable under section 5(1)(c) of AJA which stipulates:-

> *"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) ..... N/A*
>
> *(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."*

That said, we should point out that it is now well settled that a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction. This principle has

been underscored in mumerous decisions of the court including the cases of **Moses Mwakibete V. The Editor – Uhuru and two others** [1995] TLR 134; **Transport Equipines Ltd V. D. P. Valambia** [1995] TLR 161 and **Halais Pro-Chemie V. Wella A.G** [1996] TLR 269. In the latter case, the Court held thus:-

> " *(i) The Court may, on its own motion and, at any time invoke the revisional jurisdiction in respect of proceedings in the High Court;*
>
> *(ii) Except under exceptional circumstances, a party to proceeding in the High Court cannot invoke the revisonal jurisdiction of the Court as an alternative to the appellate jurisdiction of the court;*
>
> *(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appellable with or without leave.*
>
> *(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process.*

Having determined that the matter before us is appellable, the same does not fall under the propositions (i), (iii) and (iv) expressed in the

Halais Pro- Chemie (supra) case. Could it be said, as appears to be the suggestion of Mr. Tairo, that the matter qualifies to proposition (ii) as an exceptional circumstance on account of the undetermined counter claim?

We think not. As has been held times without number, a counter claim is substantially a cross suit which should be treated, for all purposes as an independent action [see, for instance, what was said by the Court of Appeal of Kenya in **Samaki Industries (Nairobi) Ltd V. Samaki Industries (K) Ltd.** [1995 – 1998] 2 EA 369]. Neither could we derive any assistance from the case **Mabibo Beer, wines and spirits** (supra) which distinctively addressed the right to a hearing and the sustainability of an appeal from an interlocutory order.

The impugned order of the High Court did not, in any respect, address the counter claim and, for that matter, its non-determination could not have been a hindrance to the appeal process.

All said, this application, we so find, has been improperly invoked as an alternative to the available appeal process. The move is clearly misconceived and the application is, accordingly, struck out. As the shortcoming was raised by us, *suo motu*, we give no order as to costs.

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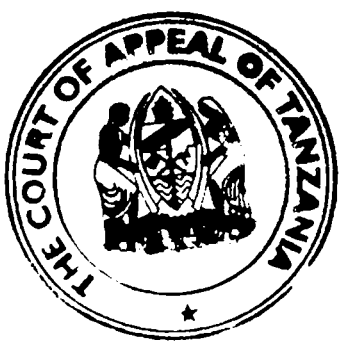
DATED at **DAR ES SALAAM** this 30th day of December, 2019

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of January, 2020 in the presence of Mr. Emmanuel Nasson, leanred Counsel for the applicant and Mr. Octavian Mshukuma , assted by Mr. Augustine Kulwa, learned Counsel for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL