IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 362/17 OF 2018

SUDI KHAMIS SUDI.....1ST APPLICANT
A.K. MAMBA t/a MAMBA AUCTION MART CO. LTD.....2ND APPLICANT
NONDO KALOMBOLOLA t/a N.J. PETROLEUM S.P.R.L.....3RD APPLICANT
AMANI ETCHA .....4TH APPLICANT

VERSUS

MAUREEN GEORGE MBOWE JILIWA.....1ST RESPONDENT
MAUREEN GEORGE MBOWE as a guardian of
BARICK BECKHAM JILIWA and
BARACK GEORGE JILIWA (minors).....2ND RESPONDENT
TWIGA BANCORP LIMITED .....3RD RESPONDENT
SAID MUSA MSWAKI .....4TH RESPONDENT

(Application for revision of the proceedings, ruling and orders of the High Court of Tanzania (Land Division), at Dar es Salaam)

(Mzuna, J.)
dated the 8th day of June, 2018
in
Misc. Land Application No. 100 of 2018

RULING OF THE COURT

9th & 30th July, 2021

MWANDAMBO, J.A.:

By way of notice of motion, the applicants have moved the Court under section 4 (3) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002-now R.E. 2019] (the AJA) together with rule 65 (1), (2), (3) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for revision. They are seeking an order of the Court to quash the

proceedings, ruling and orders of the High Court in Miscellaneous Land Application No. 100 of 2018 and Land Case No. 27 of 2018.

The applicants have raised six grounds in support of the application together with the averments of the affidavits of Sudi Khasim Sudi, the first applicant and Roman S.L. Masumbuko, learned advocate for the third and fourth applicants. The first and second respondents are resisting the application.

The tale behind the application is not too complicated to narrate. It goes as follows. The applicants were respondents in Miscellaneous Land Application No. 100 of 2018; an interlocutory application arising from Land Case No. 27 of 2018 for restraint orders against eviction from a house on Plot No. 104 Block B, Mikocheni area, Kinondoni Municipality pending hearing and determination of the main suit. Resisting both the suit and application, the applicants lodged a notice of preliminary objections on points of law consisting of four grounds to wit: lack of locus standi; res judicata, want of jurisdiction and abuse of the court process. Upon hearing the arguments for and against the objections, the High Court (Mzuna, J.) found no merit in any of them. He dismissed them all in a ruling

delivered on 8th June, 2018. Aggrieved by that ruling, the applicants are now asking the Court to revise the proceedings, application, ruling and order dated 8th June, 2021.Their application is premised on the following grounds reproduced verbatim: -

1. *"That the Trial Judge erred in law and fact in holding that the 1st and 2nd Respondents had locus [standi] in initiating proceedings in the High Court (Land Division) without regard to the decision of the High Court (Commercial Division) in Misc. Commercial Application No. 60 of 2017.*

2. *That the Trial Judge erred in law and fact in holding that the proceedings in Misc. Land Application No. 100 of 2018 and Land Case No. 27 of 2018 are not res judicata to Misc. Commercial Application No. 60 of 2017.*

3. *That the Trial Judge erred in law and fact in holding that the High Court (Land Division) had jurisdiction to deal with the proceedings relating to the house situated on Plot No. 104, Block" B" Mikocheni Area in Kinondoni Municipality contrary to the provisions of Section 38 (1) of the Civil Procedure Code [Cap 33 R.E. 2002].*

4. *That the Trial Judge erred in law and fact in holding that the suit is not time barred as it was not challenging execution contrary to the provisions of*

Section 6(b)(i) & (ii) and item 5 to the Schedule to the Law of Limitation Act [Cap 89 R.E. 2002].

5. *That the Trial Judge erred in law and fact by ruling that the application was not omnibus and overtaken by events by the decision of Hon. Wambura J in Misc. Land Application No. 155 of 2018 as the transfer of the Title had already been effected to the First Applicant by the Registrar of Titles (not a party to the proceedings).*

6. *That the Trial Judge erred in law and fact by failing to rule that the proceedings in High Court (Land Division) are an abuse of court process as there are pending execution proceedings in the High Court (Commercial Division)."*

Not amused, without prejudice to their opposition against the merits by way of an affidavit in reply, the first and second respondents acting through Mr. Kephas Simon Mayenje, learned advocate lodged a notice of preliminary objections challenging the competence of the application on two grounds namely: -

1. *The application contravenes the provisions of section 5(2) (d) of the AJA which prohibits appeals or applications for revision from preliminary or interlocutory decisions.*
2. *The affidavits supporting the application are incurably defective for containing legal arguments, conclusions and prayers.*

Mr. Mayenje argued both points during the hearing during which Messrs. Killey Mwitasi and Roman Masumbuko both learned advocates represented the first, the third and fourth applicants respectively. Mr. Adam K. Mamba, Principal Officer of the second applicant appeared in person.

Addressing the Court on the first ground, Mr. Mayenje argued that the impugned ruling sought to be revised in this application gave rise to an interlocutory order which did not have the effect of finality; it did not determine the suit before the High Court. The learned advocate contended that section 5 (2) (d) of the AJA prohibits appeals or applications for revision from orders like the impugned order and thus the Court has no jurisdiction to entertain the application. Several decisions of the Court were cited in support of the point raised namely; **MIC (T) Limited & Others v. Golden Globe International Services Limited**, Civil Application No. 1 of 2016 and **Director of Public Prosecutions v. Faridi Hadi Ahmed and 36 Others**, Criminal Appeal No. of 2021 (both unreported). The learned advocate cited the decisions to reinforce the proposition that no appeal or application for revision lies from an interlocutory order

which has no effect of finality of the suit or matter before the High Court. Specifically, Mr. Mayenje placed emphasis on the latter decision to underscore the definition of an interlocutory order and whether the impugned order fell into that definition. On the basis of the foregoing, Mr. Mayenje argued that since the impugned ruling emanated from preliminary objections which left Miscellaneous Land Application No. 100 of 2018 intact, the Court has no jurisdiction to determine the instant application. He thus moved the Court to strike out the application with costs.

Mr. Innocent Mhina, learned advocate who appeared for the third respondent was in support of the submissions by Mr. Mayenje without more.

Responding, Mr. Mwitasi was emphatic that the preliminary objection was misconceived. According to him, the objection was based on erroneous interpretation of section 5 (2) (d) of the AJA. The learned advocate argued that section 5 (2) (d) of the AJA ought to be interpreted liberally so as to distinguish between interlocutory orders and confusing proceedings in line with the Court's decision in **Stanbic Bank Tanzania Limited v. Kagera Sugar Limited,** Civil

Application No. 33 of 2012 (unreported). Elaborating, Mr. Mwitasi contended that the application is not against just the order but the whole proceedings of the High Court with a view to averting collision of two conflicting orders of the High Court, Commercial Division and the Land Division. He thus moved the Court to overrule the preliminary objection. However, he was too economic to elaborate in what way the impugned order dismissing the preliminary objections was capable of colliding with any other order of the High Court in relation to the disputed property.

Mr. Masumbuko had similar line of argument with the learned advocate for the first applicant. Essentially, the learned advocate acknowledged that the ruling in Miscellaneous Land Application No. 100 of 2018 resulted into an interlocutory order. However, he argued that the applicants approached the Court by way of revision because the order was problematic on several fronts namely; **one**, it had the effect of terminating execution proceedings before the Commercial Court involving the same property which will not augur well with orderly administration of justice underscored in **Arusha Planters and Traders Ltd & Others v. Eurafrican Bank (T) Ltd**, Civil

Appeal No. 78 of 2001 (unreported). **Two**, it had the effect of conflicting with the order made by the Commercial Court and thus susceptible to revision on the authority of **Consolidated Holding Corporation v. Mazige Mauya & Another**, Civil Appeal No. 126 of 2005 and **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012(both unreported).

The learned advocate distinguished the cases cited by Mr. Mayenje; **MIC (T) Ltd & Others v. Golden Globe International Services Ltd and DPP v. Faridi Hadi Ahmed & 36 Others** (supra) as irrelevant to the instant application. In particular, the learned advocate argued that the latter case involved a challenge on an interlocutory order in a criminal case which was not the same issue in the instant application. He urged the Court to overrule the preliminary objection and proceed with the hearing of the application on merits. Otherwise, the learned advocate contented that, in the unlikely event the preliminary objection will carry the day, the Court should nonetheless, invoke its jurisdiction to revise impugned ruling and order in the peculiar circumstances of the instant application. He

sought reliance for this proposition from our decision in **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund,** Civil Application No. 109 of 2008 (unreported).

Mr. Mayenje had his final word by way of rejoinder. As to the submission by Mr. Mwitasi, the learned advocate brushed off the alleged erroneous interpretation of 5 (2) (d) of the AJA and argued that the Court's decision in **Stanbic Bank v. Kagera Sugar Ltd** (supra) was irrelevant in so far as the contest in the instant application is limited to the ruling rather than the entire proceedings of the High Court.

On the other hand, the learned advocate countered the submissions by Mr. Masumbuko and contended that; **one,** they focused on merits rather than addressing the essence of the preliminary objection with regard to the issue of finality of the impugned order; **two,** the Court's decision in **Arusha Planters Ltd v. Eurafrican Bank (T) Ltd,** (supra) was distinguishable because the Civil Procedure Code [Cap. 33 R.E. 2019], allows a party to institute a separate suit to establish his right consistent with the decision of the High Court (Mruma, J.) in Miscellaneous Commercial

Case No. 60 of 2017. Similarly, Mr. Mayenje argued that the decision in **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund** (supra) is irrelevant because the application for revision arose from the merits of the impugned ruling of the High Court which is distinct from the instant application which has arisen from the High Court's determination of preliminary objections leaving Miscellaneous Land Application No. 100 of 2018 intact. He wound up his submissions inviting the Court to sustain the objection and strike out the application with costs. So much for the background and counsel's arguments for and against the notice of preliminary objection in ground one.

Our starting point is section 5 (2) (d) of the AJA which stipulates: -

> *"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 suit."*

The learned advocates are in agreement on the import of the section that it bars appeals and applications for revision from interlocutory decisions which do not have a finality of the suit before

the High Court. The test on what constitutes a final order determining the suit was discussed in **Tanzania Motor Services Ltd and Others v. Mehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2005 [2006] TZCA 5 **at www.tanzilii.org** in which the Court quoted with approval a passage from the judgment of the Privy Council by Lord Alverston in **Bozson v. Artrincham Urban District Council** [1903] 1 KB 547, at page 548 thus: -

> *"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 a final order; but if it does not, it is then, in my opinion, an interlocutory order".*

That passage was quoted in our recent decision in **DPP v. Farid Hadi Ahmed** (supra) as well as in **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and Two Others**, Civil Appeal No. 80 of 2016 (unreported). The central issue for our determination is; did the order dismissing the preliminary objections dispose of that application or the suit from which it was pegged? Mr. Mayenje argued, and we think correctly so, that all what Mzuna, J did was to dismiss or

overrule the applicants' objections leaving the application intact. Indeed, apart from the dissimilarity in the factual background, the nature and effect of the order in the instant application is not materially different from the order which gave rise to the application for revision in **MIC (T) Limited & Others v. Golden Globe International Services Limited** (supra). That application arose from an order of the High Court in which a High Court refused to recuse from presiding over the matter before him. The Court sustained a preliminary objection against the competence of the application premised under section 5(2) (d) of the AJA upon being satisfied that the impugned interlocutory order did not have the effect of finality considering that the suit was not extinguished by the refusal of the presiding judge to recuse himself. By parity of reasoning, it would have been strange and indeed unusual for the impugned order in the application under our consideration to have determined the application instituted by the respondents seeking injunctive orders against the applicants. Logic and commonsense dictate that it would have been the respondents complaining against dismissal of their application had the High Court sustained the applicants' preliminary objections rather than the applicants.

Both Mr. Mwitasi and Mr. Masumbuko impressed upon us that the order had a finality effect because it had the effect of terminating execution proceedings before the Commercial Court. With respect, we do not share the same view with the learned advocates the more so because what is contemplated under section 5 (2) (d) of the AJA is not any suit as the learned advocates would have us hold. In our view, the term suit here is confined to a suit from which the impugned order emanates. We are unable to read anything in section 5 (2) (d) of the AJA suggesting that it is that wide to cover suits outside the confines of the suit the subject of the impugned order. In any case, we find it difficult comprehending the argument in what way the order dismissing the preliminary objections could have conflicted with an order for execution in another case.

Without getting into the nitty gritty of the grounds, unlike in **Stanbic Bank (T) Ltd** case (supra) in which the complaint was against the propriety of the proceedings, orders of the High Court, being confusing, the scope of the instant application is limited to contesting the correctness of the ruling. For ease of reference, the notice of motion in **Stanbic Bank's** case stated: -

> *"The applicant shall move the honourable Court to* ***examine and revise the proceedings*** *before the High Court, Commercial case No. 51 of 2006 and subsequently issue appropriate orders and directions to re-establish* ***within those proceedings propriety, consistency, rationality, and credibility as behaves(sic!) the trials of civil suit (and any other matters) in the High Court".*** (Emphasis added).

It is from that perspective the Court took the view that in exceptional circumstances, it can revise proceedings of the High Court notwithstanding the existence of a right to appeal relying on its previous decisions in **VIP Engineering & Marketing Limited v. Mechmar Corporation (Malaysia) Berhard of Malaysia**, Civil Application No. 163 of 2004, **SGS Société General De Surveillance S.A. v. VIP Engineering Marketing Limited**, Civil Application No. 84 of 2000 (both unreported) and **Fahari Bottlers Limited & Another v. The Registrar of Companies & Another** [2000] T.L.R. 102.

We are unable to accept the invitation to treat the instant application as falling in the category of exceptional circumstances discussed in the above cases.

Equally misconceived is the argument advanced by Mr. Masumbuko regarding the effect of the impugned order to the execution proceedings before the Commercial Court citing several cases to bolster his submissions to wit; **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** and **Arusha Planters and Traders Ltd & Others v. Eurafrican Bank (T) Ltd** (supra). We say so because, as correctly submitted by Mr. Mayenje, those cases are not relevant to the determination of the preliminary objection. By and large they are relevant to the merits of the application which is not the concern of this ruling.

To recap, the cases referred to in this ruling are just a few among various decisions stressing the prerequisites before a litigant can access the Court to exercise its jurisdiction and revise the proceedings and orders of the High Court under section 4 (3) of the AJA. It is plain from the cases we have made reference to, the Court's revisional jurisdiction is not open ended. It is exercisable subject to

section 5 (2) (d) of the AJA which prohibits revision from interlocutory orders/decisions which do not have a finality effect. That means that a litigant who seeks to move the Court to exercise its revisional jurisdiction must satisfy it that his application is not barred by section 5 (2) (d) of the AJA. Failing which, he must satisfy the Court that his application falls in to the category of exceptional circumstances in the light of the Court's decisions in **Fahari Bottlers Ltd, VIP Engineering & Marketing Ltd v. Mechmar Corporation (Malaysia) Berhad of Malaysia, SGS Societies Generate De Surveillance S.A v. VIP Engineering and Marketing Ltd**(supra). The applicants have not met either of the conditions. That being the case, the Court lacks jurisdiction to revise the impugned order under section 4 (3) of the AJA.

We heard Mr. Masumbuko urging us to revise the impugned order in the unlikely event we sustain preliminary objection on the authority of **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund** (supra). We have seen no reason to go that far because the prevailing circumstances in the two cases are not similar. First and foremost, it was clear in **Tanzania Heart**

Institute that an eviction order against the applicant was made prematurely; before the completion of pleadings and framing of the issues. Secondly, it was obvious in that case that in any event the eviction order was not one of the reliefs sought in the suit before the High Court. The Court exercised its revisional jurisdiction **suo motu** under section 4 (3) of the AJA despite striking out the application since it was satisfied that the court process culminating into the eviction order was irregular; it was short circuited, so to speak. That is not the case here where the complaint is largely against the continuation of the hearing and determination of the application before the High Court following its order dismissing the applicants' preliminary objections.

To conclude, we sustain the first ground in the notice of preliminary objections being satisfied that the applicants have not satisfied the Court that their application is not barred by section 5 (2) (d) of the AJA neither have they placed themselves within the exceptional circumstances to enable the Court exercise its jurisdiction under section 4(3) of the AJA. Since the first ground in the notice of

preliminary objections is sufficient to dispose the application, we find it superfluous dealing with the second ground.

In the event and for the foregoing reasons, we strike out the application with costs.

Order accordingly.

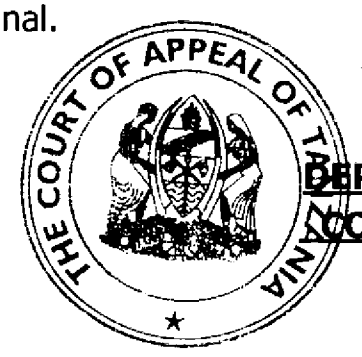
DATED at **DAR ES SALAAM** this 28th day of July, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 30th day of July, 2021 in the presence of Mr. Killey Mwitasi learned counsel for the 1st applicant, and also holding brief of Mr. Roman Masumbuko, the learned counsel for the 3rd and 4th applicants, 2nd applicant present in person, Mr. Kephas Muyenje the learned counsel for the 1st and 2nd Respondents and Mr. Innocent Mhina the learned counsel for the 3rd respondent, and 4th respondent in the absence, is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL