

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)**

CIVIL APPLICATION No. 205/16 OF 2018

D.B. SHAPRIYA AND COMPANY LTDAPPLICANT

VERSUS

STEFANUTTI STOCKS TANZANIA LTD RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Commercial Division
at Dar es Salaam)**

(Sehel, J.)

dated the 6th day of April, 2018

in

Miscellaneous Commercial Cause No. 54 of 2018

.....

RULING OF THE COURT

25th August & 27th October, 2021

KIHWELO, J.A.:

By a notice of motion filed under section 4(3) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002 now R.E. 2019] ("the AJA"), the applicant D.B. Shapriya and Company Limited is moving the Court for an order that the ruling and order of the High Court of Tanzania, Commercial Division (Sehel, J.) (as she then was) be revised and set aside upon the following grounds:

*"(1) No appeal lies against the said ruling and order;
and*

(2) The said ruling is manifestly wrong in law resulting in a miscarriage of justice and the denial of the applicant's right to be heard in the substantive application (Miscellaneous Commercial Cause No. 54 of 2018)."

The application is supported by the affidavit of Mr. Dilip Kesaria, learned advocate for the applicant. In order to facilitate an easy appreciation of the matter before us, we think, it is desirable to preface the ruling with a brief historical account. The sequence of events giving rise to the present application can be summarized as follows. On 11th September, 2017 the applicant petitioned the High Court, Commercial Division ("the High Court") in Miscellaneous Commercial Cause No. 289 of 2017 seeking to set aside an Arbitral Award of the sole Arbitrator Mr. Chikwedu Madumere dated 4th April, 2017. The petition was duly served upon the respondent who in turn filed a reply opposing the petition.

On 18th December, 2017 when the petition was called on for orders, Mr. Dilip Kesaria, learned counsel entered appearance representing the petitioner but the respondent was absent. Mr. Kesaria prayed for more time to file a rejoinder to the reply to the petition and he undertook to do so after court vacation and thereafter a date for hearing could be fixed. The High Court granted the prayer and ordered the rejoinder to be filed on 15th

February, 2018 and hearing of the petition was fixed on 27th February, 2018 at 14:00 hours.

Apparently, on 27th February, 2018 when the matter came on for hearing as scheduled, Ms. Flora Obete, learned counsel for the respondent appeared and informed the court that she was appearing for the respondent but also was holding brief for Mr. Kesaria who had travelled abroad and therefore was unable to appear for hearing. She then went ahead to pray for another hearing date preferably the first week of April, 2018. Surprised of the information that Mr. Kesaria had travelled abroad knowingly that the matter was fixed for hearing and without either formally notifying the court or sending another advocate from Kesaria & Company Advocates in his place to prosecute the petition, the High Court made the following order:

"The hearing of the petition was fixed by consensus with the counsel for the petitioner and I am surprised to be told that he is out of the country while he knows that the matter is supposed to proceed with hearing. In that respect, I do not see any justifiable reason for the adjournment of the hearing of the petition."

Consequently, the High Court Judge went ahead to dismiss the petition for want of prosecution.

On 12th March, 2018, the applicant lodged an application Miscellaneous Commercial Cause No. 54 of 2018, for the restoration of the dismissed petition upon the grounds that the High Court Judge was misled when she dismissed the petition since Mr. Kesaria was very much within the country as he attended to various cases at the Commercial Court during the week of 26th February, 2018 to 2nd March, 2018. The respondent did not contest the application for restoration and upon hearing the parties, the High Court Judge dismissed the application for restoration on account that the applicant did not demonstrate good cause for his non-appearance.

At the hearing of the application, the applicant was represented by Mr. Stanslaus Ishengoma, learned advocate who prayed to adopt the written submissions which were earlier on lodged before the Court and the respondent had the services of Mr. Gaspar Nyika, learned advocate.

Before we could go into the hearing of the application in earnest, we wanted to satisfy ourselves on the competence of the application and therefore, we prompted the learned advocates for either side to address us on whether the application before this Court was competent. Upon a brief dialogue between the Bench and the Bar, it was unanimously agreed that

both counsel should address the Court in both the issue prompted by the Court and the merits of the application.

Mr. Ishengoma started by submitting that after studying carefully the provisions of section 5(1) (b) of the AJA they were unable to ascertain an item in the list which the current circumstances could fit for appeal purposes and therefore, they found it appropriate to lodge an application for revision instead of an appeal. To bolster his argument, he referred us to the case of **CRDB Bank Limited v. George M. Kilindu and Another**, Civil Appeal No. 137 of 2008 (unreported) in which the Court discussed the provisions of section 74 and 75 of the Civil Procedure Code, Cap 33 R.E. 2002, now R.E. 2019] ("the CPC") and came to the conclusion that the order sought to be appealed against is not appealable in terms of section 74 or section 75 of the CPC and section 5(1)(b) of the AJA.

In support of the application, Mr. Ishengoma argued that, the central issue for determination by the Court is whether the applicant was given an opportunity to address the High Court Judge on the absence of the summons to prove that the learned counsel was appearing on another matter. He curiously argued that the general practice is for the court to summon the parties so that they may address the court on the issue which is the basis of

the determination which was not the case before the High Court. He rounded up his submission by arguing that, had the court summoned the parties they could have addressed it on the issue of summons and the result would have been different. Basing on the foregoing, the learned counsel prayed that the application be granted with costs.

For his part, Mr. Nyika had an opposing view in respect to the competence of the application before the Court. He argued that the impugned order was appealable subject to the leave of the High Court in terms of section 5 (1)(c) of the AJA and submitted further that, sections 74 and 75 of the CPC relate to appeals from the subordinate courts to the High Court and not appeals to the Court which are governed by the AJA and the Tanzania Court of Appeals Rules, 2009 as amended ("the Rules"). To amplify his argument, the learned counsel referred us to the decision of this Court in **Vodacom Tanzania Ltd v. FTS Services Limited**, Civil Application No. 92 of 2019 (unreported) at pages 7 and 8. He thus argued that the decision in that case is the correct position of the law as opposed to the cited case of **CRDB Bank Limited** (supra) which was made per in curium. He further contended that a revision is not an alternative to appeal, fortifying his argument, with the case of **Felix Lendita v. Michael Longida**, Civil Appeal No. 312/17 of 2017 (unreported).

As regards to the application before the Court, Mr. Nyika did not oppose it although he succinctly expressed that, by not opposing the application he did not mean that the High Court Judge did not afford the applicant the opportunity to be heard.

In a brief rejoinder, Mr. Ishengoma submitted that the Court in **CRDB Bank Limited** (supra) held that, section 75 of the CPC read together with section 5 (1) (b) of the AJA deals with appeals against orders from High Court to this Court. He further went on to argue that not every order which is not covered under section 5(1)(b) of the AJA should be predicated on section 5(1)(c) thereof and explained the exceptions to be section 5(1)(b)(iii) of the AJA and reiterated that the application for revision is appropriately before the Court.

After a careful consideration of the submissions of both learned counsel for the parties, the issue before us is a narrow one and that is whether the application is properly before the Court.

We think, we should first appreciate what the provisions of section 5(1)(c) of the AJA provides:

"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-

*(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.***"

Quite clearly, in the instant application, the applicant was disgruntled by the ruling and order of the High Court that dismissed the application for restoration of the petition. In any event, and as rightly submitted by Mr. Nyika, section 74 of the CPC applies to appeals from the subordinate court to the High Court and not to this Court and therefore not relevant in the circumstances of this case. Admittedly, section 75 of the CPC restricts appeals from orders from the High Court to this Court.

Looking critically at the provision of section 5(1)(c) of the AJA, it seems clear to us that, by all standards the provision is unambiguous, and it leaves no room for the counsel for the applicant's proposition that there are exceptions to that general rule and that not every order which is not covered under section 5(1)(b) of the AJA should be predicated on section 5(1)(c) thereof. In our respectful opinion, we think that, the above provision tells it all. It is, we think, apparent that the applicant ought to have filed an appeal to this Court subject to the leave of the High Court and not the instant application for revision. We think, such a convenient escape route is not,

unhappily, available to the applicant. We are fortified in this view by the timebound principle that revision is not an alternative to appeal.

Luckily, this Court has had occasion to pronounce itself on this issue in the case of **Transport Equipment Ltd v. Devram Valambhia** [1995] TLR 161 where it was held that:

"The appellate jurisdiction and revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases mutually exclusive; if there is a right of appeal then that right has to be pursued and except for sufficient reason amounting to exceptional circumstances there cannot be resort to the revisional jurisdiction of the Court of Appeal."

This position was also taken in the case of **Augustino Lyatonga Mrema v. Republic** [1996] TLR 267 where this Court faced with analogous situation stated that:

"To invoke the Court of Appeal powers of revision there should be no right of appeal on the matter the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."

It is our considered view that the case of **CRDB Bank Limited** (supra) is distinguishable from the current case as that was decided on different grounds and it related to different circumstances. We, therefore, firmly

believe our decision in the present case, would not conflict in substance with any of the other previous decisions.

For the above reasons, we are of the settled view that this application is not competent, for the order sought to be revised is not amenable for revision in terms of section 5(1)(b)(c) of the AJA. It is, therefore, struck out. Since the issue was raised *suo mottu* by the Court, we make no order as to costs.

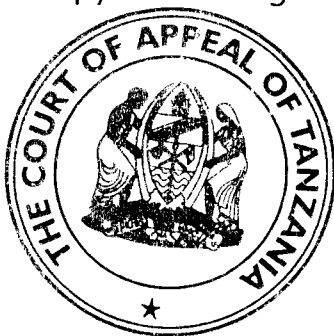
DATED at **DAR ES SALAAM** this 26th day of October, 2021.

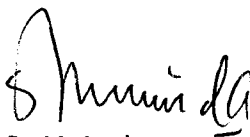
R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 27th day of October, 2021 in the presence of Ms. Jasbir Mankoo, learned counsel for the applicant and Ms. Antonia Agapiti, holding brief for Mr. Gasper Nyika for the respondent, is hereby certified as a true copy of the original.




S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL