IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 448/16 OF 2018

SHIRIKA LA USAFIRI DAR ES SALAAM LTD ..... APPLICANT

VERSUS

AFRICARRIERS LIMITED .....1ST RESPONDENT
BAY VIEW COMPLEX LIMITED ..... 2ND RESPONDENT

(Application for Revision of the proceedings, ruling and Order of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Sehel, J.)

dated the 2nd day of August 2018
in
Commercial Review No. 15 of 2017

.....

RULING OF THE COURT

01st November, & 22nd November 2021

KOROSSO, J.A.:

The applicant, Shirika la Usafiri Dar es Salaam Ltd., has by way of notice of motion supported by an affidavit sworn by Patrick Kissa Mtani, its Principal officer and counsel, brought this application and seeks revision of the proceedings, ruling and order of the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Review No. 15 of 2017. The application was brought under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, now 2019 (AJA) and Rule 65(1), (2), (3) and (4) of Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

The applicant seeks to move the Court for an order to call for and examine the record of proceedings, ruling and order of the High Court of Tanzania, Commercial Division, at Dar es Salaam (Sehel, J.) (as she then was) dated 2/8/2018 with a view to satisfying itself as to its correctness, legality, propriety or otherwise and where appropriate quash and set it aside. The notice of motion premised six grounds which for reasons to soon be apparent we shall not produce herein.

At the commencement of hearing of the application, after a short dialogue with the court, the applicant's counsel abandoned four of the grounds (a)-(d) and thus remained with grounds (e) and (f) whose gist is essentially: **one**, faults the High Court Judge for disregarding the new evidence sought to be tendered despite having recognized the existence of that evidence, and **two**, flaws the High Court Judge's finding that the applicant failed to prove that he exercised due diligence at the time of hearing of the matter which led to the impugned decision not considering the intricacies of authentication of travel documents at entrance and exit from Uganda.

The respondents through a joint affidavit in reply affirmed by Mustafa Rashid, a Principal Officer of the respondents countered the application.

The background leading to this application as deciphered from the affidavital evidence and annexures thereto, albeit in brief is that, the respondent (then, the plaintiff) sued the applicant (then, the defendant) in the High Court of Tanzania Commercial Division at Dar es Salaam, Civil Case no. 125 of 2013 for breach of a joint venture agreement entered on 13/10/2009 between the parties related to joint ownership of property which was to be constructed on Plot No. 437/129, Certificate of Title No. 186021/41, Sokoine Drive within Ilala Municipality, Dar es Salaam Region (suit premises). A judgment was entered in favour of the respondents on admission, and the applicant was ordered to pay Tshs. 2,000,000,000/- being the money spent in the joint venture up to the time of the misunderstanding.

Subsequently, the applicant filed Commercial Case No. 133 of 2016 which was dismissed for want of prosecution in view of the applicant's non-appearance on 5/6/2017. Dissatisfied with the decision, the applicant filed Misc. Commercial Cause No. 163 of 2016 to set aside the dismissal order. The application was dismissed on 26/10/2017 due to failure of Mr. Patrick Mtani, learned counsel for the applicant to enter appearance whilst the date set for hearing was by consent of the parties. It should be noted that on the said date, Ms. Quinn Allen appeared and was holding brief for Mr. Mtani and prayed for the matter

to be adjourned for reason that she was not instructed to proceed with hearing and Mr. Mtani who had travelled to Entebbe, Uganda as of 12/10/2017 was still in Uganda on the date the matter was called for hearing. Ms. Allen contended that whilst Mr. Mtani had planned to return in time to appear but was unable to do so due to matters beyond his control. A boarding pass showing that the counsel for the applicant had travelled from Nairobi to Entebbe on 12/10/2017 was availed to the presiding judge. The High Court dismissed the application for want of prosecution on 13/10/2017 stating that although she agreed that counsel Mtani had travelled to Entebbe on 12/10/2017 from the proof presented on when he left for Entebbe, however, she found that no proof was tendered to show that Mr. Mtani had not returned from Entebbe.

The applicant was dissatisfied with the decision and filed a memorandum of review, in Commercial Review No. 15 of 2017. The application was heard on 9/07/2018 and upon hearing the parties, the High Court in its ruling delivered on 2/8/2018 dismissed the application with costs. Still Aggrieved, the applicant filed the present application for revision to this Court on the grounds stated hereinabove.

When the application was called for hearing Mr. Benson Hoseah, learned State Attorney represented the applicant whereas, Mr. Ngassa

Ganja Mboje, learned Advocate entered appearance for both respondents. At the commencement of hearing the counsel for the applicant adopted the notice of motion, the affidavit in support and the applicant's written submission to form part of his overall submissions. Similarly, Mr. Mboje adopted the affidavit in reply and the written submission as part the respondent's submissions.

Mr. Hoseah informed the Court that the application is founded on the remaining two grounds as found in the notice of motion praying the Court to disregard any submissions related to the abandoned grounds. He contended that the issue before the Court for determination was whether the High Court correctly dismissed the application for review before it as found at page 220 of the record.

The learned State Attorney decided to first submit on the competency of the application. He argued that the application was properly before the Court because in terms of Order XLII Rule 1(i)(a) and (b) of the Civil Procedure Code, Cap 33 R.E. 2002, now 2019 (the CPC), the ruling of the High Court is not appealable and thus the only remedy available to the applicant was to come to the Court by way of revision. He cited the case of **Augustino Lyatonga Mrema vs Republic and Another** [1999] TLR 273 and **Halais Pro-chemie vs Wella A.G.** [1996] TLR 269 to augment his position.

Mr. Hoseah implored us to find that the High Court's decision to dismiss the application for review before it without consideration of the new evidence which was available for scrutiny was erroneous. He argued that the new evidence which was not considered by the High Court included the air ticket and extracts of the passport of the learned counsel who appeared for the applicant in the High Court showing his entrance in Uganda and argued that had the new evidence been considered, the Court would not have dismissed the application. He urged us to take inspiration in excerpts from **Mulla**, The Code of Civil Procedure, 16th Edn. at pg. 4115. The excerpts discuss discovery of new and important matter of evidence and its import. He thus prayed that the application be granted.

On the other hand, Mr. Mboje resisted the application and argued that the two grounds advanced by the applicant in the notice of motion and its supporting affidavit are insufficient to move the Court to interfere with the discretionary powers of the High Court, Commercial Division when exercising its review mandate in the impugned decision. On the competency of the instant application, he conceded that Order XLII Rule 7(1) of the CPC provides that where a review is rejected, the available remedy is a revision. On the correctness of the decision of the High Court to dismiss the review, he argued that under the circumstances the

High Court exercised its discretionary powers properly considering the reasons for review advanced by the applicant then. Mr. Mboje argued that the applicant's main reason for seeking review was failure of the High Court to consider discovered new and important evidence. He contended that the High Court in exercising its discretionary powers for review was guided by three conditions: first, the new evidence being in place; second, exercise of due diligence; and third, the time frame.

The learned counsel argued that the High Court duly addressed the first and second conditions in line with what is expounded in the cited references. He contended that due diligence is assessed by considering knowledge of evidence at the time of hearing. He argued that it is expected that when a person travels, the ticket and passport being essential tools will be available at the earliest to support the application. The learned counsel maintained that in view of the delay in supplying the same in court to support the applicant's contention for non-appearance on the day set for hearing as agreed there was no due diligence exhibited. He contended that when the date of the dismissal order that is, 26/10/2017 and the date of issuance of ticket on 8/11/2017 is considered, which is about two weeks, one discerns there was lack of diligence on the part of the applicant and thus the High Court should not be faulted for finding thus, since the tickets and

passport whereabouts were known to the applicant. He thus implored us to consider as observed by the High Court Judge that the applicant did not give due weight to the agreed date of hearing as also intimating lack of due diligence on his part. To reinforce his argument, the learned counsel for respondent cited the case of **Mbogoh vs Muhoni and Another** [2006]1 E.A. 174.

The learned counsel for respondent argued further that the applicant also failed to either aver in his affidavit that the additional evidence was not in his possession or that he was dispossessed of the same to warrant the Court to interfere with the discretionary powers of the High Court. With regard to the condition on the time frame, he urged the Court to find that time frame is part and parcel of due diligence thus where there is no due diligence it suffices that the third condition is also not fulfilled. He urged us to find the application to lack merit and be dismissed with costs.

The rejoinder by the learned State Attorney was reiteration of the submission in chief. Responding to the respondent's counsel on the lack of evidence to support the applicant's contention, he argued that as averred in the affidavit supporting the notice of motion, the applicant was not in custody of the documents at the time they were required to support the applicant's prayers. He contended that the affidavit clearly

outlines that there was a rescheduling of the counsel itinerary and dates of travelling prompting reissue of ticket hence its unavailability. He prayed that the application be granted.

In the light of the submissions by the learned counsel for the parties and our revisit of the record of revision, we find it pertinent to begin by considering the competence of the instant application. The applicant and the respondent through their written submissions respectively, rightly expound that section 4(2) and (3) of AJA set conditions which must be fulfilled to move the Court to exercise its revisionary mandate and essentially it is; **one**, where there are irregularities to the proceedings in the High Court. **Two**, where the appellate process has been blocked by judicial process. **Third**, where the decision and or order is not appealable and **fourth**, the fact that revision is not an alternative to appeal (see, **Halais Pro-chemie vs Wella A.G** (supra)).

The applicant implored us to find the instant application competent and that all the conditions have been fulfilled since there was no right to appeal available by virtue of Order XLII Rule 1(1)(a) and (b) of the CPC and cited in the case of **Halais pro-chemie** (supra**), Augustino Lyatonga Mrema** (supra) and **Societe Generale De Survellance S.A vs VIP Engineering and Marketing Ltd** [2004] T.L.R 135 to

cement this stance. On the other hand, the counsel for the respondents although conceded to the above provision, he nevertheless argued that as per section 4(2) and (3) of AJA, revisional jurisdiction can only be exercised by the Court on appropriate circumstances and argued that the two grounds advanced by the applicant in the notice of motion and the affidavit in support merely describe merits of the impugned decision which could be challenged by way of appeal. He argued that failure of the applicant to appeal while permitted under section 5(1)(c) of the AJA meant that no sufficient reasons have been demonstrated for not preferring an appeal as found in the decisions of this Court in **Moses J. Mwakibete vs The Editor- Uhuru, Shirika La Magazeti ya Chama and National Printing Co. Ltd** [1995] TLR 134 and **Transport Equipment ltd vs D.P. Valambhia** [1995] TLR161.

Additionally, through his written submissions he argued that the case of **Augustino Lyatonga Mrema** (supra) is distinguishable and urged the Court to find it irrelevant to the instant case, the same for other cases cited including the case of **Mislostav Katic and 2 Others vs Ivan Makobrad** [1999] TLR 470 and **Societe Generale De Survellance S.A** (supra). He thus urged the Court to find the application incompetent.

We are of the view that this issue need not take much of our time. As expounded above section 4(2) and (3) of AJA clearly outlined the fact that the Court is empowered to call for and examine the record of any proceedings before the High Court for purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decisions made and as to regularity of any proceedings of the High Court. On when the said powers can be invoked, the law alluded to above and numerous decisions of this Court have stated that revisional powers of the Court can only be invoked where there is no right of appeal, such case include **Moses J. Mwakibete** (supra) and **Halais Pro-chemie** (supra). In **Transport Equipment Ltd** (supra) the Court held:

> *"The appellate jurisdiction and the revisional jurisdiction of the Court of Appeal 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."*

Whereas, in the case of **Augustino Lyatonga Mrema** (supra), it was held:

> *"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter: the purpose of this condition is to prevent the power of revision being used as an alternative to appeal".*

The import of the above holdings as rightly stated by the counsel for both parties is that where there is a right of appeal, the power of revision cannot be invoked and that such powers are exercised in exceptional circumstances. In the present application, the notice of motion and paragraph 7 of the affidavit supporting the notice of motion presents the grounds to move us to invoke the powers of revision, but as stated hereinabove upon abandoning (a)-(d) grounds and remained with (e) and (f) whose gist of complaint we have already outlined hereinabove.

Suffice to say, Order XLII Rules 1(1)(a), (b) and (7(1) of the CPC which the applicant claims blocks his right to appeal against the impugned decision of the High Court states:

> *"ORDER XLII -1-(1) Any person considering himself aggrieved-*
>
> > *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

7.- (1) An order of the Court rejecting the application shall not be appealable..."

Undoubtedly, in the instant application the impugned decisic arises from a review of an order of the High Court dismissing Commercial Review No. 15 of 2017. Review proceedings which arose upon the dismissal order in Commercial Cause No. 163 of 2016. The import of Order XLII Rule 7(1) of the CPC was conceded by Mr. Mboje. Thus, in light of the position of the law cited above and the case cited, together with the obtaining circumstances presented above, it is clear that the law has blocked the applicant from the appeal remedy upon

being aggrieved by the decision of the High Court. It then suffices that the current application is competent before the Court.

Regarding the issue on correctness and propriety of the impugned decision, that is, the dismissal order by the High Court which prompted the current application, we find it important at this juncture to discuss albeit in brief, conditions that can prompt the Court to invoke its revisionary powers. In the case of **Halais Pro -Chemie** (supra), the Court laid down the legal prerequisites that can move the Court to invoke its revisional powers which are what is contained in section 4(2) and (3) of AJA. We have already summarized the four criteria hereinabove.

Clearly, this application falls under criteria (iii) and (iv) which state:

> *(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the matters which are not appealable 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 had been blocked by the judicial process."*

Therefore, as rightly argued by the learned State Attorney and conceded by the learned counsel for the respondents, under Order XLII

Rule 7(1) of CPC, there is no right to appeal against the impugned High Court Ruling which rejected the application for review.

What is before us for determination are complaints from the applicant essentially alleging irregularities in the proceedings of the High Court that denied the applicant the right to tender material evidence to justify reasons for non-appearance on the date of hearing the case. Our scrutiny of what transpired in the High Court has discerned the following sequence of events which are essentially as follows:

On 5/6/2017, the High Court dismissed for want of prosecution Commercial Case No. 133 of 2016. The application to set aside the dismissal order vide Misc. Commercial Cause No. 163 of 2017 was dismissed on 26/10/2017 for want of prosecution. Subsequently, when the applicant filed an application for review of the said decision in Commercial Review No. 15 of 2017, the High Court dismissed the application stating:

> *"... The ruling of the court dated 26th October, 2017 is patently clear that the applicant failed to tender before ethe court an air ticket for the court to be satisfied that indeed the counsel was still in Entebbe, Uganda. I understand that counsel Mtani stated under oath through his affidavit that he had to extend his stay at*

Entebbe, Uganda thus he failed to return in time. Again with due respect with such departion, a correctly submitted by the counsel for the respondents, the applicant was aware that the application was fixed for hearing on 26th October, 2017 but failed to detail or give full instruction to counsel Quinn Allen who appeared on that date and held brief of counsel Mtani.

All in all, I find that the applicant failed to act diligently in handling its application at the hearing as such it is not open for the applicant to go search and come with documents which he argues proves that he was at all times in Entebbe, Uganda. ... In the end, for reasons stated above that the applicant failed to act with due diligence coupled with the fact that discovery of new and important evidence and/or material is not sufficient, I find that he application for review has no merit. I proceed to dismiss it with costs..."

The above excerpt shows the finding by the High Court Judge that counsel Patrick Mtani for the applicant did travel to Entebbe, Uganda and that the date he travelled, was before the fixed date of hearing on 26/10/2017. The High Court found that there was no proof on the number of days the learned counsel Mtani was in Uganda and

acknowledged that counsel Mtani had averred in his affidavit that he was unable to show the ticket earlier since it was reissued.

We have revisited the memorandum of review, and the supporting affidavit, where Patrick Kissa Mtani avers in paragraph 6-8 that:

> "6. *That before the scheduled date, I travelled on duty on the 12th October, 2017 to Entebbe Uganda where I was expected to be back on 17th October, 2017 before the scheduled date, unfortunately it took me longer than expected hence came back on the 9th November, 2017. Annexed herewith and marked Annexture UDA-1(a), (b), (c) and (D) the copies of my air ticket, extract from my passport showing the dates of exit and entrance, boarding pass at Entebbe and Nairobi Airports.*
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> *7. That, previously I held a two-way air ticket for departure on the 12th October 2017 from Dar es Salaam to Entebbe and on the 17th October 2017 from Entebbe to Dar es Salaam, but owing to some changes in business schedules in Uganda I had to extend my stay there. Attached hereto and marked "Annexture UDA-2 is my air ticket from Dar es Salaam to Entebbe and from Entebbe to Dar es Salaam issued on 12th October, 2017.*

8. That I could not enter appearance in Court on the 26th October, 2017 or prove my extended stay in Uganda as my previous held ticket had been cancelled by the time the matter was called for hearing as the same had elapsed nine (9) days previous hence failed to prove that I was still in Entebbe, Uganda.

9. That the documents to support my extended stay in Uganda were not in possession of the applicant nor Ms. Queen Allen, counsel who held my brief on the material date thus were not produced at the hearing when the prayer for adjournment was made."

A reading of Order XLII Rule (1)(1)(b) of the CPC, pronounces that where there are claims of discovery of new evidence, to warrant review, the applicant must, among others, prove that upon exercising due diligence, he could not produce the evidence he wants to produce at the time when the impugned order was made. Thus, we are constrained to determine whether the applicant did exercise due diligence.

Suffice to say, discovery of new evidence must be part of the exhibited due diligence and the time within which the discovered new evidence is brought to the attention of the court. The record of revision reveals that the applicant **first**, did ensure that there was someone holding brief on the date fixed for hearing. **Second**, that the High Court

was informed that the counsel Mtani had travelled to Uganda and handed a boarding pass which was received and acknowledged by the High Court. **Third**, the applicant's memorandum of review expounded reasons for failure to provide other supporting documents to prove counsel whereabouts when the case was called for hearing. These included averments that the ticket could not be availed to the High Court due to change in date of travel and consequences related to that, such as, reissuance of ticket. There is no doubt that at the time of applying to set aside the dismissal order, it was within the knowledge of the applicant that the ticket was reissued, and as averred by him it was not in his possession at the time. In its ruling, the High Court queried lack of proof on counsel Mtani's whereabouts on the date of hearing of the suit, not satisfied with knowledge of him leaving for Uganda only.

With due respect, since the applicant sought review grounded by reasons of having discovered new evidence, it was incumbent upon the High Court to hear the new evidence and then determine whether the applicant did exercise due diligence or not. We have taken into consideration the respondents' counsel's arguments and find them not fully addressing the fact that the applicant was not accorded the right to be heard. Thus, in view of what we have endeavoured to discuss above

and the material before us, not allowing the applicant to produce new discovered evidence was an error.

For the foregoing, we invoke our revisional powers under section 4(3) of AJA, to quash and set aside the proceedings and ruling of the High Court in Commercial Review No. 15 of 2017 dated 2/8/2018. The effect being to restore the application accordingly. The High Court Commercial Division is directed to promptly hear and determine the application on merit.

DATED at **DAR ES SALAAM** this 16th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of November, 2021 in the presence of Ms. Debora Mcharo learned State Attorney for the appellant and Mr. Ngasa Ganja learned counsel for the respondent is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL