IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 522/17 OF 2020

BIN KULEB TRANSPORT COMPANY LIMITED ..... APPLICANT

VERSUS

REGISTRAR OF TITLES .....1ST RESPONDENT
COMMISSIONER FOR LANDS .....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
CARGO STARS LIMITED .....4TH RESPONDENT

(Application for revision from the ruling and order of the High Court of Tanzania, at Dar es Salaam)

(De-Mello, J.)

dated the 5th day of November, 2020
in
Misc. Land Application No. 37 of 2019
.....

RULING OF THE COURT

21st February & 9th May 2022

MWANDAMBO, J.A.:

At stake before this Court is a ruling of the High Court at Dar es Salaam, made on 5/11/2020 whereby the High Court (De-Mello, J) sitting at Dar es Salaam dismissed an application for review at the instance of the applicant, Bin Kuleb Transport Company Limited. The applicant had moved that court to review its decision in Miscellaneous Land Application No. 37 of 2019 made on 02/06/2020. The applicant has

moved the Court to exercise it revisional power with a view to quashing the impugned ruling.

Although the notice of motion has cited rule 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], henceforth, the AJA, we think the appropriate provision is section 4(3) of the AJA along with rule 65(1), (2), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by two affidavits taken out by, Najeeb Yeslam Saed, Principal Officer of the applicant and Joseph Ishengoma Rutabingwa, learned advocate.

In a nutshell, the averments in both affidavits disclose the following facts a host of which are not in dispute. The proceedings before the High Court arose from a dispute over rectification of the Land Register and deletion of the name of the applicant as its previous registered owner and substitution of H.E The President of the United Republic of Tanzania in respect of Title No. 47633 made by the first respondent on 31/03/2016 at the instance of the second respondent. The applicant avers that she became aware of the impugned rectification much later which made it difficult for her to appeal that decision before the High Court within the time prescribed under the relevant law. Accordingly, the applicant successfully moved the High

Court vide Miscellaneous Land Application No. 86 of 2016 (henceforth the first application) for an order extending time to lodge a notice of intention to appeal. Kitusi, J. (as he then was), extended the time for lodging a notice of intention to appeal within 28 days from the date of that order. However, the applicant lodged before the High Court Land Appeal No. 3 of 2017 instead of the notice of intention to appeal in terms of the order extending the time. That appeal was found to be incompetent and, Ngwala, J. struck it out in a ruling delivered on 21/06/2019. Subsequently, the applicant approached the High Court with a fresh application for extension of time to lodge a notice of intention to appeal in Miscellaneous Land Application No. 37 of 2019 (the second application). Nevertheless, the High Court (De-Mello, J.) dismissed that application on the ground that having extended the time in the first application, the court was *functus officio* and the application was res judicata.

Not amused, the applicant moved the same Judge under Order XLII rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) for the review of the decision citing an error on the face of it in holding that the second application for extension of time was res judicata. That was regardless of the fact that the order in the first application disappeared

with the striking out of Land Appeal No. 3 of 2017. The learned Judge dismissed that application, hence, the instant application for revision.

All respondents resisted the application through affidavits in reply. Gallus Lupogo, learned State Attorney took out an affidavit on behalf of the first, second and third respondents whilst, Dioniz S. E. Malinzi did so for the fourth respondent.

Well ahead of the date of the hearing, the applicant's learned advocate filed his written submissions in support of the application in terms of rule 106 (1) of the Rules. So did the first, second and third respondents pursuant to rule 106(7) of the Rules. The fourth respondent did not file hers. Mr. Killey Mwitasi, learned advocate appeared for hearing instructed by the applicant taking over from Mr. Rutabingwa. On the adversary side Ms. Alice Mtulo, learned Senior State Attorney represented the first, second and third respondents assisted by Ms. Getruda Songoi, learned State Attorney whilst Mr. Sosten Mbedule, learned advocate appeared for the fourth respondent.

Essentially, the applicant's written submissions advance two main issues. **One**, the effect of an order striking out Land Appeal No. 3 of 2017 (the Land Appeal) on the order in the first application, that is to say; whether that order survived the striking out of the appeal for being

incompetent. The learned advocate urges the Court to hold that nothing remained from the first application after the order striking out of the appeal and thus the applicant had a right to file a fresh application for extension of time to lodge a notice of intention to appeal as it did. The learned advocate calls to his aid the Court's decision in **National Microfinance Bank PLC v. Oddo Odilo Mbunda,** Civil Appeal No. 91 of 2016 (unreported) citing an unreported decision in **Athumani Kisesa v. Hadija Omari & Others**, Civil Appeal No. 106 of 2014 in support of the proposition that the order for extension of time in the first application did not survive the striking out of the Land Appeal. **Two**, the erroneous invocation of the doctrine of res judicata in dismissing the second application. It is argued that the principle was wrongly applied by the court in dismissing the second application. From the foregoing, the learned advocate urged the Court to exercise its power to revise the decision in the second application by nullifying it and ordering the High Court to determine that application on merit before another judge.

As alluded to earlier on, the respondents were initially resolute to resist the application both in the affidavit and written submissions in reply. Nonetheless, in the course of the hearing, Ms. Mtulo found it inevitable to throw in the towel. She found it wise to subscribe to the

submissions by the applicant's advocate and concede to the application. So did Mr. Mbedule who informed the Court that the fourth respondent was not resisting the application.

Whilst the concession by the learned counsel for the respondents is commendable in line with the counsel's duty to act honestly, we still have to determine whether there is merit in the application warranting the Court's interference in the decision of the High Court by way of revision. Before doing that, we find it necessary to make a few remarks in relation to the manner in which the applicant has moved the Court to exercise its revisional power. The first relates to the Court's jurisdiction. According to Order XLII rule 7 of the CPC, no appeal lies from an order rejecting an application for review. The right to appeal is thereby blocked by judicial process and hence the resort to revision. The Court made the position clear in **Moses J. Mwakibete v. The Editor Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** [1995] T.L.R 134 and reiterated in **Hallais Pro- Chemie v. Wella A.G.** [1996] T.L.R. 269 holding that a party to proceedings in the High Court is entitled to invoke the revisional jurisdiction of the Court in matters which are not appellable with or without leave as the applicant has done upon the High Court declining to review its decision.

The second aspect relates to the citation of the enabling provisions. The notice of motion cites rule 4 (2) of the AJA parallel with rule 65 (1), (2), (3) and (4) of the Rules as the enabling provisions in this application. In the first place, we think the citation of rule 4(2) of the AJA, must have resulted from a slip of the pen. The applicant must have meant section 4 (2) of the AJA rather than rule 4 (2). Be that as it may, the citation of section 4 (2) of the AJA was improper because the Court is not hearing any appeal which is what section 4 (2) of the AJA is all about. The appropriate provision for an application such as this one should have been section 4 (3) of the AJA. That means that the applicant has not properly moved the Court to exercise its revisional power. However, mindful of the proviso to rule 48 (1) of the Rules and considering that the Court has the requisite jurisdiction to entertain applications for revision such as the instant one, we shall disregard the error and proceed to determine the application on merit.

As seen earlier, the complaint in this application is against the High Court's refusal to determine an application for extension of time in the second application for filing a notice of intention to appeal against first respondent's decision to delete the name of the applicant in the land register. The High Court declined to entertain the second application on

the sole ground that since it had already granted a similar order in the first application, it was functus officio. With respect, we agree with the learned advocates that the learned Judge strayed into an error in holding as she did, that the second application was res judicata. It is plain that the principle of res judicata was wrongly invoked since the order in the first application disappeared with the striking out of the Land Appeal. The learned Judge appears to have overlooked the obvious, that is to say; in law, the first application was as if it had never existed, which entitled the applicant to file the second application as it did. Had she directed her mind to the facts before her and applied the law properly, she should not have dismissed the second application as she did. Instead, she should have determined the application on its merit. There is no doubt that as a result of learned Judge's failure to inform herself on nature of the effect of the order striking out the Land Appeal, she could not, in an application for review, see the error manifest on her decision and proceeded to dismiss it. Had she appreciated the issue, she could not have not have found any difficulty in correcting the error in the application for review. Instead, she should have vacated her order resulting in the determination of the second application on merit.

The inevitable conclusion is that we have to grant the application and exercise our revisional power vested on us under section 4 (3) of the AJA. Consequently, we quash the decision of the High Court in the second application and direct the High Court to determine it on merits by another Judge. As the respondents conceded to the application in its entirety, we order that each party bears own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 6th day of May, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The ruling delivered this 9th day of May, 2022 in the presence of Mr. Killey Mwitasi, learned counsel for the Applicant also hold brief of Mr. Sosten Mbedule, learned counsel for the 4th Respondent and Ms. Vivian Method, learned Senior State Attorney for the 1st and 3rd Respondents, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL