IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A., And MAIGE, J.A.)

CIVIL APPLICATION NO. 162/01 OF 2019

JV ELECTRICAL & ELECTRONICS CO. LIMITED AND SHANGHAI ELECTRIC POWER T & D ENGINEERING..... APPLICANT

VERSUS

RURAL ENERGY AGENCY..... 1ST RESPONDENT

PUBLIC PROCUREMENT APPEALS AUTHORITY..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

[Application for Revision of the Decision of the High Court of Tanzania, (Main Registry) at Dar es Salaam]

(Masoud, J.)

dated the 25th day of February, 2019
in
Miscellaneous Civil Cause No. 18 of 2018

.....

RULING OF THE COURT

14th & 17th June, 2022

GALEBA, J.A.:

The Rural Energy Agency, the first respondent, is an autonomous public statutory agency established under section 14 of the Rural Energy Act No. 2 of 2005. The broad policy objective behind enacting that law was among others, to establish the first respondent in order to promote and improve rural electrification in Mainland Tanzania and to provide for grants and subsidies to developers of rural energy projects.

In pursuit of part of the above objective, the first respondent had advertised in the Daily News of 1st August 2016 for prequalification in

respect of *Supply and Installation of Medium and Low Voltage Lines, Distribution Transformers and Connection of Customers in Un-Electrified Rural Areas in Kigoma and Katavi Regions* (the project). Following completion of the prequalification exercise, on 8th January 2018, the first respondent, invited ten (10) contractors, to express interest to execute the above project. The ten (10) companies shortlisted to submit their bid documents included a Joint Venture of two companies, namely, JV Electrical & Electronics Co. Limited and Shanghai Electric Power T & D Engineering, the applicant, in respect of *"Tender No. AE/008/2017-18/HQ/G/40 Lot 1 & 2 for Supply and Installation of Medium and Low Voltage Lines, Distribution Transformers and Connection of Customers in Un-Electrified Rural Areas in Kigoma and Katavi Regions"* (the tender), for purposes of execution of the project. It is not disputed that the applicant, along with other companies tendered for the works.

However, by a letter dated 23rd July 2018, the applicant was formally advised by the first respondent that her submission for the tender was not successful for reasons contained in that letter, including the reason that the applicant had submitted misleading information. On 27th July 2018, the applicant lodged an application with the first respondent for an administrative review praying for suspension of tender process pending determination of her administrative review application

lodged. By a letter dated 1st August 2018, the administrative review sought was turned down for lack of basis, with an advice that the applicant improve her participation by bidding for future works. The applicant was aggrieved by the first respondent's decision and on 6th August 2018, she lodged Appeal Case No. 3 of 2018-19 to the second respondent impleading the first respondent as the sole respondent.

As the tenure of the members of the second respondent had expired, and none had been appointed, its Executive Secretary informed the applicant that her appeal would not be determined for want of an active forum. This communication aggrieved the applicant who approached the High Court, with an application for leave in order to lodge an application for judicial review to seek for prerogative writs of *certiorari* to quash the order of the first respondent.

A preliminary objection was taken out at the instance of the present respondents, on grounds that; **first**, as there was no order of the second respondent, there was nothing to quash, in case leave was to be granted and an application for judicial review filed. **Second**, Shanghai Electric Power T & D Engineering which company was appearing as the second applicant, had no *locus standi* and; **third**, the application was incompetent for having been preferred under wrong provisions of law.

The High Court heard the first point of objection, and observed that it could only determine the application had there been in place an order of the second respondent. The court further observed that there was no law that gave it powers to entertain judicial review proceedings against the orders of the first respondent, because the remedies available against such orders are clearly stipulated in the Public Procurement Act, 2011, (the Procurement Act) and judicial review to the High Court is not one of such remedies. Based on that reasoning, the High Court upheld the objection and struck out the application with costs. That order aggrieved the applicant who approached this Court by way of the present revision proceedings.

Before us, like in the High Court, a preliminary objection was again taken at the instance of the respondents, namely that:

> *"The application for revision is bad in law for being preferred as an alternative to appeal and thus offending the mandatory provisions of Rule 65 of the Tanzania Court of Appeal Rules, 2009 as amended and practice of this Honourable Court."*

At the hearing of this application on 14th June 2022, the applicant was represented by Mr. Jeremiah Mtobesya, learned advocate and the respondents had the services of Messrs. Ayoub Sanga, Baraka Nyambita, Mjahidi Kamugisha and Bryson Ngulo, all learned State Attorneys.

Mr. Sanga is the one who argued the preliminary objection. At the outset, he submitted that there are three circumstances in which a matter may be challenged on revision. **First,** is where the process of appeal is barred by statute; **second** is where there are exceptional circumstances and; **third** is where the matter is *suo motu* called by the Court for revision. He submitted that the ruling and order of the High Court striking out the applicant's application for leave does not fall in any of the three categories. Consequently, he concluded that an application for revision has never been an alternative for an appeal. On that point, he relied on various decisions including; **Halais Pro- Chemie v. Wella A. G.** [1996] T.L.R. 269, **Moses J. Mwakibete v. The Editor, Uhuru, Shirika la Magazeti ya Chama and Another** [1995] T.L.R. 134 and **Transport Equipment Ltd v. Devram Valambhia** [1995] T.L.R. 161.

Mr. Sanga's contention was that the complaints of the applicant in this matter were not supposed to be brought by way of revision as it was done, rather if the applicant was aggrieved, he was at liberty to file appeal against the decision of the High Court. He implored us to strike out this application with costs on that score.

In reply, Mr. Mtobesya was of a diametrically opposite view. He submitted that the complaint of his client in this application is not an appealable complaint because, his client's grievance is that the High Court

Judge raised an issue on its own and did not resolve it. He contended that that complaint amounted to an exceptional circumstance, and also there was a statute that barred an appeal from such decision of the High Court. In support of that position, he sought to rely on section 5 (2) (d) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA), but when we told him to read it, he noted that the provision was not only prohibitive of appeals but also of revisions like the one he was pursuing. He thus would not make any headway in that direction. When we inquired from him as to the nature of the exceptionality he was alleging, he made a very prolonged submission but if we understood him well the exceptional nature of his client's complaint was, that he had no order of the second respondent not because of his fault but because of the absence of the that body's quorum to transact business under the law, in which case, he wanted the High Court to grant him leave so that it could quash the order of the first respondent. His further complaint was that, although the High Court noted the problem, it did not offer his client any practical solution, on what she should have done in the circumstances of a *lacunae* like the one that the High Court noted. The *lacunae* was that there was no provision in the Procurement Act providing for what should an appellant do when she presents her appeal before the second respondent at the time where its members' tenure is expired.

The other issue that Mr. Mtobesya was concerned with and which the High Court Judge, did not make a decision on, according to him, is whether the executive secretary of the second respondent has mandate, under the law, to declare that an appeal lodged before the second respondent is incapable of being determined. The totality of these, are the points which Mr. Mtobesya was all along bitter about and which he stressed were not appealable to this Court for, in his view, they constituted exceptional circumstances to warrant an application for revision to the Court. To support his position, he sought to rely on the decision of the High Court in **E1 Limited v. Bank of Tanzania and Another,** Miscellaneous Cause No. 2 of 2022 (unreported).

In rejoinder, Mr. Sanga, submitted that if Mr. Mtobesya's client was aggrieved with the *lacunae* or any deficiency in the Procurement Act, this Court is not an appropriate forum for legislative amendments. This Court cannot address his grievances in revision proceedings either, he contended. Otherwise, he reiterated his earlier submission and beseeched the Court to dismiss the application with costs.

In this matter, we attentively listened and clearly heard counsel for and against this matter. We also very carefully studied the record of this application and in our view, the issue that stands bare before us unresolved and that seek determination in the context of the preliminary

objection raised on behalf of the respondents, is whether the complaint of the appellant against the order of the High Court is not appealable.

We will start with the nature of the complaint itself. Although we did not have the advantage of reading the chamber summons, affidavit, counter affidavit or any document lodged in the High Court, for no such documents were included in the record of the application before us, nonetheless, reading the notice of motion, one notes that the applicant is aggrieved by the High Court's decision of striking out the applicant's application on a preliminary objection thereby denying the applicant leave to present his judicial review application. The reason, as indicated above, was that there was no order which would be subjected to judicial review, should the application for leave be entertained and finally granted.

We agree with the authorities cited by Mr. Sanga that, an application for revision is not an alternative for an appeal, but those decisions did not tell us whether an order refusing leave to file an application for judicial review is one of the orders that are appealable. Generally, all orders of the High Court come to this Court by way of appeal under section 4 (1) of the AJA. However, under certain circumstances a revision may be entertained particularly under section section 4 (2) of the AJA when hearing an appeal or may be initiated afresh under section 4(3) of the AJA.

In **Halais Pro- Chemie** (supra), this Court set out four circumstances, where a party aggrieved by an order of the High Court may seek revision instead of appealing. The circumstances in that decision are; **one,** where the court on its own motion calls for the record of the High Court for revision; **two,** where there are exceptional circumstances; **three,** where matters complained of are not appealable with or without leave and; **four,** where the process of appeal has been blocked by judicial process.

Otherwise in **Moses J. Mwakibete** (supra), this Court observed that: -

> *"Before proceeding to hear such an application on merits, this court must satisfy itself whether it is being properly moved to exercise its revisional jurisdiction. The revisional powers conferred by ss (3) were not meant to be used as an alternative to the appellate jurisdiction of this court. In the circumstances, this court, unless it is acting on its own motion, cannot properly be moved to use its revisional powers in ss (3) in cases where the applicant has the right of appeal with or without leave and has not exercised that option."*

With respect to Mr. Mtobesya therefore, much as he stated that his complaint fell under exceptional circumstances, we did not find any

exceptionality of the order that is challenged before this Court. If it is that the Procurement Act does not exhaustively provide for certain eventualities, and therefore deficient, still neither the High Court nor this Court has prerogative powers under the Constitution to enact laws or to amend them, assuming, that, that is the exceptionality of the order of the High Court.

Nonetheless, relevant to this ruling, we think, is the case of **Joseph Massanja v. The Principal Secretary, Prime Minister's Office, Regional Administration and Local Government and Another**, Civil Appeal No. 31 of 2009 (unreported), where this Court, in a more or less similar scenario, observed that:

> *"With respect, in the matter before us, Shayo J. determined* ***an application for leave to apply for prerogative orders****. He did not finally determine an application for the prerogative orders of certiorari one way or the other. The application before Shayo J. did not fall within the purview of section 17 (5) above.* ***Therefore, this is a matter in which leave was required under section 5 (1) (c) of the Act. In the absence of leave applied for and granted by the High Court, or the Court of Appeal under paragraph (c) above, Ms. Angela Temi, learned Senior State Attorney for the***

respondents, urged us to strike out the appeal.

Following the above concession by Mr. Sangawe and the submission of Ms. Temi, both of which we subscribe and agree to entirely, ***we hereby strike out the appeal with costs."***

[Emphasis added]

In the above matter, the order challenged was a dismissal of an application for leave to permit the appellant to apply for prerogative remedies, like the applicant was doing at the High Court in the matter at hand. In that appeal, the appellant appealed but had not first sought and obtained leave of the High Court or of this Court to do so, and the above was the outcome. We do not think we are going to depart from that position. The position is that an order of the High Court, for whatever reason, refusing an application for leave to apply for prerogative remedies is appealable, according to law, and not subject of revision.

Accordingly, we are inclined to observe that this application is incompetent because, instead of lodging an appeal to this Court, according to law, the applicant lodged this application for revision under section 4 (3) of the AJA and rule 65 (1) of the Rules, seeking revision of an appealable order.

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

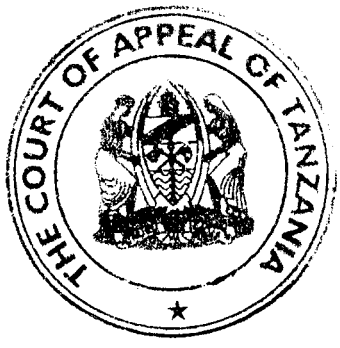
DATED at **DAR ES SALAAM** this 17th day of June, 2022

S. E. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 17th day of June, 2022 in the presence of Mr. Nashon Nkungu, learned counsel for the Applicant, Mrs. Joyce Yonazi, State Attorney for the 1st, 2nd and 3rd Respondents, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL