IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 232/16 OF 2019

SANYOU SERVICE STATION LIMITED..... APPLICANT

VERSUS

BANK OF BARODA TANZANIA LIMITED..... 1ST RESPONDENT

CHARLES R.B. RWECHUNGURA *(Receiver and Manager of Sanyou Service Station Limited)*..... **2ND RESPONDENT**

TSN OIL LIMITED..... ..... 3RD RESPONDENT

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

(Bukuku, J.)

dated the 30th day of November, 2012

in

Commercial Case No. 86 of 2012

.....

RULING OF THE COURT

14th & 20th June, 2022

GALEBA, J.A.:

For a full and complete comprehension of the nature of the applicant's complaint in this application and to appreciate the manner in which we will have to determine this application, a thorough background of the relevant facts preceding the matter, is very crucial. So, we will take some time to navigate it before we can come to the actual

substance of the application, the parties' arguments, and finally the Court's determination.

By a mortgage created on 25th November 2004 (the mortgage), the applicant charged in favor the first respondent, all the properties erected on Plot No. 672 Mikocheni Medium Density Phase II with Certificate of Occupancy No. 47117 (the mortgaged property). The mortgaged property, was charged as security against two financial accommodations extended to the applicant by the first respondent. The financial facilities accessed to the applicant were; an Overdraft Facility of Tanzania Shillings Four Hundred Million (TZS. 400,000,000.00) and a Term Loan Facility of Tanzania Shillings Two Hundred Thirty Million (TZS. 230,000,000.00) with a total exposure of Tanzania Shillings Six Hundred Thirty Million (TZS. 630,000,000.00).

It appears that, subsequently the applicant did not perform its financial commitments under the mortgage as agreed. Thus, in enforcement of the first respondent's rights under the mortgage, pursuant to the powers provided for under clause 6.03 of that deed, on 8th May 2012 the first respondent appointed the second respondent as

Receiver and Manager of the applicant. Among, the early activities performed by the second respondent subsequent to his appointment, was to dispose of the mortgaged property to State Oil (T) Limited (not a party to this matter). This sale, is not at all contested in this application, and presumably that is the reason why the purchaser of the property is not made a party to the application at hand.

It is alleged also that at the time of the receivership, the applicant was indebted not only to the first respondent but also to the third. So, subsequent to the appointment of the second respondent as a Receiver Manager of the applicant, on 3rd August 2012 the third respondent instituted Commercial Case No. 86 of 2012 in the Commercial Division of the High Court at Dar es Salaam, against the second respondent. Among the prayers made in the plaint were for payment of TZS. 502,337,500.00 being outstanding bills on account of fuel that had been supplied to the applicant, but not yet settled at the time of filing the suit and TZS. 434,714,624.50 being loss of profits which would be earned had the third respondent continued to carry on business in the mortgaged property premises had her lease with the applicant not been terminated by the

Receiver Manager. The second respondent filed his Written Statement of Defense contesting the allegations.

On 20th September 2012, the second respondent withdrew the preliminary objections earlier raised and the first pretrial settlement and scheduling conference was convened ending with an order adjourning the matter for mediation to 15th November 2012. On the latter date, the matter was called before the Deputy Registrar who adjourned the mediation session to 13th December 2012. On 29th November 2012, the matter was called before the mediator Judge in the presence of Mr. James Evarist leaned advocate for the third respondent who was the plaintiff accompanied by Mr. Farouk, the third respondent's Principal Officer. On the defendant's side was Mr. Abdullah Abdallah learned advocate accompanied by Mr. Charles R. B. Rwechungura, the Receiver Manager in person. At that session the following transpired:

> ***"Mr. Evarist:*** *The matter is coming for mediation. I am with Mr. Farouk the Principal Officer. We are ready to proceed.*
>
> ***Mr. Abdul:*** *We have been served with a number of documents to support the claim, my client's*

position has been to pay all lawful creditors in which he is a receiver manager. We request that we adjourn for a short period so that, the plaintiff and the defendant go through the documents and agree on the amount payable so that we meet, we shall report settlement.

Mr. Evarist: *I concur with that position.*

Court: *Prayer granted.*

Order: *Mention on 30th November, 2012 at 10:30 a.m. to gauge progress on negotiations.*

Sgd:
A. E. Bukuku
Judge
29/11/2012."

At the risk of making this ruling longer than it would have been otherwise, we deem it appropriate to reproduce the proceedings of the High Court dated 30th November 2012 and 10th December 2012. The latter date, is the last day that the said Commercial Case No. 86 of 2012, was called before the High Court. The proceedings are as follows:

"Date: 30/11/2012
Coram: Hon. A. E. Bukuku, J.
For the Applicant: Mr. James Evarist.

For the Respondent: Mr. Abdullah Abdallah.

Cc: Kanyochole, S. H.

Mr. Evarist: *The matter is coming for mention. The parties have agreed to the exact amount to be paid. We pray to present our settlement agreement which if accepted be turned into a decree of this court.*

Mr. Abdullah: *We are pleased to report that we met and on production of additional documents, the plaintiff was able to satisfy the defendant on the legitimacy of the claim. In the circumstances, both parties have agreed that defendant pay the plaintiff company a total of Tshs. 806,637,734.00 in full and final settlement of the plaintiff claims.*

Court: *Parties having settled the matter amicably; it is ordered:*

Order: *The matter is marked settled. The Settlement Agreement filed in this court today 30th day of November, 2012 shall be deemed to be the decree of this court.*

Sgd:
A. E. Bukuku
Judge

30/11/2012

Date: 10/12/2012

Coram: Hon. A. E. Bukuku, J.

For the Applicant: Mr. James Evarist, Advocate.

For the Respondent: Mr. C. Rwechungura, Advocate.

Cc: Kanyochole, S. H.

Mr. Rwechungura: *You entered a consent order based on a settlement agreement which was filed on 29th November, 2012. Subsequent to that, both parties realized that there was a clause which both parties had agreed to be part of the consent order. Inadvertently, we included the clause in the preamble but did not make it part of the issue agreed upon, as a result the order did not include that clause. We have agreed that we seek leave of the court to apply orally so that the order is amended by adding the following proviso at the end of para 2 (v) of the Settlement Agreement. The Proviso reads:*

"Provided however, that the decretal sum shall be certified from the balance of Sanyou Service Station lying in the No lien account with the Bank

of Baroda after satisfying the liability of the bank fully including the costs of the receivership.
That's all.

Mr. Evarist: *I have no objection to the request. My request is that, the amendment should not change the date of the decree. It should remain i.e. 5th December, 2012. The rationale being that, the payment was to be effected in 7 days from the date the decree was issued.*

Court: *Prayer to amend the decree granted.*
Order: *The decree of this Court dated 30th day of November, 2012 is hereby amended as requested, retrospectively.*

Sgd:
A. E. Bukuku
Judge
10/12/2012."

So, everything in Commercial Case No. 86 of 2012 was wound up on 10th December 2012 by the above order. Now leap forward seven years later on 21st June 2019, after a successful application for extension of time to file it, as ordered by this Court in Civil Application No. 16/16/2018, this application was ultimately filed. Three grounds were

fronted as a foundation upon which the application is grounded. The grounds are as follows, according to the notice of motion:

> *"1. The 2nd Respondent who was sued in the capacity of Receiver and Manager of the Applicant, and who filed a Written Statement of Defence in his personal capacity, not in the capacity of a Receiver and Manager as such, and who continued to plead matters involving the receivership which had no locus standi to be sued in respect of the affairs of the applicant, and to admit the liability thereof, and to facilitate the procurement of the judgment in favour of the 3rd Respondent.*
>
> *2. The settlement Agreement pursuant to which a consent judgment was entered by the High Court parted company with the pleadings. While in the said Settlement Agreement the defendant who admitted the claim was Charles R. B. Rwechungura as Receiver and Manager of Sanyou Service Station Ltd, the WSD, proceedings and decree had Charles*

R. B. Rwechungura, in his personal capacity.

3. *The proceedings leading to the decree are tainted with illegality and misdirection in the following material particulars;*

   (i) *Mediation, being a mandatory requirement in the proceedings conducted under the Civil Procedure Code, Cap 33 R.E. 2002, was in total defiance of the law in that the case was prematurely placed before the mediator before pleadings were complete.*

   (ii) *The Trial Judge wrongly played both roles of being a judge and mediator in the same case.*

   (iii) *The Mediator Judge could not validly pass a judgment on a date of mention.*

   (iv) *After the mediator had become functus officio by entering a judgment on settlement on 30th November, 2012, proceedings could not be "unofficially" re-*

opened for amendment of the decree on 10th December, 2012.

(v) In entering a consent judgment, the court did not take into account that what was at stake and subject of suit was money belonging to the applicant, a non-party to the suit and by converting a settlement agreement into a judgment affecting his property without hearing him, the court offended the principles ***audi altarem paterm.***"

In terms of rule 48 (1) of the Tanzania Court of Appeal Rules 2009 (the Rules), the notice of motion was supported by an affidavit of Mr. Ajay Somani the Principal Officer of the applicant. It was also resisted by the affidavits in reply by one Nesta Pelas the Head of Credit from the first respondent and Mr. Charles Rutayuga Burchard Rwechungura, the second respondent. There was no affidavit in reply on behalf of the third respondent. Subsequent to filing the above documents, parties, except the third respondent, filed written submissions to support their respective positions.

When the application was called on for hearing before us on 15th June 2022, the applicant was represented by Mr. Samson Mbamba, learned advocate, whereas the first and the second respondents had the services of Mr. Gerald Shija Nangi, learned advocate. Mr. Imam Hassan Daffa also learned advocate, was representing the third respondent company.

After Mr. Mbamba sought to adopt the written submissions which had been lodged earlier on under rule 106 (1) of the Rules, he took the floor to address the Court on the merits of the application. His strongest and first attack to the High Court order of 30th November 2012, was that the court was wrong to have entertained the proceedings in which Mr. Charles Rwechungura had no *locus standi* to defend a matter on behalf of the applicant. Elaborating on that point, he contended that at the time the suit was being lodged in the High Court on 3rd August 2012, the mortgage pursuant to which he had been appointed Receiver Manager, had been discharged. He submitted that the mortgage having been discharged on 5th June 2012, the second respondent's appearance and presenting any papers in court were all unlawful acts, and no valid orders

could have proceeded from proceedings in which the second respondent erroneously participated. He contended that the second respondent's powers to act as a Receiver Manager of the applicant were derived from the mortgage and the land laws. To be particular on the laws relating to powers of Receiver Managers of defaulting borrowers under landed securities, he cited sections 127 (5) and 132 (3) of the Land Act [Cap 113 RE 2002]. To substantiate his point further, Mr. Mbamba referred us to paragraph 4 of Mr. Somani's affidavit.

Mr. Mbamba also referred us to the Discharge of Mortgage instrument dated 5th June 2012 included at page 24 of the record of this application, which, according to him, evidences discharge of the mortgage over the mortgaged property. His further understanding was that 5th June 2012 is the exact date, on which the second respondent's powers of receivership and management of the applicant ceased, following discharge of the mortgage on the same day.

Finally, Mr. Mbamba submitted that the issue of *locus standi* is a serious matter of jurisdiction and he referred us to the case of **National Housing Corporation and Another v. Property Bureau (T)**

Limited, Civil Appeal No. 91 of 2007 (unreported). He stated that the court ought to have ascertained its jurisdiction in terms of *locus standi* of parties, before starting to entertain that case. Essentially, he moved the Court to nullify the proceedings of the High Court and make orders as prayed in the notice of motion, even on this point alone.

As for Mr. Nangi, like his counterpart, he prayed to adopt his clients' submissions and went straight to the point. He submitted that it is not true that the receivership assignments of the second respondent ceased on 5th June 2012, or that the Receiver Manager derived powers of receivership from only the mortgage instrument or the sections of the Land Act cited. He criticized Mr. Mbamba for not including other security documents in his record of the application as stated in the notice of appointment of a Receiver Manager contained at page 21 of the record of application. By that contention, he meant that there are in existence other security documents under which receivership could continue irrespective of the discharge of the mortgage. Mr. Nangi contended that even the alleged discharge of the mortgage did not concern the

mortgage in question, for the mortgage which was discharged was on different filed documents.

As for Mr. Nangi, receivership of the second respondent ceased on 17th January 2014, when the second respondent lodged a Notice of Ceasing to act as a Receiver or Manager in terms of section 106 (2) of the Companies Act, [Cap 212 R.E. 2002, now 2019]. He contended that the issue of *locus standi* does not arise in the circumstances of this matter because upon appointment, the second respondent became the attorney and agent of the applicant. The point he was trying to drive home was that the second respondent was all along a Receiver Manager of the applicant and had the applicant's full powers and authority to do all that he did until 17th January 2014 when he formally notified the Registrar of Companies, under the law, that he ceased to act as such. He finally moved the Court to dismiss this application with costs for want of merit.

For the third respondent was Mr. Daffa. He supported the submissions of Mr. Nangi and added a few points concerning the validity of documents in this application. His point was that this application

cannot be determined because there is no authentic record of the High Court upon which the Judge of that court can be challenged. He stated that all documents which were annexed to the Plaint and to the Written Statement of Defense are worthless because the case did not go up to admissibility where some of the documents might have been declared inadmissible. If we understood Mr. Daffa well, what he meant was that in this application what we should take as valid record should be only the substantive body of the Plaint and the Written Statement of Defense without taking into account the annexures, whose admissibility was not tested, hence worthless. We understood him also to mean that as the judge did not make any decision based on any such annexures, that court cannot be criticized on documents it did not consider when making a decision. He finally prayed that this application be dismissed with costs.

In rejoinder, Mr. Mbamba was brief. He submitted that the document mentioned by Mr. Nangi of ceasing to act as a Receiver Manager that was lodged at the Registrar of Companies under the Companies Act, was just a mere formality with no force of law, maintaining his original position that legally, the second respondent

ceased to be a Receiver when the mortgage was discharged on 5th June 2012. On the documents included in the record of the application, he submitted that all documents could be disregarded in determining this application except the pleadings and the orders that were passed by the court. He was however not at one with Mr. Daffa on the documents that were attached with the pleadings, for, to him, those documents constituted part and parcel of the record of the High Court which should be subject of scrutiny in this application.

Before Mr. Mbamba could wind up his submissions, we put to him two pertinent points for his clarification: **one,** whether by his submissions he meant that by the second respondent pleading, appearing and entering a consent decree on behalf of the applicant without authority of the applicant, he committed a misconduct by presenting himself as a person with mandate to plead on behalf of the applicant and even concede to the case, whereas he had no such mandate. **Two,** we inquired from Mr. Mbamba whether it was illegal for a mediator during mediation to record a consent settlement of the case

reached by the parties amicably like what the High Court did in the case before it.

In response to the first point, Mr. Mbamba told us that he did not mean that Mr. Rwechungura committed any misconduct at the High Court, by entering a consent settlement on behalf of the applicant. On a follow up question, if such was his position, then what was it that the second respondent did which aggrieved his client leading to commencement of such a huge litigation claiming hundreds of millions of shillings from him. He stated that what the second respondent did was just minor error. With that reply, sincerely it appeared to us like Mr. Mbamba was blowing both hot and cold at the same time, but we will come to this aspect a while later in this ruling.

As for the second question, Mr. Mbamba was unhesitatingly straight forward that if parties at a mediation session agree to settle the dispute that was brought to court, it is perfectly legal for the mediator to record such a consent settlement.

With the above background of the case, in our view, two issues stand out very clear; the **first** is whether the second respondent had

mandate of the applicant between August 2012 and December 2012 when he filed the Written Statement of Defence, appeared in court and actively participated in settlement of the suit and; the **second**, is whether that first issue can be determined in these revision proceedings. In terms of sequence, we propose to start determination of the second issue.

In this application presented under section 4(3) of the AJA, the notice of motion is to the effect that:

> *"TAKE NOTICE THAT, on the .....day of .....2019 at .....o'clock in the forenoon or soon thereafter as can be heard, MR. SAMSON EDWARD MBAMBA, the advocate for the above named applicant will move the court for revision against the decision of the Hon. Madam Justice A. Bukuku dated 30th November 2012 in commercial case No. 86 of 2012* ***and payment of a total of Tshs, 937,052,120.00 (the proceeds of sale of the applicant's property) made by the 1st Respondent in execution of the decree consequent from the decision thereof be ordered to be reimbursed to the applicant".***

[Emphasis added]

The above prayer although, it seeks revision of the court order but it casts a blame and points an accusing finger to the acts of the second respondent. The blame is more on that party to the suit than it is to the court. Briefly the major prayer in this application is to compel the second respondent and not the High Court to reimbursed TZS. 937,052,120.00 to the applicant which was realized by the second respondent from sale of the mortgaged property. Clearly, this is an application in which the applicant is questioning the conduct of the second respondent in court which led to payment of the money to some third parties, which the applicant now wants reimbursed to her.

This complaint is specifically levelled against the second respondent, not only in the notice of motion, but also the complaint is scattered throughout the affidavit and the written submissions of the applicant. In the affidavit, the complaint is referred to at paragraphs 4, 5, 9, 10, 16, 19, 20 and 21. For instance paragraphs 4, 10 and 20 read as follows:

"4. On 5th June 2012 the mortgage was discharged

and such discharge was registered by the Registrar of Titles by Filed Document No. 145100. Henceforth the receiver Manager's powers under the mortgage ceased.

10. The second respondent filed a written statement of defense in his own and individual capacity not as a Receiver Manager denying the claim.

20. That the case was settled on the basis of the

list of delivery notes and Tax Invoices which were said to have been thoroughly scrutinized by the advocate for the 2nd Respondent, did not tally with each other and were in excess of the claim in the plaint."

The complaints in paragraphs 4, 5, 9, 10, 16, 19, 20 and 21 of the affidavit seek to justify the first ground upon which this application is based. We risk to reproduce it here for the second time only to facilitate quick reference. That ground upon which this application is based, is as follows:

"The 2nd Respondent who was sued in the capacity of Receiver and Manager of the Applicant, ***and who filed a Written Statement of Defense in his personal capacity, not in the capacity of a Receiver and Manager as such, and who continued to plead matters involving the receivership which had no locus standi to be sued in respect of the affairs of the applicant, and to admit the liability thereof, and to facilitate the procurement of the judgment in favour of the 3rd Respondent."***

[Emphasis added]

Again, submissions both written and oral before us, talk the same language. In the written submissions, the applicant's bitterness on the complaint that Mr. Rwechungura acted without her authority or mandate is seriously stressed and echoed throughout the written submissions of the applicant particularly on pages 4, 5, 6 and 7. For instance at page 7 of the submissions of the applicant, it is submitted thus:

"Honourable Judges of Appeal, The settlement agreement is at page 148 – 151 of the record of revision. In there, the defendant who admitted

the liability is different from the one who filed a defence. In the written statement of defense, already submitted above, the defendant is Charles R. B. Rwechungura, while in the Settlement Agreement is Charles R. B. Rwechungura, Receiver and Manager of Sanyou Service Station Limited.

Hon. Judges of Appeal, The decree and amended decree which emanated from the Deed of Settlement ***after admission of liability by the defendant in his own name does not indicate that the judgement debtor is Receiver Manager or Sanyou Service Station but one Charles R. B. Rwechungura****."*

[Emphasis added]

Coupled with Mr. Mbamba's oral submissions, it all boils down to a clear blame by the applicant towards the second respondent as to his acts and conduct in the High Court, particularly the acts of masquerading and falsely presenting himself before the court as an authentic defendant, acting with authority of the applicant whereas he had not. Reading the application in totality, that is what one gathers. We must at

this juncture, too, settle one issue albeit by observation. The huge amount of blame loaded on the shoulders of the second respondent in this application, is inconsistent and very far from Mr. Mbamba's submission that the error of the second respondent in the High Court, was just a trivial one. Our observation is that, had acts of the second respondent in the High Court been that trivial or minor in the eyes of the applicant, the orders sought in this application by the same applicant would not have been that far reaching in potential consequences.

With the above discussion, we have thoroughly reviewed the entire record of the case at the High Court as presented. We also carefully and for quite some time listened, heard and understood counsel for all parties, and having done so, we need to answer the second issue, that is whether, indeed the complaints of the applicant levelled particularly against the second respondent can be resolved by way of revision. We formulated this issue because this application was brought under section 4 (3) of the AJA, which provides that:

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record*

of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."

Under the above law, this Court is seized with jurisdiction to examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or decision of that court. That is our mandate under the law. This Court has no mandate to investigate conducts of parties who may have been sued in their professional capacities and make orders correcting their misconducts or errors that they committed be minor or major. For instance, the Court has no jurisdiction under section 4 (3) of the AJA, to investigate sale of the mortgaged property and order that the money paid be reimbursed to the applicant. Further, this Court does not have jurisdiction under the above section of the AJA to take evidence in order to establish when exactly the receivership and management powers of the second respondent ceased. The documents of discharge of mortgage for instance, and that from the Registrar of

Companies, none was tendered in court to pass the admissibility test. We find too, that this Court cannot rely on any document without such documents having been formerly tendered in an appropriate forum with mandate to assess, not only admissibility but also evidential weight or value of such documents. In this application for revision, without taking evidence, we cannot, under the law, be able to agree or disagree with any of the parties on the issues presented in this application. Essentially, to resolve the complaint of the applicant, she must look for an appropriate forum vested with jurisdiction to resolve her dispute after taking evidence.

In the circumstances, we hit a dead end beyond which we cannot legally move an inch. We cannot therefore, resolve the **first** issue of whether the second respondent had mandate of the applicant between August 2012 and December 2012 when he actively participated in settlement of the suit. Thus, we find no escape route, not even the narrowest, through which we can get any further beyond this point, in these revision proceedings.

Thus, this application is, in the circumstances, not maintainable. For the above reasons we strike it out 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

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Ruling delivered this 17th day of June, 2022 in the presence of Ms. Halima Semanda holding brief for Mr. Simon Mbamba, the learned counsel for the Applicant, Ms. Jaquiline Mazula holding brief for Mr. Gerald Nangi, learned counsel for the 1st and 2nd Respondents, Ms. Halima Semanda, the learned counsel for the 3rd Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL