IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CONSOLIDATED CIVIL APPLICATIONS NOs. 165/16 & 518/16 OF 2019

NONDO KALOMBOLA

t/a N.J. PETROLEUM SPRL.....1ST APPLICANT

AMANI ETCHA.....2ND APPLICANT

VERSUS

BROADGAS PETROLEUM (TZ) LIMITED.....1ST RESPONDENT

SAID MUSSA MSWAKI.....2ND RESPONDENT

WYCLIFFE MAHAMBAYU SHILAYO.....3RD RESPONDENT

JOHN KIPKORIR CHESUM.....4TH RESPONDENT

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

(Sehel, J.)

dated 1st of March, 2019

in

Commercial Case No. 59 of 2013

.....

RULING OF THE COURT

14th & 27th June, 2022

KWARIKO, J.A.:

When this application was called on for hearing, at the instance of the learned counsel for the parties, the Court Consolidated Civil Applications Nos. 165/16 and 518/16 of 2019 which arose from the decision of the High Court of Tanzania, Commercial Division at Dar es

Salaam in Commercial Case No. 59 of 2013 dated 8th January, 2015. In that case, the applicants herein sued the respondents for payment of specific damages at the tune of USD 240,000.00 or its equivalent in Tanzanian shillings as refund for payment incurred in the procurement of 240,000 litres of petrol, general damages of USD 50.000.00 or its equivalent in Tanzanian shillings, interest and costs of the suit. The respondents refuted the claims and blamed the applicants for delay to deliver the consignment.

At the end of the trial, the applicants won the suit and the respondents were jointly and severally ordered to pay the amount claimed for specific and general damages of USD 240,000.00 and USD 50,000.00, respectively or its equivalent in Tanzanian shillings, interest on the specific damages at commercial rate of 17% per annum from the date of filing the suit till the date of judgment and at court's rate of 12% from the date of the decree till full payment and costs of the suit.

The respondents failed to satisfy the decree after which the applicants filed application for execution where two houses, the property of the second respondent, were attached and sold to satisfy the decree. However, the proceeds of the sale did not fully clear the decreed amount since a total of TZS. 579,939,465.86 remained outstanding.

To realise that amount, the applicants filed an application before the trial court praying for arrest and detention in prison of the second, third and fourth respondents. The application was granted and in terms of section 46 read together with Order XXI rule 28 of the Civil Procedure Code [CAP 33 R.E. 2002; now R.E. 2019] (the CPC), the court ordered for the arrest and detention of the second, third and fourth respondents and to be committed in prison as civil prisoners for a period of six months unless the decretal sum is paid. However, the second respondent was the only one available and thus he was arrested and detained in prison as ordered by the trial court.

Aggrieved by that order, the second respondent, while in prison, lodged Civil Application No. 165/16 of 2019, for revision by way of a notice of motion taken under section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA), urging the Court to call for and examine the records of the trial court to satisfy itself of the correctness, legality or propriety and regularity of the order of his arrest and detention in civil prison. The application has been supported by the affidavit of one Leocard W. Kipengele, learned advocate for the second respondent. In his affidavit, the deponent, apart from reiterating the chronological account of the events that unfolded following the issue of the trial court's decree, he complained that in execution of the decree,

the second respondent's properties were sold extremely below 75% limit set by the law. He also complained that, the warrant for arrest and detention dated 1st March, 2019 condemned the second respondent only to pay the debt imposed on four different persons and nothing was said in respect of the remaining judgment debtors.

The said application was resisted through an affidavit in reply taken out by one Simon Shundi Mrutu, learned advocate for the applicants who essentially deponed that the properties were sold at the market value and the second respondent did not object to the sale despite being fully notified about the public auction. He also deponed that, on 1st March, 2019 the trial court only committed the second respondent in prison, whereas it had ordered the arrest and detention of all judgment debtors in November, 2018.

On the other hand, following completion by the second respondent's period of six months in prison, the applicants herein filed at the trial court another application for execution of the decree in Misc. Commercial Application No. 69 of 2019 for the respondents to immediately pay the outstanding decretal amount of TZS. 576,939,465.86 or else they be ordered to show cause why the arrest and detention order should not be extended to them for failure to satisfy the decree. This application was opposed by the respondents. At the

end, the trial court dismissed the application and observed that the order of arrest and detention it issued against the third and fourth respondents on 29th November, 2018 was still in force and the decretal amount plus other justified charges be satisfied by all judgment debtors.

Dissatisfied by the trial court's order, the applicants have also preferred an application for revision against the respondents in Civil Application No. 518/16 of 2019 which has been taken by a notice of motion under section 4 (3) of the AJA. The application is supported by the affidavit of one Roman S.L. Masumbuko, learned advocate for the applicants who deponed that the trial court erred in changing the new application into an extension of the first order knowing that the second respondent had paid nothing to satisfy the decree. Mr. Masumbuko also averred that, the trial court also considered extraneous matters like the right to safeguard the freedom of the judgment debtor without consideration to the legal need to satisfy the decree, thus that decision technically exonerated the second respondent from the judgment of the same court. It was also averred that the court abrogated its duty to execute its own decree and the suggestion that the decree should be satisfied by the rest of the respondents is bias and without legal backup since the judgment was entered jointly and severally against the respondents.

The application is opposed by the second respondent where in his affidavit in reply, he deposed that, following the sale of his properties, he has satisfied the decree on his part. He also denied to be the Managing Director of the first respondent.

At the hearing of the application, the applicants were represented by Mr. Roman Masumbuko, learned counsel, whilst the respondents had the services of Mr. Augustino Ndomba, also learned counsel. However, before the hearing could commence in earnest, the Court wanted to satisfy itself as to whether the impugned orders are appealable or not in terms of the provisions of section 5 (1) (b) (viii) of the AJA. We thus called upon the learned counsel for the parties to address us on this issue.

When he took the stage, Mr. Masumbuko argued that the two applications are properly before the Court. He expounded that section 5 (1) (b) of the AJA provides for appeals to the Court from orders of the High Court exercising its original jurisdiction where sub-section (viii) thereof provides an exception to the effect that no appeal lies in respect of the order for arrest and detention in prison in execution of a decree. He thus contended that the impugned order is not appealable because the exception in that subsection has blocked the appeal process. He

went on to argue that, had the legislature intended this order to be appealable, it would have expressly stated so.

In his further argument, Mr. Masumbuko submitted that the impugned order is not appealable as it is also prohibited under Order 42 rule 7 (1) of the CPC. Upon being probed as whether he was aware of the decision of this Court in **Ms. Farhia Abdullar Noor v. Advatech Office Supplies Limited & Another,** Civil Application No. 261/16 of 2022 (unreported) where it was clearly stated that an order of the High Court for arrest and detention to civil prison of the judgment debtor in execution of the decree is appealable with leave, he responded that, the said decision is distinguishable from the instant application because it did not address the issue of arrest and detention in execution of the decree.

On his part, Mr. Ndomba argued that the applications are not properly before the Court as the parties ought to have appealed against the impugned orders in terms of section 5 (1) (b) (viii) of the AJA. He fortified his argument with the decision of the Court in **Hamoud Mohamed Sumry v. Mussa Shaibu Msangi & Two Others,** Civil Application No. 255 of 2018 (unreported). He thus urged us to strike out the applications for being incompetent.

In rejoinder, Mr. Masumbuko argued that the case of **Hamoud Mohamed Sumry** (supra) is equally distinguishable from the instant application because it dealt with lifting a corporate veil.

We have considered the submissions by the learned counsel for the parties and the issue which comes to the fore for our deliberation is whether the present applications are properly before the Court. It is trite law that the Court's power of revision can only be invoked; **one,** where there is no right of appeal; **two,** where right of appeal exists but has been blocked by a judicial process; **three,** where although a party has a right of appeal, sufficient reason amounting to exceptional circumstance exists; and **four,** where a person was not a party to the relevant proceedings of the High Court. – See for instance, the cases of **Transport Equipment Ltd v. Devram P. Valambhia** [1995] T.L.R. 161, **Moses Mwakibete v. The Editor, Uhuru and Two Others** [1995] T.L.R. 134, **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R. 161 and **Ms. Farhia Abdullah Noor** (supra).

The question which follows is whether the parties in these applications had the right of appeal. The right to appeal in civil matters is provided under section 5 (1) and (2) of the AJA. In particular, an order made by the High Court under the CPC in the exercise of its original jurisdiction, is appealable as of right except where it is expressly

provided otherwise as in the instant case where the impugned orders were ordered in execution of a decree. Section 5 (1) (b) (viii) which is relevant in this regard provides thus:

> *"5.- (1) 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-*
>
> *(a)...N/A*
>
> *(b) against the following orders of the High Court made under its original jurisdiction, that is to say-*
>
> *(i)-(vii)...N/A*
>
> *(viii) an order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person,* ***except where the arrest or detention is in execution of a decree.*** [Emphasis added].

According to this provision, an order for arrest and detention that is made in execution of a decree is not appealable as of right which means in our considered view, the appeal should be with leave as provided under section 5 (c) of the AJA, thus:

"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."

This view is supported by our previous decisions in **Ms. Farhia Abdullah Noor** and **Hamoud Mohamed Sumry** (supra). For instance, in the first case the Court when faced with an akin situation, referred to the above cited provisions and observed thus:

"Since in this case, the ruling was in relation to execution of the decree, it is not appealable as of right. It is however, appealable with the leave of the High Court or of the Court of Appeal under paragraph (c) of s.5 (1) of the AJA."

Following the above decision, with respect, we are unable to agree with the submission of Mr. Masumbuko that the two cited decisions are distinguishable from the instant application. In our considered view, both applications originated from the orders of the High Court on arrest and detention of the applicants in execution of a decree. The learned counsel also argued that section 5 (1) (b) (viii) exempts this order from appeal and if it was intended to be appealed with leave, the legislature would have stated so. As we have shown earlier, the provision is clear that an order of arrest and detention in execution of a decree is not

appealable as of right. It is only placed under the cited provision along with orders of the like nature.

In conclusion, since the applicants and the second respondent had a right of appeal, they should not have invoked the revisional jurisdiction of the Court. See also our decision in **Siemens Limited & Another v. Mtibwa Sugar Estates Limited,** Civil Application No. 106 of 2016 (unreported).

We thus agree with Mr. Ndomba that the applications are incompetent before the Court which we hereby strike out. In the circumstances of the case, each party to bear its own costs.

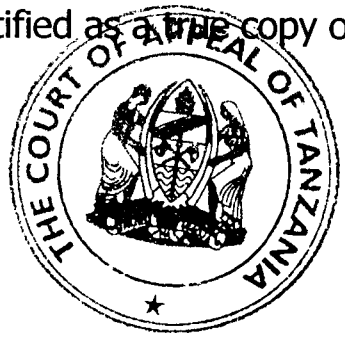
DATED at **DAR ES SALAAM** this 24th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 27th day of June, 2022 in the presence of Mr. Augustino Ndomba, learned counsel for the Applicant and Ms. Velena Clemence, learned counsel for the Respondent, is hereby certified as a true copy of original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL