IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 364/16 OF 2020

FES ENTERPRISES COMPANY LIMITED .....APPLICANT

VERSUS

SERENGETI BREWERIES LTD .....RESPONDENT

(Application for revision of the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Magoiga, J.)

Dated the 24th day of July, 2020
in
Misc. Commercial Application No. 135 OF 2019

.....

RULING OF THE COURT

25th August & 13th September, 2022

KIHWELO, J.A.:

This is an application in which the applicant, FES ENTERPRISES COMPANY LTD is seeking to challenge the ruling and drawn order of the High Court of Tanzania, Commercial Division at Dar es Salaam (Magoiga, J.) in Miscellaneous Commercial Application No. 135 of 2019 dated 24.07.2020.

The brief background leading to the instant application may be gleaned from the records as follows; the applicant and the respondent SERENGETI BREWERIES LTD, entered into a distribution agreement for the supply of the respondent's products such as beer and spirits within Chang'ombe and Kiwalani areas in the city of Dar es Salaam. The applicant is alleged to have

breached the distribution agreement the result of which the respondent through the services of NexLaw Advocates of Dar es Salaam commenced Commercial Case No. 76 of 2019 which was filed in the High Court of Tanzania, Commercial Division at Dar es Salaam on 08.07.2019. It is further alleged that efforts to serve the applicant with notice of hearing proved futile according to the sworn affidavit of the process server. A prayer was made and granted to serve the notice of hearing by substituted service through publication in the Daily News and Mwananchi both of 26.09. 2019. It is alleged that neither Written Statement of Defence was filed within the statutory 21 days nor extension of time was sought until on 05.11. 2019 when the applicant, through the legal services of Mbamba and Company Advocates lodged an application for extension of time within which to file Written Statement of Defence. The application was greeted with preliminary points of objection which the court had to dispose first. Upon hearing the parties, on the preliminary points of objection the High Court found out that the preliminary objection was meritorious and consequently, the application was dismissed.

In the quest for justice the applicant has come before this Court by way of notice of motion predicated on section 4(3) of the Appellate Jurisdiction

Act, [Cap. 141 R.E. 2002; now R.E. 2022] ("the Act") as well as rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

When the application was called for hearing before us, Mr. Samson Mbamba, learned advocate appeared, representing the applicant whereas, Mr. Ally Hamza and Mr. Ruben Robert both learned counsel appeared for the respondent.

But before the appeal could proceed to hearing in earnest, and as a rule of practice, the Court had to contend with the preliminary point of objection, notice of which had earlier on been lodged by the respondent, under rule 107 (1) of the Rules. The notice of preliminary objections was to the effect that:

> *"1. The application for revision is incompetent since the same arises from an interlocutory order contrary to Section 5 (2) (d) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019]*
>
> *2. This application for revision has been filed in an abuse of the court process since the applicant filed at the trial Court Miscellaneous Commercial Application No. 186 of 2020 containing prayers whose ultimate aim is for the applicant to be allowed to file Written Statement of Defence out of time like in this application, which was dismissed on the 19th November, 2021 and a notice of appeal dated 1st December, 2021 and filed in this court on the 3rd December, 2021, against that dismissal order, is now pending before this Court hence this renders the current application for revision to be overtaken by events."*

Upon the respondent being asked to take the floor and expound the preliminary points of objection, Mr. Hamza who began by arguing the first preliminary point of objection was fairly brief in his submission. In a nutshell, his contention was that the instant application offends the provisions of section 5 (2) (d) of the Act which bars any appeal or revision in respect of preliminary or interlocutory decisions or orders of the High Court unless such decision or order has the effect of finally determining the suit. Citing our previous decisions in **Moto Matiko Mabanga v. Ophir Energy PLC & Others**, Civil Appeal No. 119 of 2021 (unreported) page 14 of the typed decision and **Gideon Wasonga and Others v. The Attorney General & Others** Civil Appeal No. 37 of 2018 (unreported) page 10 of the typed decision, he argued that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings and therefore invited us to refer to the impugned ruling of the High Court specifically at page 220 which ruling did not terminate Commercial Case No. 76 of 2019 and thus, it was beyond question that the impugned ruling was not final and hence not amenable for revision, Mr. Hamza submitted.

Mr. Hamza went on to submit further that, this Court has pronounced itself in a number of occasions on the proper test to be applied in determining whether or not the decision or order is preliminary or interlocutory. To fortify

his argument, he referred us to our previous decisions in **MIC Tanzania Limited and Others v. Golden Globe International Services Limited,** Civil Application No. 1/16 of 2017 at page 5 of the typed decision, **Pardeep Singh Hans v. Merey Ally Saleh and Others,** Civil Application No. 422/01 of 2018 at page 8 of the typed decision and **Junior Construction Company Ltd and Others v. Mantrac Tanzania Limited** Civil Appeal No. 252 of 2019 pages 13, 14 and 15 of the typed decision (all unreported).

Submitting in support of the second point of preliminary objection, Mr. Hamza argued that, the application has been filed in the abuse of the court process and went on to contend that the same has been overtaken by events. Elaborating, Mr. Hamza referred us to Annexure "SBL-02" to the respondent's supplementary affidavit in reply, a chamber summons and its supporting affidavit seeking to set aside a default judgment and Annexure "SBL-01" to the same supplementary affidavit in reply which is a Judgment in Commercial Case No. 76 of 2019 and argued that on 20.11.2020 the suit was finally determined. Relying on the previous decision of this Court in the case of **Shabir Ebrahim Bhaijee and Others v. Selemani Rajabu Mizino,** Civil Application No. 40 of 2007 (unreported) he argued that the application should be dismissed with costs because it is overtaken by events.

Illustrating further on the abuse of the court process, Mr. Hamza contended that, the applicant filed multiple applications and a suit before the trial court referring to paragraph 4 of the respondent's supplementary affidavit in reply which describes the suit and other multiple applications which the applicant filed before the trial court. He rounded off his submission by praying that the application be dismissed with costs.

In response Mr. Mbamba elected to start with the second preliminary point of objection. The learned counsel contended that the issue of the application being an abuse of the court process was not a pure point of law no wonder the counsel for the respondent had to traverse across a number of documents filed along with the respondent's supplementary affidavit in reply to fortify his argument. To support the proposition put forward, he cited to us the case of **Mechmar Corporation (Malaysia) Benhard (In Liquidation) v. VIP Engineering and Marketing Ltd and Others,** Consolidated Civil Applications No. 190 and 206 of 2013 (unreported) page 15 of the typed decision in which we stressed that a preliminary point raised cannot qualify to be a preliminary objection if evidence will be required through perusal of documents filed in order to get the materials to support the respondent's claims. Mr. Mbamba wrapped up by arguing that, the Court

should refrain from entertaining this preliminary point of objection for the reasons assigned above.

Addressing the first point of preliminary objection, Mr. Mbamba was of the view that the impugned ruling was not interlocutory or preliminary because it finally determined the rights of the parties in as far as the right to stay the suit and extend the time within which the applicant could file written statement of defence was concerned. Reliance was placed on our previsions decisions in **Junaco (T) Ltd and Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 and **Tanzania Motor Services Ltd and Another v. Mehar Singh t/a Thanker Singh**, Civil Appeal No. 115 of 2005 (both unreported).

Mr. Mbamba distinguished the cases of **MIC Tanzania Limited** (supra), **Pardeep Singh Hans** (supra) and **Junior Construction Company Ltd** (supra) which were cited by Mr. Hamza in that they were inapplicable in the circumstances of the instant application given the fact that the circumstances in the cited cases are not the same to the ones before us. He rounded off by submitting that the preliminary objections should be dismissed.

Submitting in support of the application Mr. Mbamba was very brief, he argued that, the impugned order was amenable for revision because it is not

appealable under section 5 (1) (a) of the Act and referred us to page 14 of the typed decision in the case of **Ibrahim Mohammed Kabeke v. Akiba Commercial Bank Ltd**, Civil Application No. 71 of 2004 c/f No. 141 of 2004 (unreported). He then went further to submit that, the impugned order cannot be appealable with leave and cited the case of **Timothy Alvin Kahoho v. Salum Adam Mfikirwa**, Civil Application No. 215 of 2013 (unreported).

When prompted by the Court on whether or not section 5 (1) (c) of the Act creates right of appeal subject to the leave of the High Court or the Court, Mr. Mbamba was quick to respond that, the court does not create the right to appeal but right to appeal is a creature of statute and cited to us the case of **CRDB Bank Ltd v. George M. Kilindu and Another**, Civil Appeal No. 137 of 2008, **East African Development Bank v. Khalfan Transport Co. Ltd**, Civil Appeal No. 68 of 2003 and **Paul A. Kweka and Another v. Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002 (all unreported).

In rejoinder, Mr. Robert contended that, the submission that the case of **Mechmar Corporation** (supra) makes the preliminary points of objections irrelevant is defeated by the decision in **Moto Matiko Mabanga** (supra) which bars any appeal or revision in respect of preliminary or

interlocutory decisions or orders of the High Court unless such decision or order has the effect of finally determining the suit.

Mr. Robert argued further very briefly that even if the preliminary points of objections are defeated still the impugned order is not amenable for revision but rather is appealable with leave of the High Court or the Court as the case may be. He distinguished the cited cases of **CRDB Bank Ltd** (supra) and **East African Development Bank** (supra) on the grounds that the impugned decisions in the two cases were not barred by law. Finally, Mr. Robert reiterated the submissions made earlier by his colleague Mr. Hamza and prayed that the application should be dismissed with costs.

On our part, we have dispassionately weighed and considered the rival positions taken by the counsel from either side. For the sake of convenience, we shall dispose first the second point of preliminary objection, which is, to us, easily disposable and, for that matter, it need not unnecessarily detain us. While the counsel for the respondent argues that the application is an abuse of the court process and that it is overtaken by events, Mr. Mbamba on his part, has challenged this line of argument on account that a preliminary objection cannot qualify if evidence will be required to support the respondent's claims. With due respect to the submission by the learned counsel for the respondent, we think that, the law is long settled and clear as

to what amounts to a preliminary objection. The landmark case of **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd** [1969] E.A 696 which has been followed by courts in Tanzania, Law J.A observed that:

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration."*

To cull from the extracted part of the decision above, the second preliminary objection raised by the respondent cannot be dealt with as a preliminary objection because evidence will be required to be perused from documents filed by the respondent along with the supplementary affidavit in reply in order to get the materials to support the preliminary objection. This principle was aptly stated in the case of **Mechmar Corporation** (supra) cited to us by Mr. Mbamba. The second preliminary objection therefore, does not qualify to be a point of objection and therefore it stands dismissed.

Next, we will determine the first point of preliminary objection. For a better appreciation, we think, it is instructive to extract the relevant provision of the law in contention in full:

"5(2)

(d) no appeal or application for revision shall lie against or be made in respect of any ***preliminary or interlocutory decision or order*** *of the High Court unless such decision or order* ***has the effect of finally determining the suit.***" [Emphasis added]

We have purposely emboldened the above extract to demonstrate that the right of appeal or revision in respect of preliminary or interlocutory decisions or orders of the High Court where such decisions or orders have the effect of finally determining suits is statutory. The underlying phrase is "finally determining the suit". In the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and Others**, Civil Application No. 16/80 of 2016 (unreported), the Court insisted that under section 5 (2) (d) of the Act, there are two preconditions for the provision to come into effect. **One**, the decision or order in question must be interlocutory or preliminary; **two**, the decision or order must have the effect of finally determining the suit. Both conditions must co-exist for it to be involved.

The issue before us is whether or not the conditions stated in the case of **Murtaza Ally Mangungu** (supra). It is not in dispute that the impugned order was preliminary in the sense that Commercial Case No. 76 of 2019 was still pending, hence the first condition has been fulfilled. The next question to

consider is whether the impugned ruling had the effect of finally determining the suit. Luckily, this Court has had occasion to pronounce itself on this matter in the case of **Tanzania Motor Services Ltd and Another** (supra), in which the Court sought guidance from the case of **Bozson v. Artrincham Urban District Council** (1903) 1 KB 547 wherein Lord Alverston stated as follows at page 548-

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."*

Similar position was adopted in the case of **Junaco (T) Ltd and Another** (supra) which was cited to us by Mr. Mbamba.

The test adopted in the case of **Bozson** has been followed by courts in Tanzania as it is in accord with the language used in section 5 (2) (d) of the Act. In the instant case, the decision of the learned trial Judge in Misc. Commercial Application No. 135 of 2019 refusing to stay proceedings in Commercial Case No. 76 of 2019 pending determination of the application and also refusing to extend the time for the applicant to file written statement of defence in Commercial Case No. 76 of 2019 in our view finally determined

the rights of the parties in as far as the right to file written statement of defence is concerned and the result of which was a default judgment hence the second condition has been fulfilled as well. Since the two conditions stated in **Murtaza Ally Mangungu** (supra) have been fulfilled, the first preliminary point of objection is equally without merit and therefore, it is hereby dismissed.

However, we wish to emphasize that, we find considerable merit in Mr. Robert's submission that the impugned order is not amenable for revision but rather is appealable in terms of section 5 (1) (c) of the Act.

For clarity, let us take a look at the relevant provision of section 5 (1) of the Act which provides;

> *"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) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;*
>
> *(b) N/A*
>
> *(c) 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."***

In the instant application, the applicant was dissatisfied with the ruling and order of the High Court that dismissed the application for stay of

proceedings and extension of time to file written statement of defence. Based on our close scrutiny to the provision of section 5 (1) of the Act, it seems clear to us that, the provision is very categorical and clear and it leaves no room for Mr. Mbamba's proposition that the it does not confer any right to appeal to this Court.

This position is not novel, in the case of **East African Development Bank** (supra) which was cited to us by Mr. Mbamba we decidedly made it clear that section 5(1) of the Act provides right of appeal to the Court and that, this right is subject to the provisions of any other written law for the time being in force.

In our respectful opinion, the applicant ought to have preferred an appeal to this Court instead of the instant application for revision which is improper. It is always stated, and we wish to reaffirm that revision is not an alternative to the appeal process. See, for instance, **D. B. Shapriya and Company Ltd v. Stefanutti Stocks Tanzania Ltd**, Civil Application No. 205/16 of 2018 (unreported). The two remedies are different and should not be invoked in place or in substitution of the other. Appeals to this Court are governed under sections 5 and 6 of the Act whereas revisions are invoked under section 4 of the said Act.

Time without number, we have pronounced ourselves on this matter to the effect that, the appellate jurisdiction and the revisional jurisdiction of the Court 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. See, for instance, the case of **Transport Equipment Ltd v. Devram Valambhia** [1995] TLR 161.

For the above reasons, we are constrained to find that, the application is incompetent. It is, therefore, struck out with costs.

DATED at **DAR ES SALAAM** this 12th day of September, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 13th day of September, 2022 in the presence of Mr. Ally Hamza, learned counsel for the Respondent and also holding brief for Samson Mbamba, learned counsel for the Applicant, is hereby certified as a true copy of the original.

C. M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL