IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
CIVIL APPLICATION NO. 417 OF 2022

SAMSON ISUCHA NG'WALIDA .....FIRST APPLICANT

BWAWESH CHANDULAL GANDECHA.....SECOND APPLICANT

ASHVIN KESHAVBHAI PATEL.....THIRD APPLICANT

PARUL BHAVESH GANDECHA..... FOURTH APPLICANT

NYARUGUSU MINE LIMITED..... FIFTH APPLICANT

VERSUS

STANSLAUS MASUNGA NKOLA.....FIRST RESPONDENT

BENJAMIN JOSEPH NCHORE.....SECOND RESPONDENT

MADUHU MULOLA NKINDA.....THIRD RESPONDENT

(Application for extension of time to file revision from the decision of the High Court of Tanzania at Mwanza)
(Ismail, J.)

dated the 1st day of November, 2021
in
Civil Case No. 20 OF 2019
.....

RULING

25th April & 26th May, 2023

KIHWELO, J.A.:

The applicants herein, through Dr. Rugemeleza Albert Kamuhubwa Nshala learned counsel by way of notice of motion filed on 29th June, 2022 under rules 2 and 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), seek for orders enlarging time within which to lodge an application for revision

to the Court against the decision of the High Court of Tanzania at Mwanza in Civil Case No. 20 of 2019 dated 01.11. 2021.

The application is supported by the affidavits of the 1st, 2nd, 3rd and 4th Applicants. In order to facilitate an easy appreciation of the matter before me, I think, it is desirable to preface the ruling with the sequence of events giving rise to the present application as can be gleaned from the record.

The genesis of this application is the shareholding dispute in the 5th applicant's company in which the 5th applicant lodged Civil Case No. 20 of 2019 in the High Court of Tanzania at Mwanza against the respondents claiming among other things, declaration that the respondents be stopped from interfering with daily operations at Nyarugusu Mining Processing with Processing Mining Licence Number (PML) No. 00053/2013 located at Nyarugusu Mawemeru area within Geita Region so as to be run as resolved by the 5th applicant company shareholders' meeting held on 22.05.2019.

Subsequently, the matter was taken to the private mediator, Mr. Mwema O. Mella for mediation purposes, following which a mediation agreement was reached and a deed of settlement was executed on 29.09.2021 and later registered in court on 04.10.2021. It is on the basis of the registered deed of settlement that the High Court Judge recorded the

deed of settlement as a decree of the court. He then marked the matter withdrawn and went ahead to order transfer of shares from the shareholders and directors of the 5th respondent to the respondents as well as resignation of the directors of the 5th respondent.

Later, the respondents lodged Execution No. 33 of 2021 before the High Court of Tanzania at Mwanza which was determined by the Deputy Registrar Hon. C.M. Tengwa on 30.05.2022. Unamused, the applicants have lodged this application seeking for enlargement of time within which to file an application for revision to challenge the decision of the High Court which they feel was marred with irregularities.

At the hearing before me, Dr. Rugemeleza Nshalla learned counsel appeared for the applicants, whereas the respondents had the services of Mr. Kassim Gilla assisted by Mr. Akram Adam, learned counsel.

Before hearing of the application could commence in earnest, Mr. Gilla, learned counsel, sought to argue a preliminary objection notice of which was earlier lodged on 11.08. 2022 in terms of rule 107 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to the effect that;

1. *The application for extension of time within which to lodge an application for revision is incompetent as the 5th applicant is entitled to file an appeal and not revision.*
2. *The application is incompetent as it is not supported by affidavits of the 2nd and 5th applicants.*
3. *The application is incompetent as the Court cannot exercise jurisdiction in respect of the decision rendered by the Deputy Registrar of the High Court.*

It is a customary practice of this Court that where there is a notice of preliminary of objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. However, in the spirit of convenience and practicality, I allowed the parties to argue both the preliminary objection and the application in order to save time and costs for both parties and the Court, and the outcome of the preliminary objection will determine the fate of the application.

Mr. Gilla premised his submission by arguing the 1st and 3rd points of preliminary objection conjointly while arguing the 2nd point of preliminary objection separately. In support of the 1st and 3rd points of preliminary objection, Mr. Gilla contended that, the 5th applicant was a party to Civil Case No. 20 of 2019 as well as Execution No. 33 of 2021 and since Civil Case No.

20 of 2019 was determined through consent of the parties, then the 5th applicant had the right to lodge an appeal to this Court subject to the leave of the High Court in terms of section 5(2) (a) (i) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the Act). He emphasized that the position of the law is settled and clear that, where right of appeal is provided for by statute a party cannot opt for revision. To bolster his argument, he referred to the case of **Simon Hamis Sanga v. Stephen Mafimbo Madwary and Another,** Civil Application No. 193/01 of 2021 (unreported).

In his further submission, Mr. Gilla argued that, both the impugned decision in Civil Case No. 20 of 2019 and the decision of the Deputy Registrar in Execution No. 33 of 2021 are not amenable for revision as circumstances pertaining to revision in terms of section 4 (3) of the Act are quite distinct from an appeal. Reliance was placed in the High Court decision in **Nathaniel Mwakipiti Kigwila v. Margareth Andulile Bukuku**, Misc. Land Application No. 586 of 2022 (unreported). He curiously argued that the 5th applicant was not right in filing the application for extension of time. It is instructive to interject a remark, by way of a postscript that the argument by Mr. Gilla is misplaced this being an application for extension of time, the

question of whether revision is amenable or not is premature as such it should wait for an opportune time.

In support of the second limb of the preliminary objection, Mr. Gilla submitted that in the instant application there are five applicants but surprisingly the affidavit in support of the notice of motion for the 5th applicant is missing and further, he argued that the affidavit for the 2nd applicant is equally missing on record, instead there is an affidavit by one Bhawesh Chandulal Gandecha and not the 2nd applicant Bwawesh Chandulal Gandecha. In his view, this was contrary to rule 48 (1) of the Rules which requires that every formal application be supported by an affidavit of the applicant. He argued further that, there is nothing on record to indicate that someone swore an affidavit on behalf of the 5th applicant nor did the minutes of the Board indicate to that fact. For him, such laxity renders the entire application incompetent. To fortify his arguments, he cited our previous decision in **NBC Holding Corporation and Another v. Agricultural & Industrial Lubricants Supplies Ltd and Others**, Civil Application No. 42 of 2000 and **LRM Investment Company Limited and Others v. Diamond Trust Bank Tanzania Limited and Others**, Civil Application No. 418/16 of 2019

(both unreported). He therefore, beseeched me to strike out the application with costs on account of being incompetent.

In reply to the first limb of the preliminary objection, Dr. Nshalla had an opposing view with respect to the competence of the application before the Court. He argued that the impugned decree was drawn from a withdrawn suit from which case the 5th applicant could not appeal. In his view, it was irregular for the High Court Judge to draw a decree from a matter where parties agreed to amicably withdraw the suit and that the only consequential orders that the High Court Judge was legally justified to make, was orders for costs and not otherwise. Dr. Nshalla cited to me the decision of this Court in **Mechmar Corporation (Malaysia) Berhad (In Liquidation) v. VIP Engineering & Marketing Limited and Others**, Civil Application No. 190 of 2013 to amplify his arguments and contended further that yes, the 5th applicant is justified in pursuing the application for enlargement of time to file application for revision because there was no consent judgment upon which to appeal as the matter was withdrawn. In his opinion, all the cases cited by Mr. Gilla are appropriate in as far as the correct position of the law is concerned, however, they don't apply in the circumstances of the application before the Court.

As regards to the second limb of the preliminary objection, Dr. Nshalla admitted that truly, the name of the second applicant in the affidavit in support of the notice of motion was misspelled. However, he was of the considered opinion that since the anomaly was a mere typographical, this Court may overlook it because to error is human, and in any case, there is no any prejudice occasioned. Alternatively, Dr. Nshalla succinctly expressed that, the Court may direct that a corrected affidavit be filed in place of the one with a misspelled name.

In further responding to the second limb of the preliminary objection, Dr. Nshalla contended that, the affidavits of the 1st, 2nd, 3rd and 4th applicants also covered the 5th applicant in that they all stated that they are Directors and shareholders of the 5th applicant and that this was notably clear from the respective first paragraphs and the verification of each of the affidavits of the 1st, 2nd, 3rd and 4th applicants. Dr. Nchalla therefore, strongly opposed the view that there were no affidavits for the 2nd and the 5th applicants. He rounded of by praying that preliminary objections be dismissed with costs.

In a brief rejoinder, Mr. Gilla and Mr. Akram submitted in turns that the affidavit by the 5th applicant was missing because none of those who swore affidavits stated that they were swearing the affidavit on their own and on

behalf of the 5th applicant. They argued that the **Mechmar Corporation** case (supra) is distinguishable in that while in the instant application the suit was compromised and a deed of settlement was executed and a decree drawn, in the **Mechmar Corporation** case the suit was withdrawn. They further argued that the issue of misspelt names of the 2nd applicant cannot be taken lightly an affidavit being a sworn declaration cannot be ignored in the absence of sworn declaration clarifying that anomaly. They therefore insistently reiterated their earlier prayer of striking out the application with costs.

After a careful consideration of the submission of the learned trained minds and the application, the issue before me is a narrow one and that is whether the application is properly before the Court.

My starting point, I think, for the better understanding of the legal requirements in relation to institution of applications before the Court, I find it appropriate to digress a bit the relevant provisions of rule 48 (1) and rule 49 (1) of the Rules. Rule 48 (1) reads:

> *"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by way of notice of motion supported by*

affidavit and shall cite the specific rule under which it is brought and state the ground for the relief sought."

Furthermore, rule 49 (1) reads:

"Every formal application to the Court shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts."

Quite clearly, the provisions cited above are categorical that, for any application which is made before the Court there has to be a notice of motion supported by one or more affidavits of the applicant or some other person or persons provided that other person or persons have knowledge of the facts to be deponed in the affidavit or affidavits in support of the application.

Clearly, my reading of the record, it is quite obvious that there is no affidavit in support of the application for the 5th applicant and neither did I come across any of the applicants having sworn or affirmed an affidavit for themselves and on behalf of the 5th applicant. What is conspicuously clear is that the 1st, 2nd, 3rd and 4th applicants stated precisely in their respective affidavits that they are Directors and shareholders of the 5th applicant. I therefore find considerable merit in the respondents' counsel submission that the 5th applicant has no affidavit in support of the notice of motion before the Court as required by law.

Luckily, this situation is not novel as this Court has had occasion to pronounce itself on it in numerous occasions. In the case of **The Registered Trustees of St. Anita's Greenland Schools (T) and Others v. Azania Bank Limited,** Civil Application No. 168/ 16 of 2020 (unreported) in which the Court was faced with an application filed by seven applicants but the third applicant swore an affidavit on her own and on behalf of the first applicant only while the rest did not file any affidavit and in deciding we referred to our earlier decision in **LRM Investment Limited** (supra) where faced with an akin situation we held that:

> *"The ailment of the application not being supported by the affidavit of the fifth and sixth applicants renders the application incompetent."*

This position was also taken in the earlier case of **NBC Holding Corporation** (supra) where this Court faced with analogous situation it rendered an application incompetent for failure of one of the applicants to swear an affidavit in support of the notice of motion which was filed on behalf of both applicants.

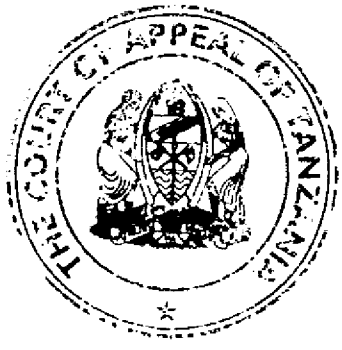
For the above reason, I uphold the preliminary objection in that this application is incompetent. That said, I think it will only be pretentiously

hypothetical to deliberate on the rest of the arguments. The application is therefore struck out with costs.

DATED at **DAR ES SALAAM** this 22nd day of May, 2023.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 26th day of May, 2023 in the presence of the Mr. John Chogoro holding brief for Dr. Rugemeleza Nshala, learned counsel for the Applicants and Kassim Gilla, learned counsel for the Respondents vide video link from Mwanza is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL