IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 110/01 OF 2019

THE ATTORNEY GENERAL..... APPLICANT

VERSUS

SWISS SINGAPORE OVERSEAS INTERPRISES PTE LTD.....1st RESPONDENT

NATIONAL INSURANCE CORPORATION

OF TANZANIA LTD.....2nd RESPONDENT

(Application for Revision of the Judgment and Decree of the High Court of Tanzania, at Dar es Salaam)

(Bubeshi, J.)

dated the 10th day of December, 2009

in

Civil Case No. 343 of 1996

.....

RULING OF THE COURT

22nd March & 22nd June, 2023

FIKIRINI, J. A.:

By way of notice of motion brought under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 [now R. E. 2019] (the AJA) read together with rules (3), 4 (2) (b), 48 (1), and 65 (1) of the

Tanzania Court of Appeal Rules, 2009 (the Rules), and section 63 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2018 read together with section 4 (1) (h) and (2) of the Office of the Solicitor General (Establishment) Order, 2018 GN. No. 50 of 2018, the applicant is moving this Court seeking revision of the decision of the High Court of Tanzania at Dar es Salaam in Civil Case No. 343 of 1996. An affidavit of Ms. Angela Kokuhumbya Lushagara, learned Principal State Attorney, and written submissions filed in terms of rule 106 (1) of the Rules support the notice of motion.

Contesting the notice of motion, the first respondent, through Mr. Gaspar Nyika, learned advocate filed an affidavit in reply in terms of rule 56 (1) and written submissions pursuant to rule 106 (7) of the Rules.

The grounds upon which the applicant seeks revision are:-

a) *That the applicant was not a party in Civil Case No. 343 of 1996 before the High Court of Tanzania, the suit which, amongst other things, affected the interests of the Government of the United Republic of Tanzania.*

b) *The applicant became aware of the judgment and decree of the High Court in Civil Case No. 343 of 1996 on the 29th*

September, 2017, when the same was forwarded to the applicant by the Permanent Secretary Ministry for Finance and Planning for consideration.

c) *That, the first respondent proceeded with the suit against the second respondent even after being declared a specified public corporation without joining the Receiver Manager, the then PSRC, CHC, and now the Office of the Treasury Registrar, contrary to section 43 (1) of Public Corporation Act, Cap. 257 R. E. 2002.*

d) *That, most of the first respondent's claims relating to the loss of huge stock of cement were lodged after the expiry of the six (6) months stipulated in the Insurance Policy.*

To appreciate the ruling that shall follow, we find it necessary to state the genesis of the application briefly. Gathered from the applicant's affidavit supporting the application is that the first respondent had a cement business stored at four different godowns located at TCMB, banda la Ngozi, Chang'ombe and Port area. For security reasons, the first respondent insured the business through the second respondent. The insurance contract entered between the first and second respondents covered the period from 7th December, 1994 to 7th June, 1996. According to the first respondent, there was a godown

breaking in at three of the godowns, and cement was stolen. The theft was first reported to the second respondent who upon visiting those godowns and saw what happened, hired Crystal Clear Loss Assessors Limited to assess the loss since the cement business was insured for TZS. 1,000,000,000/= and the loss incurred was approximately TZS. 173, 000,000/=, while the actual claim was TZS. 207,939,600/=. In their report, the hired expert could not find proof of forceful entry and that the amount of cement stolen was huge, hence advised repudiation of the claim, insinuating employees' involvement in the theft. Besides the findings, the second respondent opted for a second opinion by hiring G.A.B Robin of London International Ltd, a loss adjuster, considering the fact that the business was internationally insured. The second loss adjuster's report recommended repudiation of the claim.

Not amused by the repudiation, the first respondent lodged a suit before the High Court registered as Civil Case No. 343 of 1996. After a full trial, the Judge entered judgment in favour of the first respondent. Disgruntled, the second respondent attempted an appeal to this Court, but for one reason or the other, the appeal was not entertained.

Meanwhile, the first respondent opted to execute the decree of the High Court in her favour. The applicant, who was not a party, was made aware vide a letter dated 30th August, 2017, by the Minister for Finance and Planning, who is the custodian of all Government funds. The letter relaying information to the Ministry of Finance and copied to the applicant prompted the present application.

The applicant's main argument is that, pursuant to GN No. 330A published on 12th June, 1998, the Parastatal Sector Reform Commission (PSRC), the Consolidated Holding Corporation (CHC), which came into being after the amendment of the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, Cap 404 R. E. 2002, and now under the Treasury Registrar, in terms of the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) (Consolidated Holding Corporation) (Dissolution) Order, 2014, were all supposed to be made parties at different stages of their existence. It was contended that since the second respondent had been declared a "*specified public corporation,*" was placed under the listed bodies at one point or another, something which was never done.

During the hearing on 22nd March, 2023, Messrs. Lukelo Samwel and Aloyce Sekule, learned Principal State Attorneys assisted by Mr. Urso Luoga learned State Attorney appeared for the applicant. The first respondent had the services of Mr. Gaspar Nyika, learned counsel.

Mr. Samwel addressed the Court on behalf of the applicant's team. In his opening remarks, he urged the Court to proceed with the hearing of the application in the absence of the second respondent, who was duly served but did not enter appearance. Mr. Nyika endorsed the prayer. Having been satisfied that the second respondent was duly served, the Court ordered the hearing of the application to proceed in terms of rule 63 (2) of the Rules.

In his short submission, apart from adopting the notice of motion, the affidavit in support of the application and written submissions, Mr. Samwel prayed for the application to be allowed due to the fact that the applicant has not been heard, thus prayed for the proceedings to be nullified, and orders quashed. Expounding on that fact, Mr. Samwel continued contending that, after the second respondent was declared a "*specified public corporation*," the applicant should have been joined as

a party, otherwise, the execution can hardly be effected as the applicant was not a party. Moreover, since the applicant was not a party it was not afforded a right to be heard, which is a breach of the cardinal principle of natural justice. He therefore, prayed for the Court to grant the application under section 4 (2) of AJA.

Probed by the Court from which stage the proceedings should be nullified, Mr. Samwel recommended nullifying the proceedings right after the change in the law, which is 1998.

On his part, in his brief and concise submission, after adopting the affidavit in reply and submissions filed on 10th March, 2019, Mr. Nyika argued that, the applicant has not cited a law requiring the Attorney General to be joined. Considering section 9 (1) of the Bankruptcy Act, Cap. 25 R. E. 2002 (the Bankruptcy Act), read together with section 6 of the Government Proceedings Act, Cap. 5 R. E. 2002 (the Government Proceedings Act), he contended that the provisions were incorrectly cited since the two provisions did not direct for the institution of a new suit while there was already a pending suit. Likewise, section 9 (1) of the Bankruptcy Act, which was claimed to be violated by the High Court,

was, according to Mr. Nyika, misconstrued. He contended that the provision was about those suits that had not commenced when the corporation became "*specified*" and not those already pending in court.

He further argued that, joining the applicant under section 6 of the Government Proceedings Act, because the corporation has been declared specified, did not mean it has ceased being a legal person who can sue and be sued. Under the Bankruptcy Act, a Receiver Manager or Official Receiver can still execute the order; similarly, the Treasury Registrar can do so. On the basis of his submission, Mr. Nyika urged the Court to dismiss the application with costs.

In a brief rejoinder, Mr. Samwel maintained his earlier submission that after the second respondent had been declared a "*specified public corporation*," the Government, through the applicant, should have been joined. Otherwise, the Treasury Registrar under whom the decree can be executed would not have been heard.

We have thoroughly considered the notice of motion, affidavits and submissions made by the counsel for the parties. In determining

whether the application deserves granting or not, we think our place to start is defining who or what is a public corporation. Pursuant to sections 9 (1), (2), 13 (1) of the Public Corporation Act, Cap. 257 of R. E. 2002 (the Act), a public corporation is an entity whereby the Government is the majority shareholder hence the control and supervision are by the Government. In terms of section 3 of the Act, a public corporation has been defined to mean:-

> *"Public Corporation means any corporation established under this Act or any other law and in which the Government or its agent owns a majority of shares or is the sole shareholder."*

Under the Government Proceedings Act, particularly section 16 (3), Government properties are exempted from attachment orders of the courts or other quasi-judicial bodies. The Attorney General has therefore, in terms of sections 6 (a) and 17 (1) (a), (2) (a) and (b) of the Office of the Attorney General (Discharge of Duties) Act, Cap. 268 R.E. 2002 (the Office of AG Act), been bestowed with the duty of overseeing that. The provisions are reproduced below for ease of reference:-

"6 (a) In the discharge of the functions under sub-article (3) of the Article 59 of the Constitution, the Attorney General shall have and exercise of the following powers:-

(a) ***To appear at any stage of any proceedings, appeal, execution or any incidental proceedings before any court or tribunal in which by law the attorney General's right of audience is excluded.***"

Also, under section 17 (1) (a) (2) (a) and (b) of the same Act, the following has been provided:-

"17 (1) Notwithstanding the provisions of any written law to the contrary, the Attorney General shall have the right of audience in proceedings of any suit, inquiry on the administrative body which the Attorney General considers:-

(a) ***To be of public interest involves public property.***

17 (2) In the exercise of the powers vested in the Attorney General with regards to the provisions of subsection (1), the Attorney General shall:-

(a) ***Notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry, or administrative proceedings****; and*

(b) Satisfy the court, tribunal, or other administrative body of public interest or public property involved..." [Emphasis ours]

Before we proceed to determine the present application, we find it apt to first answer if the second respondent falls within the ambit of entities where there are public interests to be protected particularly when the entity has been declared a specified public corporation as the second respondent thus warranting the Attorney General's intervention through the Solicitor General under section 63 of the Written Laws (Miscellaneous Amendments) Act. No. 2 of 2018 read together with section 4 (1) (h) and (2) of the Office of the Solicitor General (Establishment) Order, 2018 GN. No. 50 of 2018.

From the counsel's rival submissions, there is no dispute that on 23rd April, 1998 through section 38 (1) and the First Schedule to GN. No. 330A, published on 12th June, 1998, the second respondent was

declared a specified public corporation, effective from 1st May, 1998. Consequently, the second respondent was placed under the Presidential Parastatal Sector Reform Commission (PRSC) where all the remaining assets, liabilities and control were placed. By then, Civil Case No. 343 of 1996 was already ongoing. We think it was at this juncture that things went astray. We say so, because neither the first respondent applied to join the PRSC as provided under Order 1 Rule 3 of the Civil Procedure Code, Cap. 33 R. E. 1966 (now R.E.2019] nor did it, request to be joined as a party in Civil Case No. 343 of 1996.

The opportunity to be joined as a party presented itself again after the Parliament, through Act No. 26 of 2007, which amended the National Bank of Commerce (Reorganization and Vesting of the Assets Liabilities) and vested all the remaining PRSC tasks to the Consolidated Holding Corporation (the CHC). The tasks vested in the CHC which included the remaining functions, assets and liabilities were transferred in 2014 by Dissolution Order to the Treasury Registrar. This was followed by the amendment of the Treasury Registrar (Powers and Functions), Act, Cap. 370 R. E. 2002, in which the Attorney General was

conferred powers and the right to intervene in any matter filed by or against the Office of the Treasury Registrar.

With respect, we do not agree with Mr. Nyika that since there was no case against the Treasury Registrar, it was therefore not necessary to join the applicant as a party. It is obvious, however, that since no execution can be carried out against the Government property, it was necessary for the applicant to be joined or on its own, intervene and be part of the proceedings in question.

Besides the legal provisions referred to above, this Court had on several occasions pronounced itself on the issue, such as in **Consolidated Holding Corporation v. African Terminals Limited & 3 Others**, Civil Application No. 144 of 2012, **Attorney General v. National Housing Corporation & 3 Others**, Civil Application No. 432/17 of 2017 and **Attorney General v. Tanzania Ports Authority & Alex Msama Mwita,** Civil Application No. 87 of 2016 (all unreported), by stating that the applicant has a right to intervene in any proceedings before the court or tribunal in which there is a public interest to be protected.

The decision in Civil Case No. 343 of 1996 was delivered on 10th December, 2009 without the PRSC, CHC or Treasury Registrar joining as parties, despite the fact that the second respondent was already declared a specified public corporation. The applicant who has been obligated to protect Government interests was never a party to that case.

In paragraph 4 of the affidavit in reply, Mr. Nyika discouraged the grant of the present application, contended that intervention would entail being joined in to be a part of the already existing proceedings, which would not include commencement of a fresh suit, including an application for revision for the proceedings which have already been concluded before the High Court and this Court. While we agree with him that the proceedings before the High Court and this Court have been finally concluded, we do not agree that the applicant has no opportunity to approach this Court as in the present application. We say so considering that, the applicant became aware of Civil Case No. 343 of 1996 on 29th September, 2017, as averred in paragraph 25 of the

affidavit supporting the application. The first respondent never disputed this averment.

Moreover, although there was no specific case filed against the Treasury Registrar warranting the applicant's intervention as argued by Mr. Nyika, we think according to the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016 (Act No. 13 of 2016), which amended the Treasury Registrar (Powers) and Functions) Act, Cap. 370 R. E. 2002, the applicant has the right to intervene in any matter filed by or against the Office of the Treasury Registrar, including when a decree to be executed would be directed to it, as it is likely to be in Civil Case No. 343 of 1996.

It is trite law that a party should be heard before any adverse decision is taken against it, this being a fundamental principle of natural justice that one should not be condemned unheard. See, **D.P.P. v. S. I. Tesha** [1992] T. L. R. 237, **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma,** [2003] T. L. R. 251 and **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy** Civil Application No. 33 of 2002 (unreported) to mention a few.

The Attorney General being the custodian of Government properties and interests through the Office of the Solicitor General, deserves to be heard in compliance with the dictates of section 43 (1) of the Act, regardless of the fact that the proceedings before the High Court and this Court have been concluded.

Despite our firm view that the PRSC, CHC or Treasury Registrar ought to have been joined as parties in Civil Case No. 343 of 1996, we, however, do not agree there was a need to seek leave under section 9 (1) the Bankruptcy Act as argued by Mr. Samwel, to commence a fresh suit. The provision of section 9 (1) is reproduced below:-

> *"9.-(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act,* ***no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shali have any remedy against the property or person of the debtor in respect of the debt, or shaii commence any action or other legal proceedings, unless with the***

leave of the court *and on such terms as the court may imposed."* [Emphasis ours]

Our interpretation of the provision is that since Civil Case No. 343 of 1996, was already an existing suit, what was required was to join the PRSC or CHC or the Treasury Registrar when those entities came into effect and that would not have the effect of commencing a fresh suit. Even though this was not done at the stages when the status changed, it did not bar the applicant from intervening at any other stage of the proceedings, as provided under section 6 (a). See, **Attorney General v. National Housing Corporation & 3 Others** and **Attorney General v. Tanzania Ports Authority & Alex Msama Mwita** (supra).

We thus, on the one hand, agree with Mr. Nyika that it did not require the application of section 9 (1) of the Bankruptcy Act to join the applicant. On the other, disagree with his submission that, since the second respondent is a legal entity that can sue and be sued, the receiver manager or official receiver or the Treasury Registrar can act without relying on the applicant. Since the second respondent had been

declared a specified public corporation, and under the provisions referred to above, the applicant, tasked with the obligations and duties to act on behalf of the Government where its interests are in jeopardy, like in the present situation, had all the reasons to intervene.

What has been tasking our minds is at what stage of the proceedings should the joining occur. As stated earlier in this ruling, right after the second respondent had been declared a specified public corporation the applicant should have been joined right after 12th June, 1998. Tracing from the record of proceedings in Civil Case No. 343 of 1996 marked as annexture AGC5, the applicant was supposed to be joined or should have intervened at the earliest possible opportunity, which in Civil Case No. 343 of 1996 was on 21st August, 1998.

Pursuant to the powers bestowed on us, we find that the application deserves to be granted. We, thus invoke section 4 (2) of the AJA to revise and nullify the proceedings in Civil Case No. 343 of 1996 from 21st August, 1998, which was after the second respondent had been declared a specified public corporation as per the publication of GN. No. 330A on 12th June, 1998. The record should be remitted to the

High Court for continuation with the hearing of the case in an expeditious manner, it being a 1996 case. Due to the nature of the application, we order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 15th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of June, 2023 in the presence of Mr. Lukelo Samwel, learned Principal State Attorney for the Applicant and Mr. Gasper Nyika, learned counsel for the 1st Respondent and 2nd Respondent is absent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL