

IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 219/01 OF 2022

LINUS SWAI.....APPLICANT

VERSUS

MSIMU KOMBO MEELA.....RESPONDENT

**[Application for revision from the order of the High Court of
Tanzania, at Dar Es Salaam]**

(Kakolaki, J.)

Dated the 27th day of October, 2021

in

Civil Case No. 175 of 2017

RULING OF THE COURT

21st & 29th February, 2024

MDEMU, J.A.:

This application for revision being premised under section 4(3) of the Appellate Jurisdiction Act, Cap.141 R.E. 2019 (the AJA) and rule 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules), intends this Court to revise adjournment order of the High Court of Tanzania, sitting at Dar es Salaam (Kakolaki J.) in Civil Case No. 175 of 2017. According to the record of the High Court, on 27th October, 2021 when Civil Case No. 175 of 2017 was placed before the trial Judge for continuation of trial, neither the applicant herein nor his advocate entered appearance. The learned

trial Judge thus adjourned the trial. The adjournment order which aggrieved the applicant as we note in the record is as follows:

"All said and done this matter is adjourned to another hearing date. Since the court has been forced to do so for the reason of the defendant's absence in court, he has to pay for the costs of the adjournment as provided under Order XVII, Rule 1 (3) of the Civil Procedure Code, Cap.33 RE 2019. It is hereby ordered that the Defendant has to effect the order in the following:

- 1. Pay the plaintiff Tshs. 150,000/= as costs of today's adjournment.*
 - 2. Pay to the court Tshs. 100,000/= as costs of adjournment for the inconveniencies caused.*
 - 3. Payment to be effected and proof submitted to the court on or before the next hearing date.*
- It is so ordered."*

As we said above, the applicant was not happy with this order and moved this Court on revision to examine its correctness, legality and propriety on the grounds sought for in the notice of motion. Upon being served with the notice of motion, the respondent's advocate, besides filing an affidavit in reply, raised a preliminary objection in a notice filed on 17th June, 2022 to the following effect:

“That this application being misconceived, unmaintainable and untenable for contravening section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, this Court lacks jurisdiction to entertain it.”

As usual, we had first to determine the preliminary objection. See **Ursino Palms Estate Ltd. v. Valley Foods Ltd.** Civil Application No. 28 of 2014 (unreported). This was on 21st February, 2024 in which Mr. Emmanuel Augustino Muga, learned advocate represented the applicant whereas Mr. Amin Mshana, also learned advocate, represented the respondent.

Submitting in support of the preliminary objection, Mr. Mshana stated that, the adjournment order subject for revision by this Court has no effect of finally disposing of the suit. He added that, the applicant, being a defendant in the main suit, his actions and conducts of this nature, may not have the effect of finally determining the suit. He thus said, the adjournment order is an interlocutory one barred by the law to be revised.

Mr. Muga in reply to the preliminary objection was of the argument that, the adjournment order is not interlocutory one because the continuation of the hearing of the suit as ordered, is subject to payment of costs both to the respondent and the court as ordered by the High

Court. In that regard, he argued, the order made do not guarantee smooth conduct of the suit. In this latter argument, Mr. Mshana quickly rejoined that, the issue is not one of freezing court processes but rather as long as there is no finality of the suit being the consequence of the adjournment order, no revision may be preferred to that effect.

Having heard from the parties submitting in the raised preliminary objection, we have one question which has to be resolved. It is this; whether adjournment order of the learned trial Judge with costs on a party has the effect of concluding the suit thus to be amenable for revision. Our starting point to that end is section 4 (3) of the AJA which confers revision jurisdiction to this Court so that it satisfies itself as to the correctness, legality and or propriety of any finding or order of the High Court. However, such revision powers of this Court are subject to the conditions stated under section 5 (2) (d) of the AJA which restricts exercise of revision powers on findings or orders which have the effect of disposing of a suit to finality. For clarity, we reproduce the said section as follows:

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 matter.

This Court in a number of occasions pronounced itself regarding the import of the above quoted provision of the law. In **MIC Tanzania Limited & 3 Others v. Golden Globe International Services Limited** [2017] TLR 364 for instance in an application for revision to revise decision of the trial judge refusing to recuse from the conduct of the matter, we observed that:

"The test is whether or not the order desired to be revised had the effect of finally determining the suit. In this regard, the impugned decision did not have such effect, despite the presiding officer's refusal to recuse himself, the suit was not extinguished and remains pending todate".

Applying the above test in the instant application, as we demonstrated above, the applicant was aggrieved by the order of the High Court adjourning hearing of the suit and condemning him to pay costs. As argued by the counsel for the respondent, which we entirely agree, that order does not have the effect of disposing to finality Civil Suit 175 of 2017 and in effect that suit is still pending. The argument of the counsel for the applicant that since the trial judge's order is conditional that hearing may only proceed upon paying costs, it frustrates or freezes

hearing processes thus finalizes the suit, in our view, with respects, it is not. There is nothing in that order which our reading to section 5 (2) (d) of AJA exempts that order to be interlocutory thus not barred by operation of the section. See **Augustino Masonda v. Widmel Mushi** [2020] TLR 114. We also said the following in **Vodacom Tanzania Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (unreported) regarding finality of the suit being the only test to invoke our revisional powers:

"We are of the view that the ruling and order of the High Court sought to be revised is an interlocutory order...because in that order, nowhere it has been indicated that the suit has been finally determined".

This Court also took a similar view in **Total Tanzania Limited v. Mexon Sanga**, Civil Application No. 488/16 of 2019 (unreported) where an application for revision was found incompetent on account that the decision of the High Court sought to be revised is unable to dispose of the matter to finality.

This being the settled legal position, parties submitted that Civil Case No. 175 of 2017 is still pending in the High Court of Tanzania at Dar es Salaam. Certainly, the order of the High Court dated 27th October, 2021

did not finally conclude the dispute in that suit. We thus hold, and that is our stance that, the adjournment order of the trial Judge is interlocutory, as such, is barred by section 5 (2) (d) of the AJA to be a subject for revision. We thus find merit in the preliminary objection, the consequence of which this application is eligible to be struck out, as we hereby do. The applicant is hereby condemned to pay costs.

DATED at **DAR-ES-SALAAM** this 27th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 29th day of February, 2024 in the presence of Mr. Emmanuel Augustino Muga, learned counsel for the Applicant and Ms. Amin Mshana, learned counsel for the Respondent, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL