IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DARESALAAM
(CORAM; JUMA, UTAMWA AND MUTUNGI, JJJ).
MISC. CIVIL APPEAL NO. 2 OF 2010.

1. TANZANIA TELECOMMS CO. LTD
2. CONSOLIDATED HOLDINGS CORPORATION } ....APPELLANTS.

VERSUS;

BONIFACE MJENJWA AND 13 OTHERS.....RESPONDENTS.

JUDGMENT

JUMA, J:

This appeal by the Appellants, Tanzania Telecommunications Co. Ltd (TTCL) and the Consolidated Holdings Corporation (CHC) against Boniface Mjenjwa and 13 Others Respondents originate from the decision (UAMUZI) of the Revision Panel of the Industrial Court of Tanzania (Revision No. 26 of 2009) dated 24th February 2010 (Mwipopo J CM; William DC; Mtiginjola DC). Memorandum of Appeal which the Appellants filed in this Court on 11th March 2010 contains the following nine grounds of appeal:

1) That the Honourable Revision Panel grossly erred in law and in fact, while determining our application for revision of

Hon. MWIPOPO J CM's UAMUZI dated 20/07/09 in not finding it as a fact that Hon. Mlelwa DC's UAMUZI dated 30/7/99 had in fact been revised by a competent Revision Panel of ICT not less than three times and therefore the same could not be a subject of execution.

2) That the Revision Panel erred in law and in fact in declining to determine ground No. 2 of the Revision (by labelling it as extraneous see page 4) on grounds that the same was not raised before Hon. MWIPOPO J dated 18/5/2009 at the end of para 5, and the same was overruled by Hon. MWIPOPO J CM at page 17 of his UAMUZI of 20/7/09 thereby rending it a fit ground for the Revision Panel to determine.

3) That the act of the Revision Panel to entertain applications from the Respondents on the same subject between the same parties offended the doctrines of functus officio and res judicata.

4) That the Revision Panel erred by ignoring ground number four of Revision in its UAMUZI of 24/2/10 all together that by ordering execution of Mlelwa's UAMUZI, the chairman was in principle illegally revising the Revision Panel's previous decisions that ruled against physical reinstatement of the Respondent herein.

5) That the Revision Panel erred in not determining ground No. 5 of the Revision that the Court of Appeal has jurisdiction to determine appeals preferred by a party against High Court decisions in the exercise of its jurisdiction under Act 11/03.

6) That the Revision Panel erred in not determining ground No. 3 of the Revision that the act of its Chairman of rendering advice to one of the parties to a dispute brought before him for adjudication offends the doctrine of impartiality and is contrary to the administration of justice.

7) That the Revision Panel erred in law and in fact in not reaching a finding that once a party files a notice of appeal against a whole judgment of a Court, such part cannot be heard to seek execution of some aspects of the same judgment being impeached.

8) That the Revision Panel erred in reaching a finding that a single judge or magistrate is free to comment (page 5 of UAMUZI) on the propriety or otherwise of a decision passed by a full court in a revision or appeal of his own decision.

9) That the Honourable Revision Panel erred in not determining that the orders issued by its Chairman to the Appellants herein were pregnant with threats, uncertainty

and therefore unenforceable and contrary to regulations and practice governing the issuing of Court orders.

In submissions filed on Appellants' behalf, grounds two, five, eight and nine were dropped. Appeal is opposed by the Respondents.

Briefly stated, the background facts leading up to this appeal traces back to October 1994 when 482 employees of the 1st Respondent were declared redundant. Appellants were among the employees who were declared redundant and consigned for retrenchment. Appellants, who were leaders of the local trade union branch, referred their grievance to the Labour Commissioner in compliance with the law. The Labour Commissioner duly referred the dispute to the Industrial Court of Tanzania (ICT). The ICT received the dispute as Trade Dispute Number 57 of 1997 and proceeded to conduct an inquiry presided over by Mlelwa-Deputy Chairman (DC). On 30 July 1997 Mlelwa-DC ordered the reinstatement of the Respondents because the 1st Appellant did not seek a prior consent of the District Labour Officer.

The 1st Appellant was aggrieved, and lodged an appeal. On 26 June 2000 the appeal was dismissed for non-appearance. The decision of Mlelwa-DC directing the reinstatement of the Respondents came up for yet another unsuccessful challenge in Revision Proceedings Number 7 of 2000. Respondents seized their

opportunity and applied in the ICT (presided over by Mwipopo-J, Chairman (CM) seeking the execution of the decision of Mlelwa-DC. On 27th October 2000 Mwipopo-J (CM) changed the order of Mlelwa from that of reinstatement to half-salary for the whole period between 01-11-1994 and 06-09-1999 when they were out of their employment. Respondents were unhappy with the order of Mwipopo, J. (CM), so they applied for its revision. On 06-06-2008, the ICT Revision Panel presided over by Mwipopo quashed the decision of Mwipopo and ordered termination of employment of respondents as from 30-09-1999 the date when Mlelwa-DC made his decision and ordered execution to proceed. The appellants were again aggrieved and they are now appealing before this court against that decision of the Revision Panel of ICT.

Hearing of this appeal was by way of written submissions. On 11th July 2011 Mr. Matumula the learned Advocate duly filed written submissions on behalf of the Appellants. Whereas on 25th July 2011 Mr. Bajana the learned Advocate, prepared and filed Respondents' written submissions. Submitting in support of the first ground of appeal; Mr. Matumula contends that the Revision Panel on 16th February 2010 [Mwipopo, William and Mtiginjola] determining an application seeking to revise Mwipopo-J CM's finding of 20th July 2009 should not have ordered the execution of the decision (UAMUZI) of the Deputy Chairman (Mlelwa) dated 30th July 1999

to proceed. This is because; the decision of the Deputy Chairman had been revised not less than three times and could not be subject of the execution on 16th February 2010 when Revision Panel [Mwipopo, William and Mtiginjola] made its decision. According to Mr. Matumula, the three times when the 30th July 1999 decision of the Deputy Chairman (Mlelwa) was revised were on 27th October, 2000, 20th April, 2001 and on 21st March 2006.

In his submissions opposing the first ground of appeal, Mr. Bajana maintains that the decision of the Deputy Chairman (Mlelwa) still stands for purpose of execution and has never been revised. According to Mr. Bajana, unsuccessful attempts were indeed made to try and revise the decision of the Deputy Chairman. That first such attempt was made by Mwipopo, J-CM when he ordered that Respondents should be paid their half salaries instead of reinstatement that Mlelwa-DC had ordered. But this decision of Mwipopo, J-CM was quashed and set aside by the Full Bench of this Court in **Tanzania Telecommunications Ltd and Consolidated Holding Corporation vs. Boniphace Mjenjwa & 13 Other Ex OTTU Members, HC DSM Miscellaneous Appeal Number 3 of 2008.** Mr. Bajana invited this Court to find attempts to revise the decision of the Deputy Chairman (Mlelwa) that were made on 27th October, 2000, 20th April, 2001 and on 21st March 2006 all arose from Revision Proceedings Number 7 of 2000 which was quashed

and set aside by the Full Bench of this Court in **HC DSM Miscellaneous Appeal Number 3 of 2008 (supra).**

From the submissions of the two learned Counsel, it is clear that Appellants are appealing against the decision of Revision Panel of the ICT in Application Number 26/09 that was delivered on 24th February 2010 and which had concluded that the decision of Mlelwa-DC still stands and awaits execution. The power of that Revision Panel is provided for under section 28 (1) of the **Industrial Court of Tanzania Act, Cap 60 R.E. 2002**:

> *(1) The Court shall have power, in any proceeding determined before it, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the dispute involving injustice, revise the proceedings and make such decision or award in the matter as it sees fit; save that no decision or award shall be made by the Court in exercise of its jurisdiction under this subsection, increasing the liability of any party or altering the rights or any party to his detriment, unless such party shall have first been given an opportunity of being heard.*

According to section 28 (1) of **Cap 60 R.E. 2002,** to succeed in obtaining an order of Revision in the Application Number 26/09 the Appellants were supposed to show that there has been an error in Inquiry No. 57/1997 (Mlelwa-DC) and in the decision of MWIPOPO-J (CM) of 20th July 2009 that is material to the merits of the dispute involving injustice. If it is correct that decision of the Deputy Chairman (Mlelwa) has been revised three times then one may conclude that indeed there is an error material to the merits of the dispute involving injustice. But, we have studied the records in light of the decision of the Full Bench of this Court in **HC DSM Miscellaneous Appeal Number 3 of 2008 (supra)** and we did not see any of the three occasions where the decision of Mlelwa-DC was revised. We hereby find this first ground of appeal to be without merit and we hereby dismissed this ground of appeal.

The issue arising from the third ground of appeal is whether the Revision Panel entertained applications from the Respondents on the same subject between the same parties thereby offending the doctrines of *functus officio* and *res judicata.* Supporting the Appellants' third ground of appeal, Mr. Matumula identified what he considered as "former suit" and as "subsequent suit" for purposes of res judicata. He submitted that the "former disputes" are Revision 7/2000 dated 20/04/2001, Revision 7/2000 dated 23/06/2005 and Revision 7/2000 of 21/3/2006 and the "subsequent disputes" is

Revision 26/09 dated 24/2/2010. In his replying submissions, Mr. Bajana submitted that the third ground of appeal based as it was in *functus officio* and *res judicata* is misconceived and should be dismissed because *res judicata* for example, may only occur where the decree or award to be executed has been fully satisfied. In the instant matter, all Applications that Respondents have made have never materialized because of incessant applications for revisions and appeals to the Full Bench of this Court.

From the established law governing the principles of *functus officio* and *res judicata* this third ground of appeal need not take much of our time. Mr. Bajana is with respect correct to contend that a matter becomes *functus officio* only after a court has made its decision and shall as a result lack further authority to rehear that same case after it has made its decision. In other words a court only becomes *functus officio* when it disposes of a case by making an order finally disposing of the matter. We do not with due respect agree with Mr. Matumula that the "Revisions" he has identified are "former suit" and "subsequent suit" making the matter being either *functus officio* or *res judicata.*

Similarly we have failed to see anything akin to *res judicata.* Respondents have not filed any fresh Trade Dispute over the same matters against the Appellants. Mr. Matumula has not shown how the ingredients forming a basis for *res judicata* as provided for under

section 9 of the **Civil Procedure Code,** have been met to make the Trade Dispute Number 57 of 1997 concluded by Mlelwa-DC on 30 July 1997 *res judicata* as against any party to the Trade Dispute Number 57 of 1997. From the foregoing, we have no option but to agree with Mr. Bajana that this ground of appeal similarly lacks merit and is hereby dismissed.

With regard to their fourth and sixth grounds of appeal, Mr. Matumula submitted the Revision Panel erred in law when it ignored grounds number three and four by revising its decision dated 24th February 2010. In his replying submissions on grounds four and six Mr. Bajana asked this Court to dismiss these grounds. The learned Counsel cited a Court of Appeal decision in **Melita Naikiminjal & Loishilaari Naikiminjal vs. Saileyo Lobanguti [1998] T.L.R. 120** where the Court of Appeal stated:

> *"As long as it has full grasp of the case and the grounds of Appeal in its judgment and need not separately deal with them seriatim."*

We have perused the UAMUZI dated 16th February 2010 whose TUZO is dated 24th February 2010 to determine the veracity of Appellant's grievance that the Revision Panel erred in law when it ignored grounds number three and four in its decision TUZO of 24th February 2010. The wording of the TUZO leaves us in no doubt that

all grounds of appeal were by implication, considered before the Revision Panel issued its TUZO. The following paragraphs of the decision of the Revision Panel are in our considered opinion consistent with a Panel that had fully grasped the salient bone of contention and went on to consider all grounds brought before it:

> *"..Wajibu Marejeo waliendelea kuyajibu hoja hadi hoja kwa makini na ufasaha hata kama ni mbumbumbu. Hata HIVYO Jopo kwa kuyaangalia mahitimisho yao ya pande mbili yanaonekana kuwa ni malumbano ya hoja, lakini linaloonekana kuwa la msingi katika sababu za majibu ya Marejeo ni kuwa je Hukumu au Uamuzi wa Mhe. Mlelwa-DC ulibadilishwa bila kujali ni mara ngapi umefanyiwa Marejeo au la.....*
>
> *Kila upande ulifanya Mahitimisho yake."*
>
> *"..Jopo hili kuna baadhi ya sababu za Marejeo zilizoambatanishwa, Jopo limeziona kuwa sio sababu za Marejeo ila zina hisia tuhuma zisizo za msingi na za kuokotezwa (extraneous) ambazo nimezisema Jopo limeyaona kuwa ni malalamiko ambayo yangekuwa ya*

msingi yalipaswa kutolewa mbele ya Mahakama ya Kimwanzo wakati wa kusikiliza ukazaji wa denituzo na si kuletwa kama sababu za marejeo kama zilivyoletwa katika Jopo....."- ***Third paragraph Pages 2 and 3.***

"....Kwa pamoja Jopo la Marejeo linaona Maombi haya ya Marejeo yameletwa pasi na sababu yoyote ya msingi, na linaungwa mkono na maoni ya Waungwana Washauri wa Mahakama wote wawili....."- ***Second paragraph, Page 5.***

From the foregoing, we hereby find that grounds number four and six of the appeal are devoid of merit and are hereby dismissed.

The main issue for our determination arising out of the seventh ground of appeal; is whether, once a party files a notice of appeal against a whole judgment of a Court, such party cannot as appellants contend, be heard to seek execution of some aspects of the same judgment being impeached. In support of his submission, Mr. Matumula canvassed a decision of the Court of Appeal of Tanzania in **Aero Helicopter (T) Ltd vs. F.N. Jansen 1990 TLR 142 (CA)** which had restated the law to the effect that once proceedings of appeal to the Court of Appeal of Tanzania have been commenced by filing notice of appeal to the Court of Appeal of Tanzania, High

Court would lack jurisdiction to issue an order to relating to the stay of execution. Using the restatement of the law, Mr. Matumula invited us to

> *.... declare that, with cost the deliberations on execution subsequent to Appeal 3/08, in ICT, null and void.*

In his replying submissions Mr. Bajana dismissed the appellant's submissions on the ground number seven to be more academic than relevant to the issue of reinstatement of the Respondents as ordered by Mlelwa-DC.

The power of the full bench of High Court to hear appeals from the Industrial Court of Tanzania is provided for under section 28-(4) (1C) of the **Industrial Court of Tanzania Act, Cap. 60** as amended by the **Written Laws (Miscellaneous Amendments) Act No. 11 of 2003**:

> *"(IC) Subject to the provision of this section, every award and decision of the Court shall be called in question on any grounds in which case the matter shall be heard and determined by a full bench of the High Court".*

Despite the widely worded power of this Court under section 28-(4) (1C) of the **Industrial Court of Tanzania Act** to hear appeals from Industrial Court of Tanzania, we have with all deserving respect, failed to understand the relevance to this appeal of the **Aero Helicopter (T) Ltd vs. F.N. Jansen 1990 (supra)** which dealt with an application for a stay of execution pending an appeal to the Court of Appeal is relevant. This seventh ground of appeal is also devoid of merit and is hereby dismissed.

For the above-mentioned reasons, this Miscellaneous Civil Appeal Number 2 of 2010 is without merit and is hereby dismissed with costs awarded to the Respondents.

I.H. JUMA
JUDGE
17-10-2011

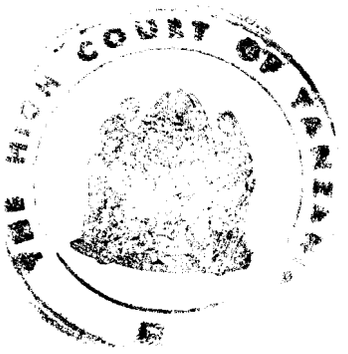
J. H. K. UTAMWA
JUDGE
17-10-2011

B. R. MUTUNGI
JUDGE
17-10-2011

Judgment delivered by two Judges present but it is a decision which is of the majority of three (3). In the presence of Mr. Mpoki, Advocate (for Matumula Adv.) for the Appellant and Respondents present in person (Christopher Mayaka).

I.H. JUMA
JUDGE
15-12-2011

J. H. K. UTAMWA
JUDGE
15-12-2011



B. R. MUTUNGI
JUDGE
15-12-2011