IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

HIGH COURT CIVIL REVISION NO.11 OF 2016

JAMES IBRAHIM MANULE .....APPLICANT

WANDIBA YUVENTINE NZINA.....APPLICANT

VERSUS

OSWALD MASATU MWIZARURA ..... RESPONDENT

J U D G E M E N T

BEFORE: MAIGE, J

The applicants and respondents were directors and shareholders in a company incorporated as JOGWA COMPANY LIMITED ("the company"). The Respondent filed an application at the trial court for declaration that the applicants were no longer the directors of and shareholders in the company. They procured an *ex-parte* order to that effect.

Initially, the respondent had filed Civil Application number 16 of 2016. It was an application for declaratory judgment as to the status of shareholding and directorship in JOGWA COMPANY LIMITED. The

application was made under section 7(2) and 95 of the CPC. The applicants herein were impleaded as respondents whereas the company was not joined as a party.

The application was heard *ex-parte*. There was an affidavit of Silas Lukas Isangi who represented himself as a court process server to the effect that the applicants had avoided service of chamber summons. It is this affidavit which prompted the trial magistrate to allow the respondent, on 8.4.2016, to proceed *ex-parte*. Upon hearing of the application, the trial magistrate, in the absence of a judgment or ruling, as the case may be, entered what he calls a declaratory order.

Upon becoming aware of the existence of *ex-parte* declaratory order on the record, the applicants applied for setting aside of the same and restoration of the application. It was their depositions that the declaratory judgment was entered into without them being served with summons to appear. The trial court rejected the application on account that the applicants had failed to call the court process server to contradict him with his deposition that the appellants had denied service of chambers summons.

In the instant application, the applicants, pursuant to section 79(1) (a), (2) and (3) of the Civil Procedure Code Act, Cap 33 R.E., 2002 read together with sections 43(3) and 44(1)(b) of the Magistrates Courts Act, Cap. 11, RE, 2002, is calling upon the court to call for and examine the record of the trial court to satisfy itself as to the propriety of the proceedings and decisions thereon and revise the decision. The application is premised on the joint affidavits of the applicants which contains the grounds in support of the application. It has been opposed by the counter affidavit of the respondent.

The proceedings initiating the substantive application is challenged, in paragraph 3 of the joint affidavit, for being filed and entertained in the absence of a suit. This assertion, the way I read it, raises serious jurisdictional issues which are capable of disposing of the application. For convenience therefore I will address this issue first.

With my permission, the hearing of this application was by way of written submissions which were timely filed. The applicants enjoyed the service of Fabian Mayenga, advocate whereas the respondent enjoyed the service of Joseph Muna, advocate. Their submissions, if I could say, were

well researched and indeed they were very useful in construction of this my judgment.

The submissions of Mr. Mayenga in respect to the aforesaid aspect is premised on the provision of section 22 of the **CPC** which requires all suits under the CPC to be made by way of presentation of a plaint. In his humble opinion, since the application at issue was made in the absence of a suit, it was not proper.

It was submitted in the alternative that assuming that the application was a statutory suit, it would have not been maintainable since it was preferred under a wrong provision of the law since section 7(2) of the CPC was not the appropriate provision. In the opinion of Mr. Mayenga, in as much as the application was pertaining to the management and affairs of the company, it would have been preferred under section 233 (1) of the Companies Act. He placed heavy reliance on the authority of my brother judge Mruma in JONH O. NYARONGA VS. CAPTAIN FERDINANDO PONT & 2 OTHERS, COMMERCIAL CASE NO. 62 OF 2009 (UNREPORTED) in which it was held that where the matter relates to the management and affairs of the company, in terms of sections 73(2) and 233 of the Companies Act, it

has to be originated by way of petition and the proper forum according to section 2 of the Companies Act, was the High Court.

In his submissions in rebuttal, Mr. Mbuna, in the first place, questioned the propriety of the application in relation to the substantive application for declaratory order. In his opinion, since the declaratory order was preceded by a decision refusing to set aside the *ex-parte* order, the applicants ought to have challenged the order refusing to set the *ex-parte* order only. With respect, I will not agree with him. The application, as I pointed out above, calls the court to examine into not only the decisions but the proceedings as well, to satisfy itself with their legality and propriety. He would have not faulted the proceedings and decision in the substantive application without attempting first to set aside the *ex-parte* order. Once the *ex-parte* order is set aside, the applicant is entitled to challenge the substantive decision provided that the grounds are not connected with his non-appearance.

Yet, the propriety of the instant application have been questioned in the submissions of the respondent on the ground that it ought to have been brought by appeal and not revision. The reason assigned being that revision is not an alternative to appeal. I was referred to the authority of

the Court of Appeal in YAHAYA NKWABI NTAKI VS. BHAVESHI J. HINDOCHI AND 2 OTHERS, MISC CIVIL APPLICATION NO. 8 OF 2015which supports that proposition. I have read the authority and I am satisfied that it does not apply in the instant application for simple reason that not all grounds that have been raised in this application are capable of being appealed from. As I pointed out above, this application challenges the propriety of both the proceedings and decisions therein made. An appeal does not lie against court proceedings. In addition, the application has raised some jurisdictional issues which were neither raised not determined by the trial court. In normal circumstances such issues would not be dealt with in an appeal.

There are many authorities of the Court of Appeal to the effect that impropriety of the proceedings can justify revision. For instance, in SGS SOCITIES GENERAL DE SURVEILLANCE S.A. VS VIP ENGENEERING AND MARKETING LTD, CAT, CIVIL APPLICATION NO. 2000 (UNREPORTED), it was held that illegalities and impropriety in the proceedings are good grounds for revision. In the above case, although the court dismissed the application, it observed that illegalities and improprieties in proceedings were special circumstances calling for revision. This principle was

enunciated in MIROSLAV KATIC VS IVAN MAKOBRAD, CAT, CIVIL APPLICATION NO. 66 OF 1998, quoted with approval in the above authority. See also FAHARI BOTTLERS LTD VS. SOUTHERN HIGHLANDS VS. THE REGISTRAR OF COMPANIES AND NBC LTD, CAT, CIVIL REV. NO. 1 OF 1999 and STANBIC BANK TANZANIA LIMITED VS. KAGERA SUGAR LIMITED, CIVIL APPLICATION NO. 57/2007, CAT. In my opinion therefore the application is properly before me.

In the substance of the grounds for the application, it was the submissions of Mr. Mbuna that section 233 of the Companies Act was not the appropriate provision. It was his contention that section 7(2) of the **CPC** was the appropriate provision.

After exposition of the lines of arguments for each of the parties, I will start with the issue of the maintainability of the substantive application at the trial court. In the course of addressing the issue, I will be dealing with the alleged errors apparent on the face of the record pointed out in the submissions and counter submissions.

It is common ground that the substantive application at the trial court was made under section 2 (2) of the CPC which provides as hereunder:-

ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint".

In this matter, the respondent has not cited any law establishing a special form of procedure that would permit him to bring a suit by way of chamber summons and affidavit. Instead, he has cited the provisions in CPC which on the face of them they don create a special form of procedure. The application in dispute was woven in such a way that it was an application under the CPC. On that, the counsel for the respondent has conceded in his written submissions that it was an application under the CPC. In my understanding of the law, a civil right cannot be determined by way of an ordinary application under CPC. The applications under CPC unless otherwise provided, are designed to deal with simple interlocutory matters which do not conclusively determine the rights and liabilities of the parties.

I understand that not all civil suits are brought by way of plaint. There are other statutory suits which are brought by way of petition, complaint, chamber summons, application and originating summons. For instance, under the Labour Institutions Act, suits are brought by way of Referral and Complaint while under Land Court Disputes Act, are brought

by way of applications in prescribed forms. These however are not suits under CPC and their forms of procedure, according to section 5 of the CPC, are not affected by the CPC.

In my opinion therefore, the substantive application at the trial court in so far as it was for declaratory judgment would have not been properly brought by way of chamber summons under section 7(2) of the CPC or any provision of the CPC. I therefore agree with Mr. Mayenga, learned advocate, that the application was not properly before the trial court and was brought under an irrelevant provision of the law.

As to the jurisdiction of the trial court, Mr. Mayenga is quite right. The the trial court did not posses the necessary jurisdiction to entertain the application, assuming it was a statutory suit. The application moved the court to award a declaratory order to the effect that the applicants were neither the directors nor the shareholders in a given company. This is a pure issue of management and affairs of a company. As held in JONH O. NYARONGA VS. CAPTAIN FERDINANDO PONT & 2 OTHERS,it would therefore fall with the domain of company law which has its special forms of dealing with dispute under the Companies Act. In this regard, the appropriate provision is section 233 of the Companies Act which requires

such an application to be brought by way of petition. The Court competent to deal with company matters according to section 2 of the Companies Act is the High Court unless the jurisdiction thereof is delegated to subordinate courts. The trial court therefore had no jurisdiction to entertain the matter.

On account of the foregoing reasons therefore, I find that the application has merit. The proceedings of the trial court were illegal for want of jurisdiction and so were the decisions thereon made. They cannot be left to stand. They are therefore quashed and set aside with costs.

It is so ordered.

I.MAIGE
JUDGE
24/10/2016

Right to appeal is duly explained.

I.MAIGE
JUDGE

AT MWANZA
24/10/2016

Date: 24/10/2016

Coram: I. Maige, J

Applicants: Mr. Mugabe H/b for Mr. Mayenga Adv

Respondent: Mr. Mugabe Adv

B/C: M. Said

Judgment delivered in the presence of Mr. Mugabe for the respondent who is also holding the brief for Mr. Mayenga, learned advocate for the applicants this 24th day of October , 2016.

I.MAIGE
JUDGE
24/10/2016