IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 89 OF 2020

(Arising from the decision of the High Court in Misc. Civil Application No. 118 of 2018)

ANAMARY BRONKHORST ..... APPLICANT

VERSUS

THE DEPOSIT INSURANCE BOARD
(The Liquidator of FBME Bank Ltd (under liquidation) ..... **RESPONDENT**

RULING

22nd & 29th April, 2021

RUMANYIKA, J.:

With respect to decision and order of this court (my brother Tiganga, J on 10/07/2020, on the ground of Mwanza Resident Magistrate court, without having been moved by parties but departed from the respective existing scheduling order, through Misc. Civil Application No. 32 of 2018 allowing discoveries then proceed to, and finally determined the main Civil Case No. 46/2017, the aggrieved Deposit Insurance Board (The Liquidator of FBME Bank Ltd (under Liquidation) herein the respondent took it both incorrect and improper. They applied successfully for revision so much so that for the reason herein above stated this court nullified the said

application for discovery proceedings and naturally so the orders were set aside.

Not happy, through legal service of S.C. Kitare learned counsel, Anamary Bronkhorst (herein the applicant) here he is for leave to appeal to the Court of Appeal of Tanzania. The application is brought under Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141 R.E. 2019 supported by affidavit of Steven K. Cleophace whose contents essentially, Mr. S.C. Kitare learned counsel adopted during audio teleconferencing hearing on 22/04/2021.

Mr. Abbakari Mrisha, learned Principal state attorney appeared for the respondent. In fact, through the digital plat form I heard them through mobile numbers 0757742256 and 0789349545 respectively.

With 3 points, by way of appeal now sought to be determined by the Court of Appeal of Tanzania, Mr. S.C. Kitare learned counsel in a nutshell essentially he submitted that the issues were;

(a) Whether it was proper for the judge by way of revision to entertain the matter originally instituted under Order XL Rule 1 (f) of the Civil Procedure Code Cap 33 RE 2019 (the Code)

(b) Whether it was proper for the judge by way of revision to entertain matter emanating from an interlocutory order.

(c) Whether it was proper for the judge to entertain revision proceedings as an alternative of appeal.

In reply, but having had adopted contents of the counter affidavit, Mr. A. Mrisha learned principal state attorney submitted that the application ran short of merit as it was both premature and out of place because the impugned decision did not determine finality of the case that if anything, having nullified the respective proceedings actually and rightly so ordered rehearing of the case. That is all.

The bottom line and central issue is whether the 3 points herein above stated they are of such general importance by way of appeal worth to be determined by the Highest fountain of justice (case of **Laiton Baliko v. Titye Village Government**, Civil Application No. 175/11 of 2017 (CA) Unreported much as I would not run risks of rehearing the revision or prematurely though, on that one usurp powers of the Court of Appeal of Tanzania just like also, at this stage with respect to which appeals should, and which ones should not go I am not intending to reduce this court to a conduit pipe.

At least as far as where the problem came from, the parties were agreed that contrary to the mandatory provisions of Order VIIIA Rule 4 of the Code and the rule in the case of **Nazir Kamru V. MIC Tanzania Ltd,** Civil Appeal No. 111 of 2015 CA, unreported, without departure from the scheduling order of the day, but at the detriment of the respondent the applicant just filed an application for discovery and it was in his favor decided such that from there, in effect the respondent's written statement of defence was no more.

Given its nature, the above noted mischief was not substantive but procedurally improper/incorrect therefore like it happened, revision proceedings were inevitable under the circumstances whether or not the decision was interlocutory it was immaterial in my considered view. I think at times it is not the timing that counts but only the meritorious end results of the court order. My brother Judge's decision may have had such far reaching effects yes, but actually it was of such an interim nature much as strictly speaking it did not, on the merit part of the case at an appeal level finally determine it. If anything, like Mr. A. Mrisha learned Psa precisely in my opinion argued, between them, the parties were ordered, only with effect from where the discoveries were ordered backwards to have the

case being heard all over again. In other words neither the applicant nor respondent had anything to lose frankly. Therefore from there, any intended appeal was both improper and uncalled for. It is very unfortunate that the application for leave was filed in the first place.

As for the principle in the case of **Nazir Kamru** (supra) I would increasingly hold that once the pleadings were, by consent of the parties and the court recorded it all as complete, unless on formal application the court was satisfied and it had re-opened it, any applications for interrogatories or, as it is the case here discoveries and chances of a part introducing new cause of action or most likely the same resulting to endless litigation was all eliminated, courts should entertain it with great caution. As far as the provisions of Order VIIIA Rule 4 of CPC that one in my considered view was intention of the Legislature now that for aforesaid reasons from its inception he had no "clean hands" applicant should not have come for equity.

In the upshot, the devoid of merits application is dismissed with costs.

S. M. RUMANYIKA

JUDGE

27/04/2021

The ruling delivered under my hand and seal of the court in chambers this 29/04/2021 in the absence of the parties.

S. M. RUMANYIKA

JUDGE

29/04/2021