IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL REVISION NO. 40 OF 2021

(Arising from the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu, in Misc. Civil Application No. 149 of 2020, by Hon. T.K Simba-PRM dated 06th day of December, 2021)

ORYX OIL COMPANY LIMITED ..... 1ST APPLICANT

STONEGATE INVESTMENT COMPANY LIMITED ..... 2ND APPLICANT

VERSUS

SETH FUEL LIMITED ..... 3RD RESPONDENT

RULING

16th, & 24th February, 2022

ISMAIL, J.

This ruling is on an application for revision, raised *suo motu* by the Court. The revision is against the decision of the Resident Magistrates Court of Dar es Salaam at Kisutu (Hon. Simba PRM), in Miscellaneous Civil Application No. 149 of 2020, whose decision was delivered on 6th December, 2021. The application had two main injunctive prayers, one of which was to be granted *ex-parte* as hearing *inter-partes* was being awaited. The *inter-partes* prayer was coined in the following words:

"The respondents herein, their agents, workmen or assignees be restrained from howsoever obstructing and/or making interferences with the applicant's running Oryx Kijitonyama Service Station in dispute pending hearing and final disposal of the main suit."

The application for the injunctive orders was disposed of by way of written submissions, culminating into a ruling that ordered maintenance of *status quo*, prevalent before the respondent took over the premises. Subsequent thereto, execution proceedings were commenced vide Execution No. 20 of 2021, to evict the applicants from the suit premises. There was also a prayer that was intended to have the applicant's directors show cause as to why they should not be detained as civil prisoners.

These execution proceedings triggered an action which involved lodging a complaint to this Court, vide a letter with reference No. ORYX/LD/2021/12/12, dated 13th December, 2021. In the application, the Court was implored to invoke its inherent powers under section 79 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), and call for and revise the proceedings in Civil Application No. 149 of 2020, on account of material irregularities and illegalities committed by the trial court.

Hearing of the application was held *ex-parte*, following a default in appearance by the respondent, despite service of the notice of appearance

effected on the latter's counsel. Mr. Joseph Nuwamanya, learned counsel whose services were enlisted by the applicant made, his submissions in writing. He submitted that the irregularities and illegalities that prompted the instant application were predicated on the following points of contention:

(i) That the Magistrates' court granted an application for injunction without following the standards and conditions set out by law and precedents in granting injunctions;

(ii) The Magistrates' court ordered maintenance of status quo ante without the same having been prayed for by the applicant, and without according the parties an opportunity to be heard;

(iii) That the court ordered maintenance of status quo ante, even after the expiry of the franchise agreement between the parties; and

(iv) The court improperly and illegally prematurely decided questions to be determined in the main suit.

With respect to the first ground, Mr. Nuwamanya submitted that the principles governing the grant of injunction, as enunciated in ***Atilio v. Mbowe*** [1969] HCD 284, were not conformed to. With respect to Misc. Civil Application No. 149 of 2020, learned counsel argued that these principles

were submitted on but the trial court refused to subscribe to them, except one that was intended to ascertain if there was any triable issue. The other two principles were not submitted on by the respondent. He cited the decision of the Court in ***Oryx Oil Company Limited v. MPS OIL (T) Limited & Another***, HC. Misc. Land Case Application No. 843 of 2017; and ***Gulf Badr Group (Tanzania) Limited v. Swaleh Said Mohamed***, HC-Civil Revision No. 10 of 2019 (both unreported). The holding in both of the decisions is that these conditions must be fulfilled cumulatively.

Regarding the second ground, Mr. Nuwamanya contended that, whereas the *inter-partes* prayer was for a restraint order against obstruction or interference with the respondent's running of the petrol station, the trial court issued an order for maintenance of status quo ante. Learned counsel contended that the said order was issued without letting the parties address the court on that point, and while it had not been prayed for. This was in contravention of the legal position as it currently obtains and as underscored in the case of ***Dr. Abraham Israel Shumo Muro v. National Institute of Medical Research and Another***, CAT-Civil Appeal No. 68 of 2020 (unreported), in which it was held that the court cannot grant a party or parties an order or relief which has not been prayed for.

The applicant's complaint in ground three is that the order for maintenance of status quo was granted after the expiry of the Franchise Agreement. This agreement was allegedly made to come to an end on 19th May, 2020. It allegedly expired on 18th September, 2020. The applicant's contention is that the order for maintenance of the status quo was illegal and irregular because it had the effect of ordering the parties to engage and enter into the Franchise Agreement which was not of their own free will. This, Mr. Nuwamanya contended, infracted the trite position which is to the effect that parties are only bound by agreements that they freely enter into. He bolstered his argument by citing the Court of Appeal's decisions in ***Simon Kichele Chacha v. Aveline M. Kilawe***, CAT-Civil Appeal No. 243 of 2018; and ***Lulu Victor Kayombo v. Oceaning Bay Limited & Another***, CAT-Consolidated Civil Appeals Nos. 22 & 155 of 2020 (both unreported).

On illegal, improper and premature decision of questions to be determined in the main suit, the contention by the applicant's counsel is that matters which were pleaded in the main suit were determined prematurely, through the application for restraint orders. The argument by the applicant is that such conduct was abhorrent, as was held in ***Abdi Ally Salehe v. Asac Care Unit Limited & 2 Others***, CAT-Civil Reference NO. 3 of 2012 (unreported), wherein it was held that the Court's only preoccupation in

applications for injunctive applications is only to see a prima facie case and not to prejudge issues in the main suit. Mr. Nuwamanya contended that rights of the parties were determined in the application without according the parties the right to be heard. He contended that such failure renders the proceedings a nullity, as was held in ***Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Service Limited***, CAT-Civil Appeal No. 257 of 2018 (unreported).

It was the applicant's prayer that the application be granted.

As I sat co compose the ruling, an issue arose on whether revisional proceedings from interlocutory proceedings are amenable to revision. I then called upon the applicant's counsel to address me on this point.

In this respect, Mr. Nuwamanya submitted that the proceedings that gave rise to this application were from Misc. Civil Application No. 49 of 2020, and were for injunctive orders, meaning that they were interlocutory in nature. He contended, however, that it is the nature of such proceedings and order made therein that make them amenable to revision. He argued that section 79 (2) of the CPC provides that even interlocutory orders are revisable as long as such decisions have the effect of finally determining the suit. Learned counsel argued that the finding in the application determined the crux in the main suit, meaning that there would be nothing else to decide

in the main suit if the decision had already been made through the application.

He urged the Court to jealously guard its supervisory powers and exercise them for purposes of ensuring that justice is served. In his view, the Court should not ignore the fact that the trial court ordered parties into a contract which expired in May, 2021.

It must be appreciated that determination of whether the proceedings are of interlocutory nature is done by applying what is known, in legal parlance, as the "**nature of the order**" test. This test acknowledges the fact that whether the decision or order is a final, preliminary or interlocutory depends on the circumstances of each case (See: ***Yusuf Hamis Mushi & Another v. Abubakari Khalid Hajj & 2 Others,*** Civil Application No. 55 of 2020 in which the upper Bench quoted its decision in ***Tanzania Motors Services Ltd & Another v. Nehar Singh t/a Thsker Singh,*** Civil Appeal No. 115 of 2005 (both unreported), in which the Court had adopted the test propounded in ***Bozson v. Artincham Urban District Council*** (1903) 1 KB 547. In the latter, Lord Alverston observed as follows:

> *"It seems to me that the real test for determining this question ought to be this;* ***does the judgment or order, as made, finally dispose of the rights of the parties?***

If it does, then I think it ought to be treated as final order; but if it does not it is then in my opinion, an interlocutory order" [Emphasis added]

Where a decision or order finally determines rights of the parties, then the same, though bred from interlocutory proceedings, becomes amenable to a challenge, either by way of appeal or revision. Thus, in the case of ***Murtaza Ally Mangungu vs. The Returning Officer for Kilwa & 2 Others,*** CAT-Civil Application No. 80 of 2016 (unreported), it was held that the order or decision of the court which is taken to have finally determined the rights of the parties must be such that it could not bring back the matter to the same court on the same matter.

(See also: ***Peter Noel Kingamkono vs. Tropical Pesticides Research,*** CAT-Civil Application No. 2 of 2009 (unreported).

I have unfleetingly gone through the trial court's proceedings on the injunctive orders and, as Mr. Nuwamanya correctly contended, these proceedings commenced as interlocutory proceedings. However, the course of the matter changed the moment the trial court dwelt onto the substance of the main dispute, thereby coming up with a decision that left nothing to be determined in the main contest by the parties. The order that came from Misc. Civil Application No. 149 of 2020 mutated into a conclusive order,

shedding off the original intent and identity as an interlocutory matter. The order is in the mould of appealable orders listed in Order XL rule 1 of the CPC. This certainly removes the decision in Misc. Civil Application No. 149 of 2020 from the list of interlocutory orders which, under section 74 (2) of the CPC, cannot be appealed against. This position concludes the question of whether the application is amenable to revision in the affirmative.

Turning back to the substance of the matter, the issue for consideration is whether this is a fit case in respect of which revisional powers may be exercised.

The Court's revisional powers are vested in it by the provisions of section 79 (1) of the CPC which provide as hereunder:

> *"The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-*
>
> > *(a) to have exercised jurisdiction not vested in it by law;*
> >
> > *(b) to have failed to exercise jurisdiction so vested; or*
> >
> > *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it."*

It is clear that illegality or material irregularity, where alleged and successfully proved, can be the basis for the Court's annulment of the proceedings that bred the order which is allegedly tainted with such illegality of irregularity. In the instant matter, the illegality is alleged to reside in the order which went far over-board and disposed of the parties' main point of disputation in the main suit. Part of the decision that is now under the cosh reads as follows, at its page 6:

> *"... **the mode of taking over the service station by the defendants was not peacefully (sic) as alleged by the 2nd respondent** in his submissions because there was no legal procedure which was followed and there was no any lawful order authorizing the defendants to act the way they did ...."* [Emphasis is added]

The observation by the learned trial magistrate was a validation of the allegation levelled by the respondent (the plaintiff in Civil Case No. 206 of 2020) that the takeover of the petrol station by the 2nd applicant (2nd defendant in the plaint) was forcible and without any legal justification. For ease of reference, the substance of paragraph 7 of the plaint is as reproduced in verbatim:

> *"That sometimes on 17th September, 2020, while the executed contract for Franchise of retail service is still*

subsisting as the same is due to expiry by 19th May, 2021 the 1st Defendant demanded the Plaintiff to immediate hand over the Service Station to them and subsequent to the demand on the same date i.e. 17/09/2020 the ***2nd Defendant forcibly took over the premises and on the 19th September, 2020 the 2nd Defendant without any legal justification started to operate the Service Station****. Copies of the Demand notice and receipt evidencing running of the service station by the 2nd Defendant are hereto annexed and marked as Annexure MNA2, forming part of this plaint."* [Emphasis is added]

A cursory glance at the two excerpts lends an unassailable credence to the applicants' contention that the order in Misc. Civil Application No. 149 of 2020 went beyond ordering maintenance of status quo, the intended prayer in the application. It was a pre-determination of the main dispute before the parties had their day in court, and it doesn't get uglier than that. It was highly irregular and an act of profound infraction of the right to be heard, guaranteed in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended), and emphasized in numerous judicial pronouncements, including ***Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma*** [2003] TLR 251, quoted in ***Ausdrill Tanzania Limited v. Mussa Joseph Kumili & Another***, CAT-

Civil Appeal No. 78 of 2014; and ***Margwe Erro & 2 Others v. Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014 (both unreported).

Needless to say, such infraction breeds consequences which are dire. This position was underscored in ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,*** CAT-Civil Application No. 33 of 2002, wherein it was held:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*** *"*[Emphasis supplied]

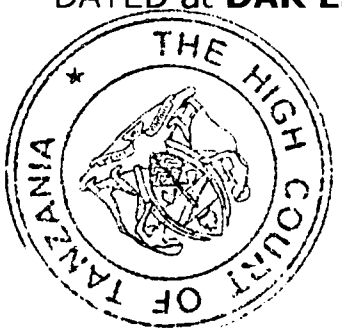
In the instant application the violation of this right is what triggers intervention of this Court, and my conviction is that a case has been made to justify the intervention. It is simply that the trial court indulged in an irregularity and illegality of a mammoth proportion, and the corresponding remedial action is to accede to the applicants' prayer.

Consequently, this application succeeds, and the proceedings of the trial Court in Misc. Civil Application No. 149 of 2020 are hereby quashed, orders emanating therefrom set aside, and the matter is remitted back to

the trial court for fresh hearing of application, if the respondent so desires. Hearing should be conducted by another magistrate. I make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th of March, 2022.



M.K. ISMAIL

JUDGE