IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CIVIL APPEAL NO. 23 OF 2022

(Originating from the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu, in Misc. Civil Application No. 179 of 2021, by Hon. Simba-PRM dated 22nd day of December, 2021)

NANGAI ENGINEERING & CONTRACTORS ..... APPELLANT

VERSUS

KAHAMA OIL MILLS LIMITED ..... RESPONDENT

JUDGMENT

20th May, & 2nd June, 2022

ISMAIL, J;

This is an appeal arising from the decision of the resident Magistrates' Court of Dar es Salaam at Kisutu, in respect of Miscellaneous Civil Application No. 179 of 2021. The said decision was delivered on 22nd December, 2021, and it was in respect of an application for review taken at the instance of the respondent.

The review altered the sum awarded as decretal sum from TZS. 80,000,000/-, awarded to the respondent in Civil Case No. 174 of 2019, to TZS. 160,816,311/-. In both of the awards, the appellant was on the losing side. This is the decision that has caused an uproar and bred the instant appeal. Three grounds of appeal have been raised by the appellant as reproduced in verbatim as follows:

1. *That the lower Court erred in law and fact for entertaining Misc. Civil Application No. 179 of 2021 which intends to review the judgment and decree of Civil Case No. 174 of 2019 which the Court had no jurisdiction to entertain the same.*

2. *That the trial Court erred in law and fact for entertaining an application for review while there was an existing appeal which the Respondent was aware of.*

3. *That the Court erred in law and fact for granting an application for review despite there being no sufficient grounds to exercise its powers.*

At the hearing, the appellant was represented by Mr. Emmanuel Mbuga, learned counsel, while the respondent was represented by Mr. Shundi Mrutu, learned advocate.

Submitting in support of ground one, Mr. Mbuga contended that the trial court did not have jurisdiction to entertain Civil Case No. 174 of 2019 from which Misc. Civil Application No. 179 of 2020 emanated. He argued that

it was improper for the trial court to review the judgment in respect of which the court had no jurisdiction. Mr. Mbuga further argued that, in Civil Case No. 174 of 2019, the claim by the respondent was to the tune of TZS. 80,000,000/- and later TZS. 168,000,000/-, being the balance due for goods sold and delivered to the appellant.

Mr. Mbuga argued that the matter is of a commercial nature, in respect of which the Resident Magistrates' Court had no jurisdiction to entertain. The learned counsel's contention was predicated on section 2 (5) and (6) of the Magistrates' Court Act, Cap. 11 R.E. 2019; and ***African Wheels & Tyres v. Transec Limited***, HC-Misc. Civil Revision No. 11 of 2020 (unreported). Mr. Mbuga was insistent that jurisdiction of the Resident Magistrates' Courts in commercial disputes is spelt out in section 40 (3) (b) of Cap. 11. And the quantum is TZS. 70,000,000/- or less while the value of the subject matter was in excess of the sum due in the proceedings. He implored the Court to be inspired by the decisions in ***NBC v. Stephen Kyando***, Civil Appeal No. 1 of 2017; and ***Savings and Finance Commercial Bank v. Bidco Oil and Soap Ltd & Another***, CAT-Civil Appeal No. 40 of 2012 (both unreported).

With regards to ground two, the argument by the appellant's counsel is that the appellant lodged an appeal in this Court i.e. Civil Appeal No. 363

of 2021. He contended that a copy of the appeal, filed on 4th November, 2021, was served on the respondent's counsel. Mr. Mbuga argued that, as this was happening, on 23rd November, 2021, the respondent instituted Misc. Civil Application No. 179 of 2021, seeking a review of the decision in Civil Case No. 174 of 2021. Learned counsel argued that the said application was hurriedly heard and determined on 22nd December, 2021. It was Mr. Mbuga's contention that it was improper for the trial court to do so as there was an existing appeal.

In the appellant's view, introduction of a review process in the pendency of the suit caused confusion in the administration of justice. On this, Mr. Mbuga relied on the case of ***Isidore Leka Shirima & Another v. PSSF & 3 Others***, CAT-Civil Application No. 151 of 2016 (unreported).

On ground three, the argument by the appellant is that the ground for review was not good enough. Mr. Mbuga took the view that the provisions of Order XLII of the Civil Procedure Code, Cap. 33 R.E. 2019 were interpreted widely by relying on the grounds which are not in the purview of the law. He was of the view that failure to consider the amended plaint ought to have constituted a ground of appeal and not a review. The appellant's contention was predicated on the decisions in ***Flora Venance Mwingira v. Geoffrey Kachenje***, HC-Misc. Land Application No. 351 of 2020; ***Noble Motors Ltd***

v. Umoja wa Wakulima Wadogo wa Bonde la Kisere, CAT-Civil Application No. 285/01 of 2016 (unreported); and Mulla on Code of Civil Procedure. He contended that powers of evaluation of the evidence on amended sum of TZS. 160,000,000/- are powers reserved for an appellate court.

The appellant prayed that the appeal be allowed with costs.

Mr. Mrutu was opposed to the appellant's submission. On ground one, the argument is that this ground is misplaced as the appeal before the Court is not in respect of Civil Case No. 174 of 2019. This means that the contention of lack of jurisdiction is utterly misplaced. He added that Commercial Division of the Court does not have exclusive jurisdiction and that the cases cited are distinguishable. He considered that this ground of appeal is hollow.

Regarding ground two, learned counsel's contention is that neither the trial court nor the respondent was aware of the appeal proceedings. He added that service of the appeal documents was done after the review proceedings had been decided. Mr. Mrutu argued that the appellant has not proved that the trial court was aware of the appeal at the time. He was adamant that the appellant was represented in the review proceedings and nothing on the appeal was raised by the appellant's erstwhile counsel. He

discounted the authorities cited as being distinguishable and that the ground is a mere afterthought.

With respect to ground three, Mr. Mrutu's take is that review proceedings are governed by Order XLII of the CPC, and are ordered where there is an error or wrong committed. In this case, Mr. Mrutu argued, the decision was based on the old claim of TZS. 80,000,000/- while issues were framed on the basis of the amended figure of TZS. 160,000,000/-. He argued that even the judgment acknowledged the new figure. It was his contention that the error was on the face of the record and was amenable to review. No appeal would lie while there was no evaluation of evidence, he retorted. He took the view that the decision on appeal was unblemished, urging the Court to dismiss the appeal with costs.

The appellant's rejoinder was mainly a reiteration of the submission in chief. Mr. Mbuga maintained, on ground one, that the matter is a commercial case over which the trial court had no jurisdiction. On ground two, the argument is that the respondent does not dispute that there was an existing appeal and that the same was filed before the review.

On ground three, the appellant argued that enhancement of the decretal sum was an evaluation process which would only be done by an appellate court.

He maintained that the appeal is meritorious.

From the parties' rival submissions, the question to be resolved is whether the appeal is meritorious.

The disposal journey begins with grounds two and three of the appeal that I propose to deal with in a combined fashion. These grounds query the propriety or otherwise of carrying out a review of the decision while an appeal was pending against the very decision on which a review was preferred.

As unanimously held by both counsel, applications for review are preferable in cases where a decree or order is passed and appeal is allowed but the applicant has chosen not to appeal; or where no appeal lies but there is a discovery of a new or important matter of evidence which would not be obtained even with due diligence by the applicant. This is provided for by Order XLII rule 1 of the CPC which postulates as follows:

> *"(1) Any person considering himself aggrieved-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not*

within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

This position has been underscored in several decisions, including the decision in ***George David Gordon v. Relliance Insurance Company (T) Limited*** [2007] TLR 220; and ***Sauda Juma Urassa v. Coca-Cola Kwanza Limited***, CAT-Civil Appeal No. 227 of 2018 (unreported). The important take away in the cited authorities is that, an application for review should not be preferred where there is already an appeal against the decision sought to be

reviewed, lest the latter proceedings suffer a rejection, as the subordinate court handling the review is considered to have lost jurisdiction.

In the instant case, there is no doubt that at the time of institution of an application for review vide Misc. Civil Application No. 179 of 2021 *i.e.* 23rd November, 2021, an appeal (Civil Appeal No. 363 of 2021) was pending in this Court. While the respondent does not doubt the appellant's contention on the existence of the appeal, the view held by Mr. Mrutu is that neither the trial court nor the respondent was aware of the institution of the appeal. This means that this fact was not brought to the attention of the trial court when parties met on 7th December, 2021.

On this day, the appellant, who featured as the respondent in the review proceedings, was represented and enjoyed the able service of Ms. Jacqueline Jonathan, learned counsel. Ms. Jonathan did not object to the application and said nothing about the pending appeal in this Court. This means that she was either oblivious to the existence of the appeal or she chose to deliberately withhold this information and unleash it at an appropriate time. The conclusion drawn from this revelation is that, in the absence of any knowledge of existence of the appeal, the challenge on the trial court's decision to entertain the application is utterly misconceived and quite uncalled for. Things would be different had the existence of the appeal

been brought in the trial court's attention and the latter chose to ignore that fact. This is unlike in the ***Sauda Juma Urassa's case*** (supra) in which the Court was alerted of the untenability of the matter but proceeded to determine it.

In my considered view, possession of the knowledge is what distinguishes this case from the ***Sauda Juma Urassa's case*** (supra). In consequence of the foregoing, I take the view that these grounds of appeal are hollow and I dismiss them.

Turning on to ground one of the appeal, the contention is that, on account of the fact that the value of the subject matter was in excess of TZS. 70,000,000/- the trial court did not have jurisdiction to handle the matter, it being a commercial dispute. The powers sought to be challenged through this ground relate to Civil Case No. 174 of 2019 from which the decision reviewed emanated.

The consternation by the appellant touches on the decision which is not the subject of the appeal before this Court. It is with respect to a decision that has not been impeached in the instant appeal. It, certainly, constitutes a foreign decision, as far as appeal from Misc. Civil Application No. 179 of 2021 is concerned. In view thereof, I find no justification in entertaining a point that touches on a decision other than that which is sought to be

impugned. I am constrained to reject this ground out of hand and hold that this ground is misplaced.

In the upshot, I hold that the appeal is destitute of fruits and I dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 2nd day of June, 2022.

M.K. ISMAIL

JUDGE

02/06/2022