

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**CIVIL REVIEW NO. 1 OF 2022**

*(From Civil Case 01 of 2017 in the High Court of Tanzania at Mbeya)*

**SAMWEL MWAISUMBE ..... APPLICANT**

**VERSUS**

**MIC TANZANIA LIMITED..... RESPONDENT**

**RULING**

Date of Last Order: 21.06.2023

Date of Ruling : 16.10.2023

**MONGELLA, J.**

In the matter at hand, the applicant seeks for review of a judgment and decree of this court rendered in Civil Case No. 1 of 2017, in which he stood as the plaintiff while the respondent was the defendant.

Briefly, the applicant filed the case against the respondent claiming payment of TZS. 615,315,000/- being loss of opportunity arising from breach of contract and negligent act done by the defendant whereby the defendant failed to promptly return to him a failed money transaction. Upon hearing the case, the question of jurisdiction was raised. This court found that it had no jurisdiction to determine the case as it ought to have commenced before the

Tanzania Communication Regulatory Authority (TCRA). The court thus struck out the case for being incompetent before the court.

The applicant's ground of this review is that there are new pieces of evidence that have surfaced that were not in the knowledge of either party during trial and thus could not be produced rendering this court to strike out the case for lack of jurisdiction. In the premises, the applicant prays for two orders: **one**, that this court reviews its decision on account of the new evidence which shows that this court has jurisdiction to entertain the suit; and **two**, that costs of the application be provided.

The application was heard through written submissions whereby both parties were represented by learned advocates. The applicant was represented by Mr. Sambwee Shitambala while the respondent was represented by Mr. Ndanu Emmanuel.

In his submission Mr. Shitambala commenced by giving a brief summary of the case. He said that this court found that it had no jurisdiction to entertain the suit and directed the applicant to follow the recourse provided under the Tanzania Communications Regulatory Authority Act, 2003 (the TCRA Act).

Mr. Shitambala averred that the applicant followed the recourse thereby filing his complaint to the TCRA which was re-directed to the Bank of Tanzania (BoT). however, the BoT told him to seek his rights through this court. In the circumstances, he had the stance

that, if this court had known the said position, it would not have struck out the case on ground of lack of jurisdiction. He further attached letters of the communication between the applicant and the two authorities (TCRA and BoT) contending that the same were new evidences that were not in the knowledge of either of the parties and the trial judge. He therefore asked this court to review its decision in the Civil Case No. 01 of 2017 on account of existence of the new evidence which shows that this court has jurisdiction.

Arguing that an application for review was the right approach and that the discovery of new evidence is one of the grounds for review. He cited **section 78 of the Civil Procedure Code [Cap 33 R.E 2019]** and the case of **Francis Nyerere Said vs. Bunda Town Council and 4 Others**, Civil Review No. 3 of 2021 to buttress his point.

This application for review did not go unchallenged. In reply to Mr. Shitambala's contentions, Mr. Ndanu submitted that this court is *functus officio* to hear and determine the matter on its merit. He contended that, the new evidence the applicant claims to have surfaced are letters from the TCRA as well as BoT in which the said authorities claim to have no jurisdiction to entertain the applicant's complaint. That, according to the case of **Attorney General vs Akonaay and Joseph Lohay** [1995] TLR 80 (CAT), courts do not have the jurisdiction to entertain the matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum.

That, according to Part VIII of the TCRA Act, specifically under section 40, it is mandatory that every complaint against a supplier of regulated goods or services in relation to any matter connected with the supply, possible supply or purported supply of goods or services to refer his or her complaint to TCRA and if aggrieved may file an appeal to the Fair Competition Tribunal within 21 days, a position re-affirmed in **Salim K. Mndende vs. Vodacom Tanzania Ltd and TCRA**, Civil Case No. 18 of 2015 (unreported).

Mr. Ndanu further averred that the letters from the two authorities in which they claim to have no jurisdiction would not give this court jurisdiction as there is already a legal mechanism, embedded with the jurisdiction to entertain the applicant's claim and the applicant has thus failed to exhaust the remedies under the TCRA Act. He added that the failure of the two authorities to perform their duties does not give room to the applicant to approach this court by way of review. With such observation, he concluded by praying for the application to be dismissed with costs for lack merit.

I have considered the submissions by both learned counsels. The applicant has sought for this review under the ground that he has discovered new evidence which did not formerly exist during trial. He had the contention that had the evidence existed, the trial Judge would not have terminated the case for lack of jurisdiction. In his view, this new evidence gives this court jurisdiction. The respondent denies the applicant's claim averring that this court is *functus officio* and the new evidence does not give this court

jurisdiction as the fact still remains that under the TCRA Act, the applicant ought to have instituted his claim before the TCRA.

Before deliberating on this matter, I find it pertinent to reproduce the relevant provision under the Civil Procedure Code governing applications for review. In particular, the provisions are **section 78 and Order XLII Rule 1.**

### **Section 78**

- 78.**-(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-
- (a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Code, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

### **Order XLII**

- 1.**-(1) Any person considering himself aggrieved-
- (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.

In consideration of the above quoted provision, it is unquestioned that discovery of a new and important matter or evidence stands as a ground for review before this court. This was also affirmed in the case of **Isaya Linus Chengula vs. Frank Nyika** (Civil Application No. 487 of 2020) [2022] TZCA 167 TANZLII whereby the Court of Appeal stated:

“Discovery of new and important matter or evidence can be raised as a ground for review in the High Court and not in this Court.”

From the above holding and as stated in the relevant provisions, this court may review its decision in appropriate circumstances as set under the law and that would not be acting *functus officio* as claimed by Mr. Ndanu. However, the underlying question in this application is whether the letters exchanged between the applicant and TCRA and BoT in which the two authorities claimed to have no jurisdiction qualify as new evidence for purposes of review in this court.

I am of considered view that the wording of the **proviso to Order XLII Rule 1** clearly indicate qualities/conditions of the so termed “new evidence” to the effect that the same must be: something new and important; that after exercise of due diligence was not in the knowledge of the party or could not be produced by the party when the decree was passed or order made. What is meant under these conditions is that the new evidence must have existed at the time of the trial, but somehow the party was unaware or that he or she could not access the same. In my settled view, these are qualities that the letters brought by the applicant do not hold.

The said letters, show the correspondence between the applicant, TCRA and BoT after this court had already struck out the case for lack of jurisdiction. The fact that the two authorities declared that they had no jurisdiction over the matter did not amount to new evidence as the same did not exist during trial.

The respondent’s counsel averred that the letters do not give this court jurisdiction because **section 40 of the TCRA Act** maintains that claims should first be heard by the TCRA and thereafter the Fair Competition Tribunal. With due respect to the learned counsel, I am of the view that he failed to note that the matter at hand was not on the letters from the two authorities giving this court jurisdiction, but rather on whether the same qualify as new evidence warranting this court to accept the applicant’s prayer for review. His arguments are therefore misplaced.

In conclusion, I reiterate my position that the purported new evidence advanced by the applicant to move this court to review its decision does not meet the criteria of new evidence for such purpose. If the applicant believed that this court had jurisdiction, he should have challenged the decision in a higher court instead of filing for review. As such, the application is found to lack merit and consequently dismissed, with costs.

Dated and delivered at Mbeya on this 16<sup>th</sup> day of October 2023.



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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA