IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CIVIL REVISION NO. 02 OF 2023

(Arising from Misc. Civil Appeal No. 01/2023 and original No. 06/2022) Bokoba RM's Court W.E.Yona - SRM)

LEONARD REVERIAN KABUTELANA.....APPLICANT

VERSUS

ALLIANCE FINANCE CORPORATION LIMITED.....1ST RESPONDENT

TATA AFRICA HOLDING TANZANIA LIMITED.....2ND RESPONDENT

RULING

19/06/2024 & 25/06/2024
E.L. NGIGWANA, J

This is an application for revision on the decision of the ruling of the District court of Bukoba at Bukoba (W.E.Yona-SRM.) in Miscellaneous Civil Application No.1 of 2023 dated 3rd day of August 2023. It has been brought by way of chamber summons made under section 79 (1) (c) and Order XLIII Rule 2 of the Civil Procedure Code [Cap.33 R. E 2019] and section 44 (1) and (b) of the Magistrates ' Courts Act, [Cap 11 R.E 2019]. The application is supported by an affidavit deposed by Mr. Projestus Prosper Mulokozi,

learned advocate from Orbit Attorneys. The applicant is seeking for the following orders;

(i) *That, the Hounorable Court be pleased to determine application for revision by the applicant in relation to the ruling of the trial court delivered 3rd day of August 2023 to satisfy itself on the correctness of the decision.*

(ii) Upon revising the propriety and correctness of the ruling and decision, this Honourable Court be pleased to make orders that the decision referring the matter to arbitration was reached without affording an opportunity on the applicant to be heard and without the court being properly moved

(iii) Costs be provided for

(iv) Any other relief as the Court may deem just and fit to grant.

The application is resisted by the 1st respondent through a counter affidavit affirmed by Ms. Ruqaiya Abdulla Al-harthy, learned advocate while the 2nd respondent in the courter affidavit deposed by Mr. Richard Magaigwa, learned to counsel for the 2nd respondent is to the effect that the 2nd

respondent was not involved in Miscellaneous Application No. 1 of 2023 hence not aware of what transpired.

Briefly, the historical back ground giving rise to this application is as follows; on 16th day of September, 2022, the applicant instituted a Civil Case to wit; Civil Case No.06 of 2022 in the Resident Magistrates' Court of Bukoba at Bukoba claiming jointly and severally from the respondents for specific performance of an indicative term sheet for potential funding of Tata Vehicle and provide Credit Agreement in consideration of the fact that the vehicle was not a brand new imported vehicle in stock pending registration with TRA or payment of **TZS.90,648,600/=** to restore applicant into the position he was if representation made by the respondents had been true.

On 20th day of October, 2022 the 1st respondent filed a Written Statement of Defence together with a counter claim while the 2nd respondent filed a Written Statements of Defence and raised therein a preliminary objection on point of law that the suit is unmaintainable for want of jurisdiction as per the provisions of section 13, 18 (a), (b) and (c) of the Civil Procedure Code [Cap.33 R.E 2019].

On 28th day of October, 2022, the 1st respondent served a notice for arbitration to the firm of Orbit Attorneys. In addition to the notice, the 1st respondent on 23rd day of November 2022 filed a chamber summons supported by an affidavit praying for the trial court to stay proceedings pending reference to arbitration. The same was registered as Miscellaneous Application No. 1 of 2023 (Arising from Civil Case No. 06 of 2022).

On 3rd day of February 2023, the applicant filed a counter affidavit and a notice of preliminary objection and served the 1st respondent on 7th day of February 2023. The objection raised was to the effect that the application by the applicant now 1st respondent is incurably defective for lack of enabling provisions of law to grant the prayers sought.

On 13th day of April, 2023, the trial court ordered for hearing of the preliminary objection by way of written submission and upon submission being filed, on 3rd day of August 2023, the ruling was delivered dismissing the raised preliminary objection with costs and consequently; granting the first respondent's application to refer the dispute to an arbitrator.

An order granting the 1st respondent's application to refer the dispute to the arbitrator was pronounced without considering the affidavits by the

applicant and the 1st respondent and without inviting the parties to submit on the filed affidavits, hence this application.

When the application was called on for hearing, Mr. Peter Matete, learned advocate appeared representing the applicant; whereas Mr. Scarius Bukagile, learned advocate holding brief for Ms. Ruqaiya Abdulla Al-harthy, with instructions to proceed, represented the 1st respondent. The hearing proceeded ex-parte against the 2nd respondent because her advocate defaulted appearance with no notice to court.

Submitting in support of the application, Mr. Peter Matete reiterated the contents of the founding affidavit. He added that, since the decision referring the Case to the arbitrator was arrived without affording the parties the right to be heard, the decision/order is nothing but a nullity.

He went on submitting faulting the trial Magistrate for dismissing the P.O. According to him, the same ought to have been sustained.

In reply, Mr. Scarious conceded that there the order referring Civil Case No.06 of 2022 to the Arbitrator was reached without affording the parties the right to be heard thus the same cannot be left to stand. As regards submission by the applicant's advocate faulting the trial Magistrate for dismissing the PO,

Mr. Bukagile submitted that that fact does not feature in the affidavit supporting the application, therefore it is nothing but submission from the bar.

Having gone through the trial court records, proceedings and the ruling and having heard parties' submissions, the issue for determination is whether this application is meritorious. It is worth noting that the High Court of Tanzania has the power to revise the proceedings the District Court or the Magistrates' Court if it appears that the court acted with material irregularity.

The inherent revisionary powers of the High Court are enshrined under both section 44(1) of the Magistrates Courts Act, [Cap.11 R.E 2019] and Section 79 of Civil Procedure Code, [Cap 33 [R.E. 2019] respectively.

Section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] clearly provides that:

(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and*

give such directions as it considers ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate ***on application being made in that behalf by any party or of its own motion,*** *if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:*

Section 79 of the Civil Procedure Code [Cap 33 R.E 2019] provides as follows;

"79 (1) 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 the 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 thinks fit.***

(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit

(3)Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act."

In the Malasyan persuasive case; **Republic versus Muhari Bin Mohd Jani and Another [1996] C LRC 728-734-5,** it was held among other things that the object of revisionary powers of the High Court is to confer upon the High Court a kind of paternal or supervisory jurisdiction in order to correct or prevent miscarriage of justice. The question which the court must ask itself is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice. The court went on to state that the High Court having been entrusted with such a wide discretion, should be the last to attempt to fetter that discretion. That the discretion however, like all other discretions ought, as far as practicable to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case.

It is settled principle of law that, where there is a PO raised the same must be determined first before dealing with the substantive matter, this position was taken in the case of **The DPP Versus Farid Hadi Ahmed and 36 Others,** Criminal Appeal No. 205 of 2021, CAT (unreported).

Turning to the matter at hand, the trial court record speak louder that Miscellaneous Application No. 1 of 2023 was filed by the 1st respondent praying for the trial court to stay proceedings in Civil Case No.06 of 2022, pending reference to arbitration and upon being served with the same, the applicant through Mr. Projestus Mulokozi filed a counter affidavit deposed by the applicant together with a notice of preliminary objection that the application is incurably defective for lack of enabling provisions of law to grant the prayers sought.

It appears that the trial Magistrate was aware of the principle which requires the PO to be determined first, thus upon the parties prayer, he ordered the Po to be argued by way of written submission.

Upon hearing the parties, the trial court ended up dismissing the preliminary objection with costs. Had it ended there, this application would not have been lodged.

The applicant was provoked by the trial court ruling because, after it had dismissed the PO with costs, the trial Magistrate proceeded to issue an order granting the 1st respondent's application to refer the dispute to an arbitrator without considering the affidavits by the applicant and the 1st respondent and without inviting the parties to submit on the filed affidavit.

In their submissions, Mr. Mtete learned counsel for the applicant and Mr. Scarius Bukagile learned advocate for the 1st respondent are at one that the order granting the 1st respondent's application to refer the dispute to an arbitrator was reached in violation of the principle of natural justice to wit; right to he heard.

Mr. Matete went a step further and submitted faulting the trial Magistrate for dismissing the preliminary objection. However, reading the founding affidavit, there is no single paragraph containing the facts faulting the trial Magistrate for dismissing the PO.

It should be noted that in applications like this, affidavits constitute not only the **pleadings** but also the evidence. Equally straight; the applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must

set out sufficient facts in his founding affidavit which will entitle him to the relief sought. Since the applicant has not set out facts in his founding affidavit, there is no way the counsel's submission can be considered by this court. Having said so, I will confine myself on whether the parties in Miscellaneous No.1 of 2023 were afforded the right to be heard before the application is granted.

It is a cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing as is the case in this matter; such decision is rendered a nullity and cannot be left to stand. The said principle is not merely a principle of common law but it is a fundamental Constitutional right stipulated under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.Let the same speak for itself;

"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinacho husika, basi mtu huyo atakua na haki ya ya kupewa tursa ya kusikilizwa kwa ukamilifu"

In the case of **Abbas Sherally and Another vs. Abdul S.H.M. Fazalboy,** Civil Application No. 33 of 2002 the Court of Appeal of Tanzania had this to say;

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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 added)*

Similarly; in the case of **Scan - Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu,** CAT-Civil Appeal No. 78 of 2012 (unreported) it was stated that;

"We are of the considered view that in line with the audi alteram partem rule of natural justice, ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit"***

Guided by the herein above Court of Appeal decisions, I agree with both Mr. Matete learned counsel for the applicant and Mr. Scarious Bukagile for the 1st respondent that the act of trial Magistrate to proceed to issue an order granting the 1st respondent's application to refer the dispute to an arbitrator without affording the parties the right to be heard was a gross irregularity.

In other words, the decision was arrived at in violation of the right to be heard, hence a nullity.

In the event, I hereby nullify, quash, and set aside the order dated 03/08/2023 issued in Miscellaneous Application No. 1 of 2023 referring Civil case No. 06 of 2022 to the Arbitrator. I further remit the case file (Miscellaneous Application No. 1 of 2023; arising from Civil Case No 06 of 2022) to the trial court so that the parties can be afforded the right to be heard as per the law. The hearing should proceed before the same trial Magistrate, and if impracticable for whatever reasonable reasons, before any other competent Magistrate. Considering the fact that the anomaly was not caused by the parties, I order each party to bear its own costs. It is so ordered.

Dated at Bukoba this 25th day June, 2024.

E. L. Ngigwana

Judge

25/06/2024.

Ruling delivered this 25th day of June 2024 in the presence of Mr. Scarious Bukagile, learned advocate holding brief for Mr. Peter Matete learned advocate for the Applicant and Ms. Ruqaiya Abdulla Al-harthy, learned advocate for the 1st respondent, Hon. A.A. Madulu-JLA and Ms. Queen Koba, B/C but in the absence advocate for the 2nd respondent.

E. L. NGIGWANA

JUDGE

25/06/2024.