IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC.COMM.CAUSE NO. 6 OF 2003

IN THE MATTER OF THE COMPANIES ORDINANCE CAP.212
AND
IN THE MATTER OF THE LIQUIDATION OF TRI
TELECOMMUNICATION TANZANIA LIMITED
BETWEEN
CITIBANK TANZANIA LIMITED.....APPLICANT
AND
TANZANIA TELECOMMUNICATION
COMPANY LIMITED.....1ST RESPONDENT

TANZANIA REVENUE AUTHORITY.....2ND RESPONDENT

TANZANIA COMMUNICATIONS REGULATION
AUTHORITY (AS SUCCESSOR TO THE TANZANIA
COMMUNICATIONS COMMISSION ...3RD RESPONDENT

VIP ENGINEERING AND
MARKETING LIMITED.....4TH RESPONDENT

THE LIQUIDATOR OF TRITELECOMMUNICATION
TANZANIA LIMITED(IN LIQUIDATION)..5TH RESPONDENT

# RULING

KIMARO, J.

Citibank Tanzania Limited is before this court with an application in which it is seeking for two main orders as follows:

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i) *the Applicant be granted an extension of time to file a Notice of Appeal(pursuant to Rule 76(1) of the Tanzania Court of Appeal Rules 1979) within a time limit to be fixed by the Hon. Judge upon determination of this Application so as to enable the Applicant to appeal to the Court of Appeal of Tanzania against the whole of the Ruling, findings and Orders of this Hon. Court delivered on 12th June 2003 in Misc.Commercial Cause No.6 of 2003;*

ii) *The applicant be granted an extension of time to file its application for Leave to Appeal (pursuant to Rule 43 (a) of the Tanzania Court of Appeal Rules 1979) within a time limit to be fixed by the Hon. Judge upon determination of this Application so as to enable the applicant to apply for such Leave to Appeal against the whole of the ruling, findings and Orders of this Hon. Court delivered on 12th June 2003 in Misc.Commercial Cause No.6 of 2003;"*

The application is supported by an affidavit of Bashir Awale. The application is filed under Section 11 (1) of the Appellant Jurisdiction Act, 1979 and Rule 44 of the Tanzania Court of Appeal Rules, 1979. The applicant is represented by Mr. D.Kesaria and Mr. Mujuliz, Learned Advocates.

The respondents are represented by Mr. Mgullu, Mr. Lugaiya, Mr. Daffa, Mr. C. Tenga and Dr.Luoga, Learned Advocates respectively as they appear in their chronological order.

Apart from all the respondents contesting the application, the 4th and 5th Respondents raised preliminary points of objection. The preliminary points of objection raised by the fourth respondent is that the applicant's right of appeal no longer exists after having sought for an extension of time under Section 78 and Order XLII rule 7(1) and Order XLII rule 9 to file a review. Another point is that this court is barred by Order XLII rule 4(1) (b) of the Civil Procedure Code 1966 from entertaining this application. In the alternative, the fourth respondent says that the application for extension of time to appeal is unmaintainable because there is still pending in the Court of Appeal, an application for extension of time to institute a review.

The 5th Respondent on the other hand raised the following points of objection:

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1. *In previously seeking to pursue the review procedure the Applicant tacitly represented that no appeal has been preferred or will be preferred.*

2. *The review procedure and the appeal procedure are not available to an aggrieved party interchangeably. That once one procedure is opted for it precludes the other.*

3. *Once a decision had been made on a similar previous application for extension of time to file an application for review the applicant cannot be permitted to seek another door into the same Court to challenge the same decision.*

4. *There are proceedings pending the Court of Appeal in Civil Application No.25 of 2005 lodged by the Applicant on 23rd February 2005 in which the applicant challenge the decision of this Honourable Court to reject the previous application for leave to appeal for review out of time. In the premises, the Applicant is coming to this Court with full knowledge that this court has no jurisdiction to entertain its application."*

When the application came up for hearing on 12/05/2005 Mr. C.Tenga for the 4th respondent submitted that the orders which are sought to be appealed from, are by virtue of the clarification given by this court in its ruling dated 20th July, 2004 and delivered on 26th July 2004 interlocutory orders. In terms of Act No.25 of 2002, appeals against interlocutory decisions are not allowed.

The reply by Mr. Kesaria in contest to this point was that Mr. C. Tenga departed from the preliminary point raised and focused on a new point which has been a suprise on their part. He requested the court to ignore and struck out the submission made by Mr. C.Tenga on this point. He submitted further that some of the orders are final and they have led to contempt proceedings before this court. Therefore not all orders are interlocutory. I find it pertinent to make a decision on this point instantly. I agree with Mr. Kesaria. The points of objection raised by the 4th Respondent are shown above. The issue of the orders sought to be appealed from, being interlocutory orders and hence barred by Act No.25/2002 is not contained in the notice of objection filed by the 4th Respondent. That point has indeed been raised as a suprise. If Mr. Tenga wanted to rely on that point, he ought to have given a prior notice to the other party. Since no notice was given, I struck out all arguments which relate to the orders sought to be appealed from being interlocutory and hence unappellable under Act No. 25/2002. In this regard, the submission made by Mr. Tenga in reply is ignored.

The other point of objection raised by Mr. C. Tenga was that so long as the applicant filed a revision in the Court of Appeal and lost the revision, she cannot resort to an appeal. He relied on the case of **Harnam Singh Bhogah** trading as **Harnam Singh and Co Vs Javda Karsan** Civil Appeal No.22 of 1952 Court of Appeal for Eastern Africa which interpreted Rule 9(1) of the East African Court of

Appeal. The rule empowered the Court to grant extension of time for filing an appeal. An appeal was previously filed in the East African Court of Appeal but was dismissed because it was not accompanied by a former order against which the appeal was preferred. In a subsequent application for extension of time to file the appeal out of time, the application was dismissed with costs. The Court held that the right of appeal is founded on a statute. A party who seeks to avail himself of the right must strictly comply with the conditions prescribed by the statute. Once a party fails to comply with the rules, he can not be given a second chance to file the same application. Mr. Tenga said since Section 11 of the Appellate Jurisdiction Act, 1979 under which this application is filed, is in pari materia with Rule 9(1) of the East African Court of Appeal Rules 1925. This application should be treated in the same way.

In his reply Mr. Kesaria conceded that a revision was filed in the Court of Appeal but it was dismissed. The Court of Appeal found that the right remedy lay in an appeal. He referred this court to the decision of the Court of Appeal in Citibank Tanzania Ltd Vs Tanzania Telecommunication Co. Ltd & Others Civil Application No.112 of 2003 (CAT) (Unreported) noting that it is binding on this court.

Mr. Kesaria asked the Court to disregard the case of **Harnam Singh Bhogal** for having no bearing to the present application. He

said it is an old case and an irrelevant precedent as it has been superceded by our own decision. However, no decision of the Court of Appeal was cited to support this argument.

My considered opinion is that the submission by Mr. C. Tenga on the revision which was filed in the Court of Appeal is also a new matter which is not contained in the notice of preliminary objection. That submission is equally struck out. It is common practice that in civil cases parties should not be taken by surprise. This is an area which deals with private property. Each party should be made aware of the nature of claim against him/her for purposes of enabling a party to make sufficient preparation for defence. Parties should never be denied this right except where a party negligently fails to exercise such right.

In his last point of objection Mr. C. Tenga submitted that Order XLII rule 7 does not allow the court to grant extension of time. The applicant instituted a review in this court. The applicant having lost the review, cannot come back to this court and seek for an appeal. He cited the case of **Bank of Tanzania V Devram Valambia** Civil Reference No.4 of 2002 unreported as well as Order 21 rule 62 saying that the applicant can not go and open a second door to seek for an appeal. The applicant is barred by its own action. Reference was also made to the decision of Hon. Judge Kalegeya in the application by the Applicant where he refused to grant it leave to appeal to the

Court of Appeal against the dismissal of the application for extension of time to file a review. Mr. C. Tenga made a prayer that the application be rejected and be dismissed with costs.

A reply by Mr. Kesaria was that the objection raised under Section 78 and Order XLII rule 7 & 9 of the Civil Procedure Code 1966, dealing with a review is misconceived because the applicant has not had an opportunity to address the court on an application for review. Mr. Kesaria said the applicant was refused an extension of time to file a review on a preliminary point of law. What is now before the court is an application for extension of time to file an appeal and not a review. He said Rule 44 requires such an application to be filed before the High Court.

As for the decision of Valambia (supra) Mr. Kesaria said the case dealt with remedies available in objection proceedings to attachment of assets and so it has no bearing on the application now before this court. I will revert to this point later because the 5th Respondent has raised a similar objection. At the moment, let me go to the objections raised by Dr. Luoga.

Dr. Luoga opted to address the first three objections simultaneously. It was submitted by Dr. Luoga that the applicant has filed an application seeking for an order for extension of time to file notice of Appeal. The appeal sought to be pursued is in respect of the

ruling, findings and orders of this court delivered on 12/06/2003 in Misc. Civil Cause No.6 of 2003. He observed that a party aggrieved by a decision of this court is primarily required to follow laid down procedure to prefer an appeal. Where however, no appeal has been preferred and prescribed grounds exist, a party can lodge an application for review. Order XLII which relates to initiation of review proceedings is explicit that there cannot be an appeal and a review simultaneously. Dr. Luoga said the gist of the first three points of his objection is that the applicant is seeking to pursue the two procedures simultaneously because of the following reasons:

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*The ruling of the court delivered on 20/10/2004 called upon the court to extend the time for review for orders delivered on 12/06/2003. It is the same orders which are intended to be challenged on the intended appeal. The ruling of 20/10/2004 dismissed the application but the matter did not end there. The Applicants lodged Civil Application No.25/2005 at the Court of Appeal contesting the correctness of the decision of this court. The implication of the application at the Court of Appeal is that the applicants are still pursuing the review proceedings. In the event of Civil Application No.25/2005 succeeding in the Court of Appeal, it means that the Court of Appeal has powers to direct this court to grant the extension of time and the applicant will file an application for a review. Such a situation could create*

*conflicting decisions between the Court of Appeal and this court and it may be an embarrassing situation."*

Dr. Luoga submitted further that it is also an abuse of the judicial process. He contended that the applicant by making an application to issue notice to appeal, is seeking to initiate a parallel procedure and this is not permissible. His last point of objection was that in so far as there are proceedings pending before the Court of Appeal in Civil Application No.25/2005 and these proceedings seek to open avenue for challenging the same decision that they seek to challenge in the application, this court is deprived of jurisdiction to entertain the application because that may lead to a conflicting decision with the Court of Appeal. He prayed that the application be dismissed with costs.

Mr. Kesaria in a reply submitted that the main issue for consideration by the court in the preliminary objections raised is whether or not parties are allowed to make an application for extension of time to appeal after having made an application for review. According to Mr. Kesaria, that is the main contention in this application. Mr. Kesaria said that Order XLII of the Civil Procedure Code which deals with review is in pari materia with Order XLVII of the Indian Civil Procedure Code. He referred to Mulla Commentaries at pages 4105,4106,4115,4117, 4128 and 4130 and argued that where a review is filed first, followed by an appeal, the court can continue

with an application for review and dispose of it provided that the appeal has not been heard. However, an appeal before a review bars an application for review. He said their application for review was restrictive in nature in that it is based on new evidence on the nullification of the Debenture and it has nothing to do with the remedies they are seeking in the intended appeal. Mr. Kesaria submitted further that the Application in the Court of Appeal is for extension of time for review, while the present application is for extension of time for Appeal. He requested the court to rely on the authorities cited by Mulla and dismiss the preliminary objections. He said that appellable grounds are not grounds for refusing a review.

Mr. Mujuliz Learned Advocate, assisted Mr. Kesaria. He too made submissions to bolster what Mr. Kesaria told the court. However, a greater part of his submission touch on the main application rather than the preliminary objections. The only relevant portion of his submission to the preliminary objection was that a preliminary objection must relate to a technical issue which disqualify the applicant to apply for extension of time to give notice of appeal. He joined hands with Mr. Kesaria that a previous attempt for review cannot bar an appeal.

A brief reply by Mr. Tenga was that the court should not rely on Mulla because our Civil Procedure Code 1966 is very clear. Either a party goes for an appeal or a review but not both. Mr. Tenga said

the grounds for review are sufficient to canvass what can be asked for in an appeal. His opinion is that what can be drawn from the application is that the applicant is not sure on which door to pass and it is doing forum shopping.

As regards the decision of Harnam Singh Bhoghal (supra) Mr. Tenga said it is very relevant because the Applicant cannot have a second bite after the first one failed. On the case of Valambia, Mr. Tenga said it interpreted Order 42 of the Civil Procedure Code 1966. He reiterated their earlier submission that the application is an abuse of the court process.

The reply by Dr. Luoga on the other hand is that Mr. Kesaria misdirected himself in framing the question which requires the decision of this court. According to Dr. Luoga, the court has to make a decision on whether the Applicant can simultaneously seek two doors to the Court of Appeal. Dr. Luoga said the Applicant has already moved the Court of Appeal to make a decision on examining the decision which was delivered by this court on 12/06/2003. That was done vide Civil Application No.25 of 2005 and the Applicant has not denied doing so. It are now before this court with another application seeking to place the same decision before the Court of Appeal. Dr. Luoga observed that this is a forum shopping. He said if a party can be redressed by a customed remedy new ones should not be resorted to.

Dr. Luoga submitted further that there are a lot inconsistencies in Mr. Kesaria submissions, the first being the basis for lodging the application for extension of time to give notice of appeal. He said all of what was said by Mr. Kesaria should be ignored and struck out because they go to the merit of the application. As regards Mr. Kesaria making reference to Mulla, Dr. Luoga said the reference should be struck out and ignored because in a disguised way arguments on the merits of the application are introduced to the preliminary objection by making reference to exhibits.

The last one is misapplication of the law by challenging a preliminary objection on the basis that an appeal is not a ground for rejecting a review. Dr. Luoga said this is not a proper context of preliminary objection. Dr. Luoga's conclusion is that Mr. Kesaria has refrained from answering the question which he said was relevant for the determination of the court in this application. He said that the applicant has not challenged the grounds raised in the preliminary objection. He prayed that the preliminary objections be upheld and the application be dismissed with costs.

In all, those were the arguments by the Advocates in support of the preliminary objection and against the same.

Let me go on to determine the merits or otherwise of the preliminary objections. As for the preliminary objections raised by the 4th Respondent, the only objection which was argued in compliance with the notice of objection was the one concerned with order XLII rules 4(1)(b) of the Civil Procedure Code 1966. Mr. Tenga's firm view is that so long as the applicant failed in the initiation of review proceedings, it cannot open a second door to seek for an appeal. In other words, an aggrieved party can not pursue both an appeal and a review. Either the party goes for a review or an appeal but not both.

Apparently, this is also the main point of objection by the 5th Respondent. Dr.Luoga has added that the Applicant is now persuing both procedures simultaneously and in different courts. That is why I considered it appropriate to have the objections on this point be determined together.

In his submission, Mr. Kesaria said that the question which the court should determine is whether or not parties are allowed to make an application for extension of time to appeal after having made an application for review.

My considered opinion is that such an avenue is not open to an aggrieved party who has undergone the process of filing a review and failed; whether on a technical point or on merit. The wording of

section 78 and Order XLII rules 1(1)(a) and 1(1)(b) are explicit that a review can only be preferred where no appeal is preferred. This means once a party opts to take a review process and fails, there is no option for going to an appeal. The provisions are clear and there is no need for resorting to the commentaries made by Mulla on the Civil Procedure Code. I did not have an opportunity to go through the edition cited by Mr. Kesaria. However, I went through Mulla on the Civil Procedure Code Abridged Eleventh Edition at Pg 935. The points raised by Mr. Kesaria are canvassed. The wording of our Order XLII of Civil Procedure Code 1966 is slightly different from that of the Indian Civil Procedure Code. Our provisions on the same subject do not allow an aggrieved party to pursue both a review and an appeal.

As regards the preliminary objections raised by Dr. Luoga, I agree that the issue for determination is the one which he has paused above.

The Applicant conceded that there is an application which is still pending in the Court of Appeal in which the applicants is seeking for extension of time to apply for a review. That being the position, in making this application, the Applicants are seeking also to pursue an appeal at the same time. Two applications have been filed at the same time and in different courts seeking to challenge the same subject matter but by different procedures.

As stated before, the law does not allow an aggrieved party to pursue both an appeal and a review simultaneously. Either one pursues an appeal or a review but not both. The worst side is that the applicant is seeking to pursue for the remedies in the Court of Appeal and the High Court at the same time.

The position however, is clear. Once a matter is being pursued in the Court of Appeal, any subordinate court is deprived of jurisdiction to pursue the same matter. What the Applicant is seeking in both remedies is to challenge the decision of this court which was issued on 12/06/2003. So long as there are proceedings in the Court of Appeal in respect of that matter, this court is deprived of jurisdiction to entertain any application related to the matter which is before the Court of Appeal. A possibility of conflicting decision, should always be avoided. Members of the Bar must avoid indulgence in matters which may bring conflicting decisions. It is not a good practice.

In his submission Mr. Kesaria seemed to suggest that since in the decision of the Court of Appeal in Civil Application No.64 of 2003 the Court of Appeal said that the proper remedy for the applicant was an appeal, this court ought to grant the application. With greatest respect to Mr. Kesaria, I do not agree with him that the application has to be granted automatically. While there is no doubt

at all that in terms of law on precedents, decisions of the Court of Appeal are binding on this court; I will add that they are binding only where the case has relevancy to the application but not otherwise.

Dr. Luoga also argued that some of the submissions made by Mr. Kesaria went beyond the preliminary objection to the main application. I concede that there was this move. Mr. Kesaria went off the line by making reference to exhibits and other arguments. The case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd 1969 EA 696** confines preliminary points to matters of law only which can be determined without going into evidence. Although the objection was not raised by the Applicant, in arguing the objection, Mr. Kesaria ought to have kept within the confines of preliminary objection and not to move out and go to the main application.

In conclusion, I will say that after a thorough scrutiny of the preliminary objections, the arguments and the relevant law, I uphold the objection that an aggrieved party can not pursue both a review and an appeal simultaneously. Once an application is filed in the Court of Appeal seeking for a certain remedy, it deprives the High Court jurisdiction to adjudicate on another application seeking for same remedy, although by different procedure so long as the matter touches substantially on the application which is before the Court of

Appeal. This application touches on a matter which is also the substance of the application in the Court of Appeal. This court has no jurisdiction to entertain it.

The preliminary objections are upheld on the points given above, and the application is dismissed with costs.

N.P.KIMARO,

JUDGE

21/06/2005

Date: 29/06/2005

Coram: Hon. N.P.Kimaro, Judge.

For the Applicant - Mr. Mujuliz.

For the 1st Respondent - Mr. Lugaiya/Mr.Mgulu

For the 2nd Respondent - Lugaiya

For the 3rd Respondent - Mr. Lugaiya/Mr.Daffa.

For the 4th Respondent - Mr. Mapande.

For the 5th Respondent - Mr. Laswai/Dr. Luoga.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The preliminary objection on an aggrieved party not being in a position to pursue both a review and an appeal simultaneously is upheld. The application is dismissed with costs.

N.P.KIMARO,

JUDGE

29/06/2005

4,880 - words

jd.

I Certify that this is a true and correct of the original order Judgement Ruling

Sign _____

Registrar Commercial Court Dsm.

Date 29/6/05