IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: BWANA, J.A., LUANDA, J.A. And ORIYO, J.A.)

CIVIL APPLICATION NO. 33 OF 2012

MOHAMED ENTERPRISES (T) LIMITED ..... APPLICANT

VERSUS

MASOUD MOHAMED NASSER ..... RESPONDENT

(Application for Revision of the decision of the High Court of Tanzania, at Dar es Salaam)

(Twaib, J.)

dated the 2nd day of February, 2012
in
Civil Case No. 127 of 2009

.....

RULING OF THE COURT

17th & 27th August, 2012

BWANA, J.A.:

The issues covered in this application seem to have a chequered background. In order to appreciate what is involved we find it proper to start by giving a detailed history of the matter although, in normal circumstances, we would not do so.

The issues involve two applications and two notices of preliminary objections raised both in the High Court of Tanzania and in this Court. In the former court two applications seem to have been heard by two different judges of the same court but at different times. The first judge, Mwarija, J, heard an application, recorded a consent settlement order and had a decree to that effect issued. Subsequent to that process which in our view, had brought the matter to a finality at that stage, another application in opposition to the earlier settled matter, was filed by one of the parties to the earlier application, challenging the contents of that first decree. Disregarding calls that the court was "*functus officio,*" Twaib, J, proceeded with the hearing of that second application. In his finding Twaib, J, set aside the former findings of Mwarija, J. together with the decree drawn therefrom and made a ruling in favour of the applicant in the second application, a party who was the respondent in the first application. That finding by Twaib, J, forms the basis of the present matter before us.

The sequence of events are as follows. On 1 June, 2010, the applicant herein instituted a Civil Case in the High Court against the present respondent, involving substantial sums of USA Dollars. The

respondent was then acting as an agent of the Lybian government in a debt swap arrangement with the government of Tanzania. Eventually the parties reached a consent agreement which they wanted to register it in court. On the 23rd May, 2011, a Deed of Settlement was filed in court resulting in a consent decree being entered against the respondent. That decree was dated 26th day of May, 2011.

However, on 24th day of June, 2011 the respondent herein filed an application in the same High Court, under sections 68 (e) and 95 of the Civil Procedure Code, Cap 33, (henceforth cap 33) moving the court to set aside the earlier findings of the consent judgment and decree on the grounds that the same had been obtained by duress, intimidation, coercion and undue influence perpetuated by the applicant's officials.

The applicant herein (a respondent in the second application before the High Court) filed a notice of preliminary objection on the following grounds:-

1. That section 68 (e) of Cap 33 under which that second application was filed, cannot form a basis of the application since there is a decree in the suit and thus, there is no pending suit, while the above mentioned provision relates to interlocutory applications and orders.
2. That section 95 of Cap 33 cannot be relied upon either since that suit is concluded. That there was no suit pending in court which would have otherwise invited Twaib, J, to invoke the inherent powers.

On 2nd day of February, 2012, Twaib, J, delivered his Ruling in the matter in which the first point above, was sustained. He, however, rejected the second point and proceeded to hold that there were sufficient reasons to allow him to exercise his discretion. He exercised that discretion and set aside the consent decree and restored the original suit. That finding by Twaib, J, forms the basis of this application for revision.

Before us, the applicant filed a notice of motion, challenging the ruling of Twaib, J, in the following terms:-

".....that this Court may be pleased to call for the record of the High Court of Tanzania, Dar es Salaam District Registry Case No. 127 of 2009 and examine it in order to satisfy itself as to the ***correctness, legality and propriety*** *of the* ***proceedings and order*** *of the High Court dated 2nd day of February, 2012 by Hon. Dr. Twaib, J. on the grounds that the learned High Court erred in law and in fact in setting aside a decree entered by his brother judge upon consent confirmed by both parties in the absence of a suit challenging it ....." (Emphasis provided).*

In both affidavit and submissions in support of the notice of motion, the following points seem to be raised.

- That after the consent decree in the first application before Mwarija, J, the High Court became "*functus officio*". Therefore Twaib, J. had no jurisdiction to entertain the subsequent application.

- That sections 68 (e) and 95 of Cap 33 relied upon by the respondent in advancing his application, are not applicable in the circumstances of this matter.
- That a consent decree could be challenged by way of a suit not by application.
- That all the afore mentioned points considered, it is apparent that the proceedings before Twaib, J, were illegal and which could be set aside by this Court by way of revision.

Dr. Masumbuko Lamwai learned counsel for the applicant, submitted further and elaborated on various aspects of the law on the above points. He requested this Court to allow the application with costs in favour of the applicant.

On his part, Mr. Majura Magafu, learned counsel for the respondent, raised two points of preliminary objection against the application, couched in the following words:-

1. That the applicant's application for revision of the decision of the High Court cannot be entertained by this Court for **being**

premature as the ground which is being relied upon by the applicant in support of his application was not raised in the High Court.

2. That the applicant's application is **misconceived** because the orders sought to be revised are appealable with leave of the High Court or this Court under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 and Rule 45 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Both Dr. Lamwai learned counsel for the applicant, and Mr. Majura Magafu, learned counsel for the respondent, addressed us on those pertinent points. Earlier on, both counsel and the Court had agreed that the preliminary objection be argued first followed by the substantive application. That procedure would expedite these proceedings. If the Court is to uphold the preliminary objection, it would then proceed to dismiss the substantive application. However, if the said preliminary objection fails, then the Court will proceed to consider the application on its merits. Both counsel addressed the Court first on the preliminary objection and thereafter, on the issues involved in the substantive application.

As a result of that approach, this Ruling will firstly focus on the points raised in the preliminary objection.

The first point concerns the application being brought **prematurely** before the Court and that its ground was not brought before the High Court.

In support of that point, Mr. Majura Magafu was of the view that since the point was not brought before the High Court, it cannot be raised now. He relied inter alia, on the decisions of this Court in the cases of **Tanzania Investment Bank vs Meis Industries Company Ltd and Another, Civil Application No. 126 of 2010** (unreported); and **Mosses Msaki vs Yesaya Ngeteu Matee** (1990) TLR 90, wherein it was stated that matters not raised at the trial or appeal in the High Court would not be entertained by the Court on revision.

As regards the second point, Mr. Majura submitted in essence that since the applicant had an option of appeal, an application for revision was misconceived. He relied on the provisions of sections 4 (3) and 5 (1) (c) of

Cap 141 and Rule 45 of the Rules to aver that since the applicant did not prefer an appeal after seeking leave of the High Court or of the Court, an application for revision should not be entertained.

On his part, Dr. Lamwai submitted that as the first application in the High Court had been concluded and a decree drawn up, the said court became "*functus officio*" and what Twaib, J. did was an illegality. No appeal could be taken up from illegal proceedings and decision of the High Court. Concerning the claim that the applicant was now raising a new issue, not raised in the High Court, Dr. Lamwai submitted that he had raised the issue of illegality in his written submissions in the High Court but it was up to Twaib, J. to address it in his Ruling. As it transpired, the judge did not take it up and that is why it came up before the Court in the application for revision. Secondly, Dr. Lamwai submitted that since the issue raised by the applicant involved a question of jurisdiction, as per settled law, it could be taken up at any stage of the proceedings even at appellate level. We do concur with Dr. Lamwai on this point.

Dr. Lamwai did note, as we did as well, that Mr. Magafu did concede that under Order XL of Cap 33, an application such as the one before Twaib, J, was not appealable. Therefore an application for revision was the only option available to an aggrieved party. Further, it was Dr. Lamwai's averment that as ***neither*** the Civil Procedure Code ***nor*** the Judicature and Application of Laws Act, Cap 358, provide for an automatic right of appeal in cases of this kind, a party who intended to challenge a consent agreement, could do so by way of a suit(thus allowing oral evidence to be adduced) but not by an application as is the case herein.

Above all, Dr. Lamwai was of the opinion that the preliminary objections raised by the respondent were not objections which, if upheld, would dispose of the suit on a point of law. He relied on the finding in the much celebrated case of ***Mukisa Biscuit Manufacture LTD VS Westend Ltd (1969) EA 697.***

We have considered the views raised by both counsel in so far as the preliminary objection is concerned. Firstly, we must restate what the law provides. It is settled law that for a preliminary objection to be

successfully argued, it should be capable of disposing of the suit without evidential proof (see the Mukisa case supra). It must be a point in "*limine litis*" (a preliminary point of law). Therefore, where a preliminary objection raised contains more than a point of law, say, law and facts ***it must fail (see OTTU and Another vs Iddi Simba, Minister for Industries & Trade and Others*** (2000) TLR 88. For, factual issues will require proof, be it by affidavit or oral evidence. That defeats the whole purpose of a preliminary objection. Having examined the two points raised by the respondent in the present application, we are of the settled view that they do not meet the requirements of a preliminary objection. The first point concerns the application being premature. Counsel for the applicant argues that the same point was raised in the High Court but it was up to the trial judge then to take it up in his final decision. Obviously that is an argument that requires factual proof. We have perused the record of the trial court and are satisfied that indeed that issue was raised. Likewise, the second point that of the application allegedly being misconceived. That is a factual issue which, presently cannot successfully be argued in favour of the respondent and secure a disposal of the application before us. We reiterate our earlier observation that both counsel did concede that an

application such as the one before Twaib, J, was not appealable under Order XL. The only option available to the applicant was, therefore, by way of this application for revision. Accordingly the preliminary objection raised by the respondent herein lacks merit. It is dismissed.

Having disposed of the preliminary objection, we are left with the substantive application. In essence, it is an application for revision under section 4(3) of cap 141 whereby the applicant's averment is that the whole proceedings before Twaib, J. were an illegality. This is so because of the following. That Twaib, J. was not competent to reopen a matter which had been concluded and a decree drawn up by his fellow judge of the High Court. The only option available to the applicant thereat was to institute a new suit.

- That the provisions of the law (i.e. sections 68(e) and 95 of Cap 33) invoked by Twaib, J. to enable him proceed with the hearing of the latter application and set aside the decision of his fellow High Court, Judge, were inapplicable in the circumstances.

- That this Court has power to invoke the provisions of section 4(2) and (3) of the Appellate Jurisdiction Act and set aside the findings of Twaib. J.

On his part Mr. Majura submitted basically thus:-

- That the powers to set aside a consent and or compromise decree is inherent as there is no specific provision in Cap 33 which provides for the same and there is no law which bars a High Court judge to set aside a decree issued by another High Court judge.
- In invoking its inherent powers, the court takes into consideration, as it did in the second application before the High Court, the need for substantive justice. The court should be prepared to utilize such powers even where there is a provision in Cap 33.
- There is no provision under Cap 33 which provides for the setting aside of a decree alleged to have been obtained by fraud, undue influence, misrepresentation and or intimidation. Therefore S.95 of Cap 33 is the only provision which provides for a way out.
- Art. 107 A of the Constitution of the United Republic of Tanzania can be invoked to defeat specific provisions of the law and practice which

may obstruct justice. Twaib, J. therefore, was guided by the same spirit in invoking his inherent powers to set aside the earlier decision of Mwarija, J. without instituting a suit.

We must state at this stage that we do agree with both counsel that Cap 33 has no provision which provides for setting aside a decree that is being challenged. In that situation, as stated in ***Tanzania Electric Supply Company vs. Independent Power (T) Limited (IPTL)*** (2000) TLR 324,

> "The Civil Procedure Code cannot be said to be exhaustive. It is legitimate therefore, to apply under section 2 (2) of the Judicature and Application of Laws Ordinance, relevant rules of Common Law and Statutes of General Application in force in England on the 22nd July 1920, where the Code is silent....."

So far we concur. We would like, however, to note with considerable apprehension, as to what would be the appropriate procedure to be

adopted. We do so bearing in mind that there should be no room open to the High Court and courts subordinate thereto whereby one judge would enter judgment and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the High Court soon thereafter setting aside the said judgment and decree and substituting therefor with a contrary judgment and decree in a subsequent application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction.

Once judgment and decree are issued by a given court, judges (or magistrates) of that court become "*functus officid*" in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court (Section 4 of Cap 141). An aggrieved party may, if he so wishes, institute a new suit challenging the findings in the earlier one. Our views are fortified by ***Mulla On the Code of Civil Procedure Code*** (16^{th} Ed. Vol. 1 PP. 299, 653 and 1066). It is provided therein thus:-

P.299,

"Unless all the parties agree, an application cannot be made to the court of first instance in the original suit to set aside a decree, **though it may be done in the case of an interlocutory order....."**

P.653,

"..... the only remedy of a person who wishes to **challenge a compromise decree on the** ground of fraud is **to file a suit for setting aside the said decree ....."**

P. 1066: **Procedure for setting Aside Consent Decrees.**

" ..... Subsection (3), in so far as it bars an appeal from consent decrees, gives effect to the principle that, a judgment by consent, acts as an estoppel. In the case of a consent decree .....

could only be set aside by substantive proceedings appropriate to that particular remedy. A consent decree can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake. **This can be done only by a suit and consent decree cannot be set aside by an appeal, review or by a rule obtained on motion. But the court in its inherent jurisdiction, may set aside an interlocutory consent order which is not a final order or judgment .....**" [all the above emphasis provided].

We subscribe to the foregoing views by Mulla. What it means in so far as this application is concerned, is the following.

- Twaib, J, would have been right to invoke S.95 of Cap 33 (concerning inherent powers of the court) if the matter before him had not been finally concluded by a fellow judge of the same High Court, or if the decision of Mwarija, J. was interlocutory in nature. The facts before us however,

clearly establish that Civil Case No. 124 of 2011 had been finally determined, a deed of settlement filed in court and a decree entered against the respondent herein. Thereafter, therefore, the High Court became ***functus officio*** in so far as this matter was concerned. Both Mwarija and Twaib, JJ. were not competent to handle the subsequent application. Although there is no statutory law (to the best of our knowledge) which bars one Judge from setting aside a decision of a fellow judge of competent jurisdiction, rules of practice, prudence and professional conduct impose such restrictions. A judge of the High Court in our jurisdiction is or should know and respect that code of conduct. Failure to do so is to open up a pandemonium of unprofessionalism, hitherto unknown in this jurisdiction. The procedure adopted by Twaib, J, therefore, is very much detested. We hope that the High Court leadership will see to it that it never happens again, in the interest of our judicial system.

- The only option open to the respondent herein was to file a fresh suit appropriate to that particular remedy. He did not do so. Instead he came before Twaib, J. by way of an application. That was not proper.

- We agree with Dr. Lamwai that matters of fraud, coercion or misrepresentation do vitiate a consent decree. It is imperative therefore that evidence be adduced in support of such factual claims. Proof by affidavit is not sufficient.

We would like to consider, albeit briefly, the issue of **substantive justice** in this application. We have no doubt in our minds that by making reference to Article 107 A (2) (e) of the 1977 Constitution of the United Republic of Tanzania (as amended) (the Constitution), counsel for the respondent wanted to tell us that in hearing the second application, Twaib, J. had in mind the need to do **substantive justice** in the matter. He had Art. 107 A (2) (e) of the Constitution as the basis for his decision. That Article provides:-

Art. 107 (2)-

> *"In delivering decisions in matters of civil and criminal nature in accordance with the laws, the Judiciary shall comply with the following rules, that is to say-*

(e) ***to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice*** *....."* *(Emphasis provided).*

We are aware that the above stated constitutional provision connotes the same message as Rule 2 of the Rules which states:-

"In administering these Rules, the Court shall have due regard to the ***need to achieve substantive*** *justice in the particular case" (Emphasis provided)*

In our considered view, that Article as well as the Rule (supra) do not, in any way, subjugate the power and intention of relevant provisions of laws and rules of procedure duly enacted. In fact the latter obtained their validity from the very provisions of the Constitution. Therefore it is not the intention of the Constitution to command departure from those provisions of Cap 33 or the Rules of this Court in order to advance what may be termed as **substantive justice**. If it were the intention of the

Constitution to do so, then in our humble opinion, the affected provisions of the law or Rules would have been deleted from our statute books for being ultra *vires* the Constitution. Which is why Art. 107 A (2) (e) uses the words "technical provisions which **may** obstruct justice". Those words are carefully crafted in our view, meaning that not all technicalities obstruct justice. Laws and Rules are intended to promote and guarantee consistency in the dispensation of justice in society. They imply fairness to parties who seek justice before the courts of law. It will therefore, be improper and dangerous to the settled tenets of our judicial system to ignore them for the so called "interest of justice" or "substantive justice". Some of those norms and rules are so fundamental to the cause of justice that they go to the very roots of justice itself. To ignore them therefore will cause greater injustice to the parties. Justice implies fairness to all parties to a case.

In the instant application therefore, we cannot condone under the pretext of substantive justice, the procedure adapted by Twaib, J. in setting aside the decision and decree of a fellow judge of competent

jurisdiction, Mwarija, J. and entering, in its stead, a different, contrary order.

For the reasons considered and stated herein above, we come to the following conclusion.

- The preliminary objection raised herein fails entirely and is dismissed.
- This application for revision was properly filed before the Court as it aimed at requesting the Court to correct an error apparent and quash an illegality following the proceedings conducted in the High Court (Twaib, J.).

As a consequence thereof, we grant this application and set aside orders by Twaib, J. dated 2nd February, 2012. We restore the original decree of the High Court by Mwarija, J. Costs of this application and the one before the High Court are awarded to the applicant herein, Mohamed Enterprises (T) Limited. It is so ordered.

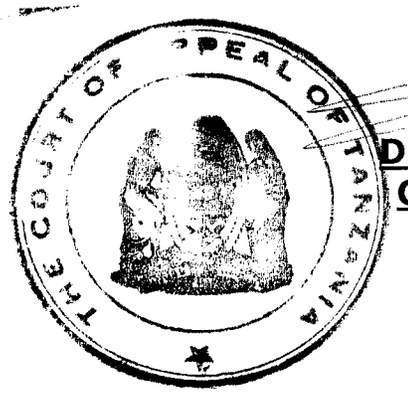
DATED at DAR ES SALAAM, this 23rd day of August, 2012

S. J. BWANA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



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