

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A., SEHEL, J.A. And KITUSI, J.A.)

CIVIL APPLICATION FOR REVISION NO. 154 OF 2020

- 1. JITESH JAYANTILAL LADWA..... 1st APPLICANT**
- 2. INDIAN OCEAN HOTELS LIMITED.....2nd APPLICANT**

VERSUS

- 1. DHIRAJLAL WALJI LADWA..... 1st RESPONDENT**
- 2. CHANDULAL WALJI LADWA.....2nd RESPONDENT**
- 3. NILESH JAYANTILAL LADWA.....3rd RESPONDENT**

(Application for revision of the proceedings, ruling and orders of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Nangela, J.)

dated the 24th day of April, 2020

in

Commercial Cause No. 2 of 2020

.....

RULING OF THE COURT

23rd Nov. & 24th December, 2020

SEHEL, J.A.:

Pursuant to Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondents through the services of Mr. Richard Karumuna Rweyongeza, learned advocate have raised a preliminary objection to an application for revision filed by the applicants that:

"The applicants have no right of revision against an interlocutory decision of the High Court."

For better appreciation of the point of law raised, we find it worthwhile to give facts leading to it. The respondents by invoking the provisions of section 233 (1) and (3) of the Companies Act, Cap. 212 R.E 2002 petitioned in the High Court, Commercial Division (the trial court) seeking the following seven (7) prayers:

- 1. A declaratory order that the conduct and operations of the 1st applicant were unlawful and prejudicial to the interests of the company and the respondents as shareholders, directors and members of the company.*
- 2. A permanent restraining order against the 1st applicant from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the respondents.*
- 3. An order directing and authorizing civil proceedings to be brought for, and on behalf of, the company by any of the respondents or the respondents jointly to compel the 1st applicant make good all losses and business distortions incurred as a result of misappropriation of the company's funds and mismanagement of the company by the 1st applicant.*

4. An order compelling the 1st applicant to vacate the office and business premises to be used by the company only and relocate his personal business venture from the company's premises.

5. Payment of general damages to the respondents.

6. Costs

7. Any other relief or order deemed fit to grant.

Opposing the petition, the applicants filed their answer to the petition wherein they raised four points of preliminary objection. During the oral hearing of the preliminary objections, the learned counsel who appeared before the trial court to argue them abandoned the second point of law. He thus made submission on the three remaining points of law. After hearing both parties, the trial court overruled all the three objections with costs and directed for the petition to proceed to the next stage of hearing.

Dissatisfied, the applicants preferred the present application for revision predicated under Rule 65 (1) (2) (3) and (4) of the Rules.

As stated herein, the application was confronted with an objection on point of law which we had to dispose of first.

At the hearing, the respondents were represented by Mr. Richard Karumuna Rweyongeza, learned advocate whereas the applicants had the services of Mr. Jeremiah Mtobesya, learned advocate.

Arguing the point of law, Mr. Rweyongeza was straight to the point that the applicants' application for revision is barred by section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 RE 2019 because the ruling which is being challenged by way of revision did not finally determine the reliefs sought by the respondents. He submitted that the ruling of the trial court appearing at pages 108 to 131 of the record essentially dismissed the preliminary objections raised by the applicants in their answer to petition. To fortify his contention that no appeal or revision shall be preferred on an order or decision which did not have an effect of finally determining the suit, Mr. Rweyongeza referred us to the case of **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (unreported). He further submitted that an order or decision is final if it finally disposes the rights of the parties as held in the case of **Junaco and Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 (unreported). He added that there are two tests to be applied for one to know whether an application for revision is barred by section 5 (2) (d) of AJA as stated by this Court in the case of **Augustino Masonda v.**

Wildmel Mushi, Civil Application No. 383/13 of 2018 (unreported) which are whether the order is interlocutory and whether it has the effect of finally and conclusively determining the matter. For the case at hand, Mr. Rweyongeza submitted that the petition is still continuing to the next stage of hearing because on that same date when the preliminary objections were dismissed, parties sought leave to file affidavit in support of the petition as per the Company's Act. For these submissions, Mr. Rweyongeza prayed for the application for revision to be struck out with costs.

Countering the submissions, Mr. Mtobesya forcefully argued that the application is not on an interlocutory order. He advanced three reasons as to why we should dismiss the preliminary objection. **First**, he argued that the impugned ruling does not squarely fall within the definition of interlocutory order. He referred us to the decisions of this Court that defined interlocutory proceedings and an interlocutory order. For interlocutory proceedings, he submitted that in the case of **University of Dar es Salaam v. Silvester Cyprian and 210 Others** [1998] TLR 175 at page 176 the Court defined an interlocutory proceedings to mean those proceedings which do not decide the rights of the parties but seek to keep things in *status quo* pending determination of the those rights, or enable the court to give direction as to how the cause is to be conducted or what is to be done in the progress of

the cause so as to enable the court ultimately to decide on the rights of the parties. For interlocutory order, he also referred us to the case of **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited** (supra) where at page 13 the Court cited to case of **Bonzon v. Artincham Urban District Council** (1903) I KB 547 that generally held that if the order finally disposes the rights of the parties then that order ought to be treated as a final order but if it does not then it is an interlocutory order.

Secondly, he argued that there is a peculiar circumstance in the trial court's ruling calling for the prompt intervention of the Court through its revisional power. He pointed to us that the respondents claimed at Paragraphs 5 and 6 of the Petition that they are shareholders and directors of the 2nd applicant whereas the respondents in their Answer to the Petition most specifically Paragraphs 6, 7, 8 and 9 disputed that allegation. Therefore, according to Mr. Mtobesya in terms of Order XIV of the Civil Procedure Act, Cap. 33 RE 2019 the shareholding and directorship were issues raised by the parties and required for the trial court's determination. But to the contrary, he submitted, the trial court determined it without hearing the parties thus the Court should intervene by its revisional power. He argued that the purpose of enacting section 4 (3) of AJA is to bestow upon the Court the

powers for, in certain circumstances, satisfying itself as to the correctness, legality and propriety of any decision or order of the High Court. For this submission, he relied on the decision of this Court in the reported cases of **SGS Societe Generale de Surveillance S.A v. VIP Engineering and Marketing Ltd** [2004] TLR 135 and **Miroslav Katic and Two Others v. Ivan Makobrad** [1999] TLR 470.

Thirdly, he submitted that there is a confusion on the High Court decision because the Drawn Order does not reflect what is contained in the ruling of the trial court. He cemented his argument by making reference to the case of **Stephen Mafimbo Madway v. Udugu Hamidu Mgezi and Another**, Civil Application No. 186 of 2008 (unreported).

Mr. Rweyongeza briefly countered the arguments by insisting that the order is an interlocutory one because by literal meaning the word interlocutory is derived from the latin words "*inter*" and "*locus*" which means "something is placed in between" as in the instant application where the order of the High Court had been placed in between. He also distinguished the cases of **SGS Societe Generale de Surveillance S.A v. VIP Engineering and Marketing Ltd** and **Miroslav Katic and Two Others v. Ivan Makobrad** (supra) in that they were decided prior to the amendment

effected in 2002. On the confusion, he said he did not see any confusion because to him the part referred to was introductory part and not part of the trial court's findings. He thus reiterated his prayer for the application to be struck out with costs.

From the above submissions, the critical issue for our determination is whether the ruling of the trial court dismissing the preliminary objections was an interlocutory order hence barred by section 5 (2) (d) of the AJA. For clarity, section 5 (2) (d) of the AJA provides as follows:

"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit."

It is in this regard that, in the case of **Britania Biscuits Limited v. National Bank of Commerce and Doshi Hardware (T) Limited**, Civil Application No. 195 of 2012 (unreported) this Court was faced with an akin situation where the respondents raised a preliminary objection to the effect that an application for revision was incompetent before the Court because an order issued by the High Court for deposit of TZS 100,000,000/= as security

for costs was interlocutory hence barred by section 5 (2) (d) of the AJA. The Court said:

" ...We are of the opinion that the Ruling and Order of the High Court sought to be revised is an interlocutory order... because in that order no-where it has been indicated that the suit has been finally determined...we uphold the 2nd preliminary objection raised by the advocate for the respondent as well and find this application incompetent having arisen from an interlocutory order which is prohibited by section 5 (2) (d) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 25 of 2002. "

Moreover, the Court in the case of **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited** (supra) succinctly stated that:

"In the light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable save where it has the effect of finally determining the charge, suit or petition."

As pointed out earlier, after the respondents had filed the petition seeking seven (7) reliefs which we had reproduced herein, the applicants countered it by filing an answer to the petition and also raised preliminary objections which the trial court dismissed and ordered the matter to be heard on merit. This means that the petition before the trial court is yet to be heard and determined. Therefore, the impugned ruling did not finally and conclusively determine the petition filed by the respondents.

As stated herein, the ruling from which this application stems is not subject to appeal or revision. It is barred by the provision of section 5 (2) (d) of the AJA. We understand that Mr. Mtobesya fronted his argument on the opening sentence of the ruling of the trial court where it stated:

*"When things seem to be falling apart, always the centre cannot hold. This is a petition brought under section 233 (1) and (3) of the Companies Act, Cap. 212 [R.E 2002]. The petition has been brought by three petitioners named herein above. **The three petitioners are also shareholders and directors of the 2nd respondent.**" [Emphasis supplied]*

On our part we considered the bolded part not part of the decisive point by the trial court on the preliminary objections. As correctly submitted

by Mr. Rweyongeza it was an introduction to parties in the ruling since section 233 (1) of the Companies Act allows only a member of the company to make petition to the trial court on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members or to some of its members. The findings of the trial court were to the effect that the preliminary objections were overruled and dismissed with costs and that it was ordered for the petition to proceed to its next stage of hearing. And this is what is also reflected in the Drawn Order dated 24th April, 2020. We therefore respectfully differ with the view expressed by Mr. Mtobesya.

Mr. Mtobesya contended that there is exceptional circumstance calling for the Court to invoke its revisional jurisdiction as provided for under section 4 of the AJA. We agree that the revisional jurisdiction of the Court is provided under section 4 (2) and (3) of the AJA and that under subsection (2), the Court exercises the revisional powers in the course of hearing an appeal or incidental to an appeal. That is to say, revision under this subsection may be resorted to as a device in the disposal of an appeal (see **Moses Mwakibete v. The Editor, Uhuru and Two Others** [1995] TLR 134 (CA) and **Halais Pro-Chemie Industries Ltd. v. Wella A. G.** [1996] TLR 269).

Whereas, the revisional powers under subsection (3) of the AJA provides:

"Without prejudice to subsection (2), the Court shall have the power, authority and jurisdictions to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."

We had an occasion to consider the above provision of the law in the case of **Halima Hassan Marealle v. Parastatal Sector Reform Commission and Tanzania Gemstone Industries Limited**, Civil Application No. 84 of 1999 (unreported), where we said:-

"It is apparent that the provision of this subsection seeks to ensure that this Court has the power to rectify any error, illegalities or impropriety in decision or proceedings of the High Court which come, or are brought to its attention."

Also, in the case of **Augustino Lyatonga Mrema v. The Republic** [2003] TLR 6 we held that:

"First of all, the power granted thereby is not dependent upon the existence of any appeal; it is a power additional to the power conferred under subsection (2). Secondly, subsection (3) makes no distinction between civil and criminal proceedings or between interlocutory and concluded proceedings. It applies to 'any proceedings before the High Court'."

Flowing from the above position of the law, it is patently clear that the spirit of revision process is to ensure that the Court can rectify any error(s), irregularities or impropriety of the decisions or proceedings of the High Court when brought to its attention. Nevertheless, that spirit is also subject to section 5 (2) (d) of AJA which prohibits appeals or applications for revision against any interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. So by operation of the law, we are unable to go along with Mr. Mtobesya's request.

Mr. Mtobesya also argued that much as the Drawn Order does not reflect what was said by the trial court there is a confusion which calls for Court's intervention. With greatest respect we are not persuaded by such argument as we are unable to find any alleged confusion in the ruling of the

trial court. We have said and we repeat that the introductory part of the ruling was not part of the trial court's findings on the preliminary objections.

All said and done and, in the end, we are in agreement with the objection raised by Mr. Rweyongeza that the application is barred by the provision of section 5 (2) (d) of AJA. Accordingly, we proceed to strike it out with costs.

DATED at DAR ES SALAAM this 23rd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 24th day of December, 2020 in the Presence of Mr. Elly Musyani, learned counsel for the applicant and Mr. Robert Rutaihwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL