IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And KILEO, J.A.)

CIVIL APPLICATION NO. 109 OF 2008

TANZANIA HEART INSTITUTE ..... APPLICANT
VERSUS
THE BOARD OF TRUSTEES OF N.S.S.F. ..... RESPONDENT

(Application for Revision from the decision of the High Court of Tanzania – Land Division at Dar es Salaam

(Longway, J.)

dated the 31st day of July, 2008
in
Land Case No. 158 of 2007

RULING OF THE COURT

13 & 15 August 2008

LUBUVA, J.A.:

Before us are two applications, namely application for stay of execution in Civil Application No. 110 of 2008 and Civil Application No. 109 of 2008 for revision. They both relate to High Court Land Division, Land Case No. 158 of 2007. As Civil Application No. 110 of 2008 regarding stay of execution is dependant upon the outcome of the revision in Civil Application No. 109 of 2008, it was decided that the hearing of Civil Application No. 110 of 2008 be stayed pending

the outcome of the revision in Civil Application No. 109 of 2008. So, the Court proceeded with the hearing of the revision.

In order to appreciate the sequence of events leading to this matter, it is instructive at this stage to set out the facts briefly. From the affidavit sworn by Mr. Mafuru, learned counsel for the applicant, Tanzania Heart Institute, and the original record, the facts may briefly be stated as follows: On 18th June, 2007, the respondent, the Board of Trustees, the National Social Security Fund (NSSF), instituted in the High Court, Land Division, Land Case No. 158 of 2007 against the applicant. The reliefs sought involved payment of the principal sum of U$ 1,319,371.20, arrears of rent for occupying the respondent's hospital building in Kinondoni District within the city of Dar es Salaam. Interest on the principal sum as well as other reliefs that the court deemed fit were claimed.

While the suit was still pending, on 3rd July, 2007, the respondents served the applicant with a notice of eviction which was to expire on 16th July, 2007. Following the notice of eviction, the

applicant filed a chamber summons seeking waiver of the eviction notice. On 9th September, 2007, the High Court, (Longway, J.) dismissed the application for waiver of the notice of eviction.

On 14th September, 2007, counsel for the respondents orally applied for two orders. First, that the applicants were to vacate the suit premises within two weeks from that date. Two, the respondent, the original defendant, was to amend the plaint. The two orders sought were granted. The applicant was allowed one month in which to vacate the suit premises effective from 15th September, 2007. As a result of this decision of the High Court, the eviction order of 31st July, 2008 subject of this revision, was issued.

By notice of motion, the Court is moved for an order to call for the record in order to satisfy itself as to the correctness, legality or propriety relating to the order. The application is made under the provisions of section 4 (3) of the Appellate Jurisdiction Act, as amended by Act No. 17 of 1993 (CAP 141 R.E. 2002)

In this application, Mr. Mafuru, learned counsel, who also had appeared in the High Court advocated for the applicant and Mr. Msemwa, learned counsel, represented the respondent.

At the commencement of hearing the application, Mr. Msemwa, learned counsel, raised a preliminary objection, notice of which had earlier been filed in terms of rule 100. Initially, counsel had filed four (4) grounds in support of the preliminary objection. However, at the hearing of the application, Mr. Msemwa, opted to abandon grounds one and four. Therefore, he argued grounds one and three respectively.

Briefly stated, ground **one** in support of the preliminary objection, is to the effect that the application is incompetent. The reason he advanced is that it is indicated that the notice of motion was presented for filing and not that it was lodged in the Registry of the Court. This, he said was in contravention of rule 48 which provides that it shall be lodged in the Registry.

On this ground, we need not be delayed. We are, with respect, in agreement with Mr. Mafuru, learned counsel that there is no merit in this ground. As correctly submitted by Mr. Mafuru, while it is correct that the words used under rule 48 are that the notice of motion "shall be lodged in the Registry" we do not think that the use of the words "presented for filing in the Registry" affected the essence and the objective behind the provisions of rule 48. In our view, what is important is that the notice of motion is presented to the proper Registry of the Court. In this case as the notice of motion was presented in the proper Registry of the Court we do not think that the use of the words different from those used under rule 48 had any material effect on the notice of motion or the affidavit.

In a situation such as this where the alleged omission does not go to the root of the matter, to accede to Mr. Msemwa's contention in this ground, would closely border on hampering justice on unwarranted technicalities. This would in effect be contrary to the spirit behind Article 107A of the Constitution of the united Republic of

Tanzania, 1977. In the event, we dismiss this ground of preliminary objection.

Next, Mr. Msemwa, made submission on ground three of the preliminary objection. He submitted that the application for revision in this Court is incompetent. He said this is so, because it involves an interlocutory order in respect of which no revision shall lie against under the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002. He further said that as the rights of the parties sought in the suit had not been finally and conclusively determined, the order of eviction of 31st July, 2008, was interlocutory in which case, no revision against it would lie. For this reason he urged the Court to strike out the application on account of it being incompetent.

Responding to these submissions on ground three, Mr. Mafuru maintained that with the issuance of the eviction order the suit was finally and conclusively determined. Both parties were heard before the eviction order was made on 31st July, 2008. In that situation, Mr.

Mafuru submitted, the eviction order of 31st July, 2008, was not interlocutory and therefore, he further urged, the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended, did not apply. That is, Mr. Mafuru emphasized, the application for revision is properly before the Court in respect of the order of eviction. He went on in his submission that the preliminary objection raised is misconceived, it should be overruled.

The central issue for consideration is whether the order of eviction of 31st July, 2008, finally determined the rights of the parties in the suit. In this regard, section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002 provides that:

> 5 (2) (d) – 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.

In this case, our perusal of the ruling of the High Court of 9th September, 2007 relating to the application for waiver of the notice of eviction the following picture emerges. Following the demand notices to the applicant for payment of arrears of rent unsuccessfully, the learned judge took the view that the breach of the agreement having not been remedied, the lease agreement was terminated. Consequently, the order for eviction was issued on 14th September, 2007 with a grace period of one month. From this it would follow as day follows night that the order of eviction is dependant upon the main suit, namely Land Case No. 158 of 2007.

As already indicated, in the main suit, the reliefs sought included payment of arrears of rent, interest and any other reliefs that the Court may deem fit to grant. Admittedly, from the reliefs sought, there was no specific prayer made as a relief with regard to the eviction of the applicant from the suit premises. This however, in our considered view does not either sever the aspect relating to the eviction of the applicant from the main suit or make it a separate suit, different from the main suit. In the circumstances we are firmly

provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002, CAP 141 R.E. 2002.

In **Tanzania Motor Services Ltd. And Presidential Parastatal Sector Reform Commission Versus Mehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2005 (unreported) in more or less similar circumstances, the Court had occasion to consider whether an interlocutory decision had the effect of finally determining the suit. In that case, the suit was based on a contract for the construction of a house. The contract, contained an arbitration clause. That in the event of a dispute between the parties, a reference would be made to arbitration. Arising from a dispute between the parties, a suit was instituted in the High Court.

As the suit was still pending, the appellant in that case, petitioned for stay of proceedings in the High Court in order to enable the appellant to invoke arbitration proceedings under the Arbitration ordinance. The petition was dismissed. Hence the matter was taken on appeal against the dismissal of the application to stay

proceedings. On appeal a preliminary objection was raised that the appeal was incompetent as it arose from an interlocutory decision. Dismissing the preliminary objection, this Court *inter alia* held:

> In the present case, the decision of the learned judge refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in contracts for arbitration meaningless. They are meant to serve a purpose.

With respect, we think that case is widely distinct from the case before us. In that case as the arbitration clause in the contract was distinct from the rest of the clauses in the contract, we think its breach could be enforced under the Arbitration Act, CAP 15 R.E. 2002, the situation in this case is different.

Because the aspect relating to the eviction order is dependant upon the main suit, proceedings touching on the eviction order cannot be taken as a distinct suit. As such, and as said before, it is an interlocutory decision in which no revision can be entertained. Consequently, the preliminary objection raised is sustained on ground three.

Having sustained the preliminary objection, on this ground, it would follow that the application before us is to be struck out. However, the decision to strike out the application has engaged our minds considerably. This is for the reason that we are seized of the record of the High Court in Land Case No. 158 of 2007. Upon a close perusal of the record as a whole, apart from the submissions made by the learned counsel for both parties in the application which we have held to be incompetent, we are increasingly of the view that the eviction order is fraught with irregularities, illegality and impropriety. For this reason, we are constrained not to strike out the application in order to retain the record for the purpose of correcting the

illegality and or impropriety. Otherwise, it would take a long time to start it all over which is not in the interest of justice.

Therefore, the Court *suo motu* has decided to invoke its powers of revision under the provisions of Section 4 (3) of the Appellate Jurisdiction Act, CAP 141 R.E. 2002 to revise the proceedings in the High Court record. This is not the first time that the Court takes this course of action when it transpires that the proceedings in the High Court are fraught with impropriety, illegality and or impropriety. Because of the peculiar circumstances, the Court **suo motu** called for the proceedings from the High Court and invoked its revisional jurisdiction in **Fahari Bottlers Ltd. Versus The Registrar of Companies And the National Bank of Commerce (1997) Ltd.,** Civil Revision No. 1 of 1999 (unreported).

From our perusal of the record two things are clear. First, that eviction was not sought as one of the reliefs in the suit in Land Case No. 158 of 2007. Second, it is also apparent that the pleadings were not completed wherein issues were to be framed as a basis for the

trial. In the absence of these basic features in the trial, the question falling for consideration is what was the basis of the eviction order issued on 31st July, 2008 when the suit was still in the process of trial? On this issue, Mr. Mafuru, for the applicant had urged that the eviction order had no legal basis upon which to stand. On the other hand Mr. Msemwa, for the respondent, was of the view that the order was proper because the parties were heard before the order was issued.

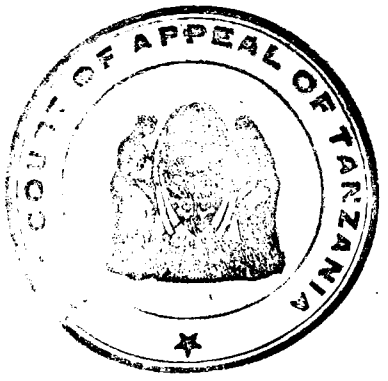
The issue is not that the parties were not heard before the issuance of the eviction order. We think the issue is crystal clear and simple, namely that from the reliefs sought in the plaint, it had to be decided by the court following the procedure laid down by the law relating to the trial of suits, whether in fact the applicant owed the respondent the principal sum of U$ 1,319,371.20 as arrears of rent due. Once that is settled, then the execution process would follow leading finally to the eviction after due notice.

This was not done in this case. Instead, the eviction order surfaces after the dismissal of the application for waiver of the notice of eviction. This is highly irregular and improper as well. It presupposes that the applicant had been adjudged to be in default of paying arrears of rent to the tune indicated in the plaint. It is elementary that once a plaint has been filed the pleading process has to be completed before the trial commences unless the suit is settled outside court or through the Alternative Dispute Resolution mechanism. This, nonetheless, has to be reflected in the record which was not the case here.

It seems to us that there was a mix up on the part of the trial High Court in invoking section 104 (2) of the Land Act, 1999 as amended by Act No. 11 of 2005 when the suit was already at an advanced stage in court. The suit having being instituted in court, it had to be proceed with all the way through the stages until the execution process. The court process should not be short circuited as it were, by failing to follow the procedure laid down under the law. On this we think, with respect, the learned trial judge fell into error.

In the event, as the eviction order of 31st July, 2008 was improperly issued, we are satisfied that in the interest of justice, it should not be left to stand. Accordingly, the eviction order of 31st July, 2008 and the rest of the proceedings after 11th September, 2007 are quashed and set aside. It is also directed that the hearing of the suit be proceeded from the stage reached on 11th September, 2007 according to the law. No order for costs.

DATED at DAR ES SALAAM this 15th day of August, 2008.



D.Z. LUBUVA
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

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

(P.B. KHADAY)
Ag. DEPUTY REGISTRAR