IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A., KAIJAGE, J.A. And MWARIJA, J.A.)

CIVIL APPLICATION NO. 80 OF 2016

MURTAZA ALLY MANGUNGU ..... APPLICANT

VERSUS

THE RETURNING OFFICER FOR KILWA
NORTH CONSTITUENCY ..... 1ST RESPONDENT
THE ATTORNEY GENERAL ..... 2ND RESPONDENT
VEDASTO EDGAR NGOMBALE ..... 3RD RESPONDENT

(Application for revision from the proceedings of the High Court of Tanzania, at Mtwara)

(Kitusi, J.)

dated the 3rd day of March, 2016
in
Misc. Civil Application No. 4 of 2015

.....

RULING OF THE COURT

25th May & 6th June, 2016

MASSATI, J.A.:

The applicant was one of the contestants in the 2015 General Elections in Tanzania, sponsored by CHAMA CHA MAPINDUZI (CCM) for a parliamentary seat for Kilwa North Constituency. He lost to the third respondent. Aggrieved, he lodged a petition to challenge the said results in the High Court of Tanzania, at Mtwara on 24/11/2015.

Before the commencement of the hearing of the petition, 9 issues were framed, filed in court, and endorsed by the parties and the trial court. They were:-

1. *Whether the result forms at Namatungutungu, Godauni Zahanati and Somanga Zahanati polling stations were not signed by polling assistants and polling agents. If so whether that affected the results.*
2. *Whether use of similar result forms with similar serial numbers by Zahanati Kipatimu. Form No. 20191 shule ya Msingi Mtoni – Form 20191 – Shule ya Msingi Hanga 1 – 20266 Shule ya Msingi Nadindu – 20266 was justified and whether that affected the results.*
3. *Whether the Petitioner requested for and was denied a recounting of votes.*
4. *Whether the result forms for Zahanati No. 2 were deleted and overwritten without reason. If so whether that affected their genuiness and the results for that particular polling station.*
5. *Whether the discrepancies between the number of registered voters and casted votes at Mtende Zahanati polling station is justified. If not whether such discrepancies affected the results at that particular polling station.*

6. *Whether the result forms had no emblem of the National Election committee as alleged. If so what is the effect of such irregularity.*
7. *What was the actual number of votes that the petitioner got.*
8. *Whether the Parliamentary General Election of Kilwa North constituency complied with the relevant laws.*
9. *To what reliefs are the parties entitled.*

The trial commenced on 3/3/2016 by taking the evidence of the petitioner who testified as PW1. According to the record, he was one of the 13 witnesses that he had proposed to bring. Midway as PW1 was about to tender 31 forms christened "Form 21 B", the state attorney who was representing the first and second respondents, objected to their admissibility on account of their being secondary evidence. After a heated exchange of legal arguments, the learned judge ruled them inadmissible.

Immediately after the ruling, Mr. Samson Mbamba, learned counsel appearing for the petitioner, expressed his intention to appeal against the said ruling, and consequently applied for stay, pending the intended appeal, which suggestion did not also find favour with the learned trial judge. He ordered the learned counsel to chart the way forward. Not all that followed after that is of particular relevance in the present application.

What followed (which is of immediate interest here) is the filing of the present application for revision on 24th March, 2016. The Notice of Motion was taken out under sections 4 (3) and 5 (2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act) as well as Rules 4 and 65 (1) of the Court of Appeal Rules, 2009 (the Rules).

The application seeks for an order that:-

> *"the record of the High Court of Tanzania (Mtwara Registry) in Misc. Civil Application No. 4 of 2015 be called into this hon. Court and the legality and propriety of the proceedings dated 3rd March, 2016, declining to admit forms No. 21 B on the grounds stated by the court (Hon. Kitusi, J.) be examined, revised, quashed and set aside."*

The notice then sets out a number of grounds in support of the prayer, which are not of particular relevance in the present ruling.

The Notice of Motion is supported by the affidavit of the applicant, but vehemently opposed by the respondents; by way of affidavits in reply. But what is of moment is a preliminary objection on a point of law raised

by the first and second respondents. In their notice, filed under Rule 4 (2) (a) of the Rules; these respondents contend that:-

> *"The application is untenable and abuse of Court's process as it contravene (sic) section 5 (2) (d) of the Appellate Jurisdiction Act Cap 141 R.E. 2002."*

At the hearing of the application, Mr. Samson Mbamba, learned counsel, continued to represent the applicant, and Mr. Sylvester Mwakitalu, together with Mr. Paul Shaidi, and Mr. Mohamed Salum, all learned Senior State Attorneys, represented the first and second respondents. The third respondent was present in person, unrepresented.

Mr. Mwakitalu argued the preliminary objection. He submitted that the decision of the High Court dated 3/3/2016, rejecting the admission of documents in evidence was interlocutory in nature, and was neither appealable, nor revisable in this Court, in terms of section 5 (2) (d) of the Act as amended by Act No. 25 of 2002.

The learned counsel referred to us, a number of decisions of this Court to the effect that such orders were not appealable or revisable; as the decision did not finally determine the suit. The decisions include those

of **MAHENDRA KUMAR GOVINDJI MONANI t/a ANCHOR ENTERPRISES vs TATA HOLDING (TANZANIA)LTD AND ANOTHER,** Civil Application No. 50 of 2002, and **THE ATTORNEY GENERAL vs WILFRED ONYANGO MGANYA @ DADII AND OTHERS**, Criminal Appeal No. 276 of 2006 (both unreported). He concluded that the application before the court was therefore incompetent and should be struck out with costs.

On his part, Mr. Mbamba first took a long tour of the various provisions of the Constitution and case law, to show that, by its nature, the decision of the High Court in question was not appealable. For this proposition, he referred us to Article 83 (4) of the Constitution of the United Republic of Tanzania and the decisions of **FREEMAN AIKAEL MBOWE AND ATTORNEY GENERAL vs ALEX O. LEMA** (2014) TLR. 85 and **EDSON OSWARD MBOGOLO vs DR. EMMANUEL NCHIMBI**, Civil Appeal No. 6 and 140 of 2006 (unreported). In doing so, the learned counsel was out to show that in such a case, an aggrieved party had no option but to apply for revision, hence the present application.

Mr. Mbamba, went on to argue that the impugned decision was not interlocutory but final in effect. For support, he resorted to the definition

of the term "interlocutory" from **BLACK's LAW DICTIONARY**; and decisions of this Court such as **CHAMA CHA WALIMU TANZANIA vs THE ATTORNEY GENERAL,** Civil Application No. 151 of 2008, **ABDI SALEHE vs ASAC CARE UNIT LIMITED AND 2 OTHERS**, Civil Revision No. 3 of 2012, **BULYANHULU GOLD MINE (T) LTD vs NICODEMUS KATUNGU AND 1511 OTHERS**, Civil Application No. 37 of 2013 (all unreported). He called upon the Court to give a broad definition of section 5 (2) (d) of the Act, so as to accommodate such exceptional circumstances as the present application. He cited the decision of **SOPHIA AMIRI MRISHO (AS ADMINISTRATOR OF THE ESTATE OF THE LATE MRISHO) vs NEW SUDAN BUILDING MATERIALS COOPERATIVE SOCIETY LTD**, Civil application No. 235 of 2015 (unreported) for inspiration.

He concluded that if the said decision was left undisturbed, its effect would be to render the whole of the applicant's case nugatory but was careful enough to ask the Court, to treat the present application on its own peculiar circumstances; and treat it as final without the excluded evidence. He thus prayed that the application be allowed.

In his rejoinder submission, Mr. Mwakitalu said that while he had no objection to the provisions of the law regarding the right of appeal in election cases, he was still adamant that the decision of Kitusi, J. now sought to be revised, was interlocutory and unrevisable.

It was his further view that the wording of section 5 (2) (d) of the Act was so clear and the Court has already interpreted it. There was nothing peculiar in the present case. He submitted that the decision could not have been taken as final because there were 9 issues for determination and other witnesses to testify. Finally, he submitted that unless the applicant wanted this Court to depart from its previous decisions the Court should follow its decision in **MAHENDRA's** case, and uphold the preliminary objection with costs.

On his part, the third respondent joined hands with the other respondents in their submissions and urged the Court to strike out the application with costs.

We agree with Mr. Mbamba that Article 83 (4) of the Constitution of the United Republic of Tanzania enshrines a right of appeal against decisions in election petitions. What we fail to understand is its relevancy in the present matter, which has nothing to do with appeals.

The issue in the present case is whether the decision of the High Court rejecting the admission of some documentary evidence is revisable?

The preliminary objection is taken under section 5 (2) (d) of the Act as amended by Act 25 of 2002 which reads as follows:-

> *"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 criminal charge or suit."*

The wording of this provision is very clear. There are two preconditions for the provision to come into effect. **Firstly,** the decision or order in question must be interlocutory or preliminary. **Secondly**, the decision or order must have the effect of finally determining the criminal charge or suit. Both conditions must exist for it to be invoked.

Mr. Mwakitalu, has referred to us the decision of this Court in **MAHENDRA's** case.

With respect, that decision simply states the obvious, which is that, an interlocutory or preliminary decision or order is not appealable, and that

a party aggrieved by an interlocutory decision or order has to wait until the final outcome of the case and if dissatisfied appeal against all the points including the ones made in interlocutory decisions or order. It also gives the philosophical rationale behind the provisions. But this is of little assistance in our present controversy which is whether, the decision of Kitusi, J. is final in effect?

In resolving the controversy we have decided to adopt what is known as "the nature of the order test". This test was applied in a decision of the Privy Council of **BAZSON vs ATTRINCHAN URBAN DISTRICT COUNCIL** (1903, 1 KB 948) which is:-

> *"does the judgment or order as made, finally dispose of the rights of the parties? If it does then ...it ought to be treated as a final order, but if it does not it is then ... an interlocutory order."*

This test was applied with approval by the Nigerian Supreme Court in **AKINSANYA vs UNITED BANK FOR AFRICA LTD** (1987) LRC Comm. 22 at p. 37. It was followed in **UNITED BANK OF NIGERIA PLC vs BONEY MARCUS INDUSTIRIES LTD AND TWO OTHERS** SC 22/2001 (– available at http/www. nigeria aw-org/Law Reporting 2005). This Court

also applied that test in **PETER NOEL KINGAMKONO vs TROPICAL PESTICIDES RESEARCH**, Civil Application No. 2 of 2009 (unreported).

From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties. That means that the order or decision must be such that it could not bring back the matter to the same court.

In its decision in this case the High Court rejected to admit in evidence some documents which the applicant intended to rely on in his case. But did this mean that it had determined the rights of the parties? We do not think so. As Mr. Mbamba admitted in the course of the hearing this preliminary objection, this decision did not dispose of all the 9 issues that were framed for determination. Apart from 12 other witnesses lined up to give evidence for the petitioner there were also 5 other documents attached to the petition, that were also potential evidence which were yet to be received. To agree with Mr. Mbamba that the rejection of these documents would negate the petitioner's case would be prejudging the case which is contrary to our established jurisprudence.

The decision did not and could not have determined or disposed of the rights of the parties. It was therefore interlocutory in nature and

therefore any application for revision of such decision is barred under section 5 (2) (d) of the Act.

We therefore uphold the preliminary objection. For the reason that it is an interlocutory decision, it is not revisable. So, the application is misconceived. We strike it out with costs. We order that the record be remitted to the trial court for it to proceed with the trial.

Order accordingly.

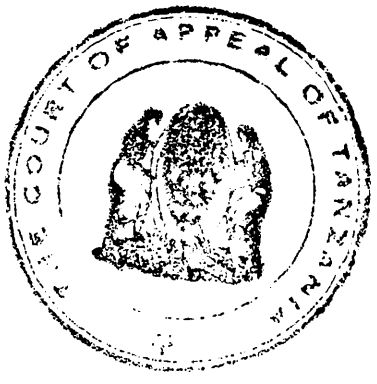
DATED at **DAR ES SALAAM** this 30th day of May, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL