

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MZIRAY, J.A. And NDIKA, J.A.)

CIVIL APPLICATION NO. 343/01 OF 2018

PETER MICHAEL MALEBO AND 8 OTHERS APPLICANTS

VERSUS

**1. THE REGISTERED TRUSTEES OF THE CIVIL
UNITED FRONT (CUF – CHAMA CHA WANANCHI)**

2. THE REGISTRAR OF POLITICAL PARTIES

3. THE HONOURABLE ATTORNEY GENERAL

..... RESPONDENTS

**(Application for revision of the decision of the High Court of Tanzania
(Main Registry), at Dar es Salaam)**

(Dyansobera, J.)

dated the 29th day of May, 2018

in

Misc. Civil Application No. 80 of 2017

RULING OF THE COURT

31st October & 24th December, 2018

MUSSA, J.A.:

The applicants seek to move the Court to call for and examine the record of the High Court, Dar es Salaam Main Registry, so as to satisfy itself as to the legality, correctness and propriety of the decision made by the High Court (Dyansobera, J.) in Miscellaneous Civil Application No. 80 of 2017 on the 29th May, 2018.

The application is by a Notice of Motion which has been taken out under section 4 (3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (the Act) as well as Rule 65 (1) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by a joint affidavit of the applicants.

In the referred High Court Miscellaneous Civil Application No. 80 of 2017, the first respondent herein had sought a temporary injunction to restrain the second and third respondents herein from disbursing the party's subventions from the Government pending the hearing *inter partes* and the determination of a Miscellaneous Cause No. 68 of 2017. It is noteworthy that none of the applicants herein were parties to the application which is sought to be impugned. At the height of the proceeding, the application was granted.

As we have hinted upon, a little later, on the 13th June, 2018 the applicants preferred the matter at hand which, as it turns out, has been greeted with a notice of preliminary points of objection raised by the first respondent to the following effect:-

"1. The application is incompetent as it seeks the court to revise interlocutory decision contrary to section 5 (2) (d) of the Appellate Jurisdiction Act

Cap 141 R.E. 2002 as amended by Act No. 25 of 2002.

2. The application is incompetent as the applicants had appropriate remedy of applying to the Court which granted the injunction to vary, discharge or set it aside.

3. The application is incompetent for failure to include in the Record of Revision the following documents which were lodged in the High Court contrary to section 4 (3) of the Appellate Jurisdiction Act Cap 141 R.E. 2002;

a) Counter affidavit for the 1st and 2nd respondents herein filed on 09th October, 2017 in Miscellaneous Civil Application No. 80 of 2017.

b) Reply to counter affidavit filed by the 1st Respondent herein on 06th November, 2017 in Miscellaneous Civil Application No. 80 of 2017.

c) Proceedings in Miscellaneous Application No. 22 of 2018 in the High Court.

d) The Ruling and Drawn Order dated 29th May, 2018

made in Miscellaneous Application No. 22 of 2018.

e) Counter Affidavit for 1st and 2nd Respondents herein

filed on 06th September, 2017 in Miscellaneous Cause No. 68 of 2017.

f) Reply to Counter Affidavit for the 1st respondent

herein filed on 13th September, 2017 in Miscellaneous Cause No. 68 of 2017.

g) Written Submissions by the 1st respondent herein

filed on 12th June, 2018 in support of Application in Miscellaneous Cause No. 68 of 2017.

h) Reply Submissions by the 1st and 2nd respondents

herein filed on 22nd June, 2018 in Miscellaneous Cause No. 68 of 2017."

To fortify the foregoing contentions, the first respondent has filed written submissions to which several authorities are appended. On their part, the applicants have similarly lodged written submissions in opposition.

When the application was placed before us for hearing, the applicants were represented by Mr. Mashaka Ngole, learned advocate,

whereas the first respondent had the services of Messrs Juma Nassoro and Daimu Halfan, also learned Advocates. The second and third respondents were represented by Mr. David Kakwaya, learned Principal State Attorney, who was being assisted by Ms. Rehema Mtulya, learned State Attorney.

Mr. Halfan, who stood up for the first respondent, fully adopted the written submissions in support of the preliminary points of objection, without more. Mr. Kakwaya just as well supported the points raised in the notice of preliminary objection and, prayed that the application be struck out for incompetence. For the applicants, Mr. Ngole also similarly adopted the written submissions in opposition to the raised preliminary points of objection. To him, the preliminary points of objection are wholly bereft of substance.

Addressing the first preliminary points of objection in the written submissions, Messrs Nassoro and Halfan sought to rely on section 5 (2) (d) of the Act which goes thus:-

"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."

Counsel submissions are to the effect that inasmuch as Miscellaneous Civil Application No. 80 of 2017 has not dealt with and determined the dispute between the parties which is the subject of the pending Miscellaneous Cause No. 68 of 2017; the application at hand is barred by the provisions of the Act and, for that matter, incompetent. To buttress their contention, Messrs Nassoro and Halfan sought to rely on the definition of "interlocutory proceeding" as propounded in the case of **University of Dar es Salaam vs Silvester Cyprian and 210 Others** [1998] TLR 175.

Coming to the second point of preliminary objection, the learned counsel for the first respondent submitted that the applicants need not have preferred the application at hand much as they had an appropriate remedy under Order XXXVII rule 5 of the Civil Procedure Code, Chapter 33 of the Laws which provides:-

"Any order for an injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

In support of their contention, the learned counsel for the first respondent referred us the English case of **WEA Records Ltd vs Visions Channel 4 Ltd** [1983] WLR 721 which held that a person who wishes to challenge an order of injunction must not appeal but apply to the court which issued the injunction to have it set aside.

As regards the third point of objection, the first respondent contends that the applicants have omitted to include in the record of revision the listed documents without which the court cannot be said to have been properly moved to exercise its revisionary jurisdiction. To buttress the contention, we were referred to two decisions – viz – **Mabalaganya vs Sanga** [2005] 1 E.A. 230; and Civil Application No. 184 of 2014 - **Ramani Consultants Ltd vs The Board of Trustees of the NSSF and Another** (unreported). As was expected, the learned Principal State Attorney for the second and third respondents went along with the submissions of the first respondent with regard to the preliminary points of objection.

In reply, the applicants strenuously argued, with respect to the first preliminary point of objection, that the decision sought to be impugned is not interlocutory. In this regard, they sought reliance in the unreported decision of this Court in Civil Application No. 151 of 2008 – **Chama cha Walimu Tanzania vs The Attorney General**. More particularly, the

applicants sought refuge in a portion of the decision where the Court observed:-

"We are of the firm view that the order issued was not interlocutory. It had the effect of conclusively determining the application. The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant was restrained from "calling for and/or participating in the planned strike". There was no other issue remaining to be determined by the Labour Court."

As regards the second point of objection the applicants take the position to the effect that the same is misleading inasmuch as Order XXXVII Rule 5 cannot be called into play by the applicants who were not parties to the High Court proceedings.

Coming to the third point of preliminary objection, the applicants refute the existence of a counter affidavit referred to in paragraph 3 (a) of the point of objection.² The counter affidavits of the first and second respondents could not be in existence, more particularly, as the first respondent was, in the proceedings below, an applicant. They also claim

that there was no ruling and drawn order referred to in paragraph 3 (d) of the objection much as the referred Miscellaneous Application No. 22 of 2018 was withdrawn. Lastly, as regards the documents listed in paragraphs (c), (e), (f), (g) and (h), the applicants concede that the same have not been included in the record of revision but they quickly rejoin that those documents are not of any material relevancy in the determination of the matter under our consideration. In the premises, the applicants pray that the preliminary points of objection be dismissed with costs.

We have earnestly considered the contending arguments on the preliminary points of objection. As regards the first preliminary point of objection, we think it is apposite to extract the substantive portion of the drawn order which went thus:-

"THIS COURT DOTH HEREBY ORDER THAT

***The application for temporary injunction is granted
by restraining the respondents from disbursing the
applicant's party's subventions from the government
pending the hearing and determination of
Miscellaneous Civil Cause No. 68 of 2017
which is pending in court or until further of
competent legal authority.***

BY THE COURT

Given under my **HAND** and **SEAL** of the court on

29th day of May, 2018.

W. P. DYANSOBERA

JUDGE" [Emphasis added].

As is patently discernible from the extract, unlike the situation in **Chama cha Walimu** (supra) where there was no other issue remaining to be determined by the Labour court; in the situation at hand, the impugned order was issued, as it were, pending the hearing and determination of Miscellaneous Civil Cause No. 68 of 2017. It was, so to speak, issued pending further action which was to be taken by the issuing court. The impugned order, we may add, squarely falls on all the attributes of interlocutory proceedings as defined in the case of the **University of Dar es Salaam** (supra) in the following words:-

"interlocutory proceedings are proceedings that do into decide the rights of parties but seek to keep things in status quo pending determination of those rights, or enable the court to give directions 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."

Having so found, we sustain the first preliminary point of objection to the effect that this application is barred by the provisions of section 5 (2) of the Act. This finding will alone suffice to dispose of this application and, for that matter, we need not belabour on the other points which were raised in the notice of preliminary objection. The application is, accordingly, struck out for incompetence with costs to the first respondent.

DATED at DAR ES SALAAM this 20th day of December, 2018.


K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL



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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL