IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 552/16 OF 2017

MANTRAC TANZANIA LIMITED ---------- APPLICANT

VERSUS

JUNIOR CONSTRUCTION COMPANY LTD ---------- 1st RESPONDENT

SULEIMAN MASOUD SULEIMAN ---------- 2nd RESPONDENT

NCHAMBI TRANSPORTERS LIMITED ---------- 3rd RESPONDENT

STAMIGOLD COMPANY LIMITED ---------- 4th RESPONDENT

(Application arising from the proceedings and orders of the High Court of Tanzania (Commercial Division) at Dar Es Salaam)

(Songoro, J.)

Dated the 6th October, 2017

in

Commercial Review No. 10 of 2017

RULING OF THE COURT

16th Feb & 27th Mar. 2018

MWANGESI, J.A.:

What could be discerned from the records in respect of this application is that, the applicant is the plaintiff in Commercial Case No. 10 of 2017, which is pending before the High Court of Tanzania (Commercial Division), wherein the respondents are the defendants. In the course of the proceedings, there cropped a number of applications among which was Commercial Review No. 10 of 2017 in which, the learned trial Judge was

asked by the applicant to recuse himself from handling the matter. Upon refusal by the trial Judge to recuse, the applicant lodged Commercial Review No. 10 of 2017, requesting the learned Judge to review his decision. The application was again dismissed for want of merit and thereby, triggering the current application to this Court moving it to revise the decision of the High Court.

The application has been made by way of notice of motion taken under the provisions of section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (**AJA**) and Rules 65 (1), (2), (3) and (7) of the Tanzania Court of Appeals Rules, 2009 (**the Rules**). The applicant is requesting the Court to hold that, the proceedings, ruling and orders in Commercial Review No. 10 of 2017 and subsequent/related proceedings in Commercial Case No. 10 of 2017, and Commercial Case No. 127 of 2016 are nullity and therefore, be quashed and the matters be heard afresh by another Judge.

The application is supported by two affidavits, the first one was affirmed by Hatem Farouk, who introduced himself as the Managing Director of the applicant company, while the second one was sworn by Mr. Roman S. L. Masumbuko, who is the learned advocate representing the

applicant in this application. The application is on the other hand strongly resisted by the respondents who additionally, greeted it with notices of preliminary objection.

In their joint notice of preliminary objection, the first, second and third respondents, raised four grounds namely, **firstly,** that the application contravenes Rule 12 (3) and (4) of the Tanzania Court of Appeal Rules GN No. 368 of 2009 in that, the pages of the application are not numbered and further that, every tenth line of each page is not indicated in the margin as mandatorily required by the law and to be specific, the provisions of Rule 12 (3) and (4) of **the Rules**. **Secondly,** that the provisions cited in the application are not the enabling ones for the orders sought by the applicant. **Thirdly**, that the contents of paragraphs from 8 to 25 of the affidavit sworn by Hatem Farouk in support of the application, are defective for being argumentative, expressing opinion, scandalous and insulting. And, **Fourthly,** that the contents of paragraphs 5 to 25 of the affidavit sworn by Roman Masumbuko are argumentative, expressing opinion, scandalous and insulting.

With regard to the notice of preliminary objection which was raised by the fourth respondent, it is averred that, the application is incompetent for contravening the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 Cap 141 R.E 2002 (**AJA**), as amended by Act No. 25 of 2002 in that, the decision sought to be revised is an interlocutory one with no effect of finally determining the rights of parties in Civil Case No. 10 of 2017 and hence, not revisable. All respondents therefore, asked the Court to strike out the application for want of merit with costs.

On the date when the application was called on for hearing, the applicant was represented by Mr. Roman Masumbuko learned counsel, whereas, the first, second and third respondents had the services of Mr. Frank Mwalongo also learned counsel. On his part, the fourth respondent was advocated for by Mr. Mudrikat Kiobya learned counsel, who was being assisted by Ms Rose Mpongolyama learned counsel.

After having heard the submissions of the learned counsel from either side in respect of the notices of the preliminary objections which they have raised and the response thereto, there was yet another issue not raised, which seemingly in our view, had a strong bearing to the propriety

of the application before us. We therefore, *suo motu*, prompted the learned counsel to address us on the issue as to whether or not, the decision sought by the applicant to be revised is appealable. And, if the answer is in the affirmative, as to whether there was any legal justification for the applicant to prefer an application for revision instead of appealing against the complained decision of the High Court.

In response to our quest, Mr. Masumbuko, submitted that, the decision sought to be revised is appealable. Nonetheless, he went on to contend, the circumstances pertaining to it, have compelled him to prefer the instant application for revision in lieu of an appeal. Accounting for the alleged compelling circumstances, the learned counsel argued that, there were various mishandlings of the matter which were occasioned by the trial Court, which included their denial of the right to be heard in regard to their application for review. In the circumstances, he implored us to treat it as a special case and that, there was justification for him to prefer an application for revision instead of appealing against the decision of the High Court.

In further amplification to his stance, the learned counsel for the applicant argued that, since in addition to its appellate jurisdiction, this Court is vested with supervisory and revisional role over the High Court and other subordinate tribunals, it is legally mandated to go through the proceedings of the High Court and make the necessary directives as it considers fit for the ends of justice to the parties.

On his part Mr. Mwalongo on behalf of the first, second and third respondents, was of the firm view that, the procedure adopted by his learned friend was improper because the decision sought to be revised was a fit one for appeal. According to him, in applying for revision in the instant matter, his learned friend was appealing through the back door. He urged us not to condone and accomodate such improper practice. The position taken by Mr. Mwalongo was seconded by his learned friend Mr. Kiobya for the fourth respondent, who had nothing to add other than imploring the Court to strike out the application. He however never pressed for costs.

In light of the foregoing rival arguments from the learned counsel for either side, what stands for our deliberation and determination, is whether the application for revision which has been preferred by the applicant to this Court is tenable. The law governing revisions and appeals to this Court

is settled in that, while revision is governed by the provisions of section 4 of the **AJA**, appeals are governed by sections 5 and 6 of the same Act. Additionally, there is case law, which has loudly amplified the procedure on how either of the two can be taken to the Court. For instance, the case of **Halais Pro-Chemie Vs Wella A. G** [1996] TLR 269, laid down in detail the legal pre-requisites that can move the Court to invoke its revisional powers, *inter alia* that:

(i) The Court may on its own motion, and at any time, invoke its revisional jurisdiction in respect of the proceedings of the High Court;

(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;

(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the matters which are not appealable with or without leave;

(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process.

A plethora of authorities have followed suit to what was articulated in the above cited case which include, **J. H. Komba Esquire Ex –**

Employee, East African Community Vs the Regional Revenue Officer, Sub – Treasury Arusha and Two Others, Civil Application No. 3 of 2002, **Christom H. Lugiko Vs Ahmednoor Mohamed Ally,** Civil Application No. 5 of 2013 and **Jumanne Jafari Nguge Vs Nzilikana Rajabu,** Civil Reference No. 4 of 2013 (all unreported).

What we had to ask ourselves in light of the explicit position of the law as stipulated above, is whether the application under discussion falls within any of the listed benchmarks. In his endeavor to move us to invoke our revisional powers, the learned counsel for the applicant stated that, there were irregularities in the proceedings of the High Court that included, denial of the right to be heard in the application for review. With due respect to the learned counsel, in as much as the decision was appealable, his complaints would have constituted part of the grounds of appeal. And since there has never been any indication that, the right of the applicant for appeal has been blocked by judicial process, we are settled in our minds that, the application for revision that has been preferred to this Court by the applicant, has been made in contemptuous disregard of the procedural law and has to fail.

And the fact that, this ground alone suffices to dispose of the application by the applicant, we are of the considered view that, the necessity to consider the remaining notices of preliminary objection which were raised by the respondents does not arise. We therefore, strike out the application with no order as to costs for the reason that, the ground disposing of the application has come from the Bench.

Order accordingly.

DATED at **DAR ES SALAAM** this 21st day of March, 2018.

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

E.Y.MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL