IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A., and KENTE, J.A.)

CONSOLIDATED CIVIL APPLICATION NOs. 76 & 90 OF 2016

1. **STANDARD CHARTERED BANK**
2. **STANDARD CHARTERED BANK (HONG KONG)** .....**APPLICANTS**
3. **WARTSILA NEDERLAND B.V**
4. **WARTSILA TANZANIA LTD**

VERSUS

VIP ENGINEERING & MARKETING LIMITED.....RESPONDENT

AND

1. **STANDARD CHARTERED BANK (T) LTD**
2. **THE JOINT LIQUIDATORS OF MECHMAR CORPORATION (MALAYSIA** ..... **NECESSARY PARTIES**

(Application for Revision of the Decision and Orders of the High Court of Tanzania at Dar es Salaam)

(Bongole, J.)

dated the 18th day of February, 2016
in
Civil Case No. 229 of 2013

RULING OF THE COURT

21st February & 7th March, 2022

KEREFU, J.A.:

This Ruling responds to the consolidated Civil Applications Nos. 76 & 90 of 2016 which were lodged by the first and second applicants on 21st March, 2016 and third and fourth applicants on 4th April, 2016 respectively.

The notices of motion were made under section 4 (3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) and Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) inviting the Court to exercise its power to revise the proceedings, rulings and orders of the High Court of Tanzania (Bongole, J.) made on 16th to 18th February, 2016 in respect of Civil Case No. 229 of 2013. The applications are supported by two affidavits duly sworn by James Nicholas Denham, the Senior Legal Counsel of the first and second applicants and Laura Susi-Gamba, the Vice President, Legal Affairs, Energy Solutions for the third and fourth applicants. The common grounds of complaint for the intended revision, as indicated in both applications are as follows: -

(a) *That, there is apparent error on the interpretation of Order VII Rules 14 and 18 read together with Order XIII Rule 1 (1) of the Civil Procedure Code, [Cap. 33. R.E. 2019] (the CPC); and*

(b) *That, the interpretation of Order VII Rules 14 and 18 read together with Order XIII Rule 1 (1) of the CPC by the trial court has brought confusion on the rule regulating filing and admissibility of plaintiff's documentary evidence which has been in application for decades, posing serious implication on the*

outcome of the Civil Case herein and other suits in future.

On the other part, the respondent has filed two affidavits in reply on 30th June, 2016 and 25th July, 2016, respectively, opposing the applications. It is noteworthy that, the 1st and 2nd necessary parties, though duly served, did not file affidavits in reply.

In order to appreciate the context in which the applications have arisen, we find it apposite to briefly provide the material facts of the matter as obtained from the record. On 12th November, 2013, the respondent instituted a suit, (Civil Case No. 229) before the High Court against the applicants and the necessary parties claiming that the applicants had conspired with the other parties to cause the IPTL and the respondent, its shareholder to incur unnecessary costs leading to a greater debt burden and greatly diminished profits. The respondent claimed for payment of damages at the tune of US$ 414.2 million for loss of dividends and US$ 77 million as legal fees and costs. Upon being served with the plaint, the applicants filed their written statements of defence disputing the respondent's claim.

It is on record that a final pre-trial conference was conducted on 19th January, 2016 where a total of twenty-three issues were framed and agreed upon by the parties. On the same date, the learned counsel for the respondent indicated that, prior to the date of hearing of the matter, he would file additional documents to be relied upon by the respondent during the trial. The trial Judge informed the parties that he would need to be convinced before he could permit the respondent to add any further documents at that later stage of the proceedings.

However, on 9th February, 2016, the learned counsel for the respondent filed in court seven voluminous files of additional documents, under Order XIII Rule 1 (1) of the CPC, which the respondent intended to rely upon during the trial. The said documents were served to the applicants and the necessary parties on 10th February, 2016. Furthermore, on the first morning of 16th February, 2016, the trial date, the respondent filed and served to the applicants and the necessary parties another set of new documents.

On the first day of hearing of the suit, the applicants objected to an attempt by the respondent to file the said documents without leave of the court and they urged the trial Judge to expunge the said documents from

the record. Upon hearing the parties on the said objection, the trial court found that the additional documents filed by the respondent were properly filed under the ambit of Order XIII Rule 1 of the CPC which allows parties to the suit to produce, at the first hearing date, all documentary evidence they intend to rely on during the trial. In addition, the trial Judge found that the additional documents did not introduce any new case different from the one indicated in the plaint. In the event the learned trial Judge overruled the objection raised by the applicants and allowed the respondent to rely on the filed additional documents which were filed during the trial.

Aggrieved, the applicants lodged the current applications as indicated above. The said applications were confronted with a notice of preliminary objection lodged by the respondent on 15th April, 2016 challenging the competence of the applications on the grounds that; **one**, the same are incompetent for being initiated by an incomplete record; **two,** there are no any exceptional circumstances, irregularities or existence of confusion in the interpretation of Order VII Rule 14 and 18 read together with Order XIII Rule 1 of the CPC by the trial court; **three,** the ruling and orders sought to be revised being interlocutory are neither appealable nor

amenable to revision; **four,** the affidavits in support of the notices of motion are incurably defective for containing extraneous matters, legal arguments, opinions, speculations, conclusions and prayers; **five,** the supporting affidavits are improperly verified; **six,** the notices of motion are bad in law for joining therein "necessary parties" which parties are not provided for by any law or practice; **seven,** the notice of motion, certificate of urgency and supporting affidavit in Civil Application No. 76 of 2016, are all bad in law for being improperly drawn, endorsed and lodged by a counsel with no locus or right of audience before the Court; **eight,** the purported record has not been certified; **nine,** that by consent of all the parties to the Civil Case No. 229 of 2013, the trial court (Hon. Bongole, J.) on 25th February, 2016 adjourned the hearing to proceed from 18th to 20th April, 2016 and 9th to 20th May, 2016; and **ten,** the applications are vexatious, frivolous and an abuse of the court process aimed at delaying the hearing and determination of Civil Case No. 229 of 2003. Furthermore, on 30th May, 2016, the respondent lodged another notice of preliminary objection comprised of one ground to the effect that: -

> *"The applications for revision are untenable and unmaintainable in law in that the applicants' remedy*

against the impugned findings, ruling and orders is an appeal with or without leave."

At the hearing, the first and second applicants were represented by Mr. Gasper Nyika, learned counsel and the third and fourth applicants were represented by Dr. Alex T. Nguluma assisted by Mr. Daudi Ramadhani, both learned counsel. The respondent was represented by Mr. Michael Joachim Tumaini Ngalo assisted by Mr. Respicius Didace, both learned counsel whereas the first and second necessary parties were represented by Ms. Faiza Salah, learned counsel who was holding brief for Ms. Samah Salah, learned counsel.

As it is the practice, we had to determine the preliminary objections first before going into the merits or demerits of the applications. Having that in mind, we invited the counsel for the parties to address us on the preliminary objections raised by the respondent. It is noteworthy that, prior to the hearing of the preliminary objections, Mr. Ngalo prayed for leave of the Court, which we granted, for him to abandon the sixth, ninth and tenth points of objections and submitted only on the remaining points.

We wish to begin, right away, with the seventh point of objection which challenges the drafting, endorsement and lodging of the notice of

motion in Civil Application No. 76 of 2016. It was the argument of Mr. Ngalo that the said notice of motion was drawn, endorsed and lodged by advocate Faiza Salah who, by that time, in 2015, did not have the qualifications prescribed under Rule 33 (3) of the Rules. That, the infraction renders the application incompetent.

In his response, Mr. Nyika contended that the point of objection raised is not on a pure point of law and does not qualify the test of a preliminary objection as it requires evidence to ascertain whether at the point of drafting, endorsing and lodging of the notice of motion, the said advocate was qualified or not. Mr. Nyika contended further that, Rule 33 (3) of the Rules cited by Mr. Ngalo is not relevant in the circumstances as the same is not related with drafting, endorsing and lodging of the notice of motion. He argued that the cited Rule is on the audience and/or appearance of advocates before the Court which does not include drafting, endorsement and lodging of documents in the Court. To buttress his argument, he referred us to the **Black's Law Dictionary,** 8th Edition, and argued that, the term *'audience'* is defined to mean, *'A hearing before judges.'* and the *'right of audience'* is defined to mean, *'A right to appear*

and be heard in a given court...' As such, Mr. Nyika urged us to overrule the seventh point of objection for lack of merit.

On their part, Dr. Nguluma and Ms. Salah associated themselves with the submission made by Mr. Nyika. In addition, Ms. Salah stated that at the time of preparing and lodging the said notice of motion, she had two years of practice. She however insisted that the point raised does not qualify to be a preliminary objection.

Having considered the submissions of the learned counsel for the parties on this issue, we agree with the learned counsel for the applicants that the conditions stipulated under Rule 33 (3) of the Rules do not relate to drafting, endorsement and lodging of documents in Court. The said Rule only restricts an advocate who has not practiced for a period of not less than five years from appearing before the Court. As such, we find the seventh point of objection devoid of merit.

We will next address the eighth point of objection where the respondent alleged that the record of the applications was not certified. On this point, Mr. Ngalo challenged the validity of the record before the Court for its authenticity not being certified by the applicants or their advocates as the true and accurate record of the trial court's proceedings. To support

his proposition, he cited Rule 96 (5) of the Rules and argued that, although the said Rule deals with certification of record of appeal, it also extends to applications for revision. He thus urged us to sustain the preliminary objection and struck out the record of the two applications with costs for being incompetent.

In their responses, both Mr. Nyika and Dr. Nguluma challenged the submission made by Mr. Ngalo for being misconceived as they argued that the record was properly certified by the counsel for the applicants. Specifically, Dr. Nguluma referred us to Civil Application No. 90 of 2016 and stated that he personally certified the said record on 25th February, 2016.

It is our considered view that, determination of this point should not detain us. We have since perused the record of Civil Application No. 90 of 2016 and indeed the same was properly certified by Dr. Nguluma on 25th February, 2016 and received and signed by the Registrar on 4th April 2016. We thus find the point of objection devoid of merit.

The fourth and fifth points of objection are on the defects in the affidavit supporting Civil Application No. 76 of 2016. Citing instances of the said defects, Mr. Ngalo argued that the affidavit is incurably defective for

contravening the principles of law which require affidavits to be confined to facts and must be free from extraneous matters. He specifically referred us to paragraphs 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 of said affidavit and argued that the same are incurably defective on account of containing extraneous matters, legal arguments, opinions, speculations and conclusions. To support his proposition, he referred us to **Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited,** Civil Reference Nos 15 of 2001 and 3 of 2002 and **Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi,** Civil Application No. 80 of 2009 (both unreported) and urged us to find that the said paragraphs are offensive and deserve to be expunged. It was his further argument that after expunging the said offensive paragraphs, there will be no sufficient information in the affidavit to support the said application.

In addition, Mr. Ngalo argued that, the said affidavit is also accompanied by a defective verification clause, as the deponent erroneously indicated that the information contained in paragraphs 1, 2, 3, 5, 17, 18, 19 and 21 were to the best of his knowledge and belief, while it is clear that, the information contained under paragraphs 17 and 19 were based on the advice he received from his counsel. He argued that the said

infraction had also rendered the application incompetent. In the light of the said defects, Mr. Ngalo urged us to strike out the Civil Application No. 76 of 2016 for being accompanied by an incurably defective affidavit.

In his response, Mr. Nyika disputed the submission made by Mr. Ngalo and contended that the said paragraphs are on the deponent's statements of facts on what transpired before the trial court based on the best of his knowledge and beliefs and some are on what he was advised by his counsel. He thus distinguished authorities cited by Mr. Ngalo arguing that, they are not applicable in the present situation. He added that, even the verification clause was properly verified as the deponent clearly separated the paragraphs on matters of facts based on his personal knowledge and belief and those he received from his advocate. As such, Mr. Nyika urged us to overrule the said objection as according to him, the application is supported by a valid affidavit.

In the alternative, Mr. Nyika urged the Court to only expunge the offensive paragraphs, if it so finds, as he said that the remaining paragraphs contain sufficient material facts that can still support the application. To support his proposition, he referred us to our previous decision in **Stanbic Bank Tanzania Limited v. Kagera Sugar Limited,**

Civil Application No. 57 of 2007 (unreported). On the verification clause, he added that, if the Court will find that the verification clause is incurably defective, the remedy is to allow the applicants to amend the same and file a fresh affidavit. Having perused the contents of the said affidavit and considered the submissions by the counsel for the parties, we wish to state that, Rule 49 (1) of the Rules, requires formal applications to the Court to be supported by one or more affidavits of the applicant or some other person having knowledge of the facts. In the case of **Uganda v. Commissioner of Prisons Exparte Matovu** (1966) EA 514, the Court stated that: -

> *"As a general rule of practice and procedure* ***an affidavit for use in court, being a substitute for orai evidence, should only contain statements of facts*** *and the circumstances to which the witness deposes either of his own knowledge...* ***such affidavit should not contain extraneous matters by way of objection or prayer or iegal argument or conclusion."*** *[Emphasis supplied].*

Again, in the case of **Phantom Modern Transport (1985) Limited (supra)** the Court, when faced with a preliminary objection in respect of an affidavit which was alleged to contain offensive paragraphs, stated that:

> *"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact."*

Furthermore, an affidavit must be verified by the deponent on what is true based on knowledge, belief or information whose source must be disclosed in the verification clause of the affidavit. In **Salima Vuai Foum v. Registrar of Cooperative Societies & Three Others** (1995) TLR 75, the Court when confronted with a preliminary objection on a verification clause which did not reveal the source of deponent's information and knowledge of some facts, it stated that: -

> *"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified."*

In the light of the above position of the law, and having scrutinized the contents of the said affidavit, we agree with Mr. Ngalo that, indeed some of the paragraphs therein contain legal arguments, opinions, speculations and conclusions, these include paragraphs 5, 7, 9, 10, 17 and

19. We, however, find that the rest of the paragraphs contain statements of facts based on the deponent's knowledge and some, are based on the information and/or advice he received from his counsel. As such, we equally agree with Mr. Nyika that the said offensive paragraphs could be safely expunged from the record, as we hereby do, without affecting the substance of the affidavit.

We equally find that the verification clause was properly verified, except only for paragraphs 17 and 19 where the deponent wrongly indicated that the information contained therein was to the best of his knowledge while the contents of the said paragraphs clearly indicated that the information was the advice he received from his counsel. However, having expunged the said offensive paragraphs, it is our settled view that the verification clause was properly verified. As such, the fourth and fifth points of objection are partly sustained.

As for the first point of objection, Mr. Ngalo contended that the record of both applications is incompetent for non-inclusion of the entire proceedings of the Civil Case No. 229 of 2013 including all pleadings, rulings, drawn orders and all documents filed by the parties thereto. That, the applicants have only included the proceedings and decision of the trial

court from 16th to 18th February, 2016. It was his strong argument that, since the said documents, which are subject of the applications were omitted from the record, it has rendered the record of both applications incomplete and incompetent as the Court will not manage to examine the said record and arrive to an informed decision. He argued that, it is trite law that, a party who moves the Court for revision under the provisions of section 4 (3) of the AJA read together with Rule 65 (1) of the Rules is enjoined to avail a complete record of the proceedings from which the revision is sought. To bolster his position, he referred us to the cases of **Benedict Mabalanganya v. Romwald Sanga** [2005] 2 EA 152 and **Tanzania Telecommunications Co. LTD v. Alfred Anasa Shara,** Civil Application No. 226 of 2013 (unreported). He then urged us to strike out the two applications with costs for being incompetent.

Upon being probed by the Court as to whether the applicants are seeking revision of the entire proceedings of the trial court or the revision is only sought on specific proceedings, decisions and orders of the trial court, Mr. Ngalo responded that, according to the notices of motion, the applicants targeted only the proceedings of three days i.e from 16th to 18th

February, 2016. He however, maintained that the record availed to the Court is incomplete.

In his response, Mr. Nyika contended that, in both notices of motion the applicants have clearly indicated that the revision sought was for the specific proceedings of the trial court from 16th to 18th February, 2016 and the resultant ruling issued on 18th February, 2016. It was his argument that, since the applicants have attached all necessary and relevant documents to the applications, the record availed to the Court is sufficient for the Court to exercise its revisional powers. He thus distinguished the case of **Benedict Mabalanganya** (supra) cited by Mr. Ngalo by arguing that it is not applicable in these applications. He then urged us to invoke the provisions of section 3A (1), (2) and 3B (1) (b) and (c) of the AJA, as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act, No. 8 of 2018). He further urged the Court to take note that the matter is long overdue, thus should be finally concluded.

In the alternative, Mr. Nyika argued that, if the Court will find that the record of the entire proceedings is necessary for the determination of the applications, may grant leave to the applicants to lodge supplementary record to include the omitted documents instead of striking out the

applications. To buttress his proposition, he cited the case of **Jovet Tanzania Limited v. Bavaria N. V**, Civil Application No. 207 of 2018 (unreported). Dr. Nguluma and Ms. Salah associated themselves with the submission made by Mr. Nyika on this point.

Having carefully considered the submissions made by the counsel for the parties and the record before us, we find, with respect, that the submission made by the counsel for the respondent is misconceived. It is on record that in both applications, the applicants sought for an order of revision by this Court on specific proceedings of the trial court from 16th to 18th February, 2016. This can be evidenced by the prayers sought in the notices of motion. In Civil Application No. 76 of 2016 the first prayer sought by the applicants is as follows: -

> *"The honourable Court be pleased to call for, examine and revise the proceedings, rulings and orders of the High Court of Tanzania (Bongole, J.) in Civil Case No. 229 of 2013 from 16th to 18th February, 2016..."*

In Civil Application No. 90 of 2016, the first prayer sought is couched thus -

> *"The honourable Court be pleased to call for and inspect the record of the High Court...in particular*

the ruling herewith attached in Civil Case No. 229 of 2013 ...for the purpose of satisfying itself as to the correctness, legality or propriety of such ruling delivered on 18th February, 2016..."

Since, it is not in dispute that, the trial court's proceedings and the subsequent ruling subject of the sought revision are all attached to the record of the applications, we agree with Mr. Nyika that the applicants have availed all necessary and relevant documents for the Court to exercise its revisionary powers. As such, we equally agree with him that the case of **Benedict Mabalanganya** (supra) cited by Mr. Ngalo is distinguishable. In that case, the applicant was required to avail the entire record of the case because the revision was sought after the dispute between the parties had been finally determined by the primary court and appeals unsuccessfully referred to the District and High Courts, which is not the case herein. We thus find the first point of objection devoid of merit and is hereby overruled.

In addressing the third point of objection, Mr. Ngalo contended that the applications are untenable for being prohibited by section 5 (2) (d) of the AJA. He argued that the said provisions of the law bars applications for revision from interlocutory decisions or orders of the High Court which do

not have the effect of finally and conclusively determining the rights of the parties. To support his proposition, Mr. Ngalo referred us to the cases of **Gulamali Shah Bokhari and Another v. The Director of Public Prosecutions,** Criminal Appeal No. 170 of 2007 and **Karibu Textile Mills Ltd v. New Mbeya Textile Mills Ltd and Three Others,** Civil Application No. 27 of 2006 (both unreported). He then implored us to find that the two applications are incompetent as the challenged decision of the trial court is interlocutory in nature.

In his response, Mr. Nyika contended that the applicants are not only disputing the ruling of the trial court dated 18th February, 2016 but also the confusion in the proceedings and the procedure adopted by the trial court to allow the respondent to file the additional documents contrary to the law. To support his proposition, he cited the case of **Stanbic Bank Tanzania Limited v. Kagera Sugar Limited** (supra) and urged us to overrule the said objection and determine the applications on merit. Dr. Nguluma and Ms. Salah supported the submission made by Mr. Nyika on this point without more.

Rejoining, Mr. Didace insisted that the revision is sought on an interlocutory decision of the trial court which had not finally determined the rights of the parties.

It is common ground that the decision of the trial court, subject of the applications herein is interlocutory as it had not finally and conclusively determined the rights of the parties in Civil Case No. 229 of 2013. That means, as matters stand today, that suit is still pending before the trial court awaiting the determination of these applications. We have keenly considered the argument by Mr. Nyika that they do not only challenge an interlocutory decision, but also the confusion and the procedure adopted by the trial court to allow the applicants to file additional documents. Mr. Nyika seemed to suggest and urged us to ignore the fact that the impugned decision of the trial court is interlocutory in nature and adopt his reasoning and stand. With respect, we do not find any merit in his submission. We say so having regard to the mandatory provisions of section 5 (2) (d) of the AJA, which provides that: -

> *"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 charge or suit."

The above provision, in our view, unambiguously prohibits appeals or applications for revision against interlocutory decisions or orders of the High Court which did not have the effect of finally determining the rights of the parties.

Admittedly, the determination of an issue as to whether the decision or order is final or interlocutory depends on the circumstances of each case. In **Tanzania Motors Services Limited and Another v. Nehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2005, the Court adopted the test propounded in **Bozson v. Artincham Urban District Council** (1903) I KB 547 where Lord Alveston observed that: -

"It seems to me that the real test for determining this question ought to be this: ***Does the judgment or order, as made, finally dispose of the rights of the parties?*** *If it does, then I think, it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order."*

Again, in **Britania Biscuits Limited v. National Bank of Commerce Limited and Doshi Hardware (T) Limited,** Civil Application No. 195 of 2012, the applicant had applied for revision against the order to deposit TZS. 100,000,000.00 as security for costs by the High Court. The application was confronted with a preliminary objection challenging its competence that it did not have the effect of finally determining the suit which was pending before the High Court. In upholding the preliminary objection, the Court found the application incompetent in terms of section 5 (2) (d) of the AJA and observed that: -

> *"...We are of the opinion that the Ruling and Order of the High Court sought to be revised is an interiocutory order... because in that order nowhere it has been indicated that the suit has been finally determined."*

In the light of the foregoing, we have no hesitation in holding, as we hereby do, that the applications before us, having been preferred in violation of section 5 (2) (d) of the AJA, are incompetent. In the circumstances, we sustain the third point of objection. Now, since the determination of the third point of objection suffice to dispose of the

applications, the need for considering the other remaining points of objection does not arise.

In the event, we proceed to strike out the incompetent applications with costs. We order that the matter before the High Court should proceeds from the stage it had reached before the filing of these applications.

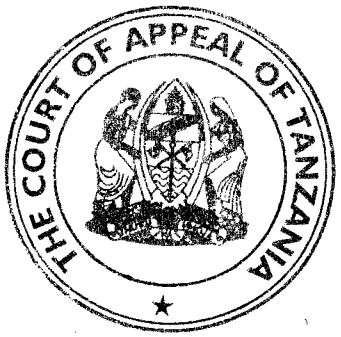
DATED at **DAR ES SALAAM** this 4th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 7th day of March, 2022 in the presence of Ms. Faiza Salah holding briefs for Mr. Gasper Nyika, counsel for the 1st & 2nd applicant and Mr. Alex Nguluma, counsel for the 3rd and 4th applicants and in presence of Mr. John Chuma assisted with Ms. Sist Bernad holding brief for Michael Ngalo, learned counsel for the respondent and Ms. Faiza Salah, learned counsel for the 1st and 2nd necessary parties is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL