IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MROSO, J. A., KAJI, J. A. AND RUTAKANGWA, J. A.)

CONSOLIDATED CIVIL REFERENCES No. 6, 7 AND 8 2006

1. **V I P ENGINEERING AND MARKETING LIMITED...1ST APPLICANT**
2. **TANZANIA REVENUE AUTHORITY.....2ND APPLICANT**
3. **THE LIQUIDATOR OF**

TRI-TELECOMUNICATION (T) LIMITED.....3RD APPLICANT

VERSUS

CITIBANK TANZANIA LIMITED.....RESPONDENT

(References from the Ruling of a Single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Munuo, J. A.)

Dated the 10th day of April, 2006

In

Civil Application No. 103 of 2005

RULING OF THE COURT

28th Aug. & 26th Sep. 2007

RUTAKANGWA, J. A.

The applicants, VIP Engineering and Marketing Limited, the Tanzania Revenue Authority and the Liquidator of Tri-Telecommunication Tanzania Limited, were dissatisfied with the

decision and order of a single judge of the Court dated 10th April, 2006. The order granted the respondent, Citibank Tanzania Limited, extension of time to file a notice of appeal and an application for leave to appeal against the ruling and order in Miscellaneous Commercial Cause No. 6 of 2003 of the High Court (Commercial Division) at Dar es Salaam dated 12th June, 2006. Each applicant individually applied under rule 57 (1) (b) of the Court of Appeal Rules, 1979 (henceforth the Rules) to have the said decision and order reversed by a full Court. Their common ground of complaint being that the learned single judge erred in holding that the respondent herein had shown sufficient reason(s) to deserve being granted the sought extensions of time. These were civil Reference Nos. 6, 7, and 8 respectively.

Before the three references were called on for hearing, the three applicants applied to have the same consolidated and heard as one reference. The reason for the application was that the references emanated from one and same decision. The application was granted. The three applicants, VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the

Liquidator Tri-Telecommunication Tanzania Ltd henceforth became the first, second and third applicant respectively. Citibank remains the sole respondent.

In these proceedings representation of the parties was as follows. Mr. Cuthbert Tenga and Mr. Michael Ngalo learned advocates, advocated for the 1st applicant. Mr. Teemba, learned advocate represented the 2nd applicant, while Professor Luoga, learned advocate, appeared for the 3rd applicant. Learned advocates Mr. Dilip Kesaria, Mr. T. Nyanduga and Ms. Fatma Karume were for the respondent.

Admittedly, this reference as consolidated has a protracted history. So in order to make easier the task of appreciating why the parties are before us in this reference it is opposite to set out the background of the case. It is as follows:-

On 17th February,2003, the Tanzania Telecommunications Company Ltd (T.T.C.L.), the 2nd applicant, and the Tanzania Communications Regulatory Authority (TCRA) petitioned the High Court (Commercial Division) for the winding up of the Tri-Telecommunications Tanzania Ltd (Tri-tel) and appointment of a

Liquidator. The petition was based on section 167 (e) of the Companies Act, Cap. 212, 2002 R.E. and the Winding Up Rules, 1929. The petition, as required by law, was published in the Guardian (Tanzania) newspaper of 3rd March, 2003. The notice invited "any creditor or contributory of the said company desirous to support or oppose the making of an order on the said petition" to appear at the time of the hearing either in person or by counsel. The notice went further to inform all those who intended to appear to serve a notice in writing of such intention to the petitioners.

There is no dispute on the fact that the respondent saw the publication in the Guardian newspaper. It took no action because going by the contents of the publication, it did not have any reason to oppose the petition or to actively support it. But the 1st applicant resolved to support the petition. It notified the three petitioners accordingly, by its letter, Ref. No. VIPEM/JB/KB/82/2003, dated 10th March, 2003. The 1st applicant further notified the petitioners that on top of supporting the petition it would propose that:-

"... when the Liquidator is appointed he be mandated by the Court to carry out a detailed investigation of Tritel's Affairs (sic) since 1999 and if fraudulent or wrongful acts are confirmed to have been committed by TRI in the management of Tritel the Court be further requested that TRI must pay all the Tritel debts that cannot be recovered from Tritel's remaining Assets (sic)".

This notice was copied only to the Managing partner, Law Associates Advocates.

The High Court (Kimaro, J., as she then was) delivered its verdict in the winding up petition on 12th June 2003. Among the orders made by the High Court which have immediate relevance to this reference were that :-

(i) *The Debenture dated 6th April, 2003 issued by the Respondent to Citibank Tanzania Ltd and Citibank N. A. Bahrain was declared invalid, and*

(ii) *The appointed Liquidator (one Mr. Peter Claver Bakilana, in the exercise of his powers should appoint experts to investigate and submit to the Court the "Respondent's Affairs (sic) since 1999 todate including the relationship of the Respondent which Citibank Tanzania Ltd on the position of the USD 14.0 million cash collateral with Citibank....."*

This order of the court was served on the respondent herein on 25th June 2003. Since the respondent had not participated in the winding up proceedings it was on this date that it learnt for the first time that the 1st applicant herein was a party in the petition for winding up TRITEL and became aware of the two above orders which it claims adversely affected its interests.

Upon seeking legal advice on this issue the respondent was advised that since it was not a party in the petition for winding up, it had no right of appeal. Its' only remedy was to apply for revision in this Court. It accordingly filed Civil Application No. 64 of 2003 in this Court seeking for the revision of the proceedings, decision and orders of the High Court dated 12th June, 2003. The said application was struck out by the Court for being incompetent. Still believing that its only remedy lay in revisional proceedings, it successfully applied in this Court for extension of time to file an application for revision (**Vide** Civil Application No. 97 of 2003). The respondent then filed Civil application No. 112 of 2003. This latter application for revision was this time dismissed. The Court held that the respondent had a

statutory right of appeal with leave against the decision and orders of the High court under section 220 of the Companies Act.

This Court had held in the case of ATTORNEY GENERAL v MAALIM KADAU AND 16 OTHERS [1997] T.L.R. 69 at page 73, that while rule 76 of the Rules *"provides for any person to appeal to this Court, it defies logic and common sense that the provision was meant to allow any person at large even if he is not a party to the original case to take up an appeal to this Court."* The respondent convinced itself that the decision of the Court in Civil Application No. 112 of 2003 was in conflict with its decision in KADAU'S case (supra). It accordingly requested, through its letter dated 5th April, 2004 the Chief Justice to constitute and convene a full bench of the Court to resolve the *"conflict".* This informal application was resisted by the 1st applicant's lawyers through their letter to the Chief Justice dated 7th April, 2004.

The Chief Justice responded to these requests by his letter dated 15th June, 2005. The respondent was informed that the matter was "closed" following the decision of the Court in Civil Application No 112 of 2003, which they could have sought to be reviewed on the grounds relied on in their letter, which they did not.

All the same, before the Chief Justice's response the respondent had decided to initiate review proceedings in the High Court. It applied in the High Court for extension of time to apply for review of the said Court's ruling and orders dated 12.06.2003. This application was dismissed by Kalegeya, J. (as he then was) on 10.02.2005. The respondent's attempt to challenge the High Court decision in this Court's Civil Appeal No. 25 of 2005 failed as the notice of appeal was struck out. When every other conceivable avenue led to futility, the respondent decided to seek its remedy in the appellate process. After failing to obtain extension of time within which to file a notice of appeal and an application for leave from the High Court it came again to this Court by way of Civil Application No. 103 of 2005.

Civil Application No. 103 of 2005 which was an application before a single judge was by Notice of Motion. It was made under section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act and Rules 8, 44 and 45 (1) of the Tanzania Court of Appeal Rules, 1979 or the Rules. The applicant was seeking therein the following orders:-

(a) *extension of time to file a notice of appeal against part of the ruling, findings and orders of the High Court dated 12th June 2003 in Misc. Commercial Cause No. 6 of 2003, and*

(b) *extension of time to file an application for leave to appeal against part of the ruling findings and orders of the High Court in Misc. Commercial Cause No. 6 of 2003 dated 12th June, 2003.*

The respondent cited six grounds upon which it rested its notice of motion. However, we find that grounds one (1) and five (5) are the more formidable. These read as follows:-

" *(ii) The Applicant was not a party who took part in the winding up proceedings in the Court yet ancillary proceeding (sic) to which it had no notice of where (sic) commenced against it separate from other creditors and orders made against it adversely affecting the Applicant to suffer to its utter detriment and prejudice over and above other creditors;*

(5) The Applicant's intended Appeal has overwhelming prospects of success".

Before the learned single judge, counsel for the respondent (applicant then) contended that the learned trial High Court judge erred in law in making orders adverse to it relating to the annulled debenture without giving it opportunity to be heard. For the applicants (then respondents), their counsel vehemently argued that Citibank had wasted time applying for review and filing revision

instead of appealing. To them Citibank deployed wrong procedures. They further argued that as the winding up petition was published, Citibank should have applied to be joined in the petition, a course of action it negligently failed to pursue.

As already shown above the application before the single judge was brought under, among other relevant provisions, rule 8 of the Court of Appeal Rules, 1979. The said rule reads as follows:-

> *"The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by the Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as so extended".*

In view of the clear provisions of this rule, after considering the contending submissions of counsel for both sides, the learned judge, rightly in our view, found herself being confronted with only one crucial issue in the matter. This was whether there was "*sufficient ground for extending time to file a Notice of Appeal and an application for leave to appeal".* She provided an affirmative answer to the issue, because the respondent herein had been condemned unheard by the High

court. The current applicants were aggrieved and hence this consolidated reference.

After the consolidation of the three applications counsel for the applicants agreed amongst themselves to let Mr. Tenga address the Court on their behalf. For the respondent, it was Mr. Kesaria who submitted resisting the reference.

In his submission Mr. Tenga was very concise and zeroed in on two key grounds of complaint only. These were that the learned single judge erred in granting the sought orders when the respondent had failed to make out a case for such extension because:-

> *(a) the delay to seek extension of time was not justified at all, and*
>
> *(b) it did not show that it had an arguable case in the intended Appeal.*

Elaborating on these two grounds, Mr. Tenga eloquently contended that the respondent became aware of the High Court orders against it on 25th June 2003. If it had really been aggrieved, it ought to have promptly and diligently put the appellate machinery in motion, he argued. Instead of doing so, to its detriment, it resorted to many trivial applications, as already shown in this ruling

and in the process lost a lot of time, he maintained. He insisted that one year passed between 10th March, 2004 when the application for revision was dismissed and 14th July, 2005 when it applied for extension of time without taking any visible steps to appeal.

On the second ground Mr. Tenga submitted that before an extension of time is granted under Rule 8 of the Rules an applicant, after explaining away the delay, has to show that he has an arguable case on appeal. To him the respondent abysmally failed to show that it had one as the grounds it intended to rely on were dismissed by the Court in Civil application No. 112 of 2003. The said dismissal, according to him, rendered the *"application for extension of time a mere academic exercise".*

Mr. Tenga further argued that under the Companies Act (section 177), in winding up proceedings once the petition is advertised in newspapers, appearance by creditors and/or contributories becomes optional and not mandatory.

He accordingly prayed for the reversal of the single judge's orders granting extension of time to the respondent to file a notice of

appeal and an application for leave to appeal. He also pressed for costs for all the applicants.

On his part, Mr. Kesaria prefaced his arguments in response with an exposition of the principles of law governing determinations of references under rule 57. He gathered them from the cases of DAUDI HAGA vs JENITHA ABDON MACHAFU, CAT Civil Reference No. 1 of 2000, MARY UGOMBA vs RENE POINTE, CAT Civil Reference No. 11 of 1992 (both unreported) and AFRICAN AIRLINES INTERNATIONAL LTD vs EASTERN & SOUTHERN TRADE AND DEVELOPMENT BANK, EALR (2003)1. These are to the effect that:-

(a) on a reference, the full Court looks at the facts and submissions the basis of which the single judge made the decision;

(b) no new facts or evidence can be given by any party without prior leave of the Court, and

(c) the single judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law.

With these principles in mind, Mr. Kesaria went on to submit at length showing how the single judge of the Court exercised her discretion judicially. Basing on the facts and circumstances before her, he said, the learned judge came to a correct and just decision which should not be interfered with.

These facts and/or circumstances included the obvious fact that the respondent was condemned unheard, he maintained. The respondent according to him, was thus condemned as he was not made aware of any application for the nullification of its debenture with TRITEL. This, to him, amounted to illegality which factor constituted sufficient reason to grant the extensions of time under rule 8 even if the respondent had not shown reasonable cause for the delay. In support of his position he cited to us these cases:-

(i) *MUGO & OTHERS vs WANJIRU & ANOTHER [1970] E. A. 48,*

(ii) *THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE & NATIONAL SERVICE vs DEVRAM VALAMBIA [1992] TLR 185;*

(iii) *THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE & NATIONAL SERVICE vs DEVRAM VALAMBIA [1992] TLR 387;*

(iv) *TRANSPORT EQUIPMENT LTD vs D.P. VALAMBIA [1993] TLR 91.*

He accordingly prayed for the dismissal of the consolidated reference with costs.

In a short rejoinder Mr. Tenga conceded to the legal principles pointed out by Mr. Kesaria. However, he quickly asserted that what the single judge considered as sufficient cause was not sufficient cause to justify the grant of extension of time. Not every error committed by a Court amounts to illegality, he insisted. As the

respondent was guilty of inordinate delay, he pointed out, it had itself to blame notwithstanding the seriousness of the alleged point of law in the case.

We shall begin our discussion by first making a concession to Mr. Tenga. We share his assertion that not every error committed by a Court amounts to an illegality. That notwithstanding we have found ourselves constrained to differ with him in his other forceful assertion to the effect that the respondent's applications for extensions of time amount to academic exercises. He was of that view because this Court dismissed the grounds the respondent is proposing to rely on in the intended appeal in Civil Application No. 112 of 2003. That cannot be true. The Court only dismissed the application for revision because the respondent had a right of appeal under section 220 of the Companies Acts after upholding a point of preliminary objection challenging the competence of the application. The application was never decided on merit. We shall now turn our attention to the merits of the reference.

It is clear to us that from the submission of Mr. Tenga on behalf of the applicants, the nub of their grievance is that the learned

single judge erred in granting the extensions of time sought when it had failed to show sufficient reason for the delay. To them, the delay was caused by negligence, and error on the part of the respondent's counsel who chose to pursue wrong avenues. The applicants have forcefully argued that in the light of this fact the single judge ought not to have granted the orders sought even if she was convinced that the respondent had been condemned unheard by the High Court.

We have found ourselves unable to accept this line of reasoning. This would be perilously close to accepting that the court would not be prepared to extend time under rule 8 unless and until the applicant has given satisfactory reason(s) for the delay. To us this appears to be contrary to the letter and spirit of rule 8 which is very wide in scope.

In the case of SHANTI v HINDOCHE & OTHERS [1973] E.A. 207 the then Court of Appeal for East Africa had this to say:-

> *"The position of an applicant for extension of time is entirely different from that of an application for leave to appeal.* ***He is concerned with showing sufficient reason why he should be given more***

> ***time*** *and the most persuasive reason that he can show ..... is that the delay has not been caused or contributed to by dilatory conduct on his part.* ***But there may be other reasons and these are all matters of degree****. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case ....*" (Emphasis is ours).

A single judge of this Court, with whom we are in full agreement, echoed similar views in the case between ABDALLA SALANGA & 63 OTHERS AND TANZANIA HABOURS AUTHORITY civil application no. 4 of 2001 (unreported). He said:-

> *"Rule 8 of the Court Rules requires that an applicant for extension of time give sufficient reason. This Court in a number of cases has accepted certain reason as amounting to sufficient reasons.* ***But no particular reason, or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each application .....***" (Emphasis is ours).

It was for these reasons that this Court in PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE v. DEVRAM VALAMBIA (1992) T.L.R. 185 held that a claim of illegality or otherwise of the impugned decision is a point of sufficient importance to constitute "sufficient reason" for the purposes of rule 8. It went

on to hold that in such a situation the Court had a duty to ascertain the point even if it means extending the time under the said rule. The Court reaffirmed this stance in the other two cases referred to us by Mr. Kesaria. It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.

In the case under discussion the learned single judge unequivocally appreciated *"the respondents (now applicants) counsels' contention that the applicant wasted time pursuing wrong procedures of review and revision."* Taking, as we do, the word *"appreciate"* to mean *"to recognize the value or significance of"* something or someone (as defined in the NEW CONCISE OXFORD ENGLISH DICTIONARY 11TH edition at page 64), we are satisfied that the learned judge accepted as valid the applicants counsels' contention. It is our considered opinion, therefore, that her observation that *"The delay did not occur because the applicant sat on the fence or remained idle"* was both superfluous and

innocuous. All the same, what is clear to us is that she granted extension of time because she found it to be:-

> *"... trite law that before adverse orders are made against a party the said party must be accorded a hearing."*

She agreed with the respondent on its major grievance that before the impugned adverse orders were made it was not accorded a hearing. She accordingly found that omission to constitute *"sufficient reason"* to extend the time for filing both a notice of appeal and an application for leave to appeal, notwithstanding the inordinate delay.

The crucial issue in this reference, then, becomes whether or not the learned single judge's decision can be faulted. In answering this issue we would like to make it absolutely clear that the respondent, as found by the single judge and vehemently argued by Mr. Tenga, was manifestly dilatory in pursuing its right of appeal. That is, however, the farthest we are prepared to go along with the applicants. Addressing our minds specifically to the issue at hand we

have no foreboding feeling in stating that the single judge's decision is unimpeachable. We shall endeavour to show why.

Before her, was a claim that the challenged High Court decision was partly tainted with illegality for having been arrived at in violation of one of the cardinal rules of natural justice. On being satisfied that the respondent CITIBANK was not heard before orders adverse to its interests were made, she granted the orders sought by it.

We agree with the single judge that indeed it is "*trite law*" that a party ought to be heard before an order adverse to it is made by a Court of law. She rightly believed this to be common knowledge that she saw no need to cite any authority to bear her out on it. However, only for the sake of dispelling any lingering doubts, we shall provide a few authorities, some from outside our jurisdiction.

In England, in the case of EARL vs SLATTER & WHEELER (AERLYNE) LTD [1973] 1 WLR 51, it was held that where natural justice is violated it is no justification that the decision was in fact

correct. Also in the case of A. G. vs RYAN [1980] A. C. 718, the Privy council said:-

> *"It has long been settled law that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision – making authority."*

This Court has expressed similar sentiments in a number of cases. In the case of ABBAS SHERALLY & ANOTHER v ABDUL SULTAN HAJI MOHAMED FAZALBOY, Civil application no. 33 of 2002 (unreported), for example, the Court said:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Similarly in the case of the BANK OF TANZANIA vs SAID A. MARINDA AND OTHERS, Civil Application No. 74 of 1998 the Court ruled that *"failure to afford an opportunity of being heard to a necessary party vitiates the proceedings"*. These two decisions were followed by the

Court very recently in the case of ECO-TEC (ZANZIBAR)LIMITED vs GOVERNMENT OF ZANZIBAR, ZNZ Civil Application No. 1 of 2007.

We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "*sufficient reason*" within the meaning of rule 8 of the Rules for extending time. Equally established is the law to the effect that a decision arrived at in breach of the rules of natural justice is null, because it is tainted with illegality. As the point of law at issue in these proceedings is the illegality or otherwise of the decision of the High Court annulling the respondent's debenture with Tri-telecommunications (Tanzania) Ltd, then this point constitutes "*sufficient reason*" as found by the learned single judge, for extending the time to file a notice of appeal and applying for leave to appeal. This is notwithstanding the fact that the respondent brought the applications very belatedly, because in the administration of justice, the right to be heard is the most overriding. If the respondent was not heard by the High Court then it has an arguable case and deserved the extensions of time.

For the forgoing reasons, we have found no reason at all to interfere with the reasoned decision of the learned single judge. We accordingly order that this consolidated reference dismissed with costs.

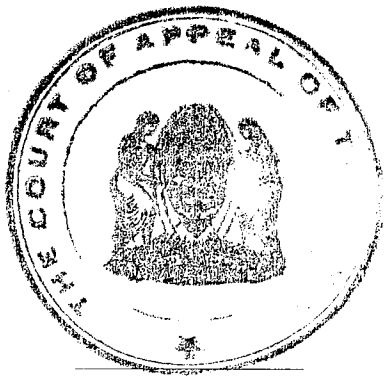
DATED at DAR ES SALAAM this 26th day of September, 2007

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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



S. M. RUMANYIKA
DEPUTY REGISTRAR