IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A., And KHAMIS, J.A.)

CIVIL APPLICATION NO. 275/17 OF 2022

JACQUILINE DONATH KWEKA ABRAHAMSON ..... APPLICANT

VERSUS

EXIM BANK (T) LIMITED..... 1ST RESPONDENT
JOHN HARALD CHRISTERABRAMSSON ..... 2ND RESPONDENT
DASCAR LIMITED.....3RD RESPONDENT
MASS & ASSOCIATES COMPANY LTD &
COURT BROKER .....4TH RESPONDENT
YUSUPH SHABAN MATIMBWA ..... 5TH RESPONDENT

(An Application for Revision against the decision of the High Court of Tanzania at Dar es Salaam)

(Kakolaki, J.)

dated the 25th day of March, 2022

in

Land Case No. 17 of 2020

.....

RULING OF THE COURT

7th February & 29th February, 2024

KOROSSO, J.A.:

This application for revision of the decision of the High Court of Tanzania at Dar es Salaam (Kakolaki, J.) in Land Case No. 17 of 2020 dated 25/3/2022, is brought by way of notice of motion under section 4(3) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and rule 65(2), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion is supported by an affidavit sworn by the applicant, Jacquiline Donath Kweka Abrahamsson.

On the part of the respondents, upon being served with the notice of motion, only the first and fifth respondents resisted it by filing affidavits in reply deponed by Mr. Edmund Aaron Mwasaga, the first respondent's Head of the Legal Department and Mr. Yusuph Shaban Matimbwa, the fifth respondent, respectively. For the 2nd, 3rd and 4th respondents, none of them resisted the application, since neither filed an affidavit in reply. In addition, the first respondent filed a notice of preliminary objection on 21/7/2022 containing one point stating that the order subject of the application did not determine the suit to its finality and thus contravened section 5(2)(d) of the AJA.

On his side, the fifth respondent filed two sets of notices of preliminary objection with four preliminary points of objection. However, on the date of the hearing of the application, his counsel sought and was granted leave to abandon the second set filed on 11/1/2024 and thus remain with the first set filed on 31/9/2022. In addition, on the second set which had three points of objection, the learned counsel for the 5th respondent prayed and was granted leave to abandon the second and third points of objection therein, and thus remain with only the first point of objection which challenged the competency of application for failure to contain necessary pleadings, proceedings, and documents.

Briefly, the background giving rise to the instant application is that it originates from the Ruling of the High Court in Land Case No. 17 of 2020. It is on record that originally, the property on Plot No. 16 Jangwani Beach Kinondoni Municipality, registered under CT. No. 43835 (disputed property) jointly owned by the 2nd respondent and applicant's husband, which is subject to this revision, was subjected to sale and attachment following an order of the High Court in execution of its decree in Commercial Case No. 51 of 2008, having been pledged as security to a loan facility advanced to 3rd respondent by the 1st respondent. The execution of the decree of the court was effected by the 4th respondent who sold the disputed property to the 5th respondent at a public auction. Before the said sale was concluded, the applicant unsuccessfully filed objection proceedings in Misc. Commercial Cause No. 69 of 2017 before the High Court (Commercial Division) to lift the attachment order issued by the same court in Commercial Case No. 51 of 2008 in respect of the disputed property.

Upon dismissal of the objection proceedings, undaunted, the applicant lodged in the High Court Dar es Salaam Registry, Land Case No. 445 of 2017 and Misc. Application No. 1084 of 2017 for a temporary injunction to restrain the auctioning of the disputed property, which ended with dismissal. Thereafter, upon the applicant's prayer, Land Case No. 445

of 2017 was marked withdrawn with leave to refile. Subsequently, the applicant filed again in the High Court, Dar es Salaam Registry, Land Case No. 39 of 2018, which was struck out. Still persistent, the applicant lodged Land Case No. 17 of 2020 in the same registry, subject to the instant revision, seeking a declaration that the sale of the disputed property in execution of the decree of the court is illegal, null, and void *ab initio* because the house subject to the attachment and sale is solely a residential home where she and her family reside.

In its decision, the High Court was of the view that the applicant failed to establish her claims and that it was incompetent to grant an injunction to restrain the transfer and to nullify the sale of the alleged matrimonial home as sought. Furthermore, the High Court invoked Order XXI rule 62 of the CPC stating that it had no jurisdiction to entertain the suit because the Commercial Court which had dealt with the objection proceedings was better suited to rule on any issue arising out of the execution process instead of the Dar es Salaam Registry. Dissatisfied with the decision, the applicant has filed the instant application for revision founded on five grounds which for reasons which shall become apparent in due course, we find no need to reproduce at this juncture.

At the hearing of this application, Mr. Eliezer Elikunda Kileo, learned counsel, represented the applicant. The 1st respondent was represented by Messrs. Zacharia Daudi and Laurent Donald, learned counsel. Mr. Sylvanus Mayenga, learned counsel represented the 5th respondent. The 2nd, 3rd and 4th respondents were absent and copies of notices of hearing showed they were duly served.

In such circumstances, we granted the prayer by Mr. Kileo which was supported by Messrs. Daudi and Mayenga, and ordered for the hearing of the application to proceed under rule 63(2) of the Rules in the absence of the absentee respondents. As is the usual practice, there being notices of preliminary objections on record filed by the 1st and 5th respondents as exposed above, we invited the parties to address us on the same.

In amplifying the point of objection by the 1st respondent, Mr. Daudi contended that the application is incompetent because it has been filed in contravention of section 5(2)(d) of the AJA since the impugned order sought to be revised did not finally determine the merit of the case before the High Court. He also addressed the fact that what was drawn from the impugned decision of the High Court is a decree instead of a drawn order

since the High Court issued a Ruling and not a judgment. He thus urged us to find that the application is not tenable and strike it out with costs.

On his part, Mr. Mayenga sailed us through the remaining one point of objection raised by the 5th respondent and contended that the record of the application is devoid of documents essential for its determination and thus renders it incompetent. According to him, the record of the application is missing the written statements of defence filed by the respondents and the commensurate replies; notices of preliminary objection and submissions by the parties which gave rise to the impugned ruling are also not part of the record.

Mr. Mayenga contended further that the omission is fundamental and cannot be cured by the overriding objective principle because it goes to the root of the application before the Court. The learned counsel argued that it is well settled that the record of a revision application has to be prepared similar to that of an appeal before the Court under rule 96 of the Rules. In those circumstances, he argued that the remedy is to strike out the application for incomplete record. He also pressed for costs.

In response to the points of objection raised by the 1st and 5th respondents, Mr. Daudi argued that the learned counsel for the 1st respondent had misconceived the import of section 5(2)(d) of the AJA

since it does not cater to a decision such as the impugned decision which originates from objection proceedings. He argued that under Order XX1 rule 62 of the CPC, a matter arising from objection proceedings is not appealable hence, revision is the available remedy upon being aggrieved. He referred us to the decision in the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa North Constituency and 2 Others**, Civil Application No. 80 of 2016 (unreported). He argued further that, since the applicant was aggrieved by the decision of the High Court faulting it as erroneous and based on improper evaluation of issues, the instant revision is competent and the objection by the 1st respondent is unmerited and therefore it be overruled. The learned counsel did, however, concede to the fact that the High Court issued a decree from a ruling instead of a drawn order, and urged us to find this to be a minor infraction that can be subject to rectification. He thus implored us upon overruling the objection, if so inclined, to allow the 1st respondent to advance proper prayers which will allow them to have time to seek rectification of the anomaly and get the proper order.

Responding to the points of objection raised by the 5th respondent, Mr. Daudi conceded to the fact that certain documents are missing from the record of revision as propounded. However, according to him, the remedy is not to strike out the application, but rather, and in the interest

of attaining substantive justice, allow the applicant to file a supplementary record of revision under rule 96(7) of the Rules.

The rejoinder by the counsel for the 1st respondent was essentially a reiteration of his submission in chief and cementing his argument that the application is incompetent. He also urged us to find the case cited by the learned counsel for the applicant to be distinguishable, arguing that it did not apply to the instant matter since the applicant in the present application is not precluded from refiling his claim at the High Court but directed to do so in the same registry which dealt with objection proceedings.

On the other part, Mr. Mayenga's rejoinder was to augment the fact that the applicant's counsel in essence conceded to the point of objection raised by the 5th respondent and had no objection to the prayer for the applicant to file a supplementary record that will include all the identified missing documents.

Having heard the counsel for the contending parties and perused through the record of the application, our starting point will be to consider and deliberate on the point of objection raised by the counsel for the 1st respondent on the competence of the application. We are of the view that the pertinent issue for our deliberation is whether the instant application

offends section 5(2)(d) of the AJA, in that it arises from a decision that did not conclude the matter before the High Court, an interlocutory decision. Section 5(2)(d) of AJA states 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 suit."*

Applying the above provision in the instant application, the fact that the impugned decision arises from a suit is not controverted and we find no need to dwell on it in the instant application since various decisions have defined "suit" broadly to mean any proceeding in a court of law where parties are in contention on perceived claims and rights (see, **Blueline Enterprises Limited v. East Africa Development Bank**, Civil Application No. 103 of 2003 (unreported)). The contentious issue is whether the issues emanating from the applicant's suit were fully addressed and concluded by the High Court. Fortunately, the Court had occasions previously to deliberate on similar incidences. In **Tanzania Motors Services Limited and Another v. Nehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (unreported), it considered the decision from England in **Bozson v. Artincham Urban District Council** (1903) 1KB 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."

The above position has been reaffirmed in various decisions of this Court and section 5(2) (d) of the AJA has been construed to have the effect of barring any appeal or application for revision against any preliminary or interlocutory decision or order of the High Court which does not have the effect of finally and conclusively determining the suit before it. See, **JUNACO (T) Ltd and Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016; **Celestine Samora Manase and 12 Others v. Tanzania Social Action Trust Fund**, Civil Appeal No. 318 of 2019 (both unreported); and **Murtaza Ally Mangungu v. The Returning Officer of Kilwa and 2 Others** (supra).

In **Murtaza Ally Mangungu** (supra), the Court's answer to the question on what is a preliminary or interlocutory decision or order prescribed under section 5(2)(d) of the AJA, was as follows: -

"In our view ..., it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply 'the nature of the order test'. That is, to ask oneself whether the [decision]

or order complained of finally disposes of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."

In the present application, as stated earlier, the High Court considered and determined *suo motu* the issue of whether the suit by the plaintiff (the applicant herein) was properly before the court and was in compliance with the requirements of Order XX1 rule 62 of the CPC. In addressing the issue, the High Court Judge gave two reasons which moved him to find that the suit was incompetent. One, that the reliefs sought by the applicant (a)-(d), do not seek to establish any of the plaintiff's rights, other than inviting the court to grant an injunction to restrain transfer and make declarations to nullify the sale, orders which under the circumstances were not properly before it. Second, that:

"in her attempt to file a fresh suit under Order XX1 rule 62, the plaintiff was expected to file the instant case in the same court that heard the original suit and the objection. In this point, I wish to be backed by the decision of this court which I subscribe to, in the case of ***Rosebay Elton Kwakabuli v. Aziza Selemani & Others****, Land Case No. 57 of 2019 ... In the present case, the original suit and the objection proceedings were filed in the High Court Commercial Division. While*

invoking the above provision of the law and the cited case which I subscribe to, it is my humble opinion that the commercial court being seized with the original proceedings during the execution of the sale order, the sale which the plaintiff is seeking to displace, stands a better chance to rule on any issue arising out of execution process. Thus, this court is incompetent to determine the present case."

Thereafter, the High Court went on to strike out the suit for non-compliance of Order XX1 rule 62 of the CPC.

In the present application, taking account of the rival submissions by the counsel for the contending parties and the holding of the High Court on the matter, we find it pertinent at this juncture, to draw out the reliefs sought by the applicant in the suit whose decision is subject to the instant revision, found in paragraphs 7 and 22, seeking for; one, a declaration that the sale of the disputed property in execution of a court decree is illegal, null and void ab initio, and two, general damages.

The learned counsel for the 1st respondent invited us to find the present application for revision to be in contravention of section 5(2)(d) of AJA for the reason that the impugned decision did not finally conclude the rights claimed by the applicant in the suit. Mr. Mayenga remained

silent on the objection, while Mr. Kileo urged us to find Mr. Daudi's arguments to be misconceived, stating that the High Court's decision is erroneous since parties are not bound to adjudicate in one same registry of the High Court that handled the objection proceedings.

Suffice it to say, we are in tandem with the holding of the Court in previous decisions when interpreting section 5(2) (d) of the AJA. In the case of **Murtaza Ally Mangungu** (supra), the Court held that the provision has two preconditions; one, the decision or order in question must be interlocutory or preliminary and two, the decision or order must have the effect of finally determining the criminal charge or suit. In addition, to invoke the said provision, both conditions must exist. In **Mahendra Kumar Govindji Monani t/a Anchor Enterprises v. Tata Holdings (Tanzania) Ltd and Another,** Civil Application No. 50 of 2002 (unreported), the Court essentially held that an interlocutory or preliminary decision or order is not appealable (or subject to revision) and that a party aggrieved by such decision has to wait until the outcome of the case and if dissatisfied to proceed accordingly in an appeal (or revision) with points of dissatisfaction including those arising from the interlocutory decision or order.

Our scrutiny of the impugned ruling of the High Court dated 25/3/2022 in Land Case No. 17 of 2020, clearly shows that the matter was struck out before the reliefs sought were fully determined. It is clear on page 9 of the ruling that the High Court Judge gave two reasons as highlighted herein; one, that the pleadings did not expound the rights and prayers sought and were incompetent to grant under the circumstances and two, that the application was filed in an improper registry since the original suit and objection proceedings were dealt with in the Commercial Division of the High Court which did not bar the applicant to proceed with a fresh suit on the same subject matter. Indeed, the impugned decision does not address any of the reliefs sought. We are thus of the view that the impugned decision was interlocutory and the current application is premature.

In the case of **Hasmukh Bhagwanji Masrani v. Dodsal Hydrocarbons and Power (Tanzania) PVT Limited and 3 Others**, Civil Application No. 100 of 2013 (unreported), we held that the word "shall," in section 5(2)(d) of the AJA is employed to prohibit applications for revision over matters that are still interlocutory or preliminary and that the provision further expects this Court to determine at the very outset the question of its jurisdiction where the matters calling for revision are still preliminary and pending in the High Court.

As a result, we are convinced that the grounds for this application found in the notice of motion do not establish that the Court has the jurisdiction to intervene by way of revision having regard to the mandatory wording of section 5 (2) (d) of the AJA. For the foregoing, we uphold the objection by the 1st respondent.

In the final analysis, our holding above on the point of objection renders the application before us, incompetent. In the circumstances, we find that this is sufficient to dispose of the instant application without addressing the remaining points of objection. Consequently, we strike out the application with costs.

DATED at **DAR ES SALAAM** this 28th day of February, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 29th day of February, 2024 in the presence of Mr. Zakaria Daudi, learned advocate for the 1st respondent also holdings brief for Mr. Eliezer Kileo, learned counsel for the applicant and Mr. Silvanus Mayenga, learned counsel for the 5th respondent and in the absence of 1st, 2nd, 3rd and 4th respondents is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL