

***IN THE HIGH COURT OF TANZANIA
AT DODOMA***

CIVIL REVISION NO. 3 OF 2012

(Original Civil Case No. 34 of 2011 at Dodoma District Court)

THE CHIEF EXECUTIVE OFFICER TANROADS.....APPLICANT

VERSUS

M/S MSUE GENERAL ENGINEERING CO. LTD.....RESPONDENT

RULING

11/10/2012 & 04/12/2012

KWARIKO, J.

In his ³plaint which was filed before the trial court the respondent alleged that the applicants agent negligently constructed a culvert at Dodoma Manyoni road along his workshop where engineering works are carried out. That, as a result of such construction of the said culvert caused storm water not to run smoothly from West to East of the road thus causing over flooding into the respondent's workshop. Thus, during the December, 2009 heavy rains the badly constructed culvert failed to properly pass the water which inturn stormed the respondent's workshop and caused a fence wall to collapse where various working equipments

were washed away. A loss of Tshs. 8,178,646.00 had been occasioned to the respondent.

Despite repeated follow-up the applicant failed to make good of anything hence the respondent filed the suit to claim damages totaling to Tshs. 58,178,646.00, reconstruction of the culvert so as to avoid flood water into the plaintiff's workshop, interest and costs of the suit.

In response to the claims the applicant herein filed a written statement of defence to resist the same and raised preliminary objection on the following points of law:

1. *That the court lacks jurisdiction to entertain this matter on ground that the Attorney General ought to be sued on this case in the High Court.*
2. *That no valid notice of 90 days per **Section 6(2) of the Government Proceedings Act Cap. 5 RE. 2002** was issued.*
3. *That the legal personality of TANROADS is restrictive to be sued in its own name only in contract, according to **Section 3 (6) (b) and (c) of the Executive Agencies Act, Cap. 245 RE. 2002.***
4. *That this suit is time barred by virtue of First Schedule paragraph 6 of the Law of Limitation Act, No. 10 of 1971 Cap. 89 RE. 2002.*

After considering the written submissions by the counsel for the parties the trial court overruled all points of preliminary objection and ordered the suit to proceed on merits.

On being aggrieved with the trial court's order which overruled the preliminary objection the applicant through the services of its legal unit filed this application for revision upon the following orders:

- (a) That this Honourable High Court may be moved to call for records of proceedings and ruling in Civil Case No. 34 of 2011 of the Dodoma District Court and revise its ruling and order dated 26/4/2012.*
- (b) That the Honourable High court be pleased to invoke its revision powers and quash the said ruling and order on account of error material to the merits of the case, namely lack of jurisdiction on the part of the District Court to entertain the matter, and the applicant lacks legal capacity to be sued on non-contractual matter which the Attorney General ought to be sued.*
- (c) The High Court be pleased to make any other orders(s) as deemed fit.*
- (d) Cost of the application to follow the event.*

This application has been brought in terms of **Section 44(1) (b) of the Magistrates Courts' Act Cap. 11** and **Section 95 of the Civil**

Procedure Code Cap. 33 R.E. 2002 and any enabling provisions of the law. The application is supported by the affidavit of Mr. Boniface Mtinangi, learned counsel for the applicant.

On the other hand the respondent through the services of Mr. Nyabiri learned counsel of Rweyongeza & Co. Advocates filed a counter – affidavit to resist this application. The counter – affidavit has been sworn by Mr. Deus J. Nyabiri Advocate.

When the application was called for hearing on 04/9/2012 the counsel for the parties applied and the court granted leave for the application to be argued by written submissions. The submissions have been duly filed and I commend the counsel for the parties for their good work. I will refer the submissions in the course of this ruling whenever need arises.

I have read and understood the submissions very well and the issue which arise out of the same is whether this application is meritorious.

It has been argued vehemently on behalf of the applicant that there has been an error on the face of the record committed by the trial court in its decision which overruled the preliminary objection essentially on the issue of the applicant lacking legal capacity to be sued in its own name on

non-contractual matters. And secondly, the lack of jurisdiction in respect of the trial court since it is the Attorney General who ought to have been sued in this respect thus the suit must have been filed in the High Court. **Section 3 (6) (b) (c) of the Executive Agencies Act Cap. 245 R.E. 2002**, and **Rule 2.1 (b) of the Executive Agencies** [The Tanzania National Roads Agency] (Establishment) Order 2000, GN No. 293 of 2000 and **Section 10 of the Government Proceedings Act, Cap. 5 R.E. 2002** have been cited to cement the argument in this respect. Also, the High Court of Tanzania cases of **Total Tanzania Limited Vs. TRANROADS**, Land Case No. 31 of 2006, Land Division at Dar es Salaam (unreported), **South Freight & Export Co. Ltd Vs. The Branch Manager, CRDB**, Civil Case No. 5 of 2002 at Tanga, (unreported) and **Jacob Nyakore [Administrator of the Estate of the late Kezia Nyakore] Vs. Attorney General and Others**, Civil Case No. 5 of 2010, at Dodoma, [unreported] have been referred to buttress the foregoing contention by the applicant's counsel.

It was thus argued that failure by the trial court to take judicial notice of the cited laws caused a miscarriage of justice. Further, the trial court's failure to appreciate higher courts authorities binding upon him is an error on the face of the record which calls for urgent remedial action by this court through its revisionary powers. The case of **Miroslav Katic and Two Others Vs. Ivan Makobrad [1999] T.L.R 470** has been cited to fortify the foregoing contention.

In the same vein the applicant's counsel conceded that they were aware that the law under **Section 43 (2) of the Magistrates Courts Act Cap. 11 R.E. 2002**, the MCA as amended by **(Miscellaneous Amendments) (No.3) Act, 2002 Act No. 25 of 2002** forbids appeal or application for revision on any preliminary or interlocutory decision or order of the district court or of a court of resident magistrate unless such decision or order has the effect of finally determining the criminal charge or suit. However, the applicant's counsel contended that the trial court's decision though interlocutory but it had the effect of finally determining the issue of jurisdiction of the district court and the legal capacity of TANROADS.

In reply to the foregoing submissions Mr. Nyabiri learned counsel for the respondent based their submission on the cited provisions of **Section 43 (2) and (3) of the MCA**. He contended that this present application is incompetent as the cited law clearly provides. That the complaints raised in this application can only be determined on an appeal. And, there are no errors apparent on the face of the record which this court can intervene. A case of **Hemed Hussein & 5 others Vs. Nyembela Gandawega, Misc. Civil Application No. 66 of 2003**, High Court of Tanzania, at Dodoma, [unreported] has been cited to that effect.

This court is in agreement with both parties that the law forbids appeal or application for revision on interlocutory or preliminary decision or order. **Section 43(2) of the MCA** thus provides;

"Subject to the provision of subsection (3), no appeal or application for revision shall be against or be made in respect of any preliminary or interlocutory decision or order of the district court or a court of a resident magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit".

Thus, while Mr. Mtinangi learned counsel for the applicant is alive to this provision of the law he contends that the trial court's decision on preliminary objection had the effect of finally determining the issue of jurisdiction of the district court and legal capacity of TANROADS in this case.

With due respect to the learned counsel, the cited law has not provided any exception to its application. Had the legislature intended to exclude other instances it could have provided so in the cited law. I believe the legislature had good intention to enact this law and I don't have any reason to interpret it otherwise.

It is further provided under subsection (3) of section 43 of the MCA thus;

"Subject to the provisions of any law for the time being in force all appeals, references, revisions and similar proceedings from or in respect of, any proceedings of

civil nature in a district court or a court of resident magistrate which are authorised by law shall lie and be heard by the High Court”.

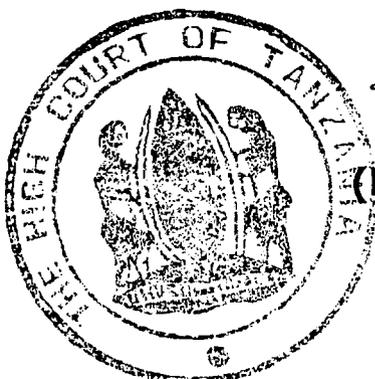
Thus, as per the cited law and as rightly submitted by Mr. Nyabiri it is only those matters which are allowed by the law that can be entertained by the High Court. As indicated above an appeal or application for revision on interlocutory or preliminary decision is forbidden by the law and nothing we can do about it.

And by overruling the preliminary objection the trial magistrate did not commit any error on the face of the record that this court can interfere. That decision is appealable and thus the said issues can be raised on an appeal after the determination of the suit pending between the parties depending on the outcome of the case.

Further, it is my considered opinion that whether or not the trial magistrate did not bind himself to the higher courts' authorities cannot be said was an error on the face of the record since every Judge or Magistrate is entitled to his/her own considered decision that is why there are appellate courts where aggrieved parties can always appeal.

I have also read the facts of the case in **Miroslav Katic and Two Others Vs. Iran Makobrad** (supra) and found that the same are distinguishable from the case at hand. In that cited case the High Court entertained an application for vacation of the execution order while there was a reference to the Court of Appeal between the same parties. In that respect the Court of Appeal revised the High Court Order. And in the case of **Auto Garage Limitd Vs. Abdulkadir Lutta Mohamed**; Civil Revision No. 3 of 2000, High Court of Tanzania at Dar es Salaam, [unreported], firstly, the same was decided before the amendment of Section 43 of the MCA in 2002. And secondly, I agree that there are instances where courts can invoke their revisionary powers either *suo motu* or on application by the parties as it was in that cited case provided there is an error on the face of the record which calls for intervention. The issues in the instant case are not errors on the face of the record. Their intervention can wait until the suit is finalized.

Finally, I agree with the respondent's counsel that this application is incompetent before this court and it is hereby dismissed with costs. The record is thus remitted to the trial court for continuation of the suit on merits. It is ordered accordingly.

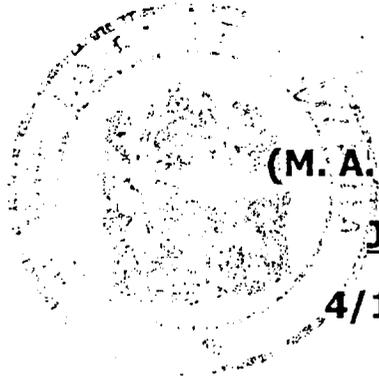



(M. A. KWARIKO)

JUDGE

4/12/2012

DELIVERED AT DODOMA



(M. A. KWARIKO)

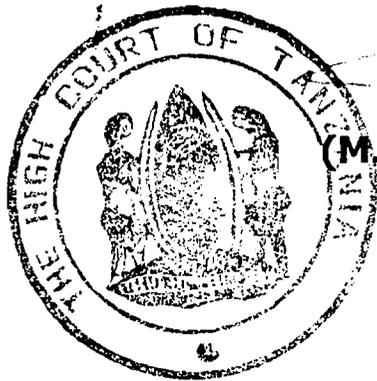
JUDGE

4/12/2012

Applicant: Mr. Mtinangi Advocate

Respondent: Absent/Mr. Nyabiri Advocate

C/C: Ms. Judith



(M. A. KWARIKO)

JUDGE

4/12/2012