IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A, KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 488/16 OF 2019

TOTAL TANZANIA LIMITED .... APPLICANT
VERSUS
MEXON SANGA ....RESPONDENT

(Application for revision of the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Magoiga, J.)

dated 13th day of September, 2019
in
Commercial Case No. 161 OF 2018

....

RULING OF THE COURT

14th & 28th June, 2022

KIHWELO, J.A.:

Central to this matter is the competence of the instant application which seeks to move the Court by way of revision under section 4 (3) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002; now R.E. 2019] (henceforth the AJA) and Rule 65 (1), (2), (3), (4) and (5) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules). The Court is invited to exercise its revisional powers to call for, examine and revise the records of the proceedings in Commercial Case No. 161 of 2018 (the suit) before the High Court of Tanzania (Commercial Division) at Dar es Salaam (the High Court) and in particular the ruling and its drawn order.

The factual setting giving rise to the impugned decision may be briefly recapitulated from the record as follows; On 22nd December, 2014 the applicant executed a Marketing License Agreement (the License) with the respondent in which the applicant as a Licensor, granted the respondent, as the Licensee, a license to operate a Total New Maendeleo Service Station, located in Njombe, subject to the terms and conditions specified in the License. The respondent was under obligation and strictly required to comply with the terms and conditions specified in the License.

On 17th February, 2017 the respondent lodged a Civil Case No. 2 of 2017 against the applicant at the Resident Magistrate's Court of Njombe at Njombe claiming for a number of things and among them is that, the applicant is in breach of the License entered on 22nd December, 2014 as well as an order for specific performance of the License.

Apparently, it also occurred that, on 30th November, 2018, the applicant instituted the suit against the respondent before the High Court claiming for among other things, a declaration that the respondent breached the License and many more prayers for other reliefs which we do not think it is necessary to reproduce them for the purposes of this ruling. For the moment, it will suffice to observe that, the applicant's claims in the suit before the High Court were the same with the

respondent's claims at Njombe Resident Magistrate's Court, with very minor variations and they all arose from the same transaction namely, the License.

The respondent filed a written statement of defence on 28th January, 2019, in which he raised a preliminary point of objection to the effect that:

> *"The suit is sub judice to Civil Case No. 2 of 2017 previously filed on 17th February, 2017 and now in the Resident Magistrate's Court of Njombe."*

She therefore, prayed that the suit should be struck out or stayed.

The learned counsel for the applicant and respondent filed their respective skeleton written arguments for and against the preliminary objection without more and left upon the court to determine it. The respondent strongly argued that the suit before the High Court was *res sub judice* in that, the matter in issue before the High Court was also directly and substantially in issue before the Njombe Resident Magistrate's Court, that parties in both two cases are the same and they litigate under the same title, that the court in which the first suit was instituted in Njombe is competent to grant the reliefs claimed and that the previous instituted suit at Njombe is still pending. He cited section 8 of the Civil Procedure Code [Cap. 33 R.E. 2002; now R.E. 2019] in support of his

proposition. The applicant gallantly resisted the preliminary objection in that the doctrine of *res sub judice* is misconceived and irrelevant in the current circumstances despite appreciating that the doctrine was meant to prevent multiplicity of suits and therefore conflicting decisions on the same issue.

Upon thorough consideration of the skeleton written arguments filed by the parties, the High Court (Magoiga, J.) determined the objection and came to the conclusion that the preliminary objection was meritorious and therefore the suit was stayed pending final determination of Civil Case No. 2 of 2017 at Njombe. Undeterred, the applicant knocked the doors of the temple of justice before this Court armed with a notice of motion supported by an affidavit seeking for the orders as hinted before.

When the matter came up for hearing on 14th June, 2022, Mr. Makarious Tairo, learned counsel, appeared for the applicant while Mr. Daniel Welwel, learned counsel appeared for the respondent. Before we could go into the hearing of the application in earnest, we prompted the learned advocates to address us on the competence of the application before us in terms of section 5 (2) (d) of the AJA which they dutifully did.

Mr. Tairo took to the floor first. He prefaced his brief submission by arguing that the central issue in the instant application is whether or not

the matter before the High Court was finally and conclusively determined. In his opinion the ruling by the High Court that the Resident Magistrate's Court of Njombe has jurisdiction to determine the matter, automatically made the High Court *functus officio* in entertaining the suit and in effect that it finally determined the matter before the High Court. He referred us to page 22 of the case in **Standard Chartered Bank and Others v. VIP Engineering & Marketing Limited and Others**, Consolidated Civil Application Nos. 76 & 90 of 2016 (unreported) in which we discussed the test for determining on whether the decision is final or interlocutory. To bolster his argument, Mr. Tairo further referred us to page 5 in the case of **Augustino Masonda v. Widmel Mushi**, Civil Application No. 383/13 of 2018 and **Tunu Mwapachu and Others v. National Development Corporation and Another**, Civil Appeal No. 155 of 2018 (both unreported). He therefore implored us to find that the application before us was competent and fit for revision.

In reply Mr. Welwel had an opposing view in respect of the competence of the application. In his brief and focused submissions, he contended that the position of the law is long settled and clear in that for an application for revision to succeed the major test is the finality effect of the impugned decision. In his view, and rightly so in our mind too, all the

cases cited by Mr. Tairo do not aid his case and in the contrary, all of them are in favour of the respondent. To amplify his argument the learned counsel, referred us to page 7 of the impugned decision and submitted that, Mr. Tairo is trying to overstretch the argument, by arguing that the Judge of the High Court in deciding the objection held that the High Court has no jurisdiction but the Resident Magistrate's Court of Njombe had jurisdiction which is not the case. He further submitted that, had the High Court found that the High Court had no jurisdiction he would have struck out the suit instead of staying it. Mr. Welwel rounded up his submission by arguing that, revision is not an alternative to appeal and prayed that the application should be struck out with costs.

In a brief rejoinder, Mr. Tairo did not have much to submit. He reiterated his earlier submission in chief and submitted that the counsel for the respondent did not address on whether the High Court will have jurisdiction to determine the suit if the matter pending before Njombe Resident Magistrate's Court is finally determined.

After a careful consideration of the submissions of the learned counsel for the parties and the application, the issue before us is a narrow one and that is whether the application is properly before the Court.

We think, for the sake of precision, we should first appreciate what the provisions of section 5(2)(d) of the AJA provides;

> *"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.***" [Emphasis supplied]

Quite clearly, the provisions of section 5(2)(d) of the AJA, is clear to us and leaves no room for any ambiguities unlike the counsel for the applicant seeks to propose. Time without number we have had occasion to pronounce ourselves on the applicability of this section. For instance, in the celebrated case of **Murtazar Ally Mangungu v. The Returning Officer for Kilwa North Constituency and Others**, Civil Application No. 80 of 2016 (unreported), we underscored two tests in determining whether an application for revision is caught under section 5 (2) (d) of AJA, that is to say; the order sought to be revised is interlocutory and whether that order has the effect of finally and conclusively disposing of the matter before the High Court.

Starting with the issue of interlocutory order or decision, what amounts to an interlocutory order or decision was discussed at considerable length in the case of **Tanzania Motors Services Limited and Another v. Nehar Singh t/a Thaker Singh**, Civil Appeal No. 115

of 2005 (unreported) in which we were persuaded by the foreign decision in **Bozson v. Artincham Urban District Council** (1903) 1 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."*

Similar position was adopted by this Court in the cases of **JUNACO (T) Ltd & Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 and **Celestine Samora Manase & Twelve Others v. Tanzania Social Action Fund Trust Fund**, Civil Appeal No. 318 of 2019 (both unreported).

In the instant application, the High Court stayed the proceedings in the suit before it pending final determination of Civil Case No. 2 of 2017 before the Njombe Resident Magistrate's Court at Njombe. By any stretch of imagination, that order is interlocutory as it did not dispose of the rights of the parties. The argument by Mr. Tairo that the effect of that order is to render the High Court *functus officio* is, in our considered opinion erroneous and misleading and if at all, we think that, the learned

counsel was in a mere fishing expedition. We think, such a convenient escape route is not, unhappily, available to the applicant.

Now, turning to the issue whether the impugned order has the effect of finally and conclusively disposing of the matter before the High Court, we hasten to state that, the impugned decision made explicitly clear that proceedings in the suit before the High Court be stayed pending final determination of Civil Case No. 2 of 2017 before Njombe Resident Magistrate's Court at Njombe and therefore, this issue does not need detain us much. In the case of **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (unreported)when faced with an analogous situation where the application was struck out on the same grounds, we stated that:

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

The case before us does present a similar outlook so as to seal the fate of the application. It is, we think, axiomatic that the applicant ought to have taken a totally different route or approach instead of lodging the instant application for revision. In our considered opinion, Mr. Welwel is undeniably right to argue that the application before us is misconceived.

For the above stated reasons, we find that this application is incompetent, for the order sought to be revised is not amenable for revision in terms of section 5(2)(d) of the AJA. It is, therefore, struck out with costs.

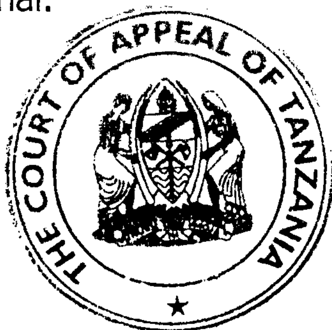
DATED at **DAR ES SALAAM** this 24th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R.J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered on 28th day of June, 2022 in presence of Ms. Mariam Ismail, learned counsel for the applicant and Mr. Erick Mhimba, learned counsel for the respondent, is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL