IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 02 OF 2019

(Arising from Miscellaneous Commercial Application No. 186 of 2018)

BETWEEN

THE ATTORNEY GENERAL .....APPLICANT

Versus

ARDHI UNIVERSITY.....1st RESPONDENT

KIUNDO ENTERPRISES (T) LIMITED.....2nd RESPONDENT

Last Order: 30th July, 2020

Date of Ruling: 24th Aug, 2020

RULING

FIKIRINI, J.

The applicant, the Attorney General initially filed Miscellaneous Commercial Application No. 186 of 2018, pursuant to Order XXI Rule 57 (1) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC), objecting for the attachment of an account belonging to the 1st respondent. In its ruling dated 28th August, 2019, the Court dismissed the application. Aggrieved the applicant now has moved this Court by way of chamber summons under section 78 (1) and (b) read together with Order XLII Rule 1 (a) and (b) and 3, of the CPC, praying for a review of the decision. In return and contesting the application, the 2nd respondent, Kiundo

Enterprises (T) Limited, filed a counter-affidavit and as well raised three (3) preliminary points of objection on the following grounds:

(a) That, this Honourable Court lacks jurisdiction for being improperly moved;

(b) That, this application is misconceived and is an abuse of the Court process as the applicant has already filed another application known as Miscellaneous Commercial Application No. 120 of 2019; and

(c) That, the applicant has no locus to file this application, having failed to move this Honourable Court to be allowed to participate in these proceedings, as required under section 17 (2) (a) and (b) of the Office of the Attorney General (Discharge of Duties) Act, Cap 268 (the Discharge of Duties Act).

Several attempts to hear the raised preliminary objections orally proved futile and hence on 15th June, 2020, the Court ordered parties to argue the objection by filing of written submissions. The filing schedule was as follows: the 2nd respondent to file their written submissions by or on 29th June, 2020; reply written submissions by or on 13th July, 2020 to be followed by rejoinder if any by or on 20th July, 2020. Ruling was set for 5th August, 2020, but for reasons beyond the Judge's control was rescheduled to 24th August, 2020 at 2.00 pm.

Following the order, the 2nd respondent filed both the skeleton arguments pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 (the

Rules) and the written submission in support of the points of the objections raised on 29th June, 2020. The applicant equally filed theirs on 13th July, 2020 and rejoinder by the 2nd respondent was filed on 17th July, 2020.

Mr. Gabriel Malata, Solicitor General appeared for the applicant and Mr. George Kilindu and Mr. Roman Masumbuko, learned counsels appeared for the 2nd respondent.

Brief account of what was argued on objections seriatim.

On the 1st point on Court's jurisdiction, Mr. Masumbuko, opened his submission with a statement that the Court has to be properly moved and by a right person for the Court to determine the matter before it. So any Court before it assumes jurisdiction over a matter it has to be satisfied that it has been properly moved.

Mr. Masumbuko, then continued with the submission on the 1st objection by arguing that since the Court has already ruled out in its Ruling in the Miscellaneous Commercial Application No. 186 of 2018, which was brought under Order XXI Rule 57 of CPC, that the applicant was not a party to the execution proceedings, thus this application for review, or for any other order by the applicant, on the subject, to this Court , is unknown under CPC, and hence cannot move this court, unless it complies to what the ruling stated, or by appealing the decision to the Court of Appeal but not review.

Expanding his submission on the 1st objection, Mr. Masumbuko also contended that, since the 1st respondent had already initiated appeal process by filing a Notice of Appeal on 23rd February, 2017, as exhibited in the counter-affidavit in Miscellaneous Commercial Application No. 186 of 2018. The process has not been terminated yet, it was thus not proper for the applicant to bring the present application, citing the case of **Tanzania Telecommunication Company Limited v Tritel (T) Limited (2006) 1 E.A. 393,** which was cited with approval in the case of **Ottu on behalf of P.L. Assenga & Others v AMI Tanzania Limited, Civil Application No. 35 of 2011, CAT at DSM** (unreported) (copy attached), where the Court of Appeal affirmed that the presence of notice of appeal initiated appeal process and the applicant could not seek another forum as an alternative to appeal. In the absence of the notice to withdraw the notice of appeal, the applicant cannot act on behalf of the 1st respondent and file the present application, the act which was equivalent to riding two horses at once.

Based on the 1st point of objection, he stressed that this Court has not been properly moved as the applicant has not yet obtained right of appearance and therefore cannot apply for review while there was a pending appeal lodged by the 1st respondent, making the whole process of moving this Court by way of review improper and prayed for the dismissal of the application.

On the 2nd point, that the application was abuse of Court process, it was submitted that after the ruling in Miscellaneous Commercial Application No. 186 of 2018, two other applications were filed on 2nd October, 2019 namely: Miscellaneous Commercial Application No. 120 of 2019 and Commercial Review No. 2 of 2019. This application, according to Mr. Masumbuko was the same as Miscellaneous Commercial Application No. 186 of 2018 in which the Court has already ruled out it was *functus officio,* for the reason that the applicant had no *locus standi*. Since it was the same applicant who has no *locus standi* who brought this application, that action was an abuse of Court process, he underscored and prayed for the application be dismissed with costs.

The 3rd point was that the applicant lacked *locus standi* to bring this application for review. Referring to the case of **Lujuna S. Balonzi v Registered Trustee of Chama cha Mapinduzi [1996] T.L.R. 203,** on *locus standi*, Mr. Masumbuko contended that based on the ruling in the Miscellaneous Commercial Application No. 186 of 2018, the applicant has to first seek for leave of the Court to intervene in the matter and be given the right of audience through section 17(2) (a) and (b) of the Discharge of Duties Act, without that having been done, the applicant cannot call herself an aggrieved party, submitted Mr. Masumbuko, also referring this Court to the definition provided in the Black's Law Dictionary Eighth Edition, which defined the term "aggrieved party" to mean:

"A party entitled to a remedy; esp.., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment. Also termed party aggrieved: person aggrieved."

In view of his submission, he pressed that the applicant has no locus after she has failed to establish her interest under section 17(2) (a) and (b) of the Discharge of Duties Act and the application is devoid of merit as held in Miscellaneous Commercial Application No. 186 of 2018 and urged for the application to be dismissed with costs.

Mr. Malata responding to the objection and particularly to the 1st point on jurisdiction, and on the submission that the present application was unknown under the law, he submitted, as being far from the truth, because the applicant's right to review was provided under Order XLII Rule 1 (b) and 2 of the CPC. Therefore, under the stated provision the 2nd respondent's submission that this Court lacks jurisdiction has no merit. The applicant being aggrieved by the ruling dated 28th August, 2019 preferred this review clearing the misleading submission that she was a 3rd party.

Answering the submission that the applicant has not complied or followed the procedure directed by this Court he asserted that was in actual fact the rationale

behind this application for review. It was thus improper and wrong for the 2nd respondent to discuss that point at this stage. The point was thus raised prematurely.

On the submission that the applicant was barred from bringing this application owing to the pendency of an appeal lodged by the 1st respondent, it was Mr. Malata's submission that, one, the applicant was neither a party to the appeal nor to the proceedings in Miscellaneous Commercial Cause No. 272 of 2015, subject of the pending appeal. Two, even if she was, yet she was not precluded from applying for review under Order XLII Rule 2 of the CPC. Disputing the two cases cited of **Tanzania Telecommunications Company Limited** and **Ottu on behalf of P.L Assenga and Others** (supra), he contended that the two cited cases were distinguishable as it dealt with a different matter from one present before this Court currently. In those cases, the applicant filed both a notice of appeal and application for review at the same time, and that was why the Court remarked that one cannot ride two horses at the same time.

Deliberating on the 2nd point of abuse of Court process, Mr. Malata argued that there was nothing like abuse of Court process by preferring this application for review stating that the Commercial Review No. 2 of 2019 was in respect of the ruling dated 28th August, 2019, the application which was predicated under Order XLII Rule 1 of the CPC. The Miscellaneous Commercial Application No. 120 of

2019 was seeking to lift the *Garnishee Order Nisi* in respect of the 1st respondent's account, pending determination of Commercial Review No. 2 of 2019, whereas Miscellaneous Commercial Application No. 186 of 2018 was in respect of the objection proceedings, which was subject of this application for review, in which case the issue of the Court being *functus officio* does not arise.

The 3rd point on *locus standi,* it was Mr. Malata's submission that, that point did not qualify to be a point of objection as it was one of the point's for review. It was the applicant's contention that the Court made an error in its decision on procedure for the applicant's intervention in the proceedings before the Court in which it was not a party. The applicant preferred a review as an option to seek for remedy for an aggrieved party.

On the strength of the submission in opposition to the points of objection raised, Mr. Malata had the contention that the case of **Lujuna S. Balonzi** (supra) cited had nothing to do with the objection raised and hence prayed for the objection be dismissed for lack of merits.

Mr. Masumbuko, in reply to the submission made by the Mr. Malata essentially reiterated his earlier submission in chief, maintaining that by entertaining the present application, this Honourable Court would be retreating from its position

that the applicant did not have a *locus standi*. Based on the rejoining submission he prayed for the application to be dismissed.

From the counsels' rivalry written submissions, the issue for determination is whether the three (3) points of preliminary objection are with merits. Determination of the Court before which the matter is placed if it has jurisdiction and been properly moved is one of the basic courts duty, before embarking on dealing with any matter before it. It is unsafe for the court to proceed on assumption that it has jurisdiction and has been properly moved. **See: Fanuel Mantiri Ng'unda v Herman Mantiri & 2 Others [1995] T.L.R. 155; Richard Julius Rukambwa v Isaack Ntwa Mwakajila & Another, Civil Application No. 3 of 2004, CAT at Mwanza (unreported)** and **TRA v New Musoma Textile Ltd, Civil Appeal No. 93 of 2009, CAT at DSM (unreported).**

The present application has been brought under section 78 (1) (a) and (b) read together with Order XLII Rule 1 (a) and (b) and 2 of the CPC, though in the chamber summons it reads Rule 3 which deals with form of the application for review, but I believe the applicant must have meant Rule 2 which illustrates to whom the application for review may be made. This is stated based on the submissions put forward by the applicant throughout making reference to Rule 2 of Order XLII of the CPC. Reference to Rule 3 instead of 2 is thus considered as a slip of a pen.

Order XLII Rule 1 (a) of the CPC, provides as follows:

> *"Any person considering himself aggrieved-*
>
> *by a decree or order from which no appeal is allowed, and who, **from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of record, or for any sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.**"*[Emphasis mine]

The provision further provides under Order XLII Rule 2 of the CPC, provide as follows:

> *"A party is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when,*

being respondent, he can present to the appellate court the case on which he applies for review."

From the two referenced parts of the provision, it is uncontested fact that the present application is not unknown under the CPC. The assertion made by the 2nd respondent's counsel is not only unsupported but also is incorrect.

The procedure for review is known under the CPC. The issue that this Court is lacking jurisdiction for being improperly moved is equally without merits. Borrowing from **Mulla, The Code of Civil Procedure, Solil Paul and Anupam Srivastava, 16th Edition, Volume 4 at p. 4105**, review is mainly for the purposes of correcting an error on the face of record. From the above cited provision it is clear that the criteria for review extends to the following circumstances: (i) when there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or (ii) on account of some mistake or error apparent on the face of the record, or (iii) for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

What the provision is basically elucidating is that a court which is manned by human beings can make wrong decisions. Under the circumstances those wrong decisions which fall within the ambit of the four (4) pointed out criterions above can be corrected by way of a review. What a court cannot do under review is to correct incorrect interpretation of the law since that is not an apparent error on the face of record or in other words it can be said that error of law is not good ground for granting a review. **See: Attilio v Mbowe [1970] H.C. D. 3.** Coming back to the present application, this Court has jurisdiction to entertain the application for review filed despite its position in the ruling made on 28th August, 2019, in Miscellaneous Commercial Application No. 186 of 2018. What would be the outcome of the said application is yet to be known as the application is still pending for determination. I thus agree to Mr. Malata's submission that the applicant has properly moved this Court under Order XLII Rule 1 (a), (b) and 2 of the CPC.

Mr. Masumbuko's point that the applicant is barred from preferring this application, due to the pendency of an appeal initiated by the 1st respondent, is alike disagreed on the basis that the applicant is covered under Order XLII Rule 2 of the CPC, which gives her opportunity to move this Court by way of review. The provision is provided below for ease of reference:

"A party is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party....."

Furthermore, and as submitted by Mr. Malata the applicant was neither a party to the appeal process initiated by the 1st respondent nor a party to the proceedings in Miscellaneous Commercial Cause No. 272 of 2015, but still covered under the provision of Order XLII Rule 2 of the CPC, which allows her to bring such application. Both cases cited (supra) are valid legal positions in relation to the principle one cannot ride two horses, but distinguishable to the present situation. Coming to the 2nd point on abuse of court process, this aspect has also not persuaded the Court. The applicant started with Miscellaneous Commercial Application No. 186 of 2018 in which he was objecting to the attachment of the 1st applicant's account. The application was dismissed. This was followed with Miscellaneous Application No. 120 of 2019 and Commercial Review No. 2 of 2019. In the Miscellaneous Commercial Application No. 120 of 2019, the applicant was seeking for lifting of a *Garnishee Order Nisi*, in which the Court ruled in the applicant's disfavor stating that it was *functus officio*. The Court order in Miscellaneous Commercial Application No. 120 of 2019, has no connection whatsoever with the Commercial Review No. 2 of 2019. Though both applications emanated from Miscellaneous Commercial Application No. 186 of 2018 they were

separate and distinct from each other, such that Mr. Masumbuko's submission that their filing albeit on the same day was an abuse of court process. It is a matter of fact that there are applications which can be filed simultaneously and yet, the exercise cannot be termed as abuse of court process. Abuse of court process in the **Black's Law Dictionary, Bryan A. Garner 10th Ed, 2014, page.13** and **Ramanatha Aiyar Concise Law Dictionary, 3rd Ed, at. page.8. Black's Law Dictionary,** has defined the phrase to mean:

> *"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."*

which is not the case as pictured by Mr. Masumbuko. Again, I support Mr. Malata's position that all the three (3) applications were properly before the Court as were provided for under the CPC and it was not more than one application seeking for the same remedy or remedy which has already been granted or declined for the reasons availed by the Court. **Lujuna Balonzi's** case cited (supra) has illustrated who has a right to sue when it stated:

> *"Locus standi is governed by common law according to which a person bringing a matter to the court should be able to show*

that his right or interest has been breached or interfered with."

The stated legal position is totally respected, however, applying it to the current situation, I find it misplaced. The reason as to why I am saying so, is at the moment the applicant's position is that the Court arrived at its decision based on a wrong principle and on that basis they want this Court to correct the error and there are three ways that can be done, file a review before the Court which made the decision marred with an alleged error, based on how they frame their issue, prefer a revision or appeal to the Court of Appeal, again based on how they frame their grounds to make it a revision or an appeal. In the process the Court will determine the applicant's right if any. The applicant has all the rights to bring this application for review even though the Court has already made its decision, but since there is a claim that there is an error made, this Court cannot abdicate that duty of looking at that alleged error. Review is one way the alleged error can be corrected.

On this point I find, Mr. Masumbuko to have misconceived what the application for review entails. The application for review as stated earlier on in this ruling is to correct an error as pointed out by the applicant, the stage which has not been reached at yet. And the fact the applicant is the one who instituted Miscellaneous Commercial Application No. 186 of 2018 she has the right to question the ruling

dated 28th August, 2019 by way of a review so long as she claims there was an error.

Most of the submission made by Mr. Masumbuko spilled into discussing the application itself, which I do not think I can say much on that at this point.

In short I find the preliminary points of objection raised devoid of merit and proceed to overrule them. It is so ordered.

P. S. FIKIRINI

JUDGE

24th AUGUST, 2020