IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 06 OF 2019

(Arising from Commercial Case No. 166 of 2017)

MASOKO AGENCIES (T) LIMITED.....APPLICANT

Versus

PRECISION AIR SERVICES PLC.....RESPONDENT

Last Order: 16th Mar, 2020

Date of Ruling: 15th Apr, 2020

RULING

FIKIRINI, J.

The applicant, Masoko Agencies (T) Limited, filed this application for review under Order XLII Rule 1 (b), section 95, section 78 (a) and (b) of the Civil Procedure Code, Cap 33 R. E. 2002 (the CPC) and any other enabling provisions of the law, under the ground that it consequently finally determined the main suit. Contesting the application, the respondent filed a preliminary point of objection contending that:

(a) The application is misconceived and bad at law for contravening the provision of section 78 (2) of the Civil Procedure Code, Cap. 33 R.E. 2002.

This ruling is thus based on the preliminary point of objection raised, which was argued orally on 16th March, 2020. At the hearing Mr. Geofrey Paul learned counsel appeared for the applicant and Mr. Roman Masumbuko learned counsel appeared for the respondent. Mr. Masumbuko filed skeleton arguments in support of the objection and prayed for the same to be adopted and made part of the submission he was about to make. Mr. Paul filed none but responded to the submissions made.

The gist of Mr. Masumbuko's objection was that the application for review made under section 78 (a) and (b) of the CPC, was bad as it was barred under section 78 (2) of the CPC. For the same reasons provided under section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (AJA), that no appeal or revision can be preferred on any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit. In support he cited the case of **Dennis Francis Ngowi v Asteria Morris Ambrose, Civil Appeal No. 90 of 2014, CAT-DSM (unreported).**

Expounding on his stance, he submitted that the ruling dated 26th August, 2019 did not finally determine the matter. He thus urged the applicant to wait for the matter which was pending before this Court to be finally determined before the applicant could appeal the decision. With the argument he referred this Court to the case of

MIC (T) Ltd & 3 Others v Golden Globe International Services Ltd, Civil Application No. 341/11 of 2017, CAT, DSM (unreported), where the Court gave the test of the effect of the matter finally being determined. The Court in the cited case had to determine whether the decision has determined the matter finally and/or the decision or order subject of the application was made independent of the suit, meaning if the order in question could stand on its own legs without depending on the suit.

Relating the decision to the matter at hand, it was his submission that the decision challenged was made in course of the hearing of the main suit therefore part of it and has not finally determined the matter. He thus prayed for the application be dismissed with costs and the main suit to proceed with hearing as cause listed.

Mr. Paul, responding to the submission stated that the order has finally determined the issue on admissibility of that particular document as well as any other subsequent documents with the same short comings. The order, according to Mr. Paul has thus closed the doors for the applicant to bring any other documents. Furthering his submission, he contended that the fact the suit was still pending should not be a determinant factor as to whether the subject matter has been finally determined or not. And fortifying his submission he cited the case of **Tanzania Motor Services & Another v Mehar Singh t/a Thaker Singh, Civil Appeal No.**

115 of 2005, p.9-10, where the Court considered the order as to have finally determined the matter despite the suit still be pending. In the same spirit, he thus considered the decline in admitting the documents has finally determined the matter.

Mr. Paul, as well argued that the review sought was based on the error apparent which resulted from the misleading and misdirecting submissions from the counsel for the respondent which ended up occasioning injustice. He thus obliged the Court not to act blindly when there were such apparent errors which can be rectified. Buttressing his position, he cited the case of **Chama cha Waalimu (T) v The Attorney General, Civil Application No. 151 of 2008 (unreported)** (copy supplied). The Court of Appeal, in the cited case (supra) after noting illegality instead of striking out the application it proceeded to intervene and remedy the situation to prevent injustice to parties. Underscoring the decision, it was his submission that even if this Court would find there was still a pending matter, should still proceed to remedy the situation. Failure for the Court to intervene will have an impact on the defence case as well as the counter-claim raised by the applicant.

With that piece of submission, Mr. Paul invited the Court to invoke the overriding principle so as to serve justice to parties. He also dissuaded the Court from relying

on the cited case of **Dennis Ngowi**,(supra) contending it was distinguishable to the present circumstances.

On the strength of his response, he prayed for the Court to dismiss the preliminary point of objection raised.

Rejoining, Mr. Masumbuko, though he said he would refrain from reacting to the submission on merits of the application, but generally opposed the submission. Aside from that, his response to the opposing submission was that the applicant's counsel was blowing hot and cold, by admitting that the order only concerned admission of the documents on one hand, but did not determine the matter of the suit on the other. Taking up on that further, it was his submission, that the gist of his objection was that section 78 (2) of the CPC, bars this kind of applications. He as well challenged Mr. Paul's submission that the order barred admission of all other documents, Mr. Masumbuko considered that not to be an exception under section 78 (2) of the CPC, even if that could have been the case. He went on arguing that, the Court order, has in actual fact remarked only on "documents with the same shortcomings" According to him the defence was therefore just being apprehensive.

As for the cited cases in support of the applicant's submission in particular the **Motor Services** (supra), where the Court refused grant of application for the

petition filed for stay of the pending arbitration proceedings. It was Mr. Masumbuko, submission that, the Court of Appeal concluded that the order finally determined the matter and there was room for appeal under section 5 (1) (c) of AJA. The situation which was different from the issue before this Court, whereby the matter has not been determined finally and there was no room for appeal. Again, on the case of **Chama cha Waalimu** (supra), it was his position that the case could not factor in since the issue before this Court did not concern citation.

Responding to the submission on overriding principle, he as well refuted for the principle to be applicable under the circumstances, since the provision of section 78 (2) of the CPC bars such applications. Answering the submission that the Court should not turn blind eye on error, it was his counter-submission that the Court cannot turn a blind eye on a prohibited application and discouraged invoking of the principle.

Reiterating his earlier submission, he urged the Court to dismiss the application and order hearing of the main suit to continue.

The only issue for determination is whether the preliminary point of objection raised deserves sustaining or not. My first stop in this situation is at Order XLII 1 (b) of the CPC which this application for review is predicated. The provision of Order XLII 1 (b) is reproduced for ease of reference below:

"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 the record, or 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"*** [Emphasis mine]

Other provisions relied on, in moving the Court are section 78 (a) and (b) of the CPC which provided that:

"(a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or

(b) by a decree or ***order from which no appeal*** *is allowed by this Code,* ***may apply for a review of judgment to the court which passed the decree or made the orde****r, and the court may make such order thereon as it thinks fit."*[Emphasis mine]

And the respondent in contesting the legality of the application relied on the provisions of section 78 (2) of the CPC, which provided as follows:

> "*Notwithstanding the provisions of subsection (1), no application for review shall lie against or be made in respect* ***of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.***"[Emphasis mine]

On a general note it can be correct to state that in order for the application for review to succeed, conditions pointed out under Order XLII R 1 of the CPC, must be fulfilled. And those conditions are: *one*, there has to be a decree or order from which no appeal is allowed; *two,* or there is a discovery of new and important matter or evidence, which was not in the party's knowledge or could not be produced by him/her, when the decree or order was made, *three,* there is an account of some mistake or error apparent on the face of the record, and/or *four,* for any sufficient reason, desire to obtain a review of the decree passed or order made against that party.

One or all the stated conditions can pave way for an application for review to be entertained. Meaning the applicant has to have in mind that: *one,* the order is appealable but no appeal has been preferred as stipulated by section 78 (a) of the

CPC, which is not the case in the present situation; *two*, no appeal is allowed pursuant to section 78 (b) of the CPC, which is the situation in the present situation, and *three*, the intended review should not be on a preliminary or interlocutory decision or order of the Court, unless such decision or order has the effect of finally determining the suit. These criteria were well articulated in the case of **James Kabalo Mapalala v. British Broadcasting Corporation [2004] TLR 143,** when the Court had this to state:

> *".....in an application for review, the judge is not sitting as an appellate Court. In that situation, if the judge is satisfied that the tests for review laid down under Order XLII, rule 1 are met, it is expected of him to grant the application by effecting the relevant and necessary rectification and corrections sought* ***in the judgment*** *which in warranting circumstances, may be varied as a result of the new and important matters discovered.* ***Otherwise, the judgment is not quashed in a review application****. On the other hand, if the judge is satisfied that there is no sufficient ground to justify a review, the application is rejected by dismissing it."*[Emphasis mine]

All the provisions cited that of Order XLII R 1 (b), section 78 (a) and (b) relied by the applicant to move this Court, and section 78 (2) relied on by the respondent to raise the preliminary point of objection as well as the decision in **Mapalala's** case (supra) which illustrated the requirements to be met when intending to file for review, it is apparent that for a review application to be sustainable, a decree or order subject of review must emanate from a judgment or decision which has finally and conclusively determined the matter.

The submission by Mr. Paul that the order made on 26th August, 2019 finally determined the matter in relation to admissibility of the documents, is *first and foremost,* not correct, unless the defence is sure that all its documents have the same short falls. *Second*, even if the order has finally determined the matter as far as admission of documents is concerned, yet, the order is only interlocutory and only appealable upon final and conclusive determination of the matter. *Third*, the ruling occurred in course of the hearing, which made it impossible to be detached from the main suit and be dealt with independently. The case of **Tanzania Motor Services** (supra) even though relevant, but is distinguishable to the situation presently before the Court. In the cited case aside from the fact that there was a clause in the parties' agreement, the order conclusively and finally determined that aspect. The order therefore unwaveringly closed the opportunity of parties to go for

arbitration, while there was a clause in their agreement in that respect. This essentially interfered with the parties' freedom of exercising their right to go for arbitration, which is not the case at hand. Moreso, the order was appealable. In the present matter, what transpired is that the applicant failed to comply with the mandatory requirement of Rule 48 (1) (d) and (2) of the Rules. The order being an interlocutory one, was not appealable.

Similarly, the decision in **Chama cha Waalimu** (supra) though sounds good but this Court could not find any reason in the case at hand to intervene and remedy any situation. The error apparent claimed by the applicant was that the Court relied on misleading submission by the respondent's counsel which is alleged consequently resulted into miscarriage of justice. It is correct that Mr. Masumbuko referred this Court to the case of **DB Shapriya & Co Ltd v Gulf Concrete & Cement Products Co. Ltd, Commercial Case No. 23 of 2015, (unreported),** besides agreeing to his submission the Court as well relied on Rule 48 (1) (d) and (2), item 3.1, 3.2 and 3.3 of the 3rd Schedule. This means, the Court had independently as well arrived at the conclusion relying on the provision of the law as pointed out.

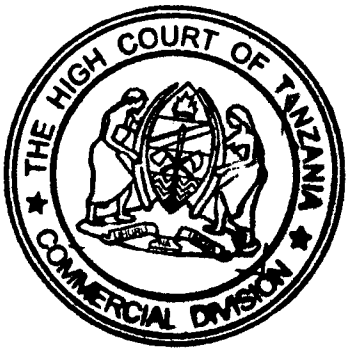
Considering that the main suit is still pending, therefore neither the application of Order XLII R 1 nor section 78 (a) and (b) would be applicable under the

circumstances. The reason being the order being sought to be reviewed did not arise out of the decree or order of the judgment rendered. And this made me agree to Mr. Masumbuko's submission that the application contravenes the dictates of section 78 (2) of the CPC which bars an application for review germinating from a preliminary or interlocutory decision or order of the Court which decision or order has no effect of finally determining the suit. The case of **MIC (T) Ltd & Another** (supra) has been relevant in two senses: *one*, expanding on what it means the matter to be finally determined, and *two*, establishing as to whether order sought to be reviewed in the present case was independent from the suit. The order being on admission of documents in course of the hearing of the main suit cannot be independent from the main suit. If there are such situation of an order made being independent from the main suit, which is rarity than a norm, the order made in the present application does not fall within that ambit.

The Court has as well been invited to invoke the overriding principle to remedy the injustice occasioned and to give opportunity for the defence to mount both their defence and counter-claim raised against the plaintiff. It is indeed important that the Court has to observe and when necessary to invoke the overriding objective principle. However, this principle should not, as properly stated by Mr. Paul, be applied blindly. I want to believe that both Mr. Paul and Mr. Masumbuko will

agree with the Court that the amendment by Act No.8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law. **See: SGS Societe Generale de Surveillance SA and Another v VIP Engineering & Marketing Ltd and Another, Civil Appeal No. 127 of 2017.** In this application alike, the Court, whilst upholding the overriding objective principle but will not turn a blind when the Court is invited to arbitrarily invoke the principle.

In light of the above and particularly on the fact that the matter is still pending before this Court, I find the preliminary point of objection raised worth sustaining and proceed to do so. The application is thus struck out and costs to follow event. It is so ordered.



P. S. FIKIRINI

JUDGE

15th APRIL, 2020