IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 94/14 OF 2018

KEMPINSKI HOTELS S.A. ..... APPLICANT

VERSUS

1. ZAMANI RESORTS LIMITED
2. THE EXECUTIVE DIRECTOR, BUSINESS AND PROPERTY REGISTRATION AGENCY ZANZIBAR ..... **RESPONDENTS**

(Application for revision from the Ruling and Order of the High Court of Zanzibar at Vuga)

(Mohamed, J.)

dated the 6th day of September, 2017
in
Miscellaneous Civil Cause No. 14 of 2017

.....

RULING OF THE COURT

6th & 12th December, 2019

NDIKA, J.A.:

By a notice of motion taken out under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 (the AJA) and Rule 65 (1), (2), (3), (4) and (7) of the Tanzania Court of Appeal Rules, 2009, G.N. 368 of 2009 (the Rules), Kempinski Hotels S.A., the applicant herein, applies for revision of the

proceedings of the High Court of Zanzibar in Miscellaneous Civil Cause No. 14 of 2017 as well as the ruling and order thereon on five grounds as hereunder:

> *"1. There are material irregularities in the conduct of the proceedings occasioning injustice to the applicant;*
>
> *2. The trial court failed to exercise jurisdiction that was still vested to it under the Companies Decree, Cap. 153 by ruling that the trial court was not properly moved to assume jurisdiction in the circumstances of Miscellaneous Civil Cause No. 14 of 2017;*
>
> *3. The trial court grossly erred in law by failing to rightly interpret the provisions of section 1 of the Companies Act No. 15 of 2013 and thereby occasioned injustice to the applicant herein;*
>
> *4. The trial court grossly erred in law and fact in holding that Miscellaneous Civil Cause No. 14 of 2017 at the High Court of Zanzibar was prematurely filed due to the pendency of Commercial Cause No. 320 of 2016 at the High Court of Tanzania Commercial Division; and*
>
> *5. The trial court grossly erred in law and fact by failing to appreciate the nature of the applicant's prayers in Miscellaneous Civil Cause No. 15 of 2017 and thereby occasioning injustice to the applicant."*

The notice of motion is supported by the affidavits deposed to by Mr. Hadrian Beltrametti-Walker (a principal officer of the applicant) and Mr. Omar Said (an advocate of the High Court of Zanzibar who had the conduct of the matter for the applicant). In response, the first respondent, Zamani Resorts Limited, filed an affidavit in reply deposed to by its advocate, Mr. Salim Hassan Bakari Mnkonje.

The essential facts of this matter are mostly undisputed. They are as follows: on 21st March, 2013 the first respondent initiated arbitration proceedings against the applicant under the Rules of Arbitration of the International Court of Arbitration for breach of contract seeking damages amounting to approximately US$ 20,000,000.00 exclusive of interest. On 16th September, 2015 the Arbitral Tribunal dismissed the claim and awarded the applicant £ 3,500,000 as party costs and US$ 244,000 as arbitration costs, both amounts attracting interest at the rate of 2% per annum from the date of the award until final payment. Being aggrieved, the first respondent moved the Arbitral Tribunal for, inter alia, review, revision and correction of the award in respect of costs. On 24th February, 2016, the Tribunal issued an Addendum to the Award dismissing the first respondent's application. As a consequence, it condemned the first respondent to pay additional costs amounting to £

38,000.00 as party costs and US$ 7,000.00 as arbitration costs. Thus, the total costs awarded against the first respondent stood at £3,855,164.55.

The aforesaid amount remained outstanding even after the applicant had served on the first respondent a statutory demand for immediate payment. So as to enforce payment, the applicant on 12th April, 2017 instituted winding up proceedings in the High Court of Zanzibar at Vuga vide Miscellaneous Civil Cause No. 14 of 2017 against the first respondent pursuant to section 218 (e) of the Companies Decree, Cap. 153 (the Decree), section 3 (1) (a) of the High Court Act No. 2 of 1985 and section 7 of the Interpretation of Laws and General Provisions Act No. 7 of 1984. As it turned out, the said proceedings were greeted by a preliminary objection raised by the first respondent on five grounds.

Having heard the submissions of the learned counsel for the parties, the High Court (Mohamed, J.) upheld the preliminary objection on the first two points and found no pressing need to resolve the other three grounds. Briefly, the court held, at the forefront, that the winding up proceedings were wrongly instituted under the Decree on 12th April, 2017 which had ceased to have effect on 3rd April, 2017 upon the repealing law, the Companies Act No. 15 of

2013, coming into force pursuant to a publication in the Legal Notice No. 42 of 2017 issued by the Minister for Trade, Industries and Marketing. Secondly, the court agreed with the first respondent's contention that the winding up petition had been instituted prematurely on the ground that the first respondent had already filed a petition in the High Court of Tanzania, Commercial Division at Dar es Salaam vide Commercial Cause No. 320 of 2016 challenging the enforcement of the arbitral award. The winding up petition was consequently struck out with costs. Aggrieved, the applicant lodged this matter contesting the legality of the proceedings before the High Court and the decision thereon.

When the matter came up before us on 6th December, 2019 for hearing, Messrs. Omar Said Shaaban and Nuhu Mkumbwa, learned advocates, joined forces to represent the applicant, whereas Mr. Salim Hassan Bakari Mnkonje, learned counsel, appeared for the respondents.

As we had noted that Mr. Mnkonje had raised a preliminary objection on four grounds vide a notice duly lodged on 28th November, 2019, we invited the learned counsel to address us on the preliminary objection ahead of dealing with the application on its merits. The said grounds are as follows:

1. *That the application for revision is incompetent for being made as an alternative to an existing right of appeal.*
2. *That the application is incompetent for being supported by a foreign executed affidavit not authenticated and notarized before a Tanzanian consular officer abroad.*
3. *That the application is incompetent for having a defective affidavit of Mr. Hadrian Beltrametti-Walker which does not contain the sources of information.*
4. *That the application is incompetent as it arises from a winding up petition being supported by a foreign executed affidavit verifying petition not authenticated and notarized before a Tanzanian consular officer abroad.*

In his brief but focused oral argument, Mr. Mnkonje canvassed the first three points but abandoned the last ground. On the first ground, he contended that the applicant was in terms of section 5 (1) (c) of the AJA entitled to appeal against the impugned decision of the High Court in exercise of its original jurisdiction under the Decree subject to obtaining leave to appeal and that in the premises it could not seek revision as an alternative to appeal. For this proposition, he cited the decisions of the Court in **Moses Mwakibete v.**

The Editor – Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd [1995] TLR 134; **Halais Pro-Chemie v. Wella A.G.** [1996] TLR 269; **Registered Trustees of Social Action Trust Fund and Another v. Happy Sausages Ltd. and Ten Others** [2002] TLR 285; **Southern Esso v. People's Bank of Zanzibar and Another** [2001] TLR 43; **Augustine Lyatonga Mrema v. Republic and Masumbuko Lamwai** [1999] TLR 273; and **Olmeshuki Kisambu v. Christopher Naing'ola** [2002] TLR 280.

Mr. Mnkonje canvassed the second and third points in the alternative. On the second point, he submitted that the application was incompetent for being supported by an affidavit of Mr. Hadrian Beltrametti-Walker executed abroad without any authentication and notarization from a Tanzanian consular office abroad contrary to the provisions of sections 11 and 12 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 RE 2002 and the Apostille Convention of 5th October, 1961. As regards the third point, the learned counsel attacked the verification in the aforesaid affidavit on reason that the deponent, a non-resident of Zanzibar, failed to disclose the sources of information on the events that occurred in Zanzibar that he averred about as if he had personal knowledge of the said occurrences. He relied upon the decisions in **Salima Vuai Foum v. Registrar of Cooperative Societies**

and Three Others [1995] TLR 75 and **Augustine Lyatonga Mrema** (supra). In conclusion, Mr. Mnkonje urged us to strike out the application with costs.

Replying on the first point, Mr. Shaaban denied that the impugned decision of the High Court was appealable. It was his strong submission that the said decision was not on the merits of the petition and that there was no statutory right of appeal against the said decision under the new company law, which contains no corresponding procedure for a court-ordered winding up. To bolster his submission, he cited the case of **Tanzania Electric Supply Company Limited v. Interbest Investment Company Limited**, Civil Appeal No. 43 of 2012 (unreported) for proposition that there is no inherent right of appeal; that a right of appeal must be traced to a specific statute.

When probed by the Court whether the impugned decision of the High Court striking out the winding up petition was appealable under section 5 (1) (c) of the AJA, Mr. Shaaban valiantly submitted that it was not primarily because the said decision was based on inherent powers of the court.

In the alternative, Mr. Shaaban argued that the circumstances of this matter disclose an illegality on the face of record which should be revised and

corrected by the Court as it did in the case of **Chama cha Waalimu Tanzania v. Attorney General,** Civil Application No. 151 of 2008 (unreported). In that case, despite the Court having found the application for revision being incompetent on account of being instituted as an alternative to the right of appeal, it went ahead to revise and nullify the impugned proceedings of the High Court, Labour Division. The Court was wary that failure to do so would have been tantamount to perpetuating illegalities.

On the second ground, Mr. Shaaban contended that authentication and notarization of documents by consular officers abroad was not mandatory. He added that, even if Mr. Beltrametti-Walker's affidavit were held defective, the notice of motion would still be maintainable as it is supported by one further affidavit made by Mr. Omar Said. As regards the verification in the said affidavit, he countered that the deponent averred all the facts based on his knowledge of the facts. Even if the offending averments were expunged, he added, most of the contents of the affidavit would remain unblemished. Furthermore, the notice of motion could still remain anchored on the other affidavit deposed to by Mr. Omar Said. The learned counsel, therefore, urged us to dismiss the preliminary objection.

In a brief rejoinder, Mr. Mnkonje submitted that it was an incorrect proposition that a decision not on the merits is not appealable. He maintained that the impugned decision in this matter was appealable with leave in terms of section 5 (1) (c) of the AJA. He then distinguished the case of **Tanzania Electric Supply Company Limited** (supra) from the instant case in that there was no right of appeal in the former case which is not the case here. It was his further submission that the instant application reveals no exceptional circumstances to warrant the Court's intervention as it happened in **Chama cha Waalimu Tanzania** (supra).

We have carefully examined the record and the authorities cited in the light of the competing arguments of the learned counsel for the parties. We are of the firm view that resolution of the first point of preliminary objection is sufficient to determine this matter. Two issues arise here for our determination: while the first question is whether the impugned decision of the High Court is appealable to this Court, the second issue, which is inextricably linked to the first issue, is whether the application for revision is maintainable.

To begin with, we agree that any right of appeal is a creature of statute and that there is no such thing as an inherent or natural right of appeal – see

Tanzania Electric Supply Company Limited (supra) cited by Mr. Shaaban. As regards the instant matter, it is our considered opinion that as the winding up petition was primarily lodged under the provisions of section 218 (e) of the Decree, the applicant had recourse to appeal in terms of section 268 (1) of the said Decree which stipulated thus:

> *"**An appeal from any order or decision made or given in the winding up of a company by the court shall lie** in the manner and subject to the same conditions as an appeal from **any order or decision of the court in cases within its ordinary jurisdiction.**"* [Emphasis added]

The above provisions, in our view, unambiguously create a right of appeal to this Court against any order or decision of the High Court made in the winding up of a company. As the said right of appeal exists "subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction," we would agree with Mr. Mnkonje that such right is exercisable subject to seeking and obtaining leave in terms of section 5 (1) (c) of the AJA. For clarity, we reproduce the said provisions as hereunder:

> *"5. - (1) In civil proceedings, except where any other written law for the time being in force*

provides otherwise, an appeal shall to the Court of Appeal-

(a) [Omitted]

(b) [Omitted]

(c) with leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

We would add that, we are not surprised that all the five grounds upon which the notice of motion was predicated save for the first ground of complaint are clearly contentions based on points of law which should have fittingly been pursued in an appeal instead of revision proceedings.

On the question whether the present revision proceedings are maintainable, we should hasten to remark that there ought to be no lingering doubts that barring exceptional circumstances a party to the proceedings in the High Court cannot invoke the revisional jurisdiction of this Court as an alternative to the Court's appellate jurisdiction unless it is shown that the appellate process has been blocked by judicial process. Indeed, relying on its earlier decisions in **Moses Mwakibete** (supra) and **Transport Equipment Ltd. v. Devram P. Valambhia** [1995] TLR 161, the Court in **Halais Pro-**

Chemie (supra) propounded the following legal propositions on its revisional powers under section 4 (3) of the AJA:

> *"(i) The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;*
>
> *(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;*
>
> *(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;*
>
> *(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process."*

While the instant matter clearly does not fall under any of the propositions (i), (iii) and (iv) above, Mr. Shaaban submitted, albeit fleetingly, that exceptional circumstances exist to warrant invocation of the Court's

revisional powers, which is what is undoubtedly contemplated by proposition (ii) above. He did not elaborate the "exceptional circumstances" he was referring to but he urged us to borrow a leaf from our decision in **Chama cha Waalimu Tanzania** (supra) where we refrained to strike out a wrongly instituted application for revision so as to remain ceased with the record for correcting, *suo motu*, an apparent illegality. Indeed, in that case the Court observed that:

> *"Because the proceedings before the Labour Court were a nullity that is why we felt constrained not to strike out this application. We did so in order to remain seized with the Labour Court's record and so be enabled to intervene* ***suo motu*** *to remedy the situation."*

See also **Emmanuel Charles @ Leonard v. Republic**, Criminal Appeal No. 369 of 2015; **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu,** Criminal Application No. 6 of 2012; and **Tanzania Heart Institute v. The Board of Trustees NSSF,** Civil Application No. 109 of 2008 (all unreported) where the Court invoked its revisional jurisdiction *suo motu* in more or less similar circumstances to correct glaring irregularities or illegalities.

On our part, with respect, we decline Mr. Shaaban's invitation as we find no exceptional circumstances in the present matter to justify the invocation of our revisional powers in a matter that the applicant had a right of appeal. The notice of motion simply alleges existence of "material irregularities in the conduct of the proceedings" before the High Court. To be sure, no irregularities are manifest on the record. In contrast, **Chama cha Waalimu Tanzania** (supra) involved a matter of public importance calling for the Court's intervention to remedy rather than perpetuate an illegality flowing from the proceedings in the Labour Court that were plainly a nullity. Similarly, in **Emmanuel Charles @ Leonard** (supra) the Court refrained from striking out an incompetent appeal and, instead, invoked its revisional jurisdiction *suo motu* to nullify the proceedings in a murder trial before the High Court of Tanzania at Tabora where all prosecution and defence witnesses were examined without oath or affirmation in contravention of the mandatory requirement under section 198 of the Criminal Procedure Act, Cap. 20 RE 2002. It means, in that case the appellant had been convicted of murder and sentenced to death in a manifestly defective trial. The irregularity involved was so egregious that it could not be left to stand.

For the reasons we have endeavoured to set out above, we uphold Mr. Mnkonje's preliminary objection on the first point as we find the present application misconceived. In consequence, we strike out the application with costs.

DATED at **ZANZIBAR** this 11th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling of the Court delivered this 12th December,2019 in the presence of Mr. Omar Said, Counsel for the applicants and Mr. Suleiman S. Abdulla holding brief for Mr. Salim H.B Mnkonje, Counsel for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL