

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 151 OF 2016

1. **ISIDORE LEKA SHIRIMA**
2. **CATHERINE ROBERT BARONG** }APPLICANTS

VERSUS

1. **THE PUBLIC SERVICE SOCIAL SECURITY FUND**
(as a successor of PSPF, PPF, LAPF and GEPF)
2. **THE CAPITAL MARKET AND**
SECURITIES AUTHORITY (CMSA)
3. **HON ATTORNEY GENERAL**
4. **KINONI ADAM WAMUNZA As Interim Manager**
National Investments Company Limited }RESPONDENTS

[Application for revision of the proceedings, Ruling and order of the High Court of Tanzania (Commercial Division), at Dar es Salaam]

(Mansoor, J.)

dated the 18th day of March, 2016

in

Misc. Commercial Application No. 288 of 2014

RULING OF THE COURT

11th August, & 18th October, 2021

MKUYE, J.A.:

This is an application for revision of the proceedings, ruling and order of the High Court (Commercial Division) in Misc. Commercial Application No. 288 of 2014 dated 18th March, 2016 (Mansoor, J.) in which the National Investment Company Limited (NICOL)'s (the applicants company)

application for extension of time to file an application for setting aside an *ex parte* order in Misc. Civil Application No. 4 of 2012; and in the alternative, an application for setting aside an *ex parte* order, were dismissed on the ground of lack of *locus standi*. The notice of motion is predicated under section 4 (3) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019; now R.E.2019] and Rule 65 (1) of the Tanzania Court of Appeal Rules, G.N. No. 368 of 2009 (the Rules) and section 85 (1) of the Public Service Social Security Fund Act, 2018. It is supported by separate affidavits of the 1st and 2nd applicants.

Upon being served with the application, the 4th respondent lodged a notice of preliminary objection containing six points to which at the hearing, Mr. Mwakagamba learned advocate who represented him abandoned all points of objection except the 1st point to the effect:

- 1. That the application of revision is incompetent for contravening the notice of appeal lodged in the High Court on 1st April, 2016.*

When the application was called on for hearing, Mr. Dominic Daniel, learned advocate appeared representing both the applicants; whereas the 1st, 2nd and 3rd respondents were represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Ms. Stella Machoke learned

Principal State Attorney together with Ms. Mr. Careen Masonda and Charles Mtae, both learned State Attorneys. The 4th respondent, as already hinted, had the services of Mr. Benjamin Mwakagamba, learned advocate.

As is the practice of this Court, where a notice of preliminary objection is raised in an appeal or application, we allowed the parties to address us on the point of preliminary objection before embarking on the hearing of the application on merit, if need be.

Submitting in support of the said point of preliminary objection, Mr. Mwakagamba contended that this application for revision is not properly before this Court because there is a notice of appeal in respect of the same matter which was lodged before this Court. The learned counsel explained that after the decision in Misc. Commercial Application No. 288 of 2014 sought to be impugned was handed down, the applicant's Company, NICOL applied and leave was granted to appeal to this Court. He went on submitting that on 1st April, 2016 the notice of appeal was filed which was followed by filing of Civil Appeal No. 124 of 2016 on 25th August, 2016 and that the said appeal is still pending before this Court. Mr. Mwakagamba submitted further that this application was filed on 17th May, 2016 while the notice of appeal had already been filed since 1st April, 2016. He argued

that it is the position of the law that revision power can only be invoked where there is no right of appeal. He referred us to the cases of **Transport Equipment Ltd v. Devram Valambhia** [1995] TLR 161 and **Felix Lendita v. Michael Longidu**, Civil Appeal No. 312/17 of 2017 (unreported) in support.

Mr. Mwakagamba contended further that both the 1st and 2nd applicants in their paragraph 1 of their respective affidavits to the amended notice of motion have averred that they are shareholders of the NICOL which is the appellant in that appeal. He added that, their averment that they were not parties in the proceedings at the High Court is a misconception on their part. It was his argument that the applicants being shareholders who wish to protect their interest ought to join NICOL in the appeal. To support his argument, he referred us to the case of **Attorney General v. Tanzania Ports Authority and Another**, Civil Application No. 4/17 of 2016 (unreported).

On the basis of these reasons, he urged the Court to find that the application is incompetent and proceed to strike it out with costs.

For his part, Mr. Nyoni subscribed to what was submitted by Mr. Mwakagamba and prayed that the application be struck out with costs.

On his part, Mr. Daniel in the first place conceded to the well settled principle of law that where a party has a right of appeal, he cannot invoke revisional jurisdiction of the Court. However, he argued that a party can only appeal if he was a party to the original proceedings sought to be impugned. To support his argument, he referred us to the case of **Mbeya – Rukwa Auto Parts Transport Limited v. Jestina George Mwakyoma** [2003] TLR 263. He, thus, contended that the cases of **Transport Equipment Ltd** (supra) and **Felix Lendita** (supra) are distinguishable to this case as in this application the applicants had no right to appeal.

He went on arguing that the case of **Tanzania Ports Authority** (supra) is also distinguishable and that the applicants could not apply to be joined in an appeal because under section 6 (a) of the Attorney General (Discharge of Duties) Act, 2005 (Act No. 4 of 2005) it is only the Attorney General who has a right to apply to be joined as a party in a case he was not a party.

In the end, Mr. Daniel prayed that as there is an appeal and revision against the same decision, the Court should order either the appeal or revision application to be heard together, though we could not gather

under which authority the counsel for the applicant really implored upon us to do. Alternatively, he prayed to the Court to direct that the application for revision be stayed pending determination of the appeal. He relied on the case of **Francis Kwaang Msei v. Hon. Wilboard Peter Slaa**, Civil Application No. 2 of 1999 (unreported).

In rejoinder, Mr. Mwakagamba stressed that an appeal cannot be joined with an application for revision and we think correctly so because an appeal and revision are two distinct causes with different outcomes. While in an appeal the party challenges the substantive part in the decision, in revision the challenge is geared towards the correctness, legality or propriety of any finding, order or any decision or as to the regularity of the proceedings of the lower court.

It was Mr. Mwakagamba's further argument that, since the applicants are shareholders of NICOL, their interests have been taken care of by NICOL who has filed an appeal. Ultimately, he implored upon the Court to strike out the application with costs.

Having examined the rival submissions from either side, we think, we must state at once that it is common ground that the counsel for both sides are agreeing on the settled principle that where a party has a right of

appeal, he cannot invoke revisional powers of the Court. This is also clearly stated in the case of **Transport Equipment Ltd** (supra) where the Court held that:

"The appellate jurisdiction and revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases mutually exclusive; if there is a right of appeal then that right has to be pursued and except for sufficient reason amounting to exceptional circumstances there cannot be resort to the revisional jurisdiction of the Court of Appeal."

This position was also taken in the case of **Felix Lendita** (supra) when the Court adopted the holding in **Augustiono Lyatonga Mrema v. Republic and Another**, [1996] TLR 267 where it was stated that:

"To invoke the Court of Appeal powers of revision there should be no right of appeal on the matter the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."

Also, in the case of **Siemens Limited and Another v. Mtibwa Sugar Estates Limited**, Civil Application No 106 of 2016 (unreported) while citing the case of **Moses J. Mwakibete v. The Editor-Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** (1995) TLR 134 the Court stated that:

"The revisional powers conferred by section 4(3) of the Appellate Jurisdiction Act, 1979, are not meant to be used as an alternative to the appellate jurisdiction of the Court of Appeal; accordingly, unless acting on its own motion, the Court of Appeal cannot be moved to use its revisional powers under section 4(3) of the Act in cases where the applicant has the right of appeal with or without leave and has not exercised that right."[Emphasis added]

In the current application, the parties are equally in agreement that the application for revision was filed while there was a notice of appeal filed in Court against the same decision. Our perusal of the record of revision has revealed that indeed, the decision sought to be revised was handed down on 18th March, 2016. Then NICOL filed a notice of appeal on 1st April, 2016 which was well within time. This application was lodged by the applicants on 17th May, 2016 after the notice of appeal had already been filed. Also, we take judicial notice that NICOL filed an appeal christened Civil Appeal No. 124 of 2016 which is yet to be determined by this Court as we had a glance on it.

The applicants are arguing that they opted to bring an application for revision instead of an appeal since they were not parties in the matter sought to be impugned. On the other hand, the respondents are of the

view that the applicants being shareholders of NICOL as they have averred in their respective affidavits, their interests were being taken care of by NICOL and hence they are barred from bringing this application.

As we have observed earlier, there are two matters intending to impugn the decision in Civil Application No. 288 of 2014 by Mansoor J. **One**, is Civil Appeal No. 124 of 2016 which has been fixed for hearing in the next convenient session to be fixed by the Registrar upon being adjourned in May 2021 at the instance of the appellant's advocate requesting so by way of a written notice. **Two**, is this application filed by the applicants to challenge the same decision by way of revision. The issue is whether this application can co-exist with an appeal challenging the similar decision.

It is notable that the parties in the appeal and the application for revision are different in the sense that while the respondents were parties in the original matter the applicants were not. In the appeal, the parties are NICOL as an appellant against the respondents herein while the applicants are not parties. We agree with the applicants' assertion that they could not be joined in that appeal as they were not parties in the original matter sought to be challenged as was suggested by Mr.

Mwakagamba. This is so because according to the case **Tanzania Ports Authority and Another**, (supra) it is only the Attorney General who has a right or could invoke the provisions of section 6 (a) of Act No. 4 of 2005 to apply to the Court to be joined as an interested party in the intended appeal in a case he was not a party in order to safeguard the Government interests as per the powers of the Attorney General under section 6 (a) of the said Act which states:

"6. In the discharge of the functions under sub-article (3) of Article 59 of the Constitution, the Attorney General shall have and exercise the following powers:

- (a) to appear at any stage of any proceedings, appeal, execution or any incidental proceedings before any court or tribunal in which by law the Attorney General's right of audience is excluded;*
- (b)N/A....."*

Nevertheless, we note that the applicants, as was submitted by Mr. Mwakagamba have averred particularly in para 1 of their respective affidavits that they are shareholders with huge shares in the company known as NICOL which is the appellant in Civil Appeal No. 124 of 2016 still pending in this Court. The applicants being shareholders holding huge

number of shares in NICOL, we think that from the time it was incorporated it acquired a legal personality whereby it could sue and be sued. This means that the assets and liabilities are born in the company and not shareholders who are liable to the extent of their shares they hold. Thus, the applicants' assets and liabilities are protected by their company, NICOL.

That notwithstanding, much as we agree that the parties are not the same, it is our considered view that the application at hand cannot co-exist with the appeal as the Court is being approached on two fronts in respect of the same matter which amounts to an abuse of the court process. On this stance, we are guided by the case of **Attorney General v. Hammers Incorporation Co. Ltd and Another**, Civil Application No. 270 of 2015 (unreported) in which, when the Court was confronted with analogous scenario, it observed that to allow a party to prosecute an application for revision where one of the parties has initiated the appeal process is to cause confusion in the administration of justice and this applied even where the applicant was not a party to the impugned proceedings before the lower court. In particular, the Court stated as follows:

"We wish to add that the position of against invoking the two jurisdictions simultaneously does

not change even where, like in this case, the applicant is a stranger or an interested party who did not participate in the proceedings before the High Court. Besides, we think that in the circumstances like the one obtaining in the present application, to allow an applicant who was not a party in the previous proceedings to apply for revision where one of the parties has initiated an appellate process, is to bring confusion in the administration of justice. This is so because some of the matters raised in the grounds of revision could be properly raised in an application for stay of execution or as grounds in the intended appeal by a party who has initiated the appeal process.”

We are of the considered view that even in this case, the confusion that was envisaged in the above cited case could be imminent. Since the appeal process was actively being pursued, it would be improper for the court allow the parties to invoke the revisional jurisdiction which would amount to riding two horses at the same time. Looking at the grounds raised in the application for revision, it is no doubt that they could be sufficiently dealt with in the appeal as they hinge on the substantive decision not on procedural matters. So, to allow the applicants even if were not parties in the original matter to prosecute the application for revision

while one of its parties has already initiated the appeal process is likely to bring confusion in the administration of justice. In this regard, even the prayer to the Court to direct that the application for revision be stayed pending determination of the appeal cannot stand in the circumstances.

With the foregoing, we find that this application is incompetent before the Court because of the existence of the appeal against the same decision which is yet to be determined. In the event, it is hereby struck out with costs.

DATED at DAR ES SALAAM this 13th day of October, 2021.

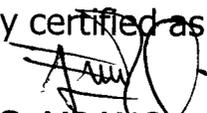
R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 18th day of October, 2021 in the presence of Mr. Benjamin Mwakagamba learned counsel for the 4th respondent who is also holding brief for Mr. Dominick Daniel, learned counsel for the applicants. Ms. Leonia Maneno learned State Attorney appeared for the 1st, 2nd and 3rd Respondents, is hereby certified as a true copy of original.




E. G. MRANGO
DEPUTY REGISTRAR
COURT OF APPEAL