IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., AND LUBUVA, J.A.)

CIVIL APPLICATION NO. 42 OF 2000
In the Matter of an Intended Appeal

BETWEEN

1. N.B.C. HOLDING CORPORATION	]	
2. SUDAN AUCTION MART t/a MUSTAPHA NYUMBAMKALI	]	..... APPLICANTS
AND		
1. AGRICULTURAL & INDUSTRIAL LUBRICANTS SUPPLIES LTD	]	
2. SHIVA OILS LIMITED	]	.... RESPONDENTS
3. THE REGISTRAR OF COMPANIES	]	

(Application for Revision from the Ruling of the High Court of Tanzania at Dar-es-Salaam)

(Chipeta, J.)

dated the 18th day of November, 1999
in
Misc. Civil Cause No. 198 of 1999

R U L I N G

KISANGA, J.A.:

This is an application to revise the order of the High Court grating stay of execution of its own decree pending the hearing and determination of a petition for winding up orders filed in that court. The notice of motion filed by the first applicant is duly supported by the affidavit of its corporation secretary, one Mr. Makarius Mbunda. Before us the first applicant is represented by Maira, Sinare,

Shiyo and Mwandambo, learned advocates. The second applicant who was unrepresented appeared in person while both the first and second respondents had the services of Malegesi, Kamugisha, Magafu and Swai, learned advocates. The third respondent was represented by Ms. Kiwia.

Mr. Magafu on behalf of his team took preliminary objection to the application. He had filed four grounds or points of objection but at the hearing he abandoned one and argued only the following three grounds, viz.:

> "1. That the Applicants' application is hopelessly time barred.
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> 2. That the Applicants' application is incompetent as it does not fall within the provisions of Section 4 (2) & 4 (3) of the Appellate Jurisdiction Act, 1979, No. 15 of 1979 as amended by section 2 of the Appellate Jurisdiction Act (Amendment) Act, 1993, No. 17 of 1993.
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> 3. That there is no affidavit to support the application by the 2nd Applicant contrary to the mandatory requirements laid down under the provisions of rule 46 (1) of the Court of appeal Rules, 1979."

On the first ground Mr. Magafu showed that this application was filed in this Court on 13.6.2000, that is, some seven months after the decision of the

High Court sought to be revised was delivered on 18.11.99. Counsel submitted that the application was hopelessly out of time and that it ought to have been brought within 60 days of the High Court decision being complained of. For this submission counsel relied on the decision of this Court in the case of Halais Pro-Chemie v. Wella A.G. [1996) TLR 269. Since no extension of time was granted or sought before filing the application, the application is time barred and should be struck out. Ms Kiwia did not wish to be heard on any of the grounds of the preliminary objection.

In response to Mr. Magafu's submission on the first ground Mr. Maira, learned Counsel for the first applicant, conceded that the application was time barred but contended that the Law of Limitation Act, 1971 does not apply to this Court. He relied for this proposition on two decisions of this Court in Abood S. Abood v. Mariam M. Salehe and Another Civil Application No. 30 of 1993 (Unreported), and VIP Engineering and Marketing Ltd. v. Saidi S.Bakhresa Ltd. Civil Application No. 52 of 1998 (Unreported). Mr. Maira seemed to take the view that Halais case relied on by Mr. Magafu was decided per incuriam.

It is true that the two cases cited by Mr. Maira lay down that the Law of Limitation Act 1971 does not apply to this Court. But the two cases do not say that matters coming to this Court are not subject to limitation periods, or that such matters can be delayed indefinitely. Indeed the Court of Appeal Rules

(hereinafter to be referred to as the Rules) prescribe various rules of limitation regulating the applications and appeals which are brought to the Court. And where the Rules do not provide time limit the Court steps in to fill the gap. Thus, for instance, in Abood's case cited above the Court was faced with a situation where the Rules did not stipulate the period within which an interested person may apply to the Court under rule 40 of the Rules for the correction of errors in its judgement. The Court, recognising that there has to be finality of judicial proceedings, ruled that an application to the Court for the purpose of correcting errors must be made before the execution of the decree in question is completed; an interested person cannot be allowed an indefinite delay in making such application.

Mr. Maira appeared to be in some doubt whether the Court is regulated by any rules of limitation other than those contained in the Court of Appeal Rules, but a glance at rule 8 of the Rules dispels any such doubt. That rule says:

> "8. The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these Rules to any such

> time shall be construed as a reference to that time as so extended."

The reading of that rule makes it plain that the Court may prescribe time limit to regulate matters coming before it, and this is precisely what it did in Abood's case already dealt with above, and also in Halais case. In the latter case the Court was dealing with an application for revision of a judgement of the High Court. In a preliminary objection raised against the application the Court considered, inter alia, whether that application was time barred. It said:

> "As already mentioned, this application for revision was made about 10 months after delivery of the judgment sought to be revised. In our considered opinion, this application is hopelessly time barred. Under the provisions of section 3 read together with the First Schedule to the Law of Limitation Act 1971 (Act 10 of 1971), specifically para 21 of the First Schedule, the period within which an application like this one ought to have been instituted is 60 days. By any standard, a 10 months' delay is too late."

It is apparent that the Court could not resort to the Rules for a rule limiting the time for making an application for revision because no such rule is provided for under the Rules. Nor could it resort to the Appellate Jurisdiction Act as amended by Act No. 17 of 1993 which confers the revisional jurisdiction because no such

provision is made under that Act either. Therefore, the Court resorted to formulating its own rule on the matter, namely that an application for revision ought to be made in 60 days. We are inclined to think that the Court formulated that rule upon drawing inspirations from the principles of the Law of Limitation Act, not that the Court was applying the rule of limitation as prescribed by the Act. Even if Mr. Maira is right that Halais case was wrongly decided, the decision remains the law of the country unless and until a competent authority says otherwise which it has not.

Thus, following the decision in Halais case the law as it currently stands is that an application for revision ought to be made within 60 days of the decision sought to be revised. Since the present application was brought seven months after delivery of the decision being complained of, and since no extension of time was granted or sought before bringing the application, the application was clearly time-barred, and Mr. Magafu's preliminary objection is sustained on that ground.

On the second ground of objection, Mr. Magafu submitted that the application which purports to be based on section 4 (3) of the Appellate Jurisdiction Act as amended by Act No. 17 of 1993 is incompetent because it does not meet the conditions for invoking the revisional power of the Court under that provision as was stipulated in Halais case, supra. We are in full agreement with that submission. This is a case where the applicant had and still has the

right of appeal. The High Court decision being complained of was appealable but the applicant has not advanced any reason whatsoever for seeking to invoke the Court's revisional jurisdiction as an alternative to the appellate process.

It is apparent from the record that before this application was filed, the applicant did approach the High Court for redress by way of review but without success. The applicant had also approached the Chief Justice in an attempt to have this Court initiate revision proceedings suo motu. It may well be that while the applicant was taking these steps, the time for filing the appeal ran out. That, however, is no answer to the point raised in this ground of objection. The appeal process was and continues to be open to the applicant. Of course, the applicant would have to apply for leave to appeal out of time and it is for the court, in the exercise of its discretion, to decide whether or not the circumstances attending the applicant's case would warrant the extension of time. The applicant has not done that, and this amounts to another sufficient ground for sustaining the preliminary objection.

The last ground of objection concerns the second applicant alone who did not file any affidavit in support of the notice of motion. The notice of motion was filed on behalf of both applicants, but there was only one affidavit in support thereof sworn by one Mr. Makarius Mbunda on behalf of the first applicant. There was no affidavit by or on behalf of the second applicant. Mr. Magafu

submitted that this contravened rule 46 (1) of the Rules which requires a notice of motion to be supported by affidavit. That requirement, counsel went on, was mandatory but since it was not complied with, the application is unmaintainable and should be struck out. The second applicant said nothing of any substance in answer to this except to blame his advocate for those failings or short-comings.

Mr. Magafu is right that it is a mandatory requirement under rule 46 (1) of the Rules that a notice of motion be supported by affidavit. The respondent's plea that his advocate was to blame for the failure to comply with the requirement is perhaps a matter between him and his said advocate. It does not, however, affect the legal position which is that by reason of such failure his application was rendered incompetent.

In the result and for the reasons we have given, we sustain the preliminary objection and strike out the application with costs.

DATED at DAR-ES-SALAAM this 9th day of April 2001.

JUSTICE OF APPEAL

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