IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 247 OF 2016

1. **INDEPENDENT POWER TANZANIA LIMITED**
2. **PAN AFRICA POWER SOLUTIONS (T) LIMITED** ....**APPLICANTS**

VERSUS

1. **MECHMAR CORPORATION (MALAYSIA) BERHAD (IN LIQUIDATION)**
2. **VIP ENGINEERING AND MARKETING LIMITED** ....**RESPONDENTS**
3. **THE ADMINISTRATOR GENERAL**

(Application for Review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Massati, Mussa, Mwarija, JJ.A.)

dated the 21st day of June, 2016
in
Civil Application No. 190 of 2013

RULING OF THE COURT

9th February, & 29th October, 2018

MWARIJA, J.A.:

The applicants, Independent Power Tanzania Limited (IPTL) and Pan Africa Power Solutions (T) Limited (the 1st and 2nd applicants respectively) were some of the respondents (the 2nd and 4th respondents respectively) in Civil Application No. 190 of 2013 determined by this

Court on 15/6/2016. The 1st respondent, Mechmar Corporation Malaysia (In Liquidation) was the applicant while the 2nd respondent, VIP Engineering & Marketing Limited and the 3rd respondent, the Administrator General, were the 1st and 3rd respondents respectively.

In that application, the 1st respondent filed an application moving the Court, under *inter alia,* Section 4(3) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], to revise the decision of the High Court (Utamwa, J.) dated 5/9/2013. The decision arose from Consolidated Miscellaneous Civil Cause No. 254 of 2013. The 1st and 2nd respondents which were until the material time the shareholders in the 1st applicant's company were involved in a dispute. Following the dispute, the 2nd respondent instituted an application in the High Court seeking a winding up of the 1st applicant company. Meanwhile, another application was filed by a firm of advocates, Law Associates Advocates which according to the record, claimed to have been appointed provisional liquidators of the 1st applicant. They had filed Miscellaneous Civil Cause No. 254 of 2013. The two applications were consolidated hence the application which gave rise to the order, the subject matter of the application for revision filed in this Court.

While the Consolidated Miscellaneous Civil Cause No. 254 of 2013 was still pending in the High Court, the 1st respondent, a company which was incorporated in Malaysia, went under liquidation in that country. As a result, Messrs Heng Ji Keng and Michael Joseph Monteiro were appointed joint liquidators of the 1st respondent (hereinafter the Joint Liquidators"). On 24/4/2013 when the matter was called on for hearing, Mr. Seni Songwe Malimi, learned counsel, informed the High Court that the Joint Liquidators had instructed him to represent the 1st respondent which was hitherto being represented by Mr. Melchisedeck Sangalali Lutema. The appearance of Mr. Malimi was opposed by Mr. Lutema contending that he was the one who had the instructions to represent the 1st respondent.

As a result of the 1st respondent's representation dispute, the learned High Court judge ordered Mr. Malimi to file a formal application so as to enable the High Court resolve the dispute. The learned counsel complied with the order by filing a formal application on 3/5/2013 whereupon the learned judge ordered the same to be argued by way of written submissions. Although however, written submissions were duly filed as ordered, the record shows that the application was not decided.

As for the winding up petition, the same did not proceed to hearing. On 27/8/2013, the same was withdrawn at the instance of the 2nd respondent following a share purchase agreement between it and the 2nd applicant. Mr. Malimi conceded to the withdrawal but objected to the consequential orders (the orders) prayed for by the 2nd respondent. The orders were however, granted by the High Court. According to the drawn order, which has been attached to the application, the granted orders are as follows:

> "1. *This Court marks the petition for winding up the IPTL as duly withdrawn with no order as to costs.*
>
> 2. *The appointment of the Provisional Liquidator is hereby terminated.*
>
> 3. *The Provisional Liquidator shall hand over all the affairs of IPTL including the IPTL Power Plant (the Plant) to PAP, which has committed itself to pay off all legitimate creditors of IPTL and to expand the plant capacity to about 500Mw and sell power to TANESCO at a tariff of between US cents 6*

and 8/Unit in the shortest possible time after taking over in public interests.

4. *Parties are free to commence new independent claims in any Court with competent jurisdiction against any party should they fail to reach amicable settlement out of Court on any issue which arose in IPTL.*

5. *The Court has taken role of the agreement between VIP and PAP."*

The 1st respondent was dissatisfied with the grant of the Orders and therefore instituted in this Court, Civil Application No. 190 of 2013 moving the Court to revise the ruling of the High Court granting the Orders. The application was resisted by the 2nd applicant and the 2nd respondent. They countered the application by filing notices of preliminary objections. Whereas the 2nd respondent filed a preliminary objection consisting of five grounds, the 2nd applicant lodged two sets of preliminary objections consisting of two grounds each. At the hearing of the application however, whereas the counsel for the 2nd respondent abandoned four grounds of his preliminary objection and remained with

only one ground, the learned counsel for the 2nd applicant abandoned one of his grounds and argued the rest.

Having heard the preliminary objections, except for the 1st ground of the 2nd set of the 2nd respondent's preliminary objection, we overruled all the other grounds. The upheld ground is to the effect that:

> *"The application for revision is incompetent and bad in law for being preferred as an alternative to appeal."*

We found that since the decision sought to be revised arose from a consent order and thus appealable under S.5 (2)(a)(i) of the AJA, the 1st respondent had a right of appeal.

Having decided that preliminary point of law in the manner stated above, we would have proceeded to strike out the application for being incompetent. We did not however, do so. We went on to consider the issue whether or not, notwithstanding that the order is appealable, there existed good and sufficient cause for the 1st respondent's option to prefer revision instead of appeal. We decided that issue in the affirmative as follows:

"In the matter under our consideration, given the fact that the decree sought to be impugned resulted from consent of the parties, we accept Mr. Lutema's formulation that the order is appealable under the provisions of Section 5(2)(a)(i) of the AJA. Nonetheless, even upon accepting that the order is appealable, a question looms large: Appealable at whose option? The question is triggered by the unresolved dispute as to who, in between Mr. Lutema and the joint liquidators, was the authorized legal representative of Mechmar. Thus, in the light of the obtaining confusion as to who was an authorized representative of Mechmar, we are fully satisfied that the applicant has yielded good cause for not taking the appeal option."

It is against this finding that the applicants have brought this application for review. The application is based on the following grounds:

(a). *The points raised and adjudicated upon by the Court in the aforesaid decision in the bid to condone revision in lieu of appeal were adjudicated upon by the Court in deprivation of the rival parties of an opportunity to be heard in that the same were decided upon without affording the rival parties the benefit of making submission on the aforesaid points.*

(b). *The points raised and adjudicated upon by the Court in vouching revision instead of appeal were based on tainted with want of jurisdiction since they are not founded in the complaints as well as the notice of motion and the affidavital pleadings constituting the revision proceedings and, also;*

(c). *The points raised and decided upon by the Court in order to validate revision instead of appeal were based on manifest error on the face of the record since the same were not decided upon by the trial court and were matters which were underpinned on points and arguments raised outside the purview*

of the pleadings for the first time in the course of writing the decision."

The learned counsel for the applicants complied with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) by filing their written submission in support of the application. In a similar vein, the learned counsel for the 1st respondent filed his reply submissions in compliance with Rule 106(8) of the Rules.

At the hearing of the application, the applicants were represented by Mr. Melchisedeck Lutema assisted by Ms. Dora Mallaba, learned advocates. On their part, the 1st respondent was represented by Mr. Charles Morrison assisted by Mr. Gaspar Nyika, learned advocates while the 3rd respondent had the services of Ms. Edna Francis, learned advocate. The 2nd respondent did not enter appearance despite having been duly served through its advocates, Didace & Co. Advocates.

From the contents of the grounds of review and the parties written submissions, the applicants are in essence complaining against the Court's finding that, although the 1st respondent had the right of appeal, it had good and sufficient cause for opting to come to this Court

by way of revision. It was argued in the written submission and orally in Court, that the point leading to that finding; that is the issue of unresolved dispute over the 1st respondent's representation, was raised by the Court *suo motu* and considered without affording the parties the opportunity of being heard.

It was argued further that, the issue did not arise from the parties' pleadings or affidavits and therefore, the Court did not have jurisdiction to entertain it. The learned counsel for the applicants contended therefore that, in the circumstances, there was a failure of justice because the principle of *audi alteram partem* was not observed. In support of his argument, Mr. Lutema cited the cases of **Sylvester S. Nyanda v. The Inspector General of Police & Attorney General**, Civil Appeal No. 64 of 2014 and **OTTU on Behalf of P.L. Assenga & 109 Others v. AMI (Tanzania) Ltd.**, Civil Application No. 44 of 2012 (both unreported).

In the cited cases, the Court reviewed its decisions after having been satisfied that the same were based on the points of law raised by it *suo motu* and decided without hearing the parties. It was argued

further that the decision in this case is, by implication, laying down a legal proposition that a dispute of representation entitles a party who has a right of appeal, to opt to invoke the revisional jurisdiction of the Court instead of preferring an appeal.

In response, the 1st respondent opposed the applicants' contention that they were not afforded the opportunity of being heard on the point which was relied upon by the Court to arrive at the impugned decision. Mr. Nyika argued that, the decision was neither founded on a new matter nor were the parties denied the opportunity of being heard.

In the 1st respondent's written submission, the learned counsel relied on the principles governing the Court's exercise of its revisional jurisdiction as provided for under Rule 66 of the Rules. He argued that the grounds of review are untenable on account of undisputed fact that there existed a dispute as regards the 1st respondent's representation. He contended that the point was not new as the same was raised by Mr. Nyika in his affidavit and argued by Mr. Morrison during the hearing of the preliminary objection. Relying on the cases of **SGS Societe Generale de Serveillance SA and another. v. VIP Engineering**

have shown also that, although the High Court had intended to solve the dispute by ordering Mr. Malimi to file a formal application, that application was unfortunately not determined. Existence of the dispute was also the subject of reference by the parties in the application for revision. Furthermore, as averred by Mr. Nyika his affidavit and according to his submission at the hearing of the application for revision, existence of the dispute was relied upon as the factor which made the 1st respondent to opt for revision instead of coming to the Court by way of an appeal.

On the second limb of the issue however; that the decision was arrived at without affording the parties the opportunity of being heard, we agree that we did not hear the learned counsel for the parties on that pertinent issue. They did not address us on the issue whether or not the 1st respondent's representation dispute constituted a good cause or exceptional circumstance under which a person who has a right of appeal may apply for revision instead of appealing.

It was stated by the 1st respondent's counsel that the issue was addressed but at their own detriment, the applicants failed to make a

reply thereto. In our considered view however, that is not a correct position. The arguments made by the learned counsel for the 1st respondent were in essence, a reply to the preliminary point of objection; that the application for revision was incompetent because it was brought as an alternative to an appeal. In his submission, the learned counsel did not argue that the application for revision was preferred because the 1st respondent could not exercise its right of appeal due to a good cause. The arguments were confined to factors upon which the 1st respondent intended to rely to show that it did not have a right of appeal.

In the circumstances, we agree that after having upheld the preliminary point of objection, we ought to have afforded the parties the opportunity of being heard before we proceeded to decide that, notwithstanding our finding that the 1st respondent had a right of appeal, on account of unresolved dispute of its representation, it was justified to come to the Court by way of revision.

The proper move as the Court did in the case of **Truck Freight (T) Ltd v. CRDB Bank Ltd;** Civil Application No. 157 of 2007 was to re-

open the hearing and require the learned counsel for the parties to address us on the issue. In that case, the Court cited the case of **SGS Sociate Generale de Surveillance S.A. v. VIP Engineering & Marketing Ltd;** Civil Application No. 84 of 2000 and stated as follows:

> *"After the Court closed to deliberate on the submission it came across S.5 (2) (d) of the Appellate Jurisdiction Act, 1979 (as amended by Act No. 17 of 1993) that there is no appeal from interlocutory order or decision of the Commercial Division. This Court re-opened the hearing to give the parties an opportunity to address it on that paragraph. After submissions the matter was decided, not on merit, but under s. 5 (2) (d). We overlooked to do that in the appeal that was before us."*

In the case at hand, we did not as well, re-open the hearing so as to hear the parties on the issue whether or not the unresolved dispute of representation, constitutes a good cause to a person who has a right of appeal, to come to the Court by way of revision. For this reason, we find that this application has merit.

As a result, we invoke Rule 66(6) of the Rules and hereby modify our decision by vacating the finding that the 1st respondent had a good cause for preferring revision instead of exercising its right of appeal.

We consequently order re-opening of the hearing so as to enable the learned counsel for the parties to address the Court on the issue.

Each party shall bear its own costs.

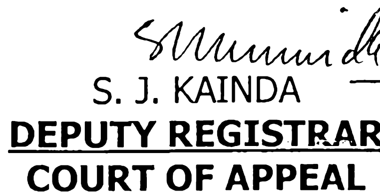
DATED at **DAR ES SALAAM** this 23rd day October, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL