IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 166/16 OF 2020

ATTORNEY GENERAL .... APPLICANT

VERSUS

MKONGO BUILDING AND CIVIL WORKS
CONTRACTORS LTD .... 1ST RESPONDENT
NAMTUMBO DISTRICT COUNCIL .... 2ND RESPONDENT

(Application for Revision from the Final Award and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mruma, J.)

Dated the 12th day of March, 2018
in
Miscellaneous Commercial Case No. 409 of 2017

....

RULING OF THE COURT

5th May & 1st September, 2022

WAMBALI, J.A.:

On 20th August, 2013, Namtumbo District Council, the second respondent entered into a written agreement (the contract) with Mkongo Building and Civil Works Contractors Ltd, the first respondent, as a contractor, to execute construction works for the completion, construction and provision of school building facilities at Luna Secondary

School in Namtumbo District Council at the agreed price of TZS. 212,734,480.00. It was agreed by the parties that four months were sufficient to complete the work. The form of contract between the parties was governed by the General Conditions of Contract (GCC) published by the Public Procurement Regulatory Authority (PPRA).

The contract was however not fully executed as the dispute arose and ultimately it was terminated on the alleged fundamental breach by the first respondent. The dispute was referred to the Adjudicator who made the decision in favour of the second respondent. Aggrieved, the first respondent referred the dispute for arbitration upon which Engineer Ronald Artalia Lyatuu was appointed by the National Construction Council as the Sole Arbitrator to preside over the arbitral proceedings. Though the said Arbitrator conducted the arbitration proceedings and prepared the Final Award which had not been signed by the parties, unfortunately, he died on 15th August, 2016 before he could hand over the verdict to the National Construction Council. As a result, on 1st December, 2016 the National Construction Council appointed Engineer Sudhir J. Chavda as the Sole Arbitrator in place of the late Engineer Ronald Artalia Lyatuu. Ultimately, the successor Arbitrator determined the dispute and delivered the Final Award on 21st March, 2017 in favour

of the first respondent. It is in the record of the application that the first respondent lodged Miscellaneous Commercial Case No. 409 of 2017, whereby the Final Award was registered at the High Court, Commercial Division at Dar es Salaam, and consequently the decree was issued on 12th March, 2018.

It is averred in the affidavit in support of the application that, The Attorney General, being the guardian of the public interest, was neither a party to Miscellaneous Commercial Case No. 409 of 2017 nor involved in any previous proceedings involving the first and second respondents. According to the record of the application, she became aware of the dispute between the parties and High Court's proceedings in respect of the registration of the Final Award on 15th February, 2019. The applicant avers further that the information in respect of the Final Award was submitted to her office by the second respondent through a letter with Reference No. AGC. ARB. 2015/7 dated 14th February, 2019.

Having gone through the arbitral proceedings and the Final Award, and after noting several irregularities, which for the purpose of this ruling, we do not intend to reproduce them herein, the applicant sought extension of time and upon being granted, she lodged the application for revision before the Court.

Upon being served with the application by the applicant, the first respondent lodged the affidavit in reply to contest it followed by a notice of preliminary objection to the effect that the applicant has no locus standi to prosecute the application because of her failure to comply with the requirement of the law. The second respondent has not lodged an affidavit in reply. According to its counsel's statement before us during the hearing, she fully supports the application.

This ruling is therefore in respect of the preliminary objection raised by the first respondent against the competence of the applicant's application.

At the hearing of the preliminary objection, Mr. Solomon Lwenge, learned Senior State Attorney assisted by Ms. Lightness Msuya, learned State Attorney represented the applicant. On the other side, Mr. George Masoud and Mr. Venance Hanje, learned advocate and State Attorney, respectively, represented the first and second respondents.

Submitting in support of the preliminary objection, Mr. Masoud argued that the thrust of the first respondent's objection is based on the argument that the applicant has failed to comply with the requirement of section 17(2)(a) of the Office of the Attorney General (Discharge of

Duties) Act, [Cap. 268 R.E. 2019] ("Cap. 268"), which provides for the procedure concerning the audience by the Attorney General in matters of public interest before the courts of law. He submitted further that, since the Attorney General claims to have formed an opinion that there exists pubic interest in the dispute between the first and second respondents as provided under the provisions of section 17(1)(a) and (b) of Cap. 268, she was bound to comply with the provisions of section 17(2)(a) and (b) of the same Act. He elaborated that the said provision requires the Attorney General to notify the respective court and satisfy it of the public interest or public property involved and to comply with any direction of the court on the nature of pleadings or measures to be taken for the purpose of giving effect to the effective discharge of the duties of her office to enable her to have audience in the proceedings of any suit, appeal or petition.

The learned advocate contended that as averred by the first respondent in paragraph 5 of the affidavit in reply, since the applicant was aware of the proceedings in respect of Miscellaneous Commercial Case No. 409 of 2017 while it was pending before the High Court, she was expected to apply to be joined in the proceedings to defend the alleged public interest. He also argued that, the applicant is not entitled

to lodge the instant application for revision predicated under section 4(3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) purporting to safeguard the public interest in the dispute between the first and second respondents in which she was not a party. He emphasized that in accordance with the law, as the applicant was aware of the proceedings at the High Court, she was bound to comply with the provisions of section 17(2)(a) (b) of Cap. 268. Besides, he submitted, if the applicant did not want to join the pending proceedings between the parties at the High Court, she would have advised the second respondent, whose interest she would have wished to safeguard to take measures to lodge the appeal against the decree of the High Court instead of trying to access the Court through the back door on her behalf.

In the circumstances, Mr. Masoud implored the Court to strike out the application with costs for the failure by the applicant to comply with the requirement of the law as stipulated under Cap. 268.

On his part, Mr. Hanje supported the applicant's application and strongly opposed the first respondent's preliminary objection. He submitted that the applicant could not have requested to intervene or join in the proceedings in respect of Miscellaneous Commercial Case No.

409 of 2017 because by the time she was notified of the existence of the dispute, the proceedings in respect of arbitration and registration of the Final Award, were no longer before the Arbitrator and the High Court.

As intimated above, though the second respondent did not lodge an affidavit in reply, Mr. Hanje fully supported the applicant's averment in paragraph 16 of the affidavit in support of the application deposed by Mr. Paul Shaidi, Senior State Attorney in the office of the Attorney General that she was not aware of parties' dispute and the ensuing proceedings before the same were concluded in the High Court. The learned State Attorney firmly emphasized that the applicant became aware of the existence of the proceedings in the High Court on 15th February, 2019 through a letter from the second respondent with Reference No. AGC. ARB. 2015/7 dated 14th February, 2019 while the impugned Arbitral Award had been duly filed and registered before that court on 12th March, 2018. He therefore contended that as the applicant was not a party to the proceedings at the High Court, she is perfectly entitled to lodge the current application to safeguard the public interest and that of the second respondent.

In this regard, Mr. Hanje maintained that though the applicant defends the interests of the second respondent, she has independent interest and is legally allowed to intervene in any proceedings as provided for under section 6A (1) of the Government Proceedings Act, [Cap. 5 R.E. 2019]. In the circumstances, Mr. Hanje urged us to overrule the preliminary objection with costs for being misconceived.

Responding to the first respondent's counsel submission, Mr. Lwenge fully supported the arguments made by Mr. Hanje and emphasized that section 17(2)(a) and (b) of Cap. 268 is inapplicable in the circumstances of the application at hand. This is so because, he argued, the applicant intends to challenge the arbitral proceedings and those of the High Court in which she was not a party as she has the right and is obliged to safeguard the interest of the government.

Mr. Lwenge submitted further that the applicant is entitled to approach the Court through an application for revision in terms of section 4(3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] because she became aware of the proceedings in respect of Miscellaneous Commercial Cause No. 409 of 2017 on 15th February, 2019 and thus he has no right of appeal. To support his submission, he made reference to the decision of the Court in **Mgeni Seif v.**

Mohamed Yahaya Khalfan, Civil Application No. 104 of 2008 in which the decision in **Grand Regency Hotel Limited v. Pazi Ally and 5 Others**, Civil Application No. 588/1 of 2017 (both unreported) was referred. He also emphasized that the applicant is an independent party with her own interest to serve. He thus contended that the applicant properly lodged the present application through the office of the Solicitor General who is duly authorized on her behalf to so act as provided under Order 4(1)(c) of the Office of the Solicitor General (Establishment) Order, 2018, G.N. No. 50 of 2018. To this end, Mr. Lwenge argued that the preliminary objection is misconceived and pressed us to overrule it with costs.

In a brief rejoinder, Mr. Masoud reiterated his earlier submission by emphasizing that since according to the record of the application the applicant was aware of the impugned High Court's proceedings between the first and second respondents, she was enjoined to approach that court and seek to be joined therein as required by the law. He therefore submitted that the decision of the Court in **Mgeni Seif v. Mohamed Yahaya Khalfan** (supra) is not applicable in the circumstances of this application.

Having heard the contending submissions of the parties' counsel, the issue for our determination is whether the applicant was required to comply with the provisions of section 17(2)(a) and (b) of Cap. 268 instead of lodging the present application for revision.

For avoidance of doubt, it is apt to start by reproducing the provisions of section 17(2)(a) and (b) of Cap. 268 which provides as follows:

> *"17(2). In the exercise of the powers vested in the Attorney General with regard to the provisions of subsection (1), Solicitor General shall-*
>
> *(a) notify the court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and*
>
> *(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the Court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for the purposes of giving effect to*

the effective discharge of the duties of the office of the Attorney General."

On the other hand, section 6A (1) of Cap. 5 provides that:

> *"The Attorney General shall, through the Solicitor General, have the right to intervene in any suit or matter instituted by or against the ministries, local government authorities, independent departments and other government institutions."*

It is settled that any person not being a party to the proceedings of the Subordinate Court with Extended Jurisdiction or the High Court has no right of appeal and thus his only recourse to the Court is an application for revision of impugned proceedings, in terms of section 4(3) of the AJA to vindicate his interest (see **Moses Mwakibete v. The Editor, Uhuru and Two Others** [1995] TLR 134), among several decisions.

In the matter at hand, it is not doubted that the applicant was not a party to Miscellaneous Commercial Case No. 409 of 2017, whose decree is the subject of the application for revision. However, the first respondent strongly contends that though the applicant was not a party to those proceedings, she was aware of its existence before they were finalized at the High Court. In this regard, Mr. Masoud maintains that

the applicant was bound to intervene in the proceedings to vindicate the interest of the government or public and that of the second respondent by invoking the provisions of section 17(2)(a) and (b) of Cap. 268.

On the adversary side, it is firmly contended by the applicant and the second respondent, both in the affidavit in support of the application and during oral submissions by the counsel that, the applicant was not aware of the said proceedings before the High Court, and therefore she properly approached the Court through revision to safeguard the public interest.

We have thoroughly perused the record of the application amid the parties contending arguments concerning the compliance with the requirement of the law by the Attorney General. We are settled that the averment by the applicant in paragraph 16 of the affidavit in support of the application that she was not aware of the pending proceedings before the High Court is not supported by the record of the application. We shall demonstrate.

Firstly, the proceedings of the High Court attached to the affidavit in support of the application indicates that the file in respect of the impugned proceedings was initially placed for mention before the

Deputy Registrar of the High Court on 29th December, 2017 who adjourned the matter to 6th February, 2018 with an order for the parties to be notified as they were absent. On 6th February, 2018 the case was mentioned before the presiding judge in the presence of Mr. Emmanuel Msengezi, learned advocate who held the brief of Mr. Lugomo, learned advocate for the petitioner (first respondent) and in the absence of the second respondent and her lawyer. It was thus ordered that personal ordinary service be issued to the second respondent. Moreover, on 12th March, 2018 when Miscellaneous Commercial Case No. 409 of 2017 was called on for hearing before the High Court judge, gauging from the submission of the second respondent counsel, there is indication that the applicant was aware of the said proceedings before that date. This is so because, the Legal Officer of the second respondent, Ms. Salome Gesabile who appeared on that day, sought an adjournment of the hearing of the proceedings on the argument that they had requested for an opinion from the office of the Attorney General on the Final Award which was the subject of the Petition. That request was however refused by the High Court, and ultimately the Final Award was registered as a court decree on the same date.

Secondly, though, on the particular date, Ms. Salome Gesabile did not mention the specific date when the second respondent communicated with the Office of the applicant, according to the same record, there is no doubt that it was before the High Court decided to register the Final Award as a formal decree. The existence of previous communication is also supported by the second respondent's letter dated 14th February, 2019 which the applicant, in paragraph 16 of the affidavit, avers that she received it on 15th February, 2019. For avoidance of doubt, we deem it appropriate to reproduce the relevant part of the letter thus:

> *"RE: NOTIFICATION OF THE MISC COMMERCIAL CAUSE NO. 409 OF 2017 AND REQUEST FOR THE INVOLVEMENT OF THE ATTORNEY GENERAL ...*
>
> *Together with your letter dated 8th June, 2018 with Ref. No. ADC. ARB. 2015/16 on the above-mentioned subject also take into consideration on your letter with Ref. No. FC/COMM. MAR/2018/01/4 which requested our office to avail you with all facts and documents relevant to the matter in hand so as to see how your good office may intervene..."*

It is further noted that in the same letter the District Executive Director of the second respondent, who authored the letter, indicated that he attached the letters from the office of the applicant mentioned above. Unfortunately, they are not part of the record of the application.

Be that as it may, considering the submission of the legal officer of the second respondent before the High Court on 12th February, 2018 and the reproduced part of the letter, we entertain no doubt that there was prior communication between the second respondent and the applicant's office on the existence of Miscellaneous Commercial Case No. 409 of 2017 and the request for intervention as clearly indicated in the record of the application. In the circumstances, we hold that the applicant was aware of the existence of those proceedings between the first and second respondents before they were finalized at the High Court. We have no any reason to impeach the record of that court on what transpired on 12th March, 2018 as there is no any other suggestion to the contrary. In this regard, it is plain that the applicant could have intervened by applying to be joined in the proceeding as requested by the second respondent. We thus find that the averment by the applicant in paragraph 16 of the affidavit in support of the application is not substantiated at all by the record of the application.

In the result, we respectfully disagree with the counsel for the applicant and second respondent, who firmly supported the applicant's averment in the affidavit in support of the application that, she was not aware of the pending proceedings before the High Court sought to be impugned in the Court before 15th February, 2019. We thus entirely agree with the first respondent's counsel that the applicant was aware of the impugned proceedings.

From the foregoing, we hold that as the applicant was made aware of the pending proceedings before the High Court in respect of Miscellaneous Commercial Case No. 409 of 2017, she was bound to comply with the provisions of section 17(2)(a)(b) of Cap. 268 by seeking to join them to safeguard the public interest, and those of the second respondent instead of lodging the present application. In the alternative, the applicant would also had advised the second respondent after the decree was issued by the High Court to appeal against it as it is clear that the right of appeal had not been blocked on her part by the judicial process.

In the event, we sustain the first respondent's preliminary objection and hold that the application is misconceived, and therefore incompetent. Consequently, we strike out the application.

Nevertheless, considering the circumstances of the application, we make no order as to costs.

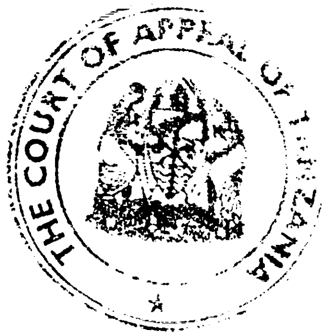
DATED at **DAR ES SALAAM** this 1st day of September, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 1st day of September, 2022 in the presence of Mr. Urso Luoga, State Attorney for Applicant and 2nd Respondent, and Mr. Litete Haji, learned counsel for the 1st Respondent, is hereby certified as a true copy of the original.



C.M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL