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IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CIVIL APPEAL NO. 61 OF 2007

TANZANIA MOTOR SERVICES LTD. .... APPELLANT
VERSUS
TANTRACK AGENCIES LTD. .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kimaro, J.)

dated the 17th day of February, 2004
in
Civil Appeal No. 58 of 2004

RULING OF THE COURT

6 May & 19 June 2008

LUBUVA, J.A.:

This matter originates from Application No. 257 of 1995 in the Regional Housing Tribunal Dar es Salaam. The appellant, Tanzania Motor Services Co., had applied for extension of time to file notice of appeal. The Regional Housing Tribunal upheld a preliminary objection raised by the respondent that the Tribunal had no jurisdiction to extend the time in which to appeal.

The appellant was dissatisfied and so, unsuccessfully appealed in the Housing Appeals Tribunal. The appeal was summarily rejected under section 24 (1) of the Rent Restriction Act, 1984. Undaunted, the appellant further appealed to the High Court, (Kimaro, J. as she then was) where the appeal was also dismissed. In dismissing the appeal, the learned judge took the view that the Housing Appeals Tribunal correctly rejected the appeal summarily. Still unsatisfied, the appellant has further appealed to this Court.

Before us in this appeal the appellant was represented by Mr. Fungamtama, learned counsel, and Mr. Ntonge, learned counsel, advocated for the respondent. Mr. Ntonge had also appeared in the High Court for the respondent.

When the appeal was called on for hearing, Mr. Ntonge raised a preliminary objection notice of which had been given in terms of the provisions of rule 100 of the Court Rules, 1979. In the preliminary objection, three grounds have been raised out of which, we think, ground one is crucial for the determination of the preliminary objection. This ground we shall shortly deal with after disposing of grounds two and three.

We have no difficulty in disposing of ground two. The complaint in this ground is that the appeal has been instituted by Tanzania Motors Services Ltd., the appellant, which has ceased to have legal capacity. According to Mr. Ntonge once, the appellant company was declared a specified authority, it ceased to exist legally in which case it had no legal capacity to pursue the appeal.

In response, Mr. Fungamtama briefly made the following submission. That although the appellant company had been declared a specified public corporation, still it continued to exist in law. In that capacity, it is capable of suing or being sued. Therefore this ground has no merit, Mr. Fungamtama stressed.

It is common ground that once a public corporation is declared a specified public corporation, in the first place, the Presidential Parastatal Sector Reform Commission, (hereinafter the PSRC) is vested with the power to act as the official receiver of the specified public corporation. Second, the PSRC is also vested with the power and the rights of a receiver in terms of the provisions of section 9 (1) of the Bankruptcy Ordinance, CAP 25 R.E. 2002. Section 9 (1) of the Bankruptcy Act, provides:-

> 9(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy **shall have any remedy against the property or person of the debtor in** respect of the debt, **or shall commence any action or other legal** proceedings, unless with the leave of the court and on such terms as the court may impose.

In our view, it is loudly clear from this provision that apart from vesting the PSRC with powers of the official receiver to the appellant company as a specified public corporation, the legal existence of the appellant company remains intact. In **Kampuni ya Uchukuzi Tabora Ltd. Versus Praxeder Paulo And T.M.K. Mrema,** Civil Application No. 43 of 1999 (unreported), the Court had occasion to deal with a similar situation. In that case the applicant company, **Kampuni ya Uchukuzi Tabora Ltd.,** had been declared a specified public corporation. In the course of hearing application for stay of execution, it was submitted that the applicant company upon being placed under receivership it ceased to exist as a legal entity. Rejecting this submission, a single Judge of this Court (Kisanga, J.A.) *inter alia* stated:-

> ..... I think that the applicant corporation continues to exist in law, continues to be the owner of its property and that, with the leave of the court, a creditor of a debt provable in bankruptcy can proceed against its property.

For similar reasons, in this case, we are increasingly of the view that Mr. Ntonge's submission that the legal existence of the appellant company had ceased to exist upon being declared a specified authority, is untenable. We agree with Mr. Fungamtama that this ground has no merit. It is accordingly dismissed.

Ground **three** of the preliminary objection need not detain us either. It reads:-

> 3. That the appeal is pre-mature in that the appellant's official receiver PSRC has filed, the High Court, Civil Revision/Review No. 102 of 2002 concerning substantially the same issues as in this appeal. In the premise, Civil Rev. 102 of 2002 ought to be allowed to proceed to its conclusion before this appeal is heard.

In the first place, it is to be observed that we have not had the advantage of ascertaining whether in fact, there is Application No. 102 of 2002 by the PSRC seeking review in the High Court as alleged in this ground. However, even if it is accepted that there is such an application by the PSRC pending in the High Court, we do not think that this in itself would render the appeal incompetent. Admittedly, it may well be undesirable for the same issue to be raised at the same time by simultaneously pursuing Civil Review No. 102 of 2002 in the High Court and the appeal in this Court. Irregular though it is, as a matter of law, we think, such does not render the appeal incompetent as alleged. We find no merit in this ground.

We shall next deal with ground one which, as observed earlier, we think raises a matter of substance. In this ground, it is claimed that the appeal is incompetent for failure to join the PSRC as a necessary party in the appeal in this Court. In his submission on this point, Mr. Ntonge observed that the appellant company is a specified public corporation by virtue of Government Notice No. 400 which was published on 28th July, 1995.

Following this publication, counsel further submitted, the PSRC was vested with the powers of a receiver in which case it was necessary to join the PSRC as a necessary party in this appeal. As the PSRC was not joined as a party in this appeal, the appeal is rendered incompetent, it should be struck out, Mr. Ntonge urged. In support of this submission, the Court was referred to its decision in **National Insurance Corporation Versus J. Mbuna,** Civil Appeal No. 67 of 1999 (unreported).

Mr. Fungamtama, learned counsel for the appellant, responded. It was however, apparent to us that he vacillated in his submission when at one stage he seemed to concede to the preliminary objection. On the other hand, he took the view that non-joinder of the PSRC should not be entertained at this stage. According to him, this is so because he had raised the same issue in Civil Application No. 91 of 2007 in this Court. Apparently, upon realization that it was necessary to join the PSRC as a party in the appeal, he sought leave of the Court to join the PSRC as a party in the appeal. However, the application was dismissed by a single Judge of this Court in Civil Application No. 91 of 2007. In this light, Mr. Fungamtama was firmly of the view that the respondent should not be allowed at this stage on appeal to raise the objection that the PSRC was not joined as a necessary party.

On the other hand, Mr. Fungamtama prayed that in the event the Court is inclined to uphold the preliminary objection, the appeal should not be struck out as urged by Mr. Ntonge. Instead, he sought the Court's indulgence to give the appellant time to rectify the irregularity.

Counsel further submitted that if the Court sustained the preliminary objection, it would not be enough for the Court to strike out the appeal. The reason, he said was that by striking out only the appeal it would leave the rest of the proceedings in the court below intact. Such proceedings should not be left intact because they are similarly affected by the irregularity. For this reason, Mr. Fungamtama invited the Court to invoke its revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 to revise the proceedings in the High Court.

We think the starting point in this ground is the consideration of the issue whether as a matter of law, the PSRC was a necessary party in this appeal, the proceedings in the High Court or the Tribunals. As we have observed earlier, it is trite law that once a public corporation is declared a specified public corporation as was the case with the appellant company in this case, the PSRC is vested with powers of an official receiver of the appellant company. Furthermore, the official receiver is also vested with the power and all the rights of a receiver appointed in terms of section 9 (1) of the Bankruptcy Act extracted above.

From this provision, it is clear that upon declaration of a public corporation as a specified public corporation, no creditor to whom the debtor is indebted shall, among other things commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose. We think Mr. Fungamtama's submission that the respondent should not be entertained in raising the argument at this stage that the PSRC was not joined in the appeal as a necessary party is without merit.

The fact that unsuccessfully effort was made in Civil Application No. 91 of 2007 in this Court to have the PSRC joined as a party in the appeal cannot be taken as justification for non-compliance with the requirement of the law. After all, it is to be observed that the Court in Civil Application No. 91 of 2007 dismissed the application on the ground that there is no need for an order of the court for joining the PSRC as a party in the pending appeal. It is our view that subject to applicable rules, it is for the party concerned to take appropriate measures at the right stage for correcting the record and not by way of a court order. We are therefore satisfied that Mr. Fungamtama's resort to Civil Application No. 91 of 2007 to explain his failure to join the PSRC in the appeal is of no avail.

We have underlined the words in section 9 (1) extracted earlier deliberately in order to underscore the fact that upon specification of a public corporation, no action or any other legal proceedings shall be commenced against the specified corporation without joining the PSRC as receiver with leave of the court. It is common knowledge that at that stage the property of the specified public corporation is