

TANZANIA / JUDGMENT

vidyadhar g chavda vs pravinchandra g chavda 2017 tzca 197 9 february 2017

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: MJASIRI, J.A.. JUMA, J.A.. And LILA, J.A.) CIVIL REVISION NO. 7 OF 2016 VIDYADHAR G. CHAVDA..... APPLICANT VERSUS PRAVINCHANDRA G. CHAVDA..... RESPONDENT (Revision to examine the propriety or any irregularly or otherwise on the proceedings in the High Court as well as the Order of the High Court) (Mujulizi, J.) Dated 20th day of March, 2015 & 19th April, 2016 in (Misc. Civil Application No. 216 of 2012) RULING OF THE COURT 2r<J Dec. 2016 & 9* Feb. 2017 LILA, J.A.: The essence of this revision is a letter by Hon. M.G. Mzuna, Judge In-charge Dar es Salaam Zone to the Honourable Principal Judge Reference No. Civil Case No. 79/2012 dated 31st May, 2016. The letter was copied to the Hon. Chief Justice. For clarity we wish to reproduce the contents of the letter as hereunder: i THE HIGH COURT OF TANZANIA, P.O. BOX9004, DARES SALAAM, TANZANIA. Ref. No. CIV. CASE NO. 79/2012/2 31st May, 2016. Hon. Principal Judge, The High Court Tanzania, P.O. Box9004, DARES SALAAM. RE: MISC. CIVIL APPLICATION NO. 216 OF 2012 VIDYADHAR G. CHAVDA VERSUS PRAVINCHADRA G. CHAVDA RECUSAL BY MUJULIZI, A T THE RULING STAGE Reference is made to the above captioned topic. On 19/4/2016, Hon. MujuHzi, J. recused himself from delivering a ruling after he heard Submissions from the parties. He said that he might have dealt with the matter or discussed it among colleagues when he was an Associate with Mkono & Company Advocates handling litigation (see the order of 20/05/2015). This came about after several adjournments on the dates set for delivering the said ruling (after almost 12 months). Nothing we said on the fate of the matter .1 seek guidance on the matter as it is of a pure legal nature. Yours faithfully, Sgd M.G. Mzuna Judge incharge DAR ES SALAAM -ZONE Copy: Hon. ChiefJustice, P.O. Box9004, Court of Appeal DAR ES SALAAM." 2 Upon receipt of the copy of the letter containing the above request, the Chief Justice directed a revision be opened hence this suo motu revision under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E 2002. This matter has a chequered background. So as to appreciate and properly comprehend the nature of the matter before this Court here is a detailed background of the matter. It all started on 1/7/1994 when the respondent through the services of P.M Majithia, learned Advocate, instituted a suit (Civil case No. 136/1994) against the applicant. The applicant (then defendant) through the services of Mkono and Co. Advocates filed a written statement of defence. Mr. Majithia raised a preliminary objection. He objected Mr. Mkono from representing the applicant on the ground

that he (Mr. Mkono) had earlier on acted as one of the two arbitrators in the arbitration proceedings between the parties. On 13/10/1997, Hon. A.G. Bubeshi, J. (as she then was) sustained the objection holding that it was unethical for Mr. Mkono to appear for one of the parties after he had acted as one the arbitrators during the arbitration proceedings between the parties. The applicant engaged Mr. Novatus Rweyemamu, learned advocate, to represent him. Mr. Majithia once again raised an objection that Mr. Novatus Rweyemamu was working in the firm of Mkono and Co. Advocate at the time arbitral proceedings between the parties were being conducted. The High Court (Hon. A.G. Bubeshi J. as then she was) upheld the objection on 21/23/2001. Mr. Novatus Rweyemamu was accordingly barred from representing the applicant. All this time the written statement of defence that was drawn by Mkono was still in the court record. Realizing that, Mr. Majithia raised another objection that the written statement of defence was incompetent and bad in law for being drawn and filed by advocates who were unqualified to act for the defendant (applicant herein) in the case. The High Court (Hon. I.D. Aboud, J.) on 14/4/2010 found the objection meritorious and she proceeded to strike out the written statement of defence with costs. The order by the High court striking out the written statement of defence meant that there was no written statement of defence filed by the applicant. By then about thirteen years had passed. The applicant engaged Law Associates Advocates who filed an application for extension of time to file written statement of defence. That application was dismissed on 25/5/2012 (Hon. I.D. Aboud J.) Dissatisfied by the High Court decision to dismiss the application for extension of time to file written statement of defence, the applicant wished to appeal to this Court but was late in filing a Notice of Appeal. He thus filed another application (Miscellaneous Civil Application No. 2016 of 2012) for extension of time to give a notice of appeal against the ruling of the High Court dated 14th day of April, 2010 and for serving the same to the respondent, extension of time to apply for the record of proceedings, ruling and order and all other documents for preparing the record of appeal, extension of time to serve the application for record upon the respondent, costs to abide results of the appeal and any other relief(s) which the Honorable Court may deem just to grant. The application was assigned to Msuya J. and the parties first appeared before her on 13/05/2013. She issued a preliminary order requiring the applicant to file a reply to the counter affidavit. She then indicated that she was by then already transferred and she accordingly placed the matter before the Judge Incharge so that the matter could be assigned to another judge. Through the process of re -assignment the application fell into the hands of Mujulizi J. Then the applicant was being represented by Mr. Beatus Malima, learned advocate, while the respondent was being advocated by Mr. Abdallah Gonzi, learned advocate. Upon finalization of all the preliminaries and several adjournments from 9/7/2013 until 4/3/2014 when the application was heard orally. Ruling was scheduled to be delivered on 28/4/2014. On that date ruling was not delivered as scheduled instead the matter suffered several adjournments. It is significant to reproduce various court orders that followed. "Date: 28/4/2014 Coram: Hon. A.K. Mujulizi, J. For the Applicant: Mr. Gozi/Malima For the Respondent: Mr. Abdallah Gonzi C.C: Shomari Mr. Gonzi: I hold brief o f Mr. Malima as well am appearing for the respondent The matter is coming for ruling. Sgd Judge 28/4/2014 ORDER The ruling is not ready the same will be delivered on Tuesday 13? may, 2014 Sgd Judge 28/4/2014 Date: 1/7/2014 Coram: A.K. Mujuiizi, J For the Applicant: Absent For the Respondent: Mr. Munyere CC: Shomary Mr.

Munyere for the respondent The matter is coming for ruling. Sgd Judge 01/07/2014 ORDER The ruling is not ready the same will be delivered on 31/07/2014. Sgd Judge 01/07/2014 Date: 24/7/2014 Coram: Hon. A.K. Mujulizi, J. For the Applicant: Absent For the Respondent: Absent CC: Shomary ORDER As I will be on safari on other official duties on 31/07/2014 delivery o f the Ruling will be made on 22/08/2014. Sgd Judge 24/07/2014 Date: 22/8/2014 Coram: Hon. A.K. Mujuiizi, J. For the Applicant: Applicant For the Respondent: Wabeya CC: Shomary ORDER Ruling is not ready. The same will be delivered on 10/09/2014. Sgd Judge 22/08/2014 Date: 10/9/2014 Coram: Hon. A.K. Mujuiizi, J. For the Applicant: Absent For the respondent: Ms. Consolate CC: Shomary ORDER Owing to innerable (sic) circumstances the ruling is not ready. The same will be delivered on 15/10/2014 at 1:00 p.m. Sgd Judge 10/9/2014 Date: 4/11/2014 Coram: A.K. Mujulizi, J. For the Applicant: Absent For the Respondent: Marando CC: Shomary ORDER Ruling on 05/12/2014 Sgd Judge 4/11/2014 Date: 13/3/2015 Coram: Hon. A.K. Mujulizi, J. For the applicant: Absent For the Respondent: Absent CC: Shomary ORDER Ruling on 20/3/2015 at 2:00 p.m. Sgd: Judge 13/3/2015" After all these adjournments, came what Hon. Nsekela J.A. (as he then was), in Mwita Chacha and Four others vs. The Republic, MZA Criminal Revision No. 1 of 2007 (unreported) dealing with a matter similar to this one, termed "dropped this bombshell" on 20/3/2015 when Mujulizi rescued himself in the presence of only Mr. Mgimba who represented the applicant; "Date: 20/3/2015 Coram: Hon. A.K. Mujulizi, J. For the Applicant: Mr. Mgimba For the Respondent: Absent CC: Shomary "ORDER In the course o f preparing the ruling, it occurred to me that the critical period to the determination o f the matter is 1996-1997. At the time I was an associate with Mkono & Company Advocates handling litigation. There is a great likelihood that I may either have dealt with the matter or otherwise discussed it among colleagues in the usual course o f events. Consequently I recuse myself form the matter let the file be returned to the Honorable Judge Incharge with a view to reassigning it to another judge to determine the matter. Sgd: Judge 20/3/2015" The application, the record shows, was then placed before Hon S.E. Mugasha, Judge Incharge before whom the matter was adjourned three times and on 3/6/2015 the matter was placed before Hon. Muruke, J. who, on the reason that she knew one of the parties, disqualified herself form the conduct of the matter. She remitted the case file to the Honorable Judge Incharge for re- assignment to another Judge. The matter once again found itself in the hands of Hon. Mujulizi, J, who, on 19/4/2014, in the presence of Mr. Mgimba, who appeared for the applicant, reiterated his position thus: "ORDER I have recused myself from the matter since 20/3/2015. The matter together with covet (sic) case No. 163/2013, and Miscellaneous Application No. 329/2015 were inadvertently re-assigned to me. Let this file the main suit and other Miscellaneous Application be returned to the Hon. Judge Incharge for re- assignment to anotherjudge. Order accordingly Sgd Judge 19/4/2016" Seemingly improper for a judge who has heard the parties submissions and at the time the matter and the parties are awaiting for delivery of a ruling to recuse from determining the matter, the Honourable Judge Incharge was prompted to write the above quoted letter seeking for guidance. At the hearing of the application Mr. Beatus Malima, learned advocate, represented the applicant and Mr. Abdallah Gonzi, learned advocate, appeared for the respondent. In his arguments before us Mr. Malima was of the view that it is improper for a judge to recuse from the case he has heard the parties and reserved the delivery of the ruling or judgment. He, on further reflection, contended that if a judge has reasons to

disqualify himself at the stage of delivery of ruling or judgment he can do so. Then the case file could just be sent to the Judge Incharge for assignment to another judge who would hear the parties afresh. On his part Mr. Gonzi, citing various provisions of the Code of Conduct for Judicial Officers, submitted that a judge has a right to recuse himself from the conduct of the case at any time he finds himself having a conflict of interest or believes that he is unable to adjudicate fairly. He further submitted that conflict of interest is an ethical issue which affects a judge's conscience and recusal is intended to maintain respect of both the judge and the Court. He argued that a judge can recuse himself even if neither of the parties asks him to do so. However when he was asked by the Court which way was proper -bringing the matter to the Court for revision or the Judge Incharge taking up the matter and assigning it to another judge, Mr. Gonzi was quick to support Mr. Malima's proposition that it was a matter for the Judge Incharge to assign it to another judge. The Court derives its powers of revision suo motu over the finding, order or any decision made in the High Court proceedings from section 4(3) of the Appellate Jurisdiction Act Cap 141 RE.

2002. The Court, in the case of Chacha Mwita (supra) interpreted the above provision of the law and demonstrated the wider powers the Court has in exercising its revisional powers. In that case the Court stated "Subsection 3 o f section 4 o f the Act applies to Vany proceedings before the High Court" There is no distinction between preliminary or interlocutory and finally determined matters. There is no distinction between Civil and Criminal Proceedings. We are therefore o f a settled view that the Court can exercise revisional powers in the proceedings before the High Court. (See Criminal Appeal No. 61 o f 1999, Augustino Lyatonga Mrema v. The Republic (unreported).)" In respect of the Court's powers to initiate revision suo motu, the Court, at page 9, went on to state "The Court's powers to proceed suo motu and revise any finding order or decision made in proceedings before the High Court derive from section 4(3) o f the Act quoted above. The subsection can be invoked where the record discloses incorrectness, illegality or impropriety in any finding order or decision o f the High Court or irregularity in the proceedings o f the Court." The Court also laid down principles guiding the Court's exercise of revisional powers in the case of Halais Pro-Chemical Industries Limited V. Wella AG (1966) TLR 269, that:-

1. The Court may on its own motion and at any time invoke its revisional jurisdiction in respect of proceedings in the High Court;
2. Except, under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisiona/ jurisdiction o f the Court as an alternative to the appellate jurisdiction o f the Court.
3. A party to proceedings in the High Court may invoke the revisional jurisdiction o f the Court where the appellate process has been blocked by judicial process". Based on the above legal position regarding the powers of this Court in revisions, the question we now ask ourselves is whether there is any incorrectness, illegalities or impropriety in the order by Hon. Mujulizi, J recusing himself from the conduct of Miscellaneous Civil Application No. 216 of 2012 warranting this Court to exercise revisional powers? As demonstrated above this

revision suo motu was prompted by the recusal order by the presiding judge at the time the parties were waiting for delivery of a ruling. In resolving the issue we wish to start with the right of a judge or magistrate to recuse himself from the conduct of a matter assigned to him/her. 17 We fully subscribe ourselves with Mr. Malima's view that a trial judge or magistrate (judicial officer) has a right to recuse himself from the conduct of a case at any stage he finds his personal interests are conflicted or is of a firm view that he will, for any reason but not flimsy ones, be unable to determine the matter fairly. This stance accords with this Court's reiteration in a recently decided case of Issack Mwamasika and three others v CRDB Bank Limited, Civil Revision No. 6 of 2016 (unreported) where it was held: "All in a h w e are o f the view that the principles for a judge or magistrate to recuse himself /herself do not take into account whether the case is at the hearing stage or at the stage o f composing a judgm ent" We fully subscribe ourselves to the above position for a reason that judges and magistrates are expected to carry out their oath of office the basis of which is to administer justice without fear or favour. In the instant matter, the trial Judge expressed his fear that he might not be able to determine the matter fairly because he firmly believed that he might have had dealt with it while he was an associate in Mkono and Company Advocates. This, in our considered view, accorded with this Court's holding in Ikindila Wigae V. The Republic Criminal Appeal No. 60 of 2000 (unreported) where it was insisted that a judge has every right to disqualify himself from hearing the case before him but is enjoined to put on record reasons for doing so because this will show that the decision was not arbitrary or capricious or motivated by personal factors. The trial judge's act also accorded with Rule 1(b) of Part C of the Code of Conduct for Judicial Officers which restricts a Judicial Officer from presiding over a matter he had earlier on acted as a lawyer in the matter in controversy. Since in the instant matter the trial judge gave reasons for his recusal there would be nothing wrong. In the present matter it took the learned trial judge several adjournments covering a period of 18 months not to deliver what should otherwise have been a short ruling. And instead of delivering the long awaited ruling the trial Judge discovered that there were potential conflict of interest and recused himself. Consequent upon the trial judge's late recusal Misc. Civil Application No. 216 of 2012 is still pending in the High Court awaiting delivery of the ruling. It is now over two years and a half since it was heard. Similarly, Civil Case No. 136 of 1994 between the parties is also still pending trial at the High Court. The case has celebrated its 22nd years stay in the High Court. The two cases now constitutes the case backlog. Expedition of court business is now a matter governed by law and Code of Conduct for Judicial Officers of Tanzania (the Code). The Code, under its rule 2(5), provides: "A judicial officer should dispose o f promptly the business o f the Court. In order to achieve this the Judicial Officer is required to devote adequate time to his duties, to be punctual in attending Court and expeditions in bringing to a conclusion and determining matters under submission..." In a similar vein, the present section 28 of the Civil Procedure Code, Act No.49 of 1966, and Cap.33 R.E 2002 after being amended by the Judicial Service Act, Act No. 2 of 2005 which repealed and replaced the previous section 28, now provides: "28. After the case has been heard, the court shall deliver a decision in open court as soon as possible, but in any case it shall not exceed ninety days o f which due notice shall be given to the parties or

their advocates, if any." In view of the above, it is our considered view that taking too long a period and particularly beyond ninety days without delivering the ruling and discovering conflict of interest followed by recusal is an impropriety. However, taking into consideration that the matter had already passed from Mujulizi J. to Muruke J. before it was later inadvertently re-assigned to Hon Mujulizi, we hereby direct that the record be remitted back to the High Court for the Judge Incharge to re-assign the same to another judge for its expeditious determination. The successor judge is reminded to comply with the procedural requirements applicable in case of change of a trial judge during the course of on-going proceedings [See M/s Georges Centre Limited V. the Honourable Attorney General and Another, Civil Appeal No. 29 of 2016 (unreported)]. However, before we conclude, we wish to emphatically advise trial magistrates and judges to study well the cases assigned to them and promptly take the necessary actions including, in case of conflicting interest, recusal at the earliest possible opportunity. A recusal at the stage of composing a judgment or ruling as is the case herein or a recusal at a very advanced stage of the trial, have very serious effects to both to parties and court's image. Borrowing the Court's observations in Mwita Chacha's case (supra). "This will cause an unnecessary added burden to other judicial officers to whom the cases will subsequently be reassigned; it will cause unwarranted delay in the disposal of the case at hand and will generally add to the financial cost of the trial of the case". For the foregoing reasons we hereby order the record be immediately remitted to the High Court for it to comply with the directions given herein. As the revision was initiated suo motu, we make no order for costs. DATED at DAR ES SALAAM this 21st day of December, 2016 . S. MJASIRI JUSTICE OF APPEAL I.H. JUMA JUSTICE OF APPEAL S.A. LILA JUSTICE OF APPEAL I certify that this is a true copy of the original. 23

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