IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., MUSSA, J.A., And MMILLA, J.A.)

CIVIL APPLICATION NO. 45 OF 2014

1. **DODSAL HYDROCARBONS AND POWER (TANZANIA) PVT LIMITED**
2. **RAJEN ARVIND KILACHAND** .....**APPLICANTS**

VERSUS

1. **MITRAS INTERNATIONAL TRADING LLC**
2. **HASMUKH BHAGWANJI MASRANI** .....**RESPONDENTS**

(Application to strike out the notice of appeal filed against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Makaramba, J.)

dated the 5th day of March, 2014
in
Misc. Commercial Application No. 20 of 2014

RULING OF THE COURT

20th May, 2014 &

MUSSA, J.A.:

The applicants are moving the Court to strike out a Notice of Appeal lodged by the first respondent on the 7th March, 2014. The impugned Notice is with respect to the decision of the High Court, Commercial Division (Makaramba, J.), dated the 5th March, 2014 in Miscellaneous Commercial Application No. 20 of 2014. The application is by Notice of Motion, taken out under the provisions of Rules 89(2) and 60(2) of the

Court of Appeal Rules, 2009 (the Rules) on account that no appeal lies against the referred decision of the High Court.

The application is accompanied by an affidavit, duly sworn by Dr. Masumbuko Roman Makunga Lamwai, the learned lead counsel for the applicants. The Notice of Motion is further bolstered by written submissions filed by counsel for, and on behalf of, the applicants. It is, perhaps, opportune to observe, at this stage, that throughout the proceedings below, as well as before us, the applicants were and are still represented by Dr. Lamwai with the assistance of Mr. Amour Said Khamis. On the adversary side, the respondents had, and continue to have, the services of Mr. Dilip Kesaria, learned Advocate, who resists the application. The learned counsel for the respondents has similarly lodged an affidavit in reply as well as written submissions in opposition. To appreciate the nature and scope of the learned rival contentions, a brief factual background of the matter is necessary.

On the 20th May, 2011 the first applicant, along with two other entities, instituted Commercial Case No. 42 of 2011 which is, presently, pending against the second respondent in the High Court, Commercial Division, at Dar es Salaam. The other two plaintiffs are, namely, Dodsal

Resources and Mining Itilima Busilili (Tanzania) Pvt Limited and; Dodsal Resources and Mining Itingi (Tanzania) Pvt Limited. The latter Dodsal entities are, respectively, the second and third plaintiffs.

In the pending suit, the plaintiffs seek a declaration, among other reliefs, to the effect that the second respondent was no longer a Director of the Dodsal entities and that, consequently, he was no longer entitled to any share in the entities. The second respondent has refuted the claim in a written statement of defence in which he, additionally, enjoins a counter-claim seeking for his reinstatement as a Director as well as a 50% share in the entities' profits; by virtue of an alleged verbal agreement between him and the second applicant herein. The second applicant was, by then, not a party to the suit but, apparently, on account of the particulars of the counter-claim, he subsequently successfully applied to be joined as a co-defendant to the counter-claim. The second applicant was, accordingly, joined as the fourth defendant to the counter-claim.

A good deal later, on the 21st December 2012, the Dodsal entities instituted another Commercial Case No. 157 of 2012 which is, similarly, presently pending against the second respondent in the same court. In that suit, the plaintiffs are seeking an order, among other reliefs,

restraining the second respondent from committing acts of extortion against them. Subsequently, the two Dodsal suits were consolidated into one and a scheduling order was drawn by the trial court on the 6th November, 2013. The way it appears, a date was fixed for hearing the case but, on the 20th January, 2014 the second respondent lodged two applications in a row. In the first cause, which was christened Miscellaneous Commercial Application No. 8 of 2014; the second respondent was seeking a variation of the scheduling order, so as to increase the number of his prospective witness from seven to twelve. In the second cause, titled Miscellaneous Commercial Application No. 9 of 2014; the second respondent sought to move the court towards enlargement of time within which to file witnesses' statements. Upon an oral submission by his counsel, the second respondent, additionally, prayed for an amendment of the pleadings in the consolidated suit, so as to join, as necessary parties, the first respondent and another Dodsal entity to be identified later. Nonetheless, both miscellaneous causes were dismissed upon two separate Rulings which were handed down by Makaramba, J. On the 4th February, 2014. The dismissal reasons are not quite of relevance to the matter under our consideration.

On the morrow of the trial court's Rulings, the first respondent lodged a formal application in the same court to refresh the quest to be joined in the consolidated suit either as a necessary party or, alternatively, as an intervener in the counter-claim. It should be recalled that the previous attempt to be joined was upon counsel's oral application. The application was greeted with a preliminary objection from the applicants mainly upon an argument that the trial court has already made its verdict on the matter. On the 5th March, 2014 Makaramba, J. upheld the preliminary objection on account that the matter was *res judicata* with the attendant consequence that the court was, thereby, rendered *functus officio*. Aggrieved by the decision, the first respondent lodged a Notice of Appeal to this Court on the 7th March, 2014. As hinted upon, the applicants are presently moving the Court to have the Notice of Appeal struck out for the reason that no appeal lies against the High Court decision. More particularly, the application is grounded on the premise that the decision desired to be impugned is interlocutory as it does not have the effect of finally determining the consolidated suit.

At the commencement of the hearing, Dr. Lamwai sought leave of the court to put upon record a supplementary affidavit under the provisions of Rule 4(1) and 2(a) read together with Rule 49 (2) of the Rules. In reality, however, the supplementary affidavit was actually lodged and

endorsed by the registry without leave of the court on the 16th May, 2014. For his part, Mr. Kesaria opposed his friend's oral application on account that it was improper for counsel for the applicants to lodge the supplementary affidavit ahead of the leave of the court. Having heard either counsel, we shared the sentiments raised by the learned counsel for the respondents and, accordingly, we expunged the supplementary affidavit from the record. We, nevertheless, reserved our reasons for doing so which we propose to briefly give. The relevant provision for admittance of supplementary affidavits is Rule 49 (2) which stipulates:-

> *An applicant may, with leave of the court or with the consent of the other party, lodge one or more supplementary affidavits and an application for such leave may be made informally.*

It is, thus, clearly implicit from the Rule that the application for leave or, as the case may be, the consent of the adversary party, has to precede the lodging of a supplementary affidavit and not the vice versa. In the situation at hand, the applicant adopted an opposite approach, comparable to mounting the cart before the horse, as the common adage goes. That being so, we were, accordingly, disinclined to endorse and put upon record the gate-crashed supplementary affidavit.

In support of the application, the learned lead counsel for the applicants fully adopted his written submissions as well as the affidavit which accompanied the Notice of Motion. In a nutshell, the argument taken on behalf of the applicants was to the effect that the desired appeal would contravene the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act (AJA) which stipulates:-

> *"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."*

In this regard Dr. Lamwai vigourously contended that the High Court decision did not finally and conclusively determine the consolidated suit whose trial has not even commenced. To that extent, he submitted, the decision sought to be impugned is an interlocutory one, to which no appeal lies. In support of the argument, learned counsel for the applicants referred us to a number of decisions, notably the case of **The University of Dar es salaam vs Silvester Cyprian and Others**[1998] TLR 175 which held:-

"Interlocutory proceedings are proceedings that do not decide the rights of the parties but seek to keep things in status quo pending the determination of those rights, or to enable the court to give directions as to how the cause is to be conducted or what is to be done in the progress of the cause so as to enable the court ultimately to decide the rights of the parties".

In reply, Mr. Kesaria similarly adopted his written submissions as well as the affidavit which countered the application. In his submissions, counsel for the respondents just as strenuously urged that the decision desired to be impugned is not interlocutory, more so as the same finally determined the right of the first respondent to be heard in the suit. To bolster up his stance, the learned counsel heavily sought persuasive authority in the American case of **Hallock v. Bonner,** 387 F. 3d 147. In that case, the United States Court of Appeals adopted the so-called *"collateral order doctrine"* as a narrow exception to the general rule that interlocutory Orders are not appealable as a matter of right. More particularly in that case it was held that to fit within the collateral order exception, the interlocutory order must:-

(i) Conclusively determine the disputed question;

(ii) *Resolve an important issue completely separate from the merits of the action and;*

(iii) *Be effectively unreviewable on appeal from a final judgment.*

In sum, Mr. Kesaria contended that the High Court decision falls squarely within the foregoing outlined three prongs of the so-called *"collateral order doctrine".* Counsel for the respondents further contended that the position in *Hallock* is reflected in the Tanzanian jurisprudence in Criminal Application No. 4 of 2004 - **Sylvester Hillu @ Dawi v. the DPP;** Civil Appeal No. 99 of 2012 **Vidyadhar Girdhar Chavda v. Dr. (Mrs) Indira P. Chavda** and; Civil Appeal No. 91 of 2003 - **21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association and Two Others** (All unreported).

Addressing the learned rival arguments, it is pertinent to observe that the determination of this application turns on the construction of section 5(2) (d) of AJA with a specific focus on the nature and essence of the decision desired to be impugned. Admittedly the issue is involving and has considerably engaged our minds. To begin with, it is noteworthy that the provision employs the word "shall" and, as such, imperatively prohibits an appeal or an application for revision over a High Court decision that is interlocutory **unless such decision has the effect of finally**

determining the Criminal charge or suit. We have already indicated the extent to which Dr. Lamwai urged that the decision sought to be appealed against is interlocutory and, therefore, not appealable in accordance with the aforecited provision. Mr. Kesaria did not quite dispute that the decision is interlocutory, but he sought to impress that the decision desired to be impugned falls within the so –called *"collateral order doctrine"* which, according to him, is accommodated in our Jurisprudence. Thus, at the threshold, we have to address the argument raised by counsel for the respondents to the effect that the High Court decision falls within the collateral order exception. Unfortunately, we were unable to read the doctrine in the decisions availed to us by the learned counsel for the respondents. For instance, in the case of **Sylvester Hillu @ Dawi** which involved an application for revision, the Court referred to section 5(2) (d) and dismissed the application thus:-

> *"The decision of the High Court at Mtwara did not finally determine the matter as it had to go back to the District Court to proceed with the trial. Therefore, according to the above quoted paragraph, there cannot be a revision of the decision of LUKELELWA, J. by this Court.*

Similarly, in the referred case of **Vidyadhar Girdhar Chavda** which involved an appeal, the Court struck out the matter on account that the

High Court Ruling, which formed the basis of the appeal, did not conclusively bring the case to an end. Finally, as regards the case of the **21st Century Food and Packaging Ltd**, the issue of appeallability was not raised at all and did not feature in the decision. Given the situation, we cannot speculate what the court would have decided had the issue been raised.

To this end, it did not dawn upon us that the so-called "collateral order doctrine" is embraced in our jurisprudence. On the contrary, from the two cases reffered to by Mr. Kesaria the bottom line appears to be that for a matter to transcend over the preliminary or interlocutory stage; it must have the effect of conclusively determining the litigation. It seems to us that in enacting section 5(2)(D) of AJA, the legislature intended that there should be no intrusion by way of an appeal or revision so long as a Criminal charge or suit remains open, unfinished or inconclusive. In this regard, we should reiterate what we stated in the unreported Civil Application No. 27 of 2006 – **Karibu Textile Mills Ltd vs New Mbeya Textile Mills Ltd and Three Others.**

> *"The intention was, strictly speaking, to include all orders arising from Civil and Criminal matters which do not finally and conclusively determine the rights of the parties. That need arose from the notorious delays in Civil matters."*

More recently, the court repeated the stance in the unreported Criminal Appeal No. 86 of 2014 - **Fredrick Mwakalebela V The Republic** where it was stated:-

> *"At any rate, and without prejudice to the foregoing, it is unlikely that an appeal would safely lie against the rejection order in view of the provisions of Act No. 25 of 2002 which bars appeals from interlocutory orders unless they have the effect of finally determining the charge or the suit."*

We do, however abide by the conventional wisdom of the Court as expressed in the referred case of **Sylvester Hillu @ Dawi** thus:-

> *"...there could be occasions when section 5(2) (d) may be difficult to apply. We have in mind for instance, where the objection that is dismissed is that a court has no jurisdiction. Would the matter be left to continue to be heard? And suppose further that the court in effect has no jurisdiction, will the section not operate an abuse of the process of the court?."*

Nonetheless, we are of the settled view that such a situation did not arise in the matter at hand, much as the court below was properly seized with jurisdiction to hear and determine the issue raised before it.

Having adjudged that the decision desired to be impugned did not finally determine the suit, the attendant consequence is that, in terms of the referred section 5(2) (d), the decision is not appealable. But, as was correctly remarked by the trial court, that does not necessarily curtail the rights of the first respondent who is not a party to the suit. We say so because there is still room for him to file a suit against the applicants upon which her rights may be heard and determined. In the end result, we find this application to be meritorious and accordingly, the Notice of Appeal filed by the first respondent is struck out with costs.

DATED at DAR ES SALAAM this 16th day of July, 2014.

J.H. MSOFFE

JUSTICE OF APPEAL

K.M. MUSSA

JUSTICE OF APPEAL

B.M.K MMILLA

JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL