

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LILA, J.A., NDIKA, J.A. And SEHEL, J.A.)

CIVIL APPLICATION NO. 517 OF 2018

**1. TECHLONG PACKAGING MACHINERY CO. LTD }
2. HONGKONG HUA YUN INDUSTRIAL LIMITED } APPLICANTS**
VERSUS

A-ONE PRODUCTS AND BOTTLERS LIMITEDRESPONDENT

**(An application for Revision of the Order of the High Court of Tanzania,
Commercial Division at Dar Es Salaam)**

(Mruma, J.)

Dated 12th April, 2018

in

Commercial Case No. 105 of 2017

RULING OF THE COURT

12th & 30th July, 2019

SEHEL, J.A:

Before us is an application for revision. The applicants prefaced their notice of motion that they are moving the Court, under certificate of urgency, to examine and revise the proceedings of the High Court (Commercial Division) at Dar es Salaam in Commercial Case No. 105 of 2017 in order to satisfy itself as to "*the propriety, consistency, rationality and credibility*" of the proceedings. In particular, the applicants are moving the Court to examine and revise the proceedings subsequent to the

applicants filing a notice of appeal to the Court of Appeal against the ruling and order made by the High Court (Commercial Division) at Dar es Salaam in Miscellaneous Commercial Application No. 311 of 2017. The notice of motion advanced three grounds upon which the application is sought. They read as follows:

1. *"That the proceedings in Commercial Case No. 105 of 2008 are fraught with such serious inconsistencies and irregularities which amount to exceptional circumstances that go to the root of the established process of dispensing justice and these circumstances call for immediate intervention of the Court as a Court of a last resort. For this reason, and on the basis of principle laid down by the Court in **VIP Engineering and Marketing Ltd v. Mechmar Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004 (unreported), this Honourable Court is being humbly urged to correct the general but serious irregularities complained of without waiting for a final decision at the end of the trial of Commercial Case No. 105 of 2008;*
2. *That litigants, and even more so commercial litigants, are rational beings and expect Courts to*

act in a balanced, rational and just manner. The continued trial of the suit in the High Court Commercial Division in the face of the inconsistencies and irregularities will undermine the established position which calls for consistency in the conduct of Court proceedings and decisions arising therefrom;

3. That this is a proper case amenable to this Honourable Court's revisional process to correct patent irregularities and inconsistencies in Commercial Case No. 105 of 2017 brought to this Honourable Court's attention by the serious general complaint embedded in this Application."

It is worth noting that whereas the notice of motion had advanced grounds of inconsistency, irregularities, and exceptional circumstances in Commercial Case No. 105 of 2017, the affidavit in support of the application sworn by Gaspar Nyika, learned advocate for the applicants, more particularly Paragraph 18 of it advanced a new ground of lack of jurisdiction. That Paragraph reads:-

"18. That there is a total confusion, illegalities, and irregularities in the proceedings in Commercial Case No. 105 of 2017 because:

- (a) *The same court is making conflicting decisions and orders in the same case;*
- (b) *That the court is proceeding in a matter in which jurisdiction has ceased following the filing of a notice of appeal and subsequently the appeal;***
- (c) *That there will be further confusion if the High Court proceedings from 19th February, 2018 are left intact and the Court of Appeal allows or dismiss Civil Appeal No. 105 of 2017;*
- (d) *That the appellants are likely to suffer injustices by the court proceedings and deciding on a matter which ought to have waited the determination of the appeal. As a result and in view of the ongoing proceedings at the High Court the applicants have been forced to take steps and suffer from decisions made on those steps by the same court, the steps of which ought not to have been taken because the jurisdiction of the court ceased on 19th February, 2018."*

The factual background giving rise to the present application is discerned from the affidavit supporting the application sworn by Mr. Gaspar Nyika, learned advocate and the record from the High Court that; the respondent instituted a suit, Commercial Case No. 105 of 2017, against the applicants, jointly and severally, claiming for payment of United States Dollars Four Million Eight Hundred Forty Five Thousand Three Hundred Sixty Two and Fifty One Cents being damages arising from the breach of contract. The defendants (applicants herein) after being duly served with the summons to appear and making appearance, filed an application seeking to stay the suit, Miscellaneous Commercial Cause No. 311 of 2017, on grounds that there is an agreement to refer all disputes arising from the contract, including the subject of the suit, to arbitration. Parties in that application filed their respective pleadings whereby, after the applicants had filed their petition for stay of the suit and service made to the respondent, the respondent opposed the application through its answer to the petition, a reply to the answer for petition by the applicants followed. The application was heard and a ruling was delivered on 14th February, 2018. In its ruling, the High Court refused to stay the suit on the ground that there was no agreement to refer the dispute the subject of

Commercial Case No. 105 of 2017 to arbitration. The applicants were aggrieved by that decision and filed a notice of intention to appeal to the Court of Appeal on 19th February, 2018.

On 9th March, 2018 Mr. Nyika appeared in Commercial Case No. 105 of 2017 representing the applicants and prayed for a stay of the proceedings *sine die* pending determination of the intended appeal in Miscellaneous Commercial Cause No. 311 of 2017. His prayer was predicated on the fact that the applicants had lodged a notice of appeal against a ruling issued in the said application. Mr. Nyika impressed upon the High Court that by virtue of the provisions of section 5 (1) (b) (v) of the Appellate Jurisdiction Act, Cap 141 (the Act) and in accordance with the holding in the case of **AERO Helicopters Tanzania Limited v. F.N Jansen** [1990] T.L.R 142 that once a notice of appeal is filed, the jurisdiction of the High court ceases.

That prayer faced a strong resistance from Dr. Lamwai who appeared at the High Court as advocate for the respondent. In opposing the application, Dr. Lamwai reasoned that the dismissal order made in the application for stay of proceedings was an interlocutory order which is not amenable to appeal in terms of Section 5 (2) (d) of the Act and that the

High Court, by asserting that there was no agreement to refer the dispute to arbitration, ruled out the applicability of section 5 (1) (b) (v) of the Act. That being the case, he prayed for the respondent to be allowed to prove its case ex parte against the applicants as the applicants failed to file any defence.

In the ruling delivered on 12th April, 2018, the High Court declined to grant the prayer for stay of the suit for the following reasons:

"Finally there is a question whether a notice of appeal is a ground for stay of proceedings. On this point Mr. Nyika cited the decision of the Court of Appeal in the case of AERO Helicopters Tanzania Limited v. F.N. Jensen [1990] TLR 142. In that case the Court of Appeal held that once proceedings of appeal have been commenced the High Court could not properly apply section 95 of the Code for the simple reason that the proceedings no longer in the court as required by section 2 of the Code. It should be noted that in AERO Helicopter's case (supra), that Court of Appeal was dealing with the question whether the High Court can entertain an application for stay of execution where there is an appeal pending in the Court of Appeal. The Court of

Appeal deliberated on the inherent powers of the High Court as provided under section 95 of the Civil Procedure Code. The court did not discuss the import of the provisions of rule 5 (1) of Order XXXIX of the same code which provides that:

"An appeal shall not operate as a stay of proceedings under the decree or order appealed from except so far as the Court may order,....."

In view of the above clear provision of the law, and in absence of any application for stay and therefore an order to that effect I reject Mr. Nyika's prayer for adjournment of this suit sine die. I order the matter to proceed until such time when the records will be called by the Court of Appeal therefore to deprive this court's jurisdiction in view of the provision of section 2 of the Civil Procedure Code. Order accordingly."

Following that refusal, the applicants lodged an application for extension of time to file a written statement of defence which application was dismissed for failure to account for the delay. From that dismissal, the applicants then filed the present application for revision.

When the application came up for hearing, we first took up with Mr. Gaspar Nyika, learned advocate for the applicants to clarify to the Court on the applicants' application. Mr. Nyika elucidated that the applicants are inviting the Court to call and examine the proceedings in Commercial Case No. 105 of 2017 that followed after issuance of the notice of appeal in Miscellaneous Commercial Cause No. 311 of 2017. With that understanding, Dr. Masumbuko Lamwai, learned advocate for the respondent prayed to withdraw the notice of preliminary objection which he had earlier on filed to oppose the application. Mr. Nyika did not have any objection to the prayer. We granted the prayer and consequently, the notice of preliminary objection was duly marked withdrawn.

In his submission in support of the present application, Mr. Nyika adopted the notice of motion, affidavit in support, as well as written submissions which he lodged on 15th January, 2019, to form part of his oral submission. Mr. Nyika submitted that the general complaint by the applicants is centered on how the proceedings in Commercial Case No. 105 of 2017 were handled. In trying to show that the proceedings were improperly handled, he gave chronological events from the time the suit was filed to the order of denying stay of the suit. Relying on the holdings in

Serenity on the Lake Ltd v. Dorcus Martin Nyanda, Civil Revision No. 1 of 2019 and **AERO Helicopter** (supra), Mr. Nyika contended that the High Court had no jurisdiction to entertain the proceedings after lodging a notice of appeal in respect of Miscellaneous Commercial Cause No. 311 of 2017. He thus prayed for nullification of the proceedings that followed after lodging the notice of appeal so as to pave way for appeal process.

Dr. Lamwai began his reply by notifying the Court that they have not filed affidavit in reply and he will focus his submission on issues of law. He, first, attacked the notice of motion that it has no prayer. He pointed out that the applicants are asking from the Court revision but there is no specific prayer apart from one for costs. He said that the applicants are not explicit as to what they are seeking from the Court. He wondered whether they are asking for nullification or stay of proceedings.

On the merits of the application, he submitted that it seems that the applicants are trying to relate the proceedings in Commercial Case No. 105 of 2017 with Miscellaneous Commercial Cause No. 311 of 2017 which Dr. Lamwai strongly believed to be separate and distinct from each other. In trying to show that the High Court's ruling was legally sound and valid, Dr. Lamwai pointed out that there was no formal application for stay of

proceedings as required by Order XXXIX Rule 5 (1) of the Civil Procedure Act, Cap. 33 RE 2002 (the CPC). Thus, to Dr. Lamwai, the High Court was not properly moved to exercise its jurisdiction.

On the notice of appeal, Dr. Lamwai argued that the said notice filed was in respect of Miscellaneous Commercial Cause No. 31 of 20017 thus it had no correlation with Commercial Case No. 105 of 2017 for the jurisdiction of the High Court to be ousted.

Dr. Lamwai also pointed out that the ruling in Miscellaneous Commercial Cause No. 31 of 20017 was delivered on 14th February, 2018 and the notice of appeal was lodged on 19th February, 2018 but on 25th April, 2018 the applicants filed an application for extension of time within which to file a written statement of defence, Miscellaneous Commercial Application No.93 of 2018. In Dr. Lamwai's submission, the applicants are blowing hot and cold at the same time since, he argued, the act of filing an application for extension of time to file defence was a submission to the jurisdiction of the High Court while in this application the applicants are contending that the High Court had ceased jurisdiction. He submitted that the applicants are frustrating the conclusion of Commercial Case No. 105 of

2017 by filing the present frivolous application. He, thus, prayed for the application to be dismissed with costs for lacking merit.

Mr. Nyika rejoined that Order XXXIX rule 5 (1) of the CPC applies to appeal from the lower court to the High Court. He stressed that once a notice of appeal is filed, then the jurisdiction of the High Court ceases. On the question whether the two proceedings are different, he submitted that they are dependent on each other.

What stands for our deliberation and determination in the light of the submissions by the learned counsel of both sides, is the propriety or otherwise of the order of the High Court to proceed with the hearing of Commercial Case No. 105 of 2017 after the appellants had lodged the notice of appeal in respect of Miscellaneous Commercial Cause No. 311 of 2017. There is no doubt that before the High Court, there were proceedings for Commercial Case No. 105 of 2017, the subject of the present revision, and Miscellaneous Commercial Cause No. 311 of 2017, not subject for revision. The main complaint by the applicants is that the High Court had no jurisdiction to proceed with the hearing of Commercial Case No. 105 of 2017 after the applicants had lodged a notice of appeal

against dismissal order in respect of Miscellaneous Commercial Cause No. 311 of 2017.

We have adverted herein that Miscellaneous Commercial Cause No. 311 of 2017 was seeking to stay the suit, that is, Commercial Case No. 105 of 2017, pending submission of the dispute to arbitration. Had the application been allowed, the proceedings in Commercial Case No. 105 of 2017 would have been stayed pending the outcome of arbitral Tribunal findings. In that regard, the proceedings in Miscellaneous Commercial Cause No. 311 of 2017 are interlinked to the extent that if allowed it would have stalled, for a while, the hearing in Commercial Case No. 105 of 2017. What we ask ourselves is whether the proceedings in Miscellaneous Commercial Cause No. 311 of 2017 can be treated as one and the same with Commercial Case No. 105 of 2017?

Before we go further, perhaps it may be appropriate to define the word "*proceeding*" to appreciate the issue under consideration. The word "*proceeding*" is not defined, either in the CPC or in the Interpretation of Laws Act, Cap. 1 RE 2002. We shall thus resort to the ordinary and literal meaning of the word "*proceeding*" defined in various dictionaries.

According to Oxford Advanced Learner's Dictionary, Sixth Edition, the word "*proceeding*" is defined thus:

"The process of using a court of law to settle a dispute or to deal with a complaint; an event or series of actions; the official written report of a meeting."

Meaning assigned to the word "*proceeding*" in Black's Law Dictionary, Eighth Edition reprinted in 2004 at page 3808:

"The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment; any procedural means for seeking redress from a tribunal or agency; an act or step that is part of a larger action; the business conducted by a court or other official body; a hearing."

Black's Law (supra) further referred to the word "proceedings" as defined in Bankruptcy that it refers to "*A particular dispute or matter arising within a pending case- as opposed to the case as a whole [Cases: Bankruptcy 2156. C.J.S. Bankruptcy 26]*".

It further quoted a book by **Edwin E. Bryant**, titled "*The Law of Pleading Under the Codes of Civil Procedure*", 2nd ed. 1899 where the author defined the word "proceeding" at pages 3-4 as follows:

"Proceeding is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word action, but it may include- (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remittitur, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort."

In view of the above dictionary meaning, it is plain that the word proceeding is wider and it embraces all actions or proceedings in which a

/is was instituted or was between parties. It encompasses the whole process from taking an action or event from its initiations to the final conclusion be it an action before ordinary courts, or administrative tribunals, or to any quasi judicial body. In essence, the definition without prefix, in its ordinary sense, is not confined to civil, criminal or other administrative or miscellaneous proceedings. It entails all actions at law, be it before a court of law or out of court.

In **R v. Westminster (City) London Borough Council Rent Officer, ex parte Rendall (1973) 1 Q.B 959** at page 974 Lord Denning interpreted the word Proceeding as used in Rent Act of 1968 as follows:

"Proceeding covers any proceeding of a legal nature, even though it does not take place in a court of law."

Taking the aforesaid definition and coming back to the issue before us, that is, whether the lodging of the notice of appeal in Miscellaneous Commercial Cause No. 311 of 2017 ousted the High Court jurisdiction in Commercial Case No. 105 of 2017.

It is common ground that the applicants lodged a notice of appeal against the ruling in Miscellaneous Commercial Cause No. 311 of 2017, refusing to stay the proceedings in Commercial Case No. 105 of 2017 pending submission of parties' dispute to arbitration.

Subject to the provisions of section 5 (2) (d) of the Act which bars appeals on interlocutory orders, an order refusing to stay a suit where there is an agreement to refer to arbitration is appealable under Section 5 (1) (b) (v) of the Act. Section 5 (1) (b) (v) of the Act reads:

5-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say-

(i).....not relevant

(ii).....not relevant

(iii).....not relevant

(iv).....not relevant

*(v) an order staying or refusing to stay a suit where
there is an agreement to refer to arbitration;"*

In **Tanzania Motor Services Limited and Another v Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (unreported) we held that a petition for stay of a suit is a suit of its own kind though brought by way of petition and it is not caught in a web of an interlocutory order thus not barred by section 5 (2) (d) of the Act.

Now does the expression "*in civil proceedings*" appearing in section 5 (1) of the Act connote a wide interpretation to cover proceedings in Miscellaneous Commercial Cause No. 311 of 2017 and Commercial Case No. 105 of 2017. In other words, whether the notice of appeal lodged in respect of Miscellaneous Commercial Cause No. 311 of 2017 has, in the context of this application, a bearing on Commercial Case No. 105 of 2017.

It is trite law that a document which institutes an appeal is a written notice. This is clearly provided under rule 83 (1) of the Court of Appeal Rules of 2009 as amended by G.N. Nos. 362 of 2017 and 344 of 2019 (the

Rules) that, a person who desires to appeal to the Court of Appeal must lodge a written notice of appeal. That notice must comply substantially with Form D to the First Schedule of the Rules. Amongst the conditions which the intended appellant must show in the notice of appeal are: the case number; the decision sought to be appealed against, whether in whole or in part; the date when the judgment or order sought to be appealed from was given; the name of the presiding judge.

It has repeatedly been held by the Court that, without a proper notice of appeal renders the appeal incompetent. In **Dhow Mercantile (E.A) Ltd and 2 Others v. Registrar of Companies and 4 Others**, Civil Appeal No. 56 of 2005 (unreported) we said:

"It is common ground that a notice of appeal properly lodged in terms of the provisions of rule 76 is a pre-requisite condition for the institution of an appeal. Otherwise there is no denying the fact that without a valid and proper notice of appeal there would be as it were, no leg upon which the appeal would stand."

In the matter at hand, the applicants lodged a notice of appeal, a copy of which was attached to the affidavit as Annexure GN5. We have carefully

scrutinized it and noted that it intends to appeal against the whole decision given by Mruma, J. on 14th February, 2018 in Miscellaneous Commercial Cause No. 311 of 2017. That notice has no reference to Commercial Case No. 105 of 2017. Thus, the civil proceedings from which the notice of appeal arose, and laid before the Court for appeal purposes pursuant to section 5 (1) of the Act was for Miscellaneous Commercial Cause No. 311 of 2017 and not Commercial Case No. 105 of 2017. It follows therefore that the term "*civil proceedings*" referred under section 5 (1) of the Act relates to the proceedings in Miscellaneous Commercial Cause No. 311 of 2017. In that regard, though the proceedings in Miscellaneous Commercial Cause No. 311 of 2017 are interlinked with the proceedings in Commercial Case No. 105 of 2017, the two are not for the purposes of the appeal, one and the same. The notice of appeal lodged by the applicants has no correlation with Commercial Case No. 105 of 2017. Since, the complaint in the present application for revision is not geared to the proceedings in Miscellaneous Commercial Cause No. 311 of 2017 and since the grievance in Commercial Case No. 105 of 2017 is the continuation of the proceedings after the applicants had lodged the notice of appeal in a matter which we

find has no connection with Commercial Case No. 105 of 2017, we see no inconsistency or irregularities in the proceedings.

On the basis of the foregoing reasons, the application is hereby dismissed with costs.


DATED at DAR ES SALAAM this 24th day of July, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 30th day of July, 2019 in the presence of Mr. Gasper Nyika, learned Counsel for the Applicants and Mr. Pombolele David, Counsel for the Respondent, is hereby certified as a true copy of the Original


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL