IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 155 OF 2018

TUNU MWAPACHU.....1ST APPELLANT

RUKIA RIYAMI.....2ND APPELLANT

NURU NASSOR.....3RD APPELLANT

SOPHIA KOMBE.....4TH APPELLANT

VERSUS

NATIONAL DEVELOPMENT CORPORATION .....1ST RESPONDENT

THE REGISTERED TRUSTEES OF TANZANIA

ASSEMBLIES OF GOD.....2ND RESPONDENT

[Appeal from the Ruling and Drawn Order of the High Court of Tanzania, Land Division at Dar es Salaam]

(Kalombola, J.)

dated the 4th day of September, 2013

in

Land Case No. 163 of 2008

JUDGMENT OF THE COURT

18th February, & 7th March, 2022

KWARIKO, J.A.:

This appeal is against the ruling of the High Court of Tanzania, Land Division at Dar es Salaam (the trial court) which refused the appellants' prayer to amend their plaint.

It is common ground that the first respondent is the owner of the premises situated on Plot No. 951 Mbwera Street in Upanga Area, Dar es Salaam (the suit premises) which were leased to the appellants. According to the plaint, on 15th March, 2005, the first respondent served

the appellants with a three months' notice to terminate the lease agreement and ultimately for vacant possession of the suit premises to pave way for public use of the same. However, later it became apparent that the suit premises had been sold to the second respondent. The appellants were aggrieved by that decision hence filed the suit at the trial court for the declaration that the sale of the suit premises to the second respondent was unlawful and tainted with fraud on the ground that the procedure of disposing of government and public proparties was not observed. That, the government and the first respondent's board of directors prohibited the disposition of the suit premises. They claimed that if at all the first respondent intended to dispose of the suit premises, priority ought to have been given to them as sitting tenants. The appellants thus prayed *inter alia,* for declaration that the sale of the suit premises to the second respondent violated the procedure of disposing of government properties and that it was tainted with fraud.

On their part, the respondents denied the allegations that the sale of the suit premises was tainted with fraud, and that the appellants were entitled to be given priority to purchase the same.

On 12th August, 2013, when the matter was called on before the trial court for hearing, the appellants' counsel prayed to amend the

plaint which prayer was opposed by the first respondent's counsel for the reason that the amendment aimed at taking advantage of the facts which were disclosed during the mediation process.

The trial court declined the prayer on the ground that the appellants intended to introduce the issue of the first respondent's board resolution which was not in the original plaint. It was thus held that, allowing the amendment would affect the whole case. The trial court, advised the appellants, if they so wished, to withdraw the suit and start afresh so that they could include matters they found to be important.

Aggrieved by that decision, the appellants filed the present appeal on the following single ground:

> *"The trial Judge erred in law in denying the Appellants leave to amend their plaint before the hearing of the suit commenced."*

When the appeal was called before us for hearing, Ms. Cresencia Rwechungura, learned advocate, appeared for the appellants whilst the first respondent had the services of Mr. Ponziano Lukosi, learned Principal State Attorney assisted by Mr. Camilius Ruhinda, learned Senior State Attorney and Ms. Rehema Mtulya, learned State Attorney. The second respondent did not appear though duly served on 10th February, 2022. Thus, the hearing proceeded in her absence in terms of rule 112 (2) of the Tanzania Court of Appeal Rules, 2009.

At the onset, the Court required the parties in the course of arguing the appeal to address a legal point as to whether the impugned decision is not an interlocutory order which cannot be appealed against.

On her part, arguing the said point of law, Ms. Rwechungura contended that the impugned order was final hence the appellants had a right to appeal against it.

Mr. Ruhinda, on the other hand submitted that section 5 (2) (d) of the Appellate Jurisdiction Act [CAP 141 R. E. 2019] (henceforth the AJA) bars appeal to the Court against an interlocutory order or decision of the High Court unless such order or decision has the effect of finally determining the suit. He thus contended that, the present appeal is incompetent before the Court. The learned counsel submitted further that, upon refusal by the trial court to amend the plaint, the appellants ought to have proceeded with the suit to the end and they could only appeal after the disposal of the suit. To support his contention, Mr. Ruhinda referred us to the decision of the Court in the case of **Tanzania Posts Corporation v. Jeremiah Mwandi,** Civil Appeal No. 474 of 2020 (unreported).

It was Mr. Ruhinda's further submission that, the trial court's decision did not finally determine the suit between the parties, hence

not appealable. Based on his submissions, the learned counsel urged us to strike out the appeal with costs for being incompetent.

Having considered the contending submissions by the counsel for the parties, the issue for our determination is whether the trial court's decision dated 4th September, 2013, was an interlocutory order or it was a final decision which determined the suit between the parties. Mr. Ruhinda argued that, that decision was an interlocutory order which is not appealable as per section 5 (2) (d) of the AJA. This provision states:

> *"No appeal or application for revision shall lie against or 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 suit."*

The cited provision has been interpreted by the Court in its various decisions as barring an appeal or application for revision against interlocutory decisions or orders which do not have the effect of finally determining the suit. Some of these decisions include; **Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2006; **Murtaza Ally Mangungu v. The Returning Officer of Kilwa & Two Others,** Civil Application No. 80 of 2016; **Augustino Masonda v. Widmel Mushi,** Civil Application No. 383/13 of 2018; **Celestine Samora Manase & Twelve Others v. Tanzania**

Social Action Fund & Another, Civil Appeal No. 318 of 2019 (all unreported); and **Tanzania Posts Corporation** (supra), cited by Mr. Ruhinda.

Further, a definition of the term 'suit' referred to in the cited provision was given in the case of **Tanzania Motor Services Ltd & Another** (supra) which sought guidance from the *Law Lexicon, The Encyclopaedic & Commercial Dictionary, 2002 (Reprint)* at page 1831 where it is stated thus:

> *"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding in (sic) is a suit."*

From the definition of the 'suit' quoted above, it is abundantly clear that what was before the trial court is a suit in which the appellants asserted their rights.

What amounts to an interlocutory order or decision was considered in the same case of **Tanzania Motor Services Ltd** (supra), which relied on the English case of **Bozson v. Artrincham Urban District Council** [1903] 1KB 547 wherein Lord Alverston stated as follows at page 548:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

See also the cases of **JUNACO (T) Limited and Justin Lambert v. Harei Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 (unreported); **Murtaza Ally Mangungu** (supra) and **Celestine Samora Manase & Twelve Others** (supra).

This definition of interlocutory order tallies with the wording used under section 5 (2) (d) of the AJA, such that where an order or decision does not have the effect of finally determining the suit, it is an interlocutory order or decision. The question which follows here is whether the impugned order finally determined the rights of the parties in the present case. The answer is clearly in the negative. This is so because that order only declined the appellants' prayer to amend the plaint. It did not finally decide any issues involved in the case. Following that refusal on 4th September, 2013, the trial court fixed the suit to come before it for hearing on 18th September, 2013 as reflected at page 261 of the record of appeal. However, the hearing could not proceed since the appellants appealed against that order to this Court.

In the event, since the impugned order was interlocutory, the same is not appealable in accordance with the cited provision of the law and the supporting authorities. What the appellants ought to have done was to proceed with the trial and in the event, they lost the suit, they were at liberty to appeal against that order. We are thus satisfied that this appeal is incompetent and we hereby strike it out. The respondents shall have their costs. The case file is thus remitted to the trial court for trial.

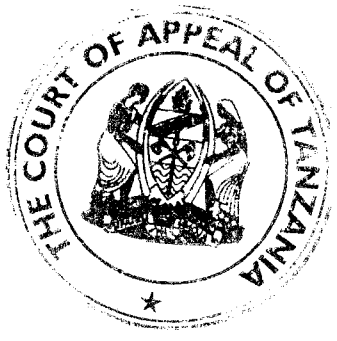
DATED at **DAR ES SALAAM** this 03rd day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered on 7th day of March, 2022 in the presence of Ms. Cresencia Rwechungura, learned counsel for the appellants and the 1st and 2nd Respondent absent though they were dully served, is hereby certified as a true copy of original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL