IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 244 OF 2018

YARA TANZANIA LIMITED .....APPELLANT

VERSUS

DB SHAPRIYA & CO. LIMITED .....RESPONDENT

[Appeal from the Ruling, Order and Proceedings of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Mruma, J.)

dated 30th day of August, 2018
in
Misc. Commercial Application No. 92 of 2016

RULING OF THE COURT

6th & 23rd May, 2022

KITUSI, J.A.:

The proverbial legal labyrinth is so real in this case that it complicates determination of issues that would otherwise be straightforward. The intricate background goes like this:

The appellant and the respondent are parties to a written contract of construction which has a clause specifying that in case of any dispute the said parties will refer it to an international arbitral tribunal. A dispute indeed arose and the respondent considering the appellant to be blame worth, sued it in Commercial Case No. 37 of 2016, seeking reliefs. However, the appellant prayed for a stay of that suit pending reference

of the dispute to an arbitrator, in terms of section 6 of the Arbitration Act No. 2 of 2020. The High Court, Commercial Division granted the prayer and stayed the proceedings in Commercial Case No. 37 of 2016 for 30 days, but no reference to an arbitrator was made by the appellant even after the lapse of those 30 days.

Proceedings in Commercial Case No. 37 of 2016 resumed. In the course of the resumed proceedings the respondent prayed for and was granted leave to amend the plaint. According to the appellant, the amended plaint introduced a totally new set of facts making the suit different from the original. The appellant contended that the change in the nature of the suit justified it to apply for another stay of proceedings so as to refer the fresh dispute to an arbitrator. This time around the appellant preferred Miscellaneous Commercial Application No. 92 of 2016 to pray for an order of stay of proceedings in Commercial Case No. 37 of 2016.

These two matters, that is Commercial Case No. 37 of 2016 and Miscellaneous Commercial Application No. 92 of 2016 were handled separately. In the former the appellant was ordered to file a Written

Statement of Defence (WSD) within 21 days. That was on 15th June, 2016.

However, by 30th August 2018 no WSD had been filed. On the same date, the respondent prayed for and was granted a default judgment in Commercial Case No. 37 of 2016. He also successfully prayed for dismissal of Misc. Commercial Application No. 92 of 2016 for being overtaken by the events. In dismissing Misc. Commercial Application No. 92 of 2016, the court held that there was nothing to refer to arbitration as a default judgment had been entered in Commercial Case No. 37 of 2016. It also observed that there was an intention to appeal.

Aggrieved against both decisions, by way of appeal to this Court, the appellant challenged the decision in Commercial Case No. 37 of 2016 vide Civil Appeal No. 245 of 2018 and against the decision in Misc. Commercial Application No. 92 of 2016, vide Civil Appeal No. 244 of 2018, the present appeal.

When this appeal was placed before us for hearing, Civil Appeal No. 245 of 2018 had already been heard and determined. This fact has

formed one of the two grounds of preliminary objection which the respondent raised by a notice. These are: -

> *"1. That this appeal is misconceived as the Honourable Court is functus Officio with regard to matters relating to Commercial Case No. 37 of 2016 after ordering the appellant to set aside the default judgment in Civil Appeal No. 245 of 2018.*
>
> *2. That the present appeal has been overtaken by events as the High Court (Commercial Division) has already refused to register an Arbitral Award No. 22118/TO through Miscellaneous Commercial Cause No. 3 of 2019. There is nothing to refer to the arbitration tribunal.*

At the hearing of this appeal, Mr. Nuhu Mkumbukwa learned advocate who represented the appellant both at the trial and before us, resisted the points of preliminary objection. Mr. Roman Masumbuko assisted by Ms. Velena Clemence learned advocates submitted on the points of preliminary objection on behalf of the respondent. He too had acted for the respondents at the High Court. Learned counsel for the respondent had earlier filed written submissions which he briefly highlighted on.

In his submissions, Mr. Masumbuko argued that we are *functus officio* because by our decision in Civil Appeal No. 245 of 2018 refraining from entertaining the appeal arising from Commercial Case No. 37 of 2016, we would not entertain any other appeal arising from it. The learned counsel invited us to refrain from entertaining this appeal because doing so would not augur with good administration of justice. He cited the Court's decision in **Arusha Planters & Traders Ltd & Others v. Euroafrican Bank (T) Ltd**, Civil Appeal No. 78 of 2001 (unreported).

On this point, Mr. Mkumbukwa submitted that Civil Appeal No. 245 of 2018 did not determine the merits of the default judgment in Commercial Case No. 37 of 2016, therefore this Court cannot be *functus officio.* He pointed out that this appeal arises from a refusal by the High Court in Misc. Commercial Application No. 92 of 2016 to stay proceedings in Commercial Case No. 37 of 2016. Counsel submitted that the order of refusal is appealable as of right. He further submitted in elaboration, that the grounds of appeal in Civil Appeal No. 245 of 2016 and those in the current appeal are quite different. The learned counsel cited the case of **Tanzania Motor Service Ltd and Presidential Parastatal Sector Reform Commission v. Mehar Singh t/a**

Thaker Singh, Civil Appeal No. 115 of 2005 (unreported). He also sought to distinguish the case of **Arusha Planters & Traders** (supra) from this case, arguing that that case involved a consent judgment, whereas the essence of this appeal is an order of refusal to stay Commercial Case No. 37 of 2016.

On the second point of preliminary objection alleging that this appeal has been overtaken by the events, Mr. Masumbuko argued that there is now nothing to refer to arbitration. He pointed out that subsequent to the High Court's refusal to stay Commercial Case No. 37 of 2016, the appellant referred it for arbitration vide Arbitration Case No. 22118/TO which delivered its award on 17th July 2018, two months before the ruling in Misc. Commercial Application No. 92 of 2016.

Mr. Mkumbukwa's response to the second point of preliminary objection was first that the very conclusion that Misc. Commercial Application No. 92 of 2016 had been overtaken by the events, is a subject of this appeal, so instead of being an obstacle, it should form a justification for hearing it. Secondly, he submitted that the arbitral award under reference is distinct from the dispute which the appellant is intending to refer to an arbitrator. Thirdly, he submitted that the second

point of preliminary objection does not qualify as a point of preliminary objection because it needs verification of facts which, he argued, is being done by reference to documents which are not part of the record of appeal.

Addressing Mr. Masumbuko's argument on good administration of justice. Mr. Mkumbukwa was of the view that this dilemma which he referred to as a mayhem, came about after the Commercial Court refused to hear and determine Misc. Commercial Application No. 92 of 2016 and proceeded to determine Commercial Case No. 37 of 2016 first.

In a short rejoinder responding to the argument that the proceedings in Arbitration Case No. 22118/ TO are distinct from the ones intended to be filed upon obtaining a stay of proceedings in Commercial Case No. 37 of 2016, Mr. Masumbuko submitted that there cannot be more than one arbitration proceedings arising from the same dispute. He referred us to the case of **Attorney General v. Hammers Incorporation Co. Ltd & Others**, Civil Application No. 270 of 2015 (unreported) in support of that argument. The learned counsel reiterated the argument that if a decision is made in favour of the appellant in this case and the status of Commercial Case No. 37 of 2016

remains what it is, it will not be in keeping with good administration of justice.

On the principle in the case of **Tanzania Motor Services Ltd** (supra), that a refusal to stay proceedings so as to refer a dispute for arbitration is appealable, Mr. Masumbuko submitted that he is aware of that principle but proceeded to argue that it cannot apply in the circumstances of this case where in Civil Appeal No. 245 of 2018 the Court ordered the appellant to go back and apply to set aside the default judgment.

Two more developments were brought to our attention. One, that on 2nd December, 2021 on application by the respondent, vide Miscellaneous Commercial Cause No. 3 of 2019, the High Court set aside the arbitral award above cited. And that there is an intention by the appellant to appeal that decision. Two, there is Misc. Commercial Cause No. 57 of 2020 in which the appellant is seeking for extension of time within which to apply for setting aside the default judgment in Commercial Case No. 37 of 2016.

Those are the materials relevant for our consideration in determining the two points of preliminary objection. We may as well

observe right at the beginning that the scenario we have here is quite out of the ordinary such that some of the cases cited to us may only be of limited value. On the one hand, the law is clear on the appellant's right of appeal under section 5 (1) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019], which provides: -

> *"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) .....*
>
> *(b) against the following orders of the High Court made under its original jurisdiction, that is to say: -*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) .....*
>
> *(iv) .....*
>
> *(v) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration".*

On the basis of the above, we cannot but agree with Mr. Mkumbukwa to the extent that the decision of the High Court Commercial Division in Misc. Commercial Application No. 92 of 2016 is appealable as of right.

In the same vein, we do not agree with Mr. Masumbuko that our determination of Civil Appeal No. 245 of 2018 arising from Commercial Case No. 37 of 2016, makes us *functus officio* in considering and determining this appeal arising from Misc. Commercial Application No. 92 of 2016. The term *functus officio* as defined in the case of **Tanzania Telecommunication Company Limited and Others v. Tri – Telecommunications Tanzania Limited** [2006] 1 EA 393 cited in **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018 (unreported) does not apply in the instant case. From those cases it is plain that a judge or magistrate becomes *functus officio* when he makes an order that finally disposes of the case. As rightly submitted by Mr. Mkumbukwa, Civil Appeal No 245 of 2018 was not determined on its merits. From what we have demonstrated above, we cannot sustain the first point of preliminary objection, so we dismiss it.

We do not think the second point of preliminary objection stands on firm grounds either. First of all, we go along with Mr. Mkumbukwa that it does not pass the test of a point of preliminary objection as set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696. And again, the decisions that would have rendered this appeal to be overtaken by the events, are yet to be finally determined given the fact that undisputedly, there are ongoing processes of having them vacated. This point of preliminary objection is accordingly devoid of merit, so we dismiss it too.

However, on the other hand, we have a lot more to consider than just the appellant's right to appeal. This is mainly because it is generally incumbent upon us to make orders that make sense and, specifically in this case, make orders that will not contribute to the mayhem, alluded to by Mr. Mkumbukwa himself. We subscribe to remarks that were made by an American Judge quoted in **The New Lawyer's Wit and Wisdom**, by Kathryn Zullo, Universal Law Publishing Co. Pvt Ltd, 2011, that: -

> *"The law is not a machine and the judges not machine tenders. There never was and there*

never will be a body of fixed and predetermined rules alike for all".

In the course, and appreciating the peculiar circumstances of this case, we may have to take cognizance of facts or decisions that are not part of the record but which have been brought to our attention. Although Mr. Mkumbukwa would have us avoid reference to those documents, we are inclined to the view we took in the case of **Joseph Magatha v. Vodacom (T) Limited**, Civil Appeal No. 220 of 2019 reproducing a paragraph in the case of **Mohamed Igbal v. Esrom M. Manyogo,** Civil Application No. 141/01 of 2017 (both unreported): -

"We must emphasize that an advocate, in addition to being a professional, is also an officer of the court and plays a vital role in the administration of justice. An advocate is therefore expected to assist the Court in an appropriate manner in the administration of justice. Indeed, one of the important characteristics of an advocate is openness in different ways to share to the court the relevant information or message which comes to his attention whether from his client or his colleagues concerning the handling of the case

regardless of whether he has been requested by the court to do so or not."

In the case cited above, the Court was dealing with a confusion in the proceedings which could have been avoided had one of the advocates not withheld some vital information. In view of the foregoing, we commend counsel for disclosing information that, if not brought to our attention, we would have ended up making absurd decisions.

Therefore, although we have dismissed the two points of preliminary objection, we still ask ourselves whether we should proceed to determine the appeal bearing in mind some of the undisputed facts that were brought to our attention. For instance, the fact that the default judgment in Commercial Case No. 37 of 2016 is yet to be set aside, and that the application to register the arbitral award made in Arbitration No. 22118/TO has been refused in Misc. Commercial Cause No. 3 of 2019. We have been made aware of the fact that there is an application for extension of time within which to make an application for setting aside the default judgment. Also, that there is an intention to appeal the decision in Misc. Commercial Cause No. 3 of 2019.

We asked Mr. Mkumbukwa to figure out what will be the value of our decision in his favour in the current appeal, if the appellant were to

lose in his quest to set aside the default judgment in Commercial Case No. 37 of 2016. All the learned counsel said was that he would still challenge the refusal to set aside the default judgment.

As earlier observed, both counsel alluded to the fact that there is confusion in the proceedings, and we agree there is indeed a confusion. Mr. Mkumbukwa is blaming it on the way the High Court dealt with Misc. Commercial Application No. 92 of 2016 as being the essence of the confusion. In our sober reflection on the matter, and assuming without concluding, that the learned counsel is correct on that assertion, we do not think we should correct a wrong by another wrong.

Thus, we shall try to tame the confusion as we did in the **Attorney General v. Hammers Incorporation Co. Ltd & Another**, Civil Application No. 270 of 2015 (unreported) cited to us by Mr. Masumbuko. We shall also apply common sense so as to maintain sense in the orders we make, in keeping with good administration of justice.

We are also inspired by a statement that was made by Pendukeni Iivula – Ithana, Minister of Justice and Attorney – General, Namibia, reproduced in the book titled **Law & Justice in Tanzania, Quarter of**

a Century of the Court of Appeal, by Chris Maina Peter and Hellen Kijo – Bisimba, Mkuki na Nyota Publishers, 2007, at page 1 that: -

> *"...**the ultimate objective of decisions made by the members of the judiciary should not only be to apply the law, but to do this in such a way that justice is achieved...**this in itself means that judgments of the courts must measure up to the public perception of fairness. In other words, judicial pronouncements must pass the test in the court of public opinion". (emphasis ours).*

In the end, although it is not correct to say we are *functus officio* as far as this appeal is concerned, or that the appeal has been overtaken by the events, good administration of justice requires that the appellant should first pursue our order in Civil Appeal No. 245 of 2018, in relation to Commercial Case No. 37 of 2016. To do otherwise would be to apply the law without any sense of reason and the sequence of events in relation to that main case will be seriously muddled by proceeding to hear this appeal and decide it one way or the other, before the default judgment in Commercial Case No. 37 of 2016 is set aside. To proceed that way will not, as submitted by Mr. Masumbuko, augur with sound administration of justice. In the case of **Arusha**

Planters and Traders Ltd (supra), the Court was faced with a situation that posed a danger of allowing an order of one High Court Judge overruling an order of another High Court judge. The Court concluded as follows: -

> *"Granting such an order would not augur with good administration of justice. Also in similar vein, for a Commercial Division of the High Court to declare a consent settlement recorded by the Main Registry of the High Court null and void thereby vacating it as prayed for in prayers (a) and (b),* ***would not augur with good administration of justice*** *as it would give a false impression that a Commercial Division of the High Court can overrule a decision made by the High Court Main Registry". (emphasis supplied).*

As alluded to earlier, we required the learned counsel to address us on what purpose would our decision in favour of the appellant serve, if the status in Commercial Case No. 37 of 2016 will remain the same. Mr. Mkumbukwa's submission was anticipatory, that he will still pursue appeals against any decisions against the appellant. On the other hand, Mr. Masumbuko urged us to refrain from deciding this appeal.

In our conclusion, since the utility of our decision in the instant appeal will be dependent on decisions in other cases, this appeal is premature especially for being based on a wrong assumption that Commercial Case No. 37 of 2016 is pending. If we proceed to hear and determine this appeal by pronouncing ourselves on its merits, there will be more confusion in all matters related to Commercial Case No. 37 of 2016. Consequently, while we dismiss the two points of preliminary objection for the reasons discussed, we strike out this appeal for being premature, a point that was raised by the Court.

We make no order as to costs.

DATED at **DAR ES SALAAM** this 19th day of May, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of May, 2022 in the presence of Mr. Reuben Robert, learned counsel for the Appellant and Ms. Velena Clemence, learned counsel for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL