IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 100 OF 2021

ZANZIBAR ELECTRICITY CORPORATION ..... APPELLANT

VERSUS

INFRATECH LIMITED ..... 1ST RESPONDENT

GENUS POWER INFRASTRUCTURES LIMITED ..... 2ND RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Vuga)

(Mohamed, J.)

dated the 10th day of November, 2020
in
Civil Case No. 04 of 2019

RULING OF THE COURT

3rd & 16th June, 2022

MASHAKA, J.A.:

The High Court of Zanzibar (Commercial Division) sitting at Vuga, in Commercial Case No. 04 of 2019 entered judgment on admission against the appellant Zanzibar Electricity Corporation for USD 425,450.00 claimed to have been due and payable to Infratech Limited, the first respondent, in a contract for supply of specified goods. That judgment aggrieved the appellant who has now preferred the instant appeal.

On 26th January, 2017 the appellant corporation engaged in the supply of electricity in Zanzibar awarded the first respondent the Tender No. ZECO/G/MT/2016 – 2017/01 for the supply of 1900 pieces of single and 900 pieces of three - phase prepaid energy meters at a contract price of USD 850,900.00 exclusive of VAT CIF to Zanzibar Port. The contract price was payable in two tranches, first advance payment of 50% upon the signing of the contract and the remaining 50% balance was payable after delivery of the contracted goods.

To execute the contract, the first respondent placed an order with the second respondent, Genus Power Infrastructure Limited, a manufacturer in India to supply the said meters at a cost of USD 697,200.00 CIF to Zanzibar Port within 12 weeks of the receipt of firm purchase orders.

Even though there were considerable delays in the supply of the meters by the second respondent, the first respondent delivered the last agreed consignment of prepaid energy meters to the appellant on 14/11/2017. The first respondent issued an invoice for payment of the USD. 425,450.00 balance of the contract price. Nevertheless, the appellant did not pay the amount and thus the first respondent instituted a suit before the Commercial Division of the High Court for recovery of the unpaid amount

against the appellant and several reliefs against the appellant and the second respondent for interfering the contract with the appellant.

In her defence, the appellant noted most of the averment in the plaint while disputed having never refused to pay the outstanding amount, it being a result of the court's restraint order issued on 12/09/2018 suspending the payment pending determination of the Commercial Case No. 4 of 2018 filed by the second respondent. On the other hand, the appellant claimed that the first respondent delayed delivery of the contracted meters as a reason for the delayed payment and prayed for the dismissal of the suit.

After the conclusion of the pleadings followed by the filing of witness statements, on 9/11/2020, the first respondent's counsel moved the trial court under Order XIV rule 6 of the Civil Procedure Decree [Cap 8 of the Laws of Zanzibar] (the CPR) for a judgment on admission against the appellant for an outstanding amount of USD 425,450.00 to be paid as to have been admitted in paragraphs 3 and 5 of the written statement of defence (WSD). Despite the objection from the appellant's counsel, the trial court with unanimous opinion from the lay assessors entered judgment on admission as prayed. It did so after being satisfied that paragraphs 3 and 5 of the appellant's written statement of defence contained nothing but

admission that the outstanding amount pleaded in paragraph 4 of the plaint arising from the tender for the supply of prepaid energy meters particulars in paragraph 6 of the plaint.

The judgment on admission dated 10/11/2020 is now being challenged in this appeal. The appellant has preferred six grounds of appeal, namely; **one**, entering judgment on admission without considering appellant's argument. **Two**, awarding the amount of USD 425,450.00 without strict proof. **Three**, the judgment was based on counsel's submissions contrary to the requirement of the law. **Four**, failure to make a proper analysis on the evasiveness of the noted, denial and admitted in the appellant's written statement of defence. **Five**, failure to rule whether the appellant's noting in her WSD were inclined evasive before entering judgment on admission and **six**, the entire judgment is problematic. By those grounds of complaint, the appellant implores the Court to quash the impugned judgment with an order for the determination of the suit on merit.

At the hearing of the appeal, Messrs. Ali Ali Hassan and Ali Issa Abdalla, learned Principal State Attorney and State Attorney respectively represented the appellant, the first respondent had the service of Mr. Seni Malimi, learned

advocate and Mr. Rajab Abdalla Rajab, learned advocate represented the second respondent.

At the onset, Mr. Malimi sought the leave of the Court under rule 4(2) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to raise a preliminary objection. Upon hearing gist of the points of preliminary objection, the Court ordered parties to present their arguments in support and against the preliminary objection and thereafter each party to address us on the merits of the appeal. With the blessings of the Court, it was agreed that in the course of composing the ruling, if the preliminary objection is found to be meritorious, the Court would sustain it and the appeal would be struck out. But in the same vein, if the Court overrules the objection, it would proceed to compose the judgment on the merits of the appeal. This course was intended to expedite the disposal of the matter.

Mr. Malimi contends that since this appeal emanates from a decree extracted from a judgment on admission which is a preliminary decree contravenes the dictates of section 5 (2) (d) of the Appellate Jurisdiction Act [Cap 141 R.E. 2009] (the AJA).

In his submission, Mr. Malimi argued that despite the judgment on admission, there were other issues which had not been heard and conclusively determined by the trial court. He further argued that there is a pending suit at the High Court as gathered from pages 1 – 8 of the record of appeal. He referred us to section 5 (2) (d) of the AJA and argued that such an order is not appealable and the Court is not conferred with power to determine the appeal hence rendering it incompetent. In support of his arguments, he referred us to the Court's decision in **Tanzania Posts Corporation v. Jeremiah Mwandi**, Civil Appeal No. 474 of 2020, **JUNACO (T) Limited and Justin Lambert v. Harei Mallac Tanzania Ltd**, Civil Application No. 473/16 of 2016 and **Tunu Mwapachu and Three Others v. National Development Corporation**, Civil Appeal No. 155 of 2018 (all unreported). He amplified that though the decree suggests at page 454 of the record of appeal that it is a final decree, the fact is that it is a judgment on admission as captured at page 450 of the record for the claim of USD 425,450.00 which was among other claims in the plaint in the suit; claims yet to be determined. Further, he reasoned that the omission by the trial court to mention the continuation of hearing after the delivery of the ruling does not in any way prejudice any party to the suit. Mr. Malimi

admitted that though they had an obligation to inform the trial court on the undetermined claims, they failed to do so.

He prayed the appeal to be struck out and the parties go back to the High Court to proceed with hearing of the suit on the remaining issues.

In response to the preliminary objection, Mr. Rajab contended that his client was prejudiced by the judgment on admission as he was condemned unheard on the claims they had raised in the written statement of defence before the trial court.

Mr. Hassan submitting in reply to the arguments made by Mr. Malimi, contended that the objection is lacking in merit. He argued that the judgment on admission was final and conclusive on the claims raised by the first respondent. Additionally, he claimed to have lodged an application for stay of execution after the first respondent had undertaken the step to execute the decree. He urged us not to consider the authorities referred by Mr. Malimi as they were distinguishable to the appeal at hand. He prayed to the Court to dismiss the preliminary objection and determine the appeal on merit.

In a brief rejoinder, Mr. Malimi disagreed that the judgment on admission was final. He reiterated that some of the first respondent's claims had not yet been determined and therefore the preliminary objection be sustained and the appeal to be struck out.

We have considered the contending submissions by the learned advocates and the issue for our determination is whether or not the decision of the trial court dated 10/11/2020 conclusively determined the suit between the parties and thus appealable. The fundamental argument by Mr. Malimi is that the judgment on admission was a preliminary decree which is not appealable in terms of section 5 (2) (d) of the AJA as there are pending issues which had not conclusively determined the rights of the parties. For ease of reference, we reproduce section 5 (2) (d) which stipulates that: -

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

Arising from the reading of the provision, we need to ask ourselves whether the judgment on admission was final and conclusive.

We have thoroughly examined the record of appeal particularly page 447, on 9/11/2020 whereby the learned counsel for the first respondent made a prayer under Order XIV rule 6 of the CPD for judgment on admission as we alluded to earlier. The legal officer for the appellant objected to that prayer contending that paragraphs 3 and 5 of the WSD did not constitute admissions to the claim and urged to the court not to grant the prayer.

After the arguments for and against and upon receiving opinions from the assessors, the trial Judge reserved her judgment, ordered a date for hearing of the suit and filing of statements of witnesses for the respondents in the suit. The trial court order displays the following: -

> ***"Order:***
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> *(1) Judgment on 10/11/2020 at 09:00.*
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> *(2) Hearing on 18/11/2020 at 11:00 a.m.*
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> *(3) Witness statement for 1st and 2nd Respondent to be filed.*
>
> *Sgd: Rabia H. Mohamed*
>
> ***Judge***
>
> *9/11/2020"*

The judgment on admission was delivered to the parties by the Registrar on 10/11/2020 against the appellant who was ordered to pay the

first respondent USD 425,450.00. Six days later, the appellant lodged a notice of appeal against the judgment on admission leading to this appeal. In **Tanzania Motor Services Ltd v. Mehar Singh t/a Thaker Singh** (supra), the Court quoted the statement of Lord Alverston in **Bozson v. Altrincham Urban District Council** [1903] 1 KB 547 at p. 549 that :

> *"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".*

Likewise, in **Tanzania Posts Corporation v. Jeremiah Mwandi** (supra) and **Tunu Mwapachu and Three Others v. National Development Corporation** (supra) cited by Mr. Malimi, the Court in its various decisions referred to it as "the nature of the order test". See – **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and Two Others**, Civil Application No. 80 of 2016, **Celestine Samora Manase and Twelve Others v. Tanzania Social Action Fund and Another**, Civil Appeal No. 318 of 2019, **Peter Noel Kingamkono v. Tropical Pesticides Research Institute**, Civil Application No. 2 of 2009 (all unreported).

Applying the nature of the order test to the appeal, the judgment on admission sought to be challenged was entered in terms of Order XIV rule 6 of the CPD. However, the suit is still pending at the Commercial Division of the High Court. In the circumstances, we are inclined to agree with Mr. Malimi that the judgment on admission was an interlocutory order as it did not finally determine the other claims of the first respondent. In terms of section 5(2)(d) of the AJA, an appeal lies to the Court if such interlocutory decision or order has the effect of finally determining the suit and not just some matters in the suit passing the test of an appealable decision. It is trite law that an order or decision is final only when it finally disposes of all the rights of the parties in the suit.

In the event, we find and hold that the judgment on admission sought to be challenged is an interlocutory order and thus not appealable. It contravenes section 5(2)(d) of the AJA. We accordingly sustain the preliminary objection raised by the first respondent. It is apparent that due to our findings on the preliminary objection, we will not consider the appeal on merit.

The appeal is therefore incompetent and we strike it out with costs. Going forward, we order that the record be remitted to the Commercial

Division of the High Court to proceed with the hearing of the suit on merit on the remaining claims between the parties.

It is so ordered.

DATED at **ZANZIBAR** this 15th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of June, 2022 in the presence of the Mr. Abubakar Omar, learned State Attorney for the Appellant and Ms. Rosemery Nyandwi holding brief for Mr. Seni Malimi, learned counsel for the 1st respondent and Mr. Rajab Abdalla, learned counsel for the 2nd Respondent is hereby certified as a true copy of original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL