IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 177 OF 2020

METMAR TRADING (PTY) LIMITED ..... APPELLANT

VERSUS

K& K CARGO LOGISTICS (T) LIMITED ..... 1ST RESPONDENT
ALFRED H. KNIGHT TANZANIA LIMITED ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, (Commercial Division) (at Dar es salaam)

(Philip, J.)

dated the 18th day of February, 2020
in
Commercial Case No. 201 of 2017

JUDGMENT OF THE COURT

6th & 26th June, 2023

KENTE, J.A.:

In order to bring this dispute which has a chequered history into a proper perspective, one cannot help but set out the salient features of this appeal which emanates from the judgment and decree of the High Court (Commercial Division) dismissing the appellant's (then as plaintiff's) claim against the respondents (then as the defendants) in Commercial Case No. 201 of 2017.

Initially, the appellant company Metmar Trading (PTY) Limited instituted a suit in the High Court of Tanzania, Dar es Salaam Registry (Civil Case No. 110 of 2011) against the respondents who were respectively the 1st and 2nd defendants.

In that suit which was struck out on 11th November, 2011 for want of prosecution following expiry of the agreed speed track and after the appellant's application to have the trial court depart from the scheduling order was dismissed for being time barred, the appellant had sued the respondents for breach of contract and was substantially seeking from them the same reliefs and declarations as those which were subsequently sought in the Commercial case, the subject of the present appeal.

It is worthy of mention here that, the said Commercial Case which, like this appeal, was heard in the second respondent's absence, was firmly resisted by the first respondent's counsel who also raised preliminary objections framed inter alia, as follows:

(a) *The suit is time barred; and*

(b) *The institution of this suit is an abuse of the court process since a similar suit was struck out for want of prosecution.*

Having heard the parties' submissions on the objections, the High Court Judge (Songoro J as he then was), was not convinced with the first respondent's arguments. He accordingly went on overruling the objections for what he found to be the lack of merit. In overruling them, the learned High Court Judge was of the view that, the suit before him was neither time barred nor an abuse of the court process. Upon that ruling, the trial proceeded on merit and the end result was that, the learned successor Judge (Phillip, J) found no merit in the appellant's claim which she accordingly dismissed with costs, hence this appeal.

Before this Court, the appellant has presented a memorandum of appeal citing eighteen grounds of complaint but, for the reasons which will be made clear shortly in the ensuing part of this judgment, it will not be necessary for us to go into the merits or demerits of the said grounds. Rather, we find it imperative to consider the crucial question that arises from the 1st respondent's notice of cross appeal as to whether or not, the suit filed in the Commercial Court was an abuse of the court process. To be exact, the first respondent has contended that:

> *"The High Court erred in law for entertaining a suit filed In clear abuse of the Court process since a*

similar suit had been struck out for want of prosecution."

In the course of his submissions and arguments in support of the cross-appeal, Mr. Dominic Daniel learned counsel who appeared for the respondent begun by taking us through the sequence of the undisputed events which we accept as true. As stated at the beginning of this judgment, the learned counsel submitted that, before the institution of Commercial Case No. 201 of 2017, a similar suit involving the same parties, the same cause of action and the same reliefs was filed in the High Court, Dar es Salaam District Registry and it was subsequently struck out after expiry of its lifetime which was set by the court at the first pre-trial conference. Notably, the fact that one year after expiry of the speed track to which the suit was assigned, the appellant had, in an attempt to salvage the situation, filed an application seeking the trial court to depart from the scheduling order and that the said application was dismissed for being time barred, attracts no controversy between the parties.

In view of the above stated facts which are not disputed, Mr. Daniel contended that, it is rather inconceivable for a suit which had been struck out following the expiry of its lifespan in court to be reinstituted in another court of the same jurisdiction. In the circumstance, the learned counsel

submitted that, if the tendency of the litigants of shopping forums when more than one court have jurisdiction over the dispute as the appellant did will be greeted by the courts with enthusiasm, the provisions of Order VIIIB of the Civil Procedure Code, 1966 (the CPC) which were intended to ensure that cases are heard and determined expeditiously, will be rendered nugatory.

The second main point made by Mr. Daniel so far as this ground of the cross-appeal is concerned is that, after the suit before the High Court was struck out for want of prosecution because of expiry of the speed track, it was not open for the appellant to re- open it in the Commercial Court. The only remedy that was available to the appellant according to Mr. Daniel, was to challenge the High Court order striking out the suit by way of appeal. The learned counsel referred us to the case of **Hashim Madongo and Others v. Minister for Industries an Trade and Others,** Civil Appeal No. 27 of 2003 (unreported) in a bid to reinforce his argument.

In conclusion, Mr. Daniel prayed that, the second ground in support of the cross – appeal should be upheld and the matter be left as having rested at the point where the suit before the High Court was struck out for want of

prosecution, even more so that the application to resuscitate it had been dismissed.

On her part, Ms. Hamida Sheikh learned senior counsel appearing for the appellant, was diametrically opposed to the contention by the first respondent's counsel that refiling a similar suit in the Commercial Division of the High Court was an abuse of the court process. It was her short argument that, after the suit before the High Court was struck out on account of expiry of the speed track, the appellant had no right to appeal hence the decision to file a fresh suit in the Commercial Division of the High Court. However, the learned senior counsel could not refer to us any specific provisions of the CPC or any other written or case law which bars appeals from orders made by the High Court in exercise of its original jurisdiction striking out or dismissing a suit because of expiry of the speed track to which the suit is set to be tried.

For our part, we must say, without hesitation that, we do not, with respect, agree with Ms. Sheikh regarding her contention that after the suit before the High Court was struck out because of expiry of the speed track to which it was assigned, the remedy of appeal was not available to the appellant who was obviously aggrieved by the said order of the High Court.

We are mindful of the consistent position taken by the courts in Tanzania that, there is no inherent right of appeal and that courts can only exercise appellate jurisdiction where that jurisdiction is given by the laws of the land, (See for instance the cases of **Tanzania Electric Supply Company Limited V. Interbest Investment Company Limited,** Civil Appeal No. 43 of 2012 and **Leo .K. Lekule v. J.N. Limited HC**, Civil Appeal No. 3 of 1988 (both unreported)). In this connection, in view of the clear provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Laws (hereinafter the AJA) which we shall later on take the liberty to reproduce, together with the recent developments through our jurisprudence, it can be said without any doubt that, an order of the High Court either striking out or dismissing a suit on account of expiry of the speed track before the suit is finally determined, is appealable to this Court or amenable to revision.

Addressing ourselves to sections 74 and 75 and order 40 of the CPC together with section 5 (1) and (2) (a),(b) and (c) of the AJA, which are the most relevant to this matter, it must be noted that, all these provisions were enacted with an eye towards conventional judgments and orders that mark the end of a civil matter in the High Court without fore knowledge that, with

the advent of Order VIIIB of the CPC, a suit would be struck out or dismissed simply because of expiry of a speed track.

However, in the particular circumstances of the instant case, being final in that the said order had the effect of ending the proceeding in the High Court by terminating the appellant's substantive claim against the respondents, as it happened, it is certain that, that order was appealable. This and other similar situations must have been the reason why the Legislature enacted section 5 (2) (d) of the AJA which provides in no ambiguous terms that:

> *"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 suit."***
>
> [Emphasis added]

Moreover, for the purpose of showing that we are not navigating uncharted waters, we have to observe in passing that, in an almost identical situation, a similar order issued by the High Court striking out a suit on account of expiry of its life span, was successfully challenged by way of appeal in the case of **National Bureau of Statistics v. The National**

Bank of Commerce and Another, Civil Appeal No. 113 of 2018. It should be noted quite clearly that, in the above-cited case, the question as to whether or not the High Court order was appealable to this Court, did not arise.

What this means therefore, in the circumstances of the instant case is that, it was indeed a wrongful use of processes for the appellant to go to the Commercial Court and reopen a fresh but similar suit after the former suit was struck out on account of lapse of its life span. Clearly, that was an abuse of the court process as correctly argued by the first respondent's counsel.

In this regard, we think with respect that, had the trial court given very careful consideration to the first respondent's preliminary objection which was raised at a very opportune moment, it would have found that indeed, the commercial case giving rise to this appeal was filed in clear abuse of the court process.

In view of the position we have taken, we are settled in our mind that, the second ground of complaint in the cross – appeal is not without merit. We accordingly sustain it and proceed to nullify the proceeding, quash and set aside the judgment and decree of the Commercial Court in Commercial Case No. 201 of 2017.

In the ultimate event, we dismiss the appeal with costs for having been preferred from a suit which was incompetent on account of the appellant's abuse of the court process.

For the avoidance of doubts, the status of the matter shall remain as to where it had reached in Civil Case No. 110 of 2011 before the High Court, Dar es Salaam District Registry.

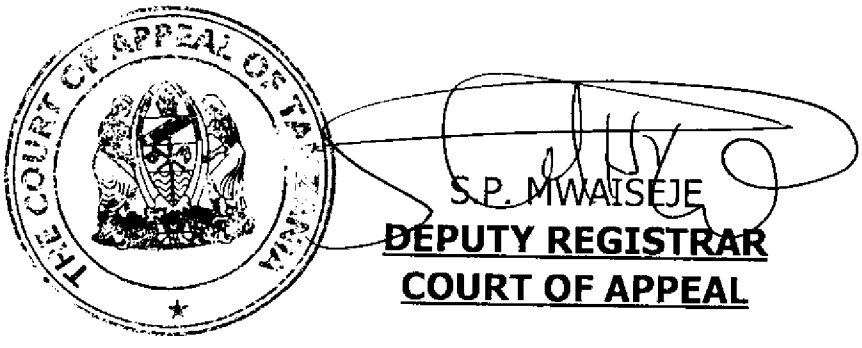
DATED at **DAR ES SALAAM** this 23rd day of June, 2023.

A.G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 26th day of June, 2023 in the presence of Mrs. Yusufu Sheikh, learned counsel for the Appellant, Mr. Dominic Daniel learned counsel for the 1st Respondent, and in the absence of the 2nd Respondent is hereby certified as a true copy of the original.



S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL