IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 28/16 OF 2024

PRESTIGE INVESTMENT SA ..... APPLICANT

VERSUS

NUMORA TRADING PTE LIMITED ..... 1ST RESPONDENT

LAMAR COMMODITY TRADING DMCC ..... 2ND RESPONDENT

KCB BANK KENYA LIMITED ..... 3RD RESPONDENT

LAKE OIL LIMITED ..... 4TH RESPONDENT

[Application for striking out the Notice of Appeal from the Ruling of the High Court of Tanzania, Commercial Division at Dar es Salaam]

(Nangela, J.)

dated the 8th day of December, 2023

in

Misc. Commercial Cause No. 164 of 2023

.....

RULING OF THE COURT

ISMAIL, J.A.:

This is an application to strike out the notice of appeal, filed by the first respondent, against the ruling and drawn order of the High Court of Tanzania Commercial Court in Misc. Commercial Application No. 164 of 2013. The notice of motion is preferred under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is

supported by the affidavit of the counsel for the applicant. Before commencement of the hearing of this application we had a dialogue with the counsel for the parties on the status of submissions filed by some counsel while others did not get the opportunity to do so. We agreed with all of them that written submissions which were filed by some of them be abandoned. Th counsel were allowed to address us orally.

At the hearing of this application, the applicant was represented by Ms. Seni Malimi, learned advocate, assisted by Mr. Tazan Mwaiteleke, also learned advocate, whereas the 1st respondent was represented by Mr. Nuhu Mkumbukwa, learned counsel. Representing the 2nd respondent was Mr. Stephen Axwesso, learned counsel who was assisted by Mr. Godwin Nyaisa, also learned advocate. The 3rd respondent enlisted the services of Mr. Gasper Nyika, learned advocate, whilst the 4th respondent enjoyed the services of Mr. Thobias Laizer, learned counsel who was assisted by Ms. Oliver Mark, learned advocate.

When he rose to address the Court, Mr. Malimi stated that the decision sought to be challenged in the intended appeal whose notice

of appeal was instituted on 4th January, 2024, and arising from a ruling in Miscellaneous Commercial Application No. 164 of 2023, was not appealable. He submitted that, in terms of section 5 (2) (d) of the Appellate Jurisdiction Act (the AJA), this is an interlocutory order that did not finally and conclusively determine the suit. He argued that the ruling arose from an application for temporary injunction preferred under Order XXXVII rule 2 (1) and section 68 (e) of the Civil Procedure Code (CPC). He further argued that determination of the application left the main suit alive and kicking and that the same is slated for first pretrial, settlement and scheduling conference on 08.04.2024, and that substantial issues remained unresolved and they all await trial. To buttress his argument on the non-appealability of the order, Mr. Malimi referred us to several decisions of the Court, including **Pardeep Singh Hans v. Merey Ally Saleh & 3 Others,** Civil Application No. 422/01 of 2018, and **Junaco & Another v. Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 (both unreported). In his view, release of fuel was just one relief and that relief (a) in the plaint indicates that there were more issues for determination. He further clarified that the remedy available to the respondents was to

invoke rule 5 of Order XXXVII of the CPC and this would entail moving the trial court to revisit the matter. He brought to the attention of the Court the institution of an appeal (Civil Appeal No. 109 of 2024) filed by the 1st respondent on 03.03.2024. He implored the Court to deem it as struck out the moment it strikes out the notice of appeal. He premised his prayer on our decision in **Eliudy Gichaine v. Geita Gold Mine Ltd,** Civil Application No. 418/08 of 2022 (unreported).

On his part, Mr. Mkumbukwa was not in dispute that this was an interlocutory order. His take, however, was that the order had the effect of finally determining the stratum of the matter and that what remained were inconsequential prayers which had little significance. To him, release of the fuel constituted what the applicant prayed in reliefs a, b, c, d and e in the plaint. He argued that the High Court finally determined that the respondents were in breach of the supply contract. This, in his view, amounted to pre-judging the matter upon which the trial court was now *functus officio*.

On the applicability of rule 5 of the order XXXVII of the CPC, the learned counsel referred us to the literature from Sarkar's Code of Civil Procedure, 11th Edition, Reprint 2011, in which circumstances for

invocation of that right were said to be different from what obtains in this matter. He sought to distinguish the cases cited, arguing that in none of the cases was there a finality of the matters. He prayed that the application be dismissed with costs.

Mr. Nyaisa's contention in the matter was that the order in question is appealable as the right of appeal is statutorily pegged on section 5 (2) (d) of the AJA, arguing that all prayers in the plaint involved the consignment and that prayer one in the ruling determined all the reliefs in the plaint. To that extent, he said, the High Court is now *functus officio*. There is nothing left to be determined by that court. He referred us to cases cited by his colleagues. He argued that the amount in the letter of credit was a maximum sum and nothing else.

Mr. Nyika's submission dwelt on the single issue as to whether the applicant was entitled to the consignment. He argued that, that being a singular issue for determination before the High Court, the outcome of this question resolved the dispute and there was nothing left to determine. In his contention, this answer bred a preliminary

decree whose status is that of a decree appellable under section 5 (1) (d) of AJA. In his view, the notice of appeal is perfectly in order.

On the part of Mr. Laizer, his firm contention was that, the objective of an interlocutory order, in the form of temporary injunction, is to maintain a *status quo.* However, the order in question went far overboard to determine a substantive claim. He argued that section 5 (2) (d) of the AJA allows appeals if the appealed orders have the hallmarks of finality irrespective of the fact that ancillary prayers remain. He disclosed that there is, in the pending suit, a counter-claim which is yet to be determined but insisted that, through the order, the applicant got what it wanted. He was insistent that the notice of appeal is quite in order.

Mr. Malimi's rejoinder was a reiteration of what he had earlier on submitted in chief.

We have dispassionately considered the contending submissions. We have also gone through the cases referred to us and the material placed before us. We think that the counsel are in unison that this is an interlocutory order that arose from the application for temporary

injunction. The dispute is on the finality or otherwise of the order and whether it is amenable to appeal.

We wish to state at the outset that, we consider Mr. Nyika's contention that this is a preliminary decree flawed. The order did not emanate from a suit and no trial was conducted in respect of any issue. In fact, there was no issues framed. This means, therefore, that, section 3 of the CPC which defines a decree cannot, in our view, be stretched to cover this ruling.

Turning on to the question of finality, we are of the fortified view that the finality that has the effect of allowing an appeal under the last part of section 5 (2) (d) of the AJA is the finality of the suit and not a fraction of the issues in a suit. This is what we held in the cases cited by the learned counsel.

In the instant matter, the counsel agree that the suit is pending and awaiting the first PTC. Mr. Laiser has, in fact, been generous with facts when he stated that even the counter claim by his client constitutes the remainder of the suit. We are aware that issues revolving around relief (a), which we consider to be substantive and

significant, are also begging for answers which will only come through production of evidence.

This, in our view, reveals a key fact that there are still issues to be litigated upon and it cannot be said that such issues are of trifling effect. Mr. Nyaisa has contended that awaiting conclusion of the matter would render the intended appeal time barred. With respect, this is not an assertion founded on the law as it currently obtains. We also consider this to be a contention that is mostly based on convenience and not the fact that this is an appellable order. The trite position is that convenience is not the business of any court. It is justice that is the business of the court and in this respect, we take the view that justice does not allow preference of an appeal on a suit that did not come to a final and conclusive determination in the High Court.

In the upshot of all this, we take the view that the notice of appeal that was lodged on 4th January, 2024 against a ruling in Miscellaneous Commercial Application No. 164 of 2023 is premised on an interlocutory order that did not finally and conclusively determine the suit. Consequently, we grant the application and strike out the notice of appeal with costs. It follows that the appeal (Civil Appeal No.

109 of 2024) emanating from the incompetent notice is deemed to be struck out as well, in terms of Rule 89 (3) of the Rules.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of March, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL