IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 26 OF 2016

(Arising from Commercial Case No. 168 of 2014)

SYMBION POWER LLC ..... APPLICANT

VERSUS

SALEM CONSTRUCTION LIMITED ..... RESPONDENT

31st May & 30th June, 2016

RULING

MWAMBEGELE, J.:

This application was filed by the applicant seeking this court to invoke its inherent powers under section 95 of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 and do three things in its favour, namely:

a) Stay of proceedings in Commercial Case No. 168 of 2014 pending final determination of the Appeal against the decision of this Court (Honorable Mwambegele, J.) in Miscellaneous Commercial Application No. 128 of 2015;

b) Order that costs of this application being the cause; and

c) Grant any other relief or reliefs as it will deem fit and just to grant.

A brief background can be gleaned from an affidavit sworn by Senen Edmund Mponda in support of the application, counter-affidavit as well as the entire record of the matter in the court record. It goes thus: the respondent had instituted a suit christened Commercial Case No. 168 of 2014 claiming from the applicant, *inter alia*, a total of USD 466,482.73 being an outstanding sum for the works performed under the contract which had, *inter alia*, an arbitration clause. The applicant instituted Miscellaneous Commercial Cause No. 12 of 2015 to have the said suit kept at abeyance so that room could be created for them to submit to arbitration. That move was futile as the application was, on a preliminary objection, found to have been tainted with not only procedural but also substantive defects affecting the jurisdiction and competency of this court and was therefore struck out.

The applicant did not despair. She attempted a second endeavour; this time through Miscellaneous Commercial Cause No. 128 of 2015 in pursuit of the same remedy but, again, it met the same fate; the prayer for keeping the proceeding in Commercial Case No. 168 of 2014 at abeyance pending submission of the parties to arbitration was refused for want of merit and the suit was ordered to proceed on merits. Dissatisfied, the applicant herein filed a notice of appeal against the said decision on 07.12.2015 and applied for copies of the ruling, order and proceedings for that purpose. It is also stated that once the appeal is lodged the Court of Appeal would require the original case No. 168 of 2014 to satisfy itself as to the correctness of the decision of this court and therefore procedure requires that this court stay the said suit; Commercial Case No. 168 of 2014 pending final determination of the appeal.

A counter-story thereto is gathered from statements by Mr. Fungamtama, learned counsel for the respondent, particularly with respect to the statements to the effect that upon lodging the appeal, the original case file of

Commercial Case No. 168 of 2014 will be required by the Court of Appeal and that procedure requires that the said suit be stayed pending determination of the said intended Appeal. The learned counsel for the respondent states that the said statements are false and/or misleading because the order of this Court dated 30.11.2015 is not appealable at this stage of the proceedings and that should need arise, the case file which would be required by the Court of Appeal is the original case file from which the impugned decision emanates namely Miscellaneous Commercial Cause No. 128 of 2015 and not the main case; Commercial Case No. 168 of 2014.

The oral hearing was preceded by the respective counsel for the parties filing their written skeleton arguments. This is a requirement under rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. I commend the learned counsel for the parties for according this court an opportunity to read through their minds before hearing them *viva voce*.

The learned counsel for the applicant hinges his submissions on two main authorities, namely the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (sections 5 (1), (b) (v) and 2 (d), and **Mulla: the Code of Civil Procedure**, Vol. 1 (16th Edition, pages 1421, 1431 and 1437). His, in the main, are two arguments. One, that the order sought to be appealed against being one refusing to stay a suit where there was agreement to arbitrate, and in essence that order having the effect of closing the door for arbitration, it is appealable as of right and therefore it is properly before the Court of Appeal. Two, that staying proceedings in view of an intended appeal and or execution of a decree pending decision of selected action is among the circumstances for which this court can invoke section 95 of the CPC to grant such orders. It is finally maintained by the learned counsel that proceeding with the main suit; Commercial Case No. 168 of 2015, will render the appeal

nugatory. He thus prays that the proceedings in Commercial Case No. 168 of 2015 should be stayed as prayed and that costs should be in the cause.

Mr. Fungamtama, learned counsel, strenuously resists the application. His stiff opposition is grounded on two main points; first, that the order sought to be appealed against is not appealable and therefore the intended appeal is not maintainable at law and secondly, incompetence of the application for citing an improper provision of the law.

The learned counsel seems to have sought to draw this court into the question as to whether the order of this court is or is not appealable. Luckily, having been supplied with the relevant authority of the Court of Appeal; ***Tanzania Motor Services Ltd Vs Mehar Singh t/a Thaker Singh,*** Civil Appeal No. 115 of 2005, Mr. Fungamtama, learned counsel, maintains no qualm anymore.

The only problem that he appears to maintain therefore relates to the provision of the law on which the application has been brought; that is, section 95 of the Civil Procedure Code. According to him, the proper provision would have been section 68 (e) of the CPC as it is the one that caters for this court to make interlocutory orders and not section 95 which is on inherent powers of the Court and which is applicable only where there is no specific provisions of the law to cater for the situation. On the other hand, the learned counsel for the applicant is of the view that the section is applicable because, the orders sought are among the circumstances for which the inherent powers of this court can be invoked and that there is no specific provision under the CPC or the Arbitration Act or any other law because section 68 (e) is a general provision.

Before they could rest their respective cases, I posed a question to the learned counsel as to whether, in view of the said Appeal in the Court of Appeal, this court has jurisdiction to entertain this application. Quickly Mr. Mponda, learned counsel for the applicant, affirmed the position. His opinion was that this court has powers to stay Commercial Case No. 168 of 2014 because it is not before the Court of Appeal unlike Miscellaneous Commercial Cause No. 128 of 2015 which is there. Referring me to ***Tanzania Motor Services Ltd*** (Supra), he emphasized that the two are different suits in their own. On the other hand, Mr. Fungamtama sees it differently. To him, this court has no jurisdiction since the matter that gave rise to this application is in the Court of Appeal, then this Court ceases to have jurisdiction. To buttress his stance, he cited to me ***Tanzania Electric Supply Company Limited Vs Dowans Holdings SA (COSTA RICA) and Another***, Civil Application No. 142 of 2012 (unreported), stressing that it is only the Court of Appeal which can grant the order sought by the applicant.

To me, the question of jurisdiction is the biggest of all deals at this stage. I cannot virtually proceed to legally do or say anything before I am assured of my powers so to do. As was heard by the Court of Appeal in ***Nicomedes Kajungu & 1374 Others Vs Bulyankulu Gold Mine (T) LTD*** Civil Appeal No. 110 of 2008 (unreported) it is the duty of the Court to satisfy itself that it is properly seized or vested with the requisite jurisdiction to hear and determine a matter. It is a well settled principle that a question of jurisdiction goes to the root of determination, stressed the court of Appeal.

I will therefore seek to verify whether this court has jurisdiction to entertain an application for stay of Commercial Case No. 168 of 2014 in view of the notice of Appeal instituted by the applicant.

I think this issue will not detain me, thanks to ***Tanzania Electric Supply Company Limited***, a case cited and supplied to me by Mr. Fungamtama, learned counsel for the respondent. Thus, it is an established principle of legal practice and procedure, which I think, grew out of the need for procedural coherence, certainty of decisions and respect for the highest court of the land, that once a notice of appeal is laid in respect of a matter, the lower court ceases to have jurisdiction over the said matter. The former court is presumed to have then assumed jurisdiction over the matter to determine all issues primary and incidental thereto. This, in my thinking and opinion, is a good law and practice as it avoids duplicity of proceedings and contradictions of decisions which might invite uncertainties in the administration of justice.

It goes without saying therefore that, in view of the Notice of Appeal filed on 07.12.2015, in respect of Miscellaneous Commercial Case No. 128 of 2015 this court has no jurisdiction over the same so as to warrant grant of any order incidental thereto. That, in my considered view, is entirely within the realm of the Court of Appeal where an appeal against the decision refusing stay and dismissing the petition is to be pursued.

Thus, I deem that grant of the same (order of staying the Commercial Case No. 168 of 2015) by this Court and at this stage would only be technically granting the.denied order through the back door. That, in my view, may be tantamount to circumventing the very order refusing stay made previously in Miscellaneous Commercial Cause No. 128 of 2015 and hence tantamount to abuse of this court's very process. This stance then, dispossesses me of any further chance to go into the rest of the arguments such as the propriety or

otherwise of the provision of the law on which the present application is pegged. I take that position because, this application, though seeking to stay Commercial Case No. 168 of 2015 which is before this court as rightly stated by counsel for the applicant, emanates from Miscellaneous Commercial Cause No. 128 of 2015 which is the subject of Appeal.

But, as the circumstances of the matter at hand are such that the above does not put all of the matter to rest. Hence, the pertinent sub-issue cropping up is: what is the consequence of lack of jurisdiction by this court to entertain this application? An answer is, obviously, failure by this court to stay proceedings of Commercial Case No. 168 of 2015. This is so because, firstly, as intimated hereinabove a short while ago, the court has no mandate to go into the merits or otherwise of the application, and secondly, the law, like nature, allows no vacuum space to exist in the proceedings where no reason whatsoever exists. Reasons for such rather procedural recess (vacuum space) are to be adduced by the litigants and accepted by the court which accedes to such proposal, an exercise which, as I have found hereinabove, this Court is not empowered to undertake.

The next hurdle then becomes this: will this court not be precluded from entertaining the said Commercial Case No. 168 of 2015 in view of the Notice of Appeal in respect of Miscellaneous Commercial Cause No. 128 of 2015? This question, minute as it might seem, has caused me a great straining of my mental faculties. Having pondered it over, and on the basis of the authorities cited to me, I think, the answer is in the negative. This is firstly, for the very reason as rightly put by the counsel for the applicant that the two are different suits of their own. I, apart from being bound by the decision in ***Tanzania Motor Services Ltd*** (Supra) on the point, entirely agree that the two are different matters. Thus, whereas in Commercial Case No. 168 of

2014 the plaintiff is seeking to enforce a contract of works, in Miscellaneous Commercial Cause No. 128 of 2015, the applicant (the petitioner) was seeking to enforce an agreement to arbitrate or arbitration clause which, in terms of ***Heyman Vs Darwins Ltd*** [1942] AC 356 at page 375, is an agreement of its own nature enforceable through specific performance. The fact that these two matters are separate is vindicated by the fact that the proceedings which were requested by the applicant herein (then petitioner), are specifically those in relation to the said petition; namely, Miscellaneous Commercial Cause No. 128 of 2015, a view which is supported by the filing system of this Court.

Further to this, the question as to whether by proceeding with Commercial Case No. 168 of 2014, the intended appeal against the order of this court in Miscellaneous Commercial Cause No. 128 of 2015 will or will not be rendered nugatory cannot detain me here. It is simply because, as I have intimated hereinabove, by virtue of the Notice of Appeal filed by the applicant in relation thereto, this court is stripped of jurisdiction to entertain such question.

The foregoing discourse notwithstanding, the circumstances as gleaned from the record of this matter; that is from Commercial Case No. 168 of 2014, Miscellaneous Commercial Cause No. 12 of 2015, Miscellaneous Commercial Cause No. 128 of 2015, the notice of appeal filed since 07.12.2015 to the filing of the present application (Miscellaneous Commercial Cause No. 26 of 2016 on 29.02.2016), makes my mind uncomfortable with staying the proceedings in Commercial Case No. 168 of 2014. I shall demonstrate.

Apart from the mere mention of the said notice of appeal having been preferred and having written to this court to apply for copies of proceedings, ruling and order in respect of the said Miscellaneous Commercial Cause No. 128 of 2015, save for the said impugned ruling, none of these have been

attached to the said application. Assuming, as it might seem, that that was not fatal for the reason that the same are presumed to be in the court record, yet, the affidavit in support of the application does not disclose as to whether, first, the proceedings have been supplied or not and what is the status thereof; and secondly, whether the said appeal has actually been preferred or not. This latter fact is crucial considering the fact that this application was filed in this court about 82 days from the date the notice of appeal was lodged. Presumably, the actual appeal should have been filed by then in terms of rule 90 (1) of the Court of Appeal Rules, 2009. I am of this view because from 07.12.2015 to 29.02.2016, it is about the said 82 days which is inordinately far beyond the 60 days within which the said appeal should have been already preferred. To date; 30.06.2016, no appeal has been preferred and it is well beyond six months after the ruling intended to be challenged in the Court of Appeal was delivered. This vindicates Mr. Fungamtama's complaint to the effect that the applicant is but playing delaying tactics.

As intimated earlier on, nothing is stated as to whether an appeal has actually been instituted, or if not, whether the proceedings have been issued by the registrar of this court for the purpose of the said appeal, and if not, what is the status thereof. These, in my strongest conviction, could have shed light on the diligence, need, and willingness of the applicant to pursue the remedy sought out of the purportedly intended proceedings before the Court of Appeal.

The foregoing analysis, however, should not be taken as pre-empting the merit or otherwise of the intended appeal. Rather, it is a genuine assessment of the facts and circumstances to which this court is legally entitled to make in the course of dispensation of its constitutional duty. It is this assessment which inclines me to a conclusion that there might not be an appeal or rather

it might be a sham attempt in the light of the said rule 90 (1) above and the ***Tanzania Motor Services Ltd*** (at page 12 of the typed ruling of the Court of Appeal). Therefore, staying the proceedings in Commercial Case No. 168 of 2014 will, in my view, be a delay to justice on rather flimsy grounds, and an act of sabotage to the interests of justice.

Eventually from the above discussion, I am convinced that this court is still clothed with jurisdiction to proceed with Commercial Case No. 168 of 2014 and accordingly will proceed to preside over the same until further notice to the contrary from the Court of Appeal is issued, which is, of course subject to proper legal pursuit for the same.

In fine, therefore, I proceed to dismiss the present application in its entirety with costs to the respondents. Commercial Case No. 168 of 2014 will proceed to the next step on the date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE
JUDGE