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. 435 OF 2020

JITESH JAYANTILAL LADWA ..... 1ST APPELLANT

INDIAN OCEAN HOTELS LIMITED ..... 2ND APPELLANT

VERSUS

DHIRAJLAL WALJI LADWA ..... 1ST RESPONDENT
CHANDULAL WALJI LADWA ..... 2ND RESPONDENT
NILESH JAYANTILAL LADWA.....3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Nangela, J.)

dated the 28th day of August 2020
in
Commercial Case No. 2 of 2020
.....

JUDGMENT OF THE COURT

11th May, & 31st August, 2022

KOROSSO, J.A.:

The instant appeal is prompted by the refusal of the High Court Judge (Nangela, J.) to recuse himself from the conduct of the case in a ruling dated 28/8/2020 in Commercial Cause No. 2 of 2020.

The brief background of the case leading to the current appeal is that the respondents, pursuant to section 233(1) and (3) of the Companies Act, Cap 212 R.E 2002 (the Companies Act) petitioned in the High Court, Commercial Division (trial court) essentially seeking for: a

declaratory order that the conduct and operations of the 1st appellant were unlawful and prejudicial to the interests of the company, shareholders, directors, and members of the company; a permanent restraining order against the 1st appellant from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the respondents, an order directing and authorizing civil proceedings to be brought for, and on behalf of the company by any of the respondents or the respondents jointly to compel the 1st appellant make good all losses and business distortions incurred because of misappropriation of the company's funds and mismanagement of the company by the 1st appellant; an order compelling the 1st appellant to vacate the office and business premises to be used by the company only and relocate his personal business venture from the company's premises; and payment of general damages, costs, and any other relief or order.

The appellants filed four points of preliminary objection to challenge the petition. The trial court overruled all three of the argued preliminary points of objection with costs and ordered the hearing to proceed on merit. Dissatisfied, the appellants filed an application for revision to the Court under Rule 65(1)(2)(3) and (4) of the Tanzania Court of Appeal

Rules, 2009 (the Rules). Notwithstanding the filed application for revision, the trial court proceeded with the hearing of the petition on merit. Moreover, on 14/5/2020, the 1st appellant by way of a letter urged the presiding Judge to recuse himself from hearing and determining Commercial Cause No. 2 of 2020 and Misc. Commercial Applications Numbers 56 and 62 of 2020 while pending in the High Court advancing various allegations that included that the trial judge held secret meetings at his chamber with other respondents and some advocates and apprehended that he engaged in corrupt transactions.

As alluded to earlier, the High Court Judge having deliberated on the said complaints and allegations refused to recuse himself from the conduct of the case, which is the subject of the present appeal and ordered that the hearing proceed accordingly. Aggrieved, the appellant lodged a memorandum of appeal premised on six grounds lodged in this Court, and for reasons to be shown later, the grounds of appeal will not be reproduced.

On 11/5/2022, the day the appeal was called for hearing, Mr. Jeremiah Mtobesya, learned advocate entered appearance for the appellants, whereas the respondents enjoyed the services of Mr. Richard Rweyongeza, learned advocate.

As the respondents had on 5/5/2022 filed a notice of preliminary objection pursuant to Rule 107(1) of the Rules, the Court proceeded to first deliberate on the points and thereafter determine the way forward with respect to the grounds of appeal.

The respondents raised two points of objection in alternative. One, is that the appeal is incompetent as it is based on an interlocutory decision of the Court contrary to the requirements of the law and alternatively, that the appeal is incompetent for want of leave.

Expounding on the points of objection, Mr. Rweyongeza contended that the appeal is against an interlocutory decision of the High Court and thus in contravention of section 5(2)(d) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 since it arises from the Ruling of the High Court Commercial Division in Misc. Commercial Cause No. 2 of 2020, rejecting the request for the Presiding Judge, Nangela J., to recuse himself from the conduct of the matter. He asserted that at the time the ruling was given, the hearing of the said petition had not been heard or determined. To augment his position, the learned counsel cited the case of **Vodacom Tanzania Ltd Public Company Vs Planetel Communications Ltd.**, Civil Application No. 43 of 2018 (unreported), which held that where a matter is interlocutory an appeal should not be preferred to the Court. Mr.

Rweyongeza argued that adopting the finding in the present case, the appeal should not have been preferred since there was no existing right to appeal to the Court.

Addressing the Court on the alternative point of objection, the learned counsel for the respondents argued that section 5 (1)(a) of the AJA clearly enunciates what is appealable to the Court as a matter of right. That this includes, a decree or a preliminary decree. A ruling, he argued does not give rise to a decree but a drawn order thus the instant appeal contravenes the said provision. Regarding section 5(1)(b) of the AJA, he contended that leave must be sought to appeal against, an appealable order or ruling of the High Court which does not fall under section 5(1)(a) and (b) of the AJA and goes to section 5(1)(c) of AJA that addresses any other order which is not permitted.

Furthermore, the learned counsel argued that in the present appeal, there was no leave that was sought or granted, and thus in the eyes of the law, there is no appeal before the Court. He asserted that under the circumstances, the appeal before the Court is incompetent and it should be struck out, as the only available remedy for incompetent appeals. He also pressed for costs.

In response, Mr. Mtobesya commenced by responding to the first point of objection. He referred us to the definition of an interlocutory order as expounded in the case of **University of Dar es Salaam Vs Silvester Cyprian and 210 Others** [1998] T.L.R. 176, that; *"interlocutory proceedings are proceedings that do not decide the rights of parties but seek to keep things in status quo pending determination of those rights..."*. He argued that refusing to recuse oneself by the High Court judge in the instant case goes beyond the definition stated therein since it touches on the ability of the court to determine the matter with impartiality. He argued further that the refusal of the High Court Judge to recuse himself challenged the confidence of the parties. He cited the case of **Ernest Ndesangio Vs Republic** [1980] T.L.R. 333, where the Court stated; *"Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking: 'The judge was biased'."*

According to Mr. Mtobesya, the impugned ruling of the High Court went beyond the apprehension of fear and should be considered thus. He cited the case of **Arcado Ntagazwa Vs Bayogeza Bunyambo** [1997] T.L.R. 242 to emphasize his contention. He argued that the challenged decision of the High Court went beyond interlocutory orders since it addresses matters of lack of fair trial since justice cannot be rendered

where a party lacks confidence in the presiding court. Other cases cited to reinforce his stance included **Palumbo Reef Ltd Vs Jambo Rafiki Bungalow**, Civil Appeal No. 226 of 2020; **Reginald M. Morenje Vs Warda Mohamed**, Civil Appeal No. 141 of 2019 and **Boniface Anyisile Mwabukusi Vs Atupele Fredy Mwakibete and Two Others**, Civil Appeal No. 46 of 2021 (all unreported). He then urged us to find the point of objection to be misconceived and to lack merit.

Confronting the second point of objection, the learned counsel conceded the fact that section 5(1)(c) of AJA stipulates on appeals that require leave. However, he contended that when exercising its discretion, the requirement for leave can be waived where the Court decides to do so upon consideration of the material before it. He referred us to the decision of the Court in **Rutagatina C. L. Vs The Advocates Committee and Another**, Civil Application No. 96 of 2010 (unreported) and find that the issues before the Court are such that it is pertinent for the Court to hear and determine. Whilst conceding the lapse in failing to seek for leave to appeal as required by the law, he, however urged us to find that it is pertinent for the Court to dispense with procedural matters that delay justice delivery and proceed to hear the appeal on merit by invoking the overriding objective principle and cited the case of

Commissioner General Tanzania Revenue Authority Vs JSC Atomredmetzoloto (ARMZ), Consolidated Civil Appeal No. 78 of 2018, and No. 79 of 2018 (unreported) to cement his position.

Moreover, the learned counsel for the appellants argued that the Court should take into consideration the fact that each case must be decided on its own material facts and that the instant appeal is a proper case to apply the overriding objective principle and do away with undue technicalities in line with Article 107 (5)(e) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Mr. Mtobesya thus implored us to find the second point of objection to be devoid of merit and proceed to determine the appeal on merit, inspired by the decision in **Murtaza Ally Mangungu Vs The Returning Officer for Kilwa and Two Others**, Civil Application No. 80 of 2016 (unreported).

The rejoinder by the respondents' counsel was brief and a reiteration of his submission in chief. Regarding the first point of objection, Mr. Rweyongeza argued that most of the arguments expounded by the learned counsel for the appellant are misconceived and should be argued at the hearing of the appeal and not at this stage when the Court was yet to determine whether the impugned decision appealed against is interlocutory or not. He argued the Court to find most of the cited cases

by the appellant's counsel as not supporting the appellant's case and some to be distinguishable. He cited the case of **University of Dar es Salaam** (supra) as not applicable since it was decided on 3/7/1996 when section 5(2)(d) of AJA was not there having been introduced in AJA by Act No. 25 of 2005. He maintained that the said case discusses interlocutory proceedings and not decisions and thus in essence a different issue.

On the point of objection in the alternative, the learned counsel for the respondents urged us not to consider the arguments fronted by the learned counsel for the appellants because they are misguided. He argued that the learned counsel for the appellants was inviting the Court to move in an unchartered arena, as the Court cannot assume jurisdiction not vested on it. Mr. Rweyongeza vehemently argued that, leave to appeal is a legal requirement which cannot be waived. Therefore, he prayed that the appeal be struck out.

Before us for determination are two points of objection, the first one being a substantive point of objection and the second point of objection being an alternative. The critical issue raised by the points of objection is whether the order by Nangela J. dated 28/8/2020 to proceed with hearing of Commercial Case No 2 of 2020 upon refusal to recuse himself from the conduct of the said case is appealable in terms of section 5(2)(d) of AJA

and in the alternative, whether this Court has jurisdiction to hear the appeal in the absence of leave to appeal under section 5(1)(c) of AJA.

On the first point of objection, whilst the learned counsel for the respondents argued that the impugned ruling by the High Court judge was interlocutory, the learned counsel for the appellants adamantly invited the Court to find the order of the High Court not to be interlocutory because it was made amidst the appellants having shown lack of confidence and apprehension on whether his rights will not be compromised, and justice be effected. He argued this meant that the refusal to recuse himself from the conduct of the case was essentially a closure and an act of finality on delivery of justice as against the appellants. We find it pertinent at this juncture to better understand what an interlocutory order or decision is. In the case of **Seif Sharif Hamad Vs S.M.Z** [1992] T.L.R 43, the Court held that it has no jurisdiction to hear and determine an appeal confronting an interlocutory order, and adopted the definition of "interlocutory order" from Black's Law Dictionary (4th Edition) that states:

> *"An order which decides not the cause but settles some intervening matter relating to it."*

Again, in the case of **Tanzania Posts Corporation Vs Jeremiah Mwandi**, Civil Appeal No. 474 of 2020 (unreported), the Court decided to consider the definition of "interlocutory order" as found in Black's Law Dictionary (8th Edition) which alludes:

> *"An order that relates to some intermediate matter in the case, any order other than the final."*

We subscribe to the observation we made in **Tanzania Posts Corporation** (supra) that what the definitions cited bring forth is that "interlocutory orders" are those:

> *"that do not completely dispose of all issues of law and fact that were presented to the court.... And the proceedings from which they emanate, interlocutory proceedings."*

In deciding whether the impugned Ruling is appealable or not we also find it pertinent to reproduce the challenged order found in the said ruling on pages 297-318 of the record of appeal. It arose from a letter for recusal made by the 1st appellant vide a letter dated 14/6/2020 for reasons stated therein. The learned High Court judge held:

> *"... Consequently, I hereby dismiss the 1st respondent's prayer to recuse myself from the conduct of this petition. In the meantime, since it was brought to the attention of this Court that,*

there is currently a pending application No. 54 of 2020 before Court of Appeal for revision of the earlier ruling which was issued on 24th April 2020, this matter is hereby stayed pending the determination of the said revision."

From the above excerpt it shows that the hearing of the case was still pending. Section 5(2)(d) of AJA stipulates such:

"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."

When determining whether an order falls within the ambit of section 5(2)(d) of AJA this Court had occasion to deliberate on it and developed a test thereto to determine whether the decision of the Court is final or not. In **DPP Vs Faridi Hadi Ahmed and 36 Others**, Criminal Appeal No. 205 of 2021 (unreported), the Court made a reference to our decision in **Murtaza Ally Mangungu** (supra) where we stated:

"In resolving the controversy, we have decided to adopt what is known as "the nature of the order test". This test was applied in a decision of the PRIVY Council of BAZSON VS ATTINCHAN URBAN DISTRICT [1903, 1KB 948] which is:

"does the judgment or order as made, finally dispose of the rights of the parties? If it does then... it ought to be treated as a final order, but if it does not it is then interlocutory."

From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties. That means that the same order or decision must be such that it could not bring back the matter to the same court."

Indeed, the above holding provides a direction to answer the question we alluded to above on whether Nangela, J. challenged ruling had the effect of finally concluding the rights of parties when the "*nature of the order test*" discussed in **Murtaza Ally Mangungu** (supra) and other cases including **JUNACO (T) Limited and Justin Lambert Vs Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016, and **Jitesh Jayantilal Ladwa and Another Vs Dhirajlal Walji Ladwa and 2 Others**, Civil Application For Revision No. 154 of 2020 (both unreported) are taken into account.

At this juncture, when applying "*the nature of the order test*" we shall also consider the import of section 5(2)(d) of AJA. In **Augustino Masonda Vs Windmel Mushi**, Civil Application No. 383/13 of 2018 where the Court stated:

> *"... section 5(2)(d) of AJA... prohibits appeal and application for revision from interlocutory orders of the High Court which do not have the effect of finally and conclusively disposing matters before that court."*

Similarly, in **Vodacom Tanzania Public Limited Company** (supra), the position was reiterated, and the Court held:

> *"In the light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable save where it had the effect of finally determining the charge, suit or petition."*

Having considered the impugned ruling by the High Court and especially the excerpt reproduced hereinabove, the High Court judge having refused to recuse himself from the conduct of the case, proceeded to order on matters related to the proceedings of the suit before him, which showed that the trial was yet to be heard and determined, a fact not disputed by the learned counsel for the appellants.

Conversely, there is nothing before us to show that the impugned order, locked the doors for the appellants in pursuit of justice through the suit. We are thus of the firm view that there was nothing presented to augment his contention that there was apprehension on the part of the appellants that justice was compromised and thus it has no legs to stand

on. Indeed, even upon determination of the instant matter, there is still an opportunity for the appellants' concerns to be addressed if properly channeled within the confines of the law. Therefore, without a doubt, the instant appeal is premature since the impugned ruling did not finally and conclusively determine the suit filed by the appellants and still pending at the High Court. The first preliminary point of objection is thus found to have substance and sustained.

Certainly, the above finding is sufficient to dispose of the appeal without proceeding to address the alternative point of objection. Suffice to say, without delving too much into the matter, for the sake of argument if the first point would have fallen, this second point of objection would have also sufficed to dispose of the appeal. We think it is important for better appreciation of the matter to reproduce the provisions of section 5(l)(c) of the AJA, 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-*
>
> > *(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."*

Undoubtedly, the appeal before us, being one against a ruling of the High Court does not fall within the ambit of the other provisions in section 5 of AJA and thus by its nature falls squarely under section 5(1)(c) of AJA. The above position of the law and the essence of leave to appeal were not disputed by the learned counsel for the appellants. However, he implored us to do away with the procedural technicalities and invoke the overriding principle in the interest of justice. A careful scrutiny of section 5(l)(c) of the AJA, has led us to find, that the essential requirements are very clear and written in a language easily understood. There is no ambiguity and does not provide for any exceptions to the provision.

On the argument by the learned counsel for the appellants that substantive justice should override procedural directives, it should be noted that where the law (or Rules) clearly stipulate certain measures to be taken then the provisions and requirements of such law or rule must be adhered to. Remembering that rules of procedure are as held in the case of **Microsoft Corporation Vs Mitsum Computer Garage Ltd** (2001) 2 EAR 467 that:

> *"the handmaidens and not the mistresses of justice. They should not be elevated to a fetish.... Theirs is to facilitate the administration of justice*

in a fair, orderly, and predictable manner, not to fetter or choke it."

We unreservedly subscribe to the above articulation. Certainly, we are aware that there are some technicalities that can be ignored without causing injustice to the parties. We are alive to the principle of the overriding objective, which is incorporated under section 3 of the AJA and incorporated in the amended Rule 2 of the Rules. Noteworthy that, that this principle is not supposed to blindly disregard the rules of procedure couched in mandatory terms but is there to also ensure that they are applied and determined justly as pronounced in the case of **Njake Enterprises Limited Vs Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (unreported).

With due respect, failure to quest for leave on the part of the appellants means this Court is left without jurisdiction to entertain the appeal. The Court held in **Juma Busiya Vs Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020 (unreported), that for a court to invoke any powers, not only the principle of overriding objective, but it must also have jurisdiction to preside over the matter. The requirement for leave to appeal for orders such as the one subject to the instant appeal goes to the jurisdiction of the Court to entertain the appeal, and thus cannot be easily waived or disregarded.

In the premises, we refrain from accepting the invitation by Mr. Mtobesya to invoke the principle of overriding objective and waive the requirement for leave to appeal in terms of section 5(1)(c) of AJA. This is because as stated above, the principle of overriding objective cannot be applied where there is a failure to comply with mandatory provisions as was the case in the instant appeal. This point of objection though raised as an alternative is also found to have merit.

In the end, the appeal is rendered incompetent. The remedy for an incompetent appeal is to strike it out, which we hereby do. For the avoidance of doubt, the appeal is struck out with costs.

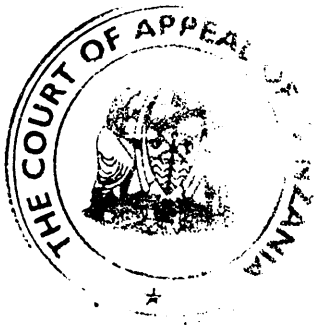
DATED at **DAR ES SALAAM** this 26th day of August, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The judgment delivered this 31st day of August, 2022 in the presence of Mr. John Chuma, learned advocate for the appellants who also holds brief for Mr. Jeremiah Mutobesya, learned advocate for the respondents is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL