IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 43 OF 2018

VODACOM TANZANIA PUBLIC LIMITED COMPANY..... APPELLANT

VERSUS

PLANETEL COMMUNICATIONS LIMITED..... RESPONDENT

(Appeal from the Ruling and Drawn Order of the Commercial Division of the High Court

at Dar es Salaam)

(Sehel J.)

Dated 16th October, 2017

In

Miscellaneous Commercial Cause No. 295 of 2017

RULING OF THE COURT

7th & 26th June 2019

MUGASHA, J.A.

The appellant was the petitioner in Miscellaneous Commercial Cause No. 295 of 2017 which was a matter under the Arbitration Act Cap 15 RE.2002. After the commencement of those proceedings between 17th July 2017 and 4th August, 2017, on 10th August, 2017, the appellant filed a petition seeking reliefs reflected at page 16 of the record as follows:-

1. *an interim and urgent order staying the proceedings in arbitration pending hearing and determination of this Petition.*

2. *A declaration that the Arbitral proceedings conducted on 17th July, 2017 and 4th August, 2017, and any other subsequent proceeding, and consequential order for directions given in the arbitration proceedings in which the panel of Arbitrators was not properly constituted, are a nullity and of no legal effect.*

3. *An order quashing and nullifying arbitral proceedings conducted on 17th July, 2017 and 4th August, 2017, and any other subsequent proceeding, and consequential order for directions given in the arbitration proceedings in which the panel of Arbitrators was not properly constituted.*

4. *An order setting aside or remitting for consideration the Interim Award signed by one of the two Arbitrators and an Umpire issued on 17th July, 2017.*

5. *An order removing Prof Gamalilel Mgongo Fimbo as an umpire, for wrongful assumption and unlawful usurpation of the powers and jurisdiction of Arbitrators and for misconduct following such wrongful assumption of jurisdiction.*

6. *Costs of this petition ; and*

7. *Any other such orders as the Court may deem fit.*

The petition was followed by the appellant's application seeking a temporary injunction/ interim order to restrain the continuation of the arbitral proceedings. Having issued an interim order restraining the arbitration for three weeks pending the hearing of the main application for temporary injunction as reflected at page 363 of the record of appeal, the substantive application was heard on 11th October, 2017 and ultimately dismissed on ground that, it was not merited for the grant of the restraint orders sought.

Aggrieved by the said decision, the appellant filed an appeal to the Court raising two grounds of complaint namely:

1. The honourable Court erred in her finding by allowing arbitral proceedings to proceed in utter disregard of the Petition seeking to nullify the proceedings and removal of an umpire and an arbitrator.

2. The Honourable Trial Court erred in law by pre-empting the outcome of the appellant's petition seeking to remove an umpire and arbitrator which was still pending before the very court rendered the decision.

In addition the appellant has prayed to the Court to make orders to quash, set aside the decision of the Commercial Court contained in the Ruling, Drawn Order and grant the appellant costs and reliefs that this Court may deem fit and just to grant.

The hearing of the appeal was confronted with the Notice of preliminary objection challenging the competence of the appeal on the following grounds:

a) Being an appeal against a ruling and order of the High Court in an interlocutory application for temporary injunction, the appeal is unmaintainable and or

misconceived for violating the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act; and In the alternative,

b) The appeal is incompetent for want of leave to appeal sought from and granted by the High Court or the Court in terms of section 5 (1) (c) of the Appellate Jurisdiction Act .

At the hearing, the appellant was represented by Messers Silvanus Mayenga and Edward Mwakingwe, learned counsel whereas the respondent had the services of Mr. Michael Ngalo, learned counsel.

In addressing the first preliminary point of objection, Mr. Ngalo submitted that, the appeal is misconceived and untenable as it is prohibited by section 5 (2) (d) of the Appellate Jurisdiction Act Cap 141 RE. 2002 (the AJA) as amended by Act No 25 of 2002. He argued that, since the appeal emanates from the Ruling in which the appellant sought to restrain the continuation of arbitral proceedings pending determination of interim award in Arbitration, it is not appealable because the rights of the parties were not conclusively determined. To support his proposition Mr. Ngalo referred us to the cases of **AFRICAN TROPHY HUNTING LTD VS THE ATTORNEY GENERAL AND FOUR OTHERS,** Civil Appeal No. 25 of 1997, **VIDYADHAR CHAVDA VS DR. INDIRA CHAVDA**, Civil Appeal No. 99 of 2012,

BRITANIA BISCUITS LIMITED VS NATIONAL BANK OF COMMERCE AND DOSHI HARDWARE (T) LIMITED, Civil Application No. 195 of 2012 (all unreported).

In arguing the second ground of preliminary objection which was in the alternative, he submitted that, even if it is assumed that the appeal is properly before the Court, the same is incompetent for want of leave under section 5 (1) (c) of AJA. In this regard he argued that, since the impugned decision dismissed an application for the temporary injunction, the order is not appealable as a matter of right and without seeking and obtaining requisite leave. Mr. Ngalo thus urged us to dismiss the appeal with costs on account of the incompetence.

On the other hand, opposing the preliminary objections, Mr. Mayenga submitted that the impugned Ruling and Drawn Order are appealable. He argued that, the dismissal of the temporary injunction against the pending determination of the petition had the effect of conclusively determining the reliefs contained in the petition. He pointed out that, at pages 489 to 490 the High Court Judge walked on the merits of the petition having allowed the arbitral proceedings to continue. To support his propositions he referred us to the cases of **REGISTERED TRUSTEES OF NBC CLUB VS NBC**

HOLDING, Civil Application No 59 of 2001, **TANZANIA MOTOR SERVICES LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION (PSRC) VS MEHAR SINGH t/a THAKER SINGH,** Civil Appeal No. 115 of 2005, **CHAMA CHA WALIMU TANZANIA VS THE ATTORNEY GENERAL,** Civil Application No.151 of 2008 (all unreported) and **TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS (TUICO- OTTU UNION) AND ANOTHER VS TANZANIA ITALIAN PETROLEUM REFINING COMPANY LTD (TIPER)** [2001] TLR n.332.

Regarding the alternative ground of the preliminary objection, Mr. Mayenga submitted that, the present matter is appealable under section 5 (1) (a) of AJA. He added that, the decisions cited by the respondent's counsel are distinguishable with the situation at hand. He thus prayed the Court to overrule the preliminary objections with costs and proceed to hear the appeal.

In his rejoinder, Mr. Ngalo submitted that, in the impugned Ruling the High Court Judge properly exercised her discretion to dismiss the application for temporary injunction. He added that, at pages 489 to 490 of the record of appeal the High Court Judge considered the principle of the balance of probabilities in the grant or otherwise of an injunction, which in

any case was not a determination of the petition. He as well distinguished the authorities cited by the appellant's counsel arguing that the same are not applicable as they all relate to issues whereby the Court concluded that, the rights of the parties were finally determined as opposed to the present matter. Reiterating his earlier submission, he urged us to dismiss the appeal on account of incompetence.

Having carefully considered the submission of counsel and the record before us, the issue for our determination is whether the temporary injunction was an interlocutory one or had the effect of finally determining the petition before the High Court.

Temporary injunctions are among others regulated by section 68 (e) of the Civil Procedure Code CAP 33 RE. 2002 (the CPC) which categorically states as follows:

> *" In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf–*
>
> *(a) not applicable*
>
> *(b) not applicable*
>
> *(c) not applicable*

(d) not applicable;

(e) make such other interlocutory orders as may appear to the court to be just and convenient."

According to BLACK'S LAW DICTIONARY, 8TH Edition, at page 800:

" *A temporary injunction is issued before or during trial to prevent an irreparable injury from accruing before the court has a chance to decide a case."*

Therefore, the purpose of an injunction in law is said to be interlocutory when granted in an interlocutory application and continues until a defined period. It aims at preserving the *status quo* until the final determination of the main application or suit. See - **CHAMA CHA WALIMU TANZANIA VS THE ATTORNEY GENERAL** (supra).

In the present matter, it is not in dispute that, after the appellant had filed the petition, it unsuccessfully applied for an order of temporary injunction pending the determination of the petition. The question to be addressed is whether or not the Ruling and the order of the High Court which dismissed the application are appealable which takes us to the provisions regulating appeals against the interlocutory orders, whereby section 5 (2) (d) of the AJA categorically states as follows:

> *"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 Count* ***unless such decision or order has the effect of finally determining the charge or suit."***

[Emphasis supplied]

In the light of the cited provision of the law what comes to mind is that, an interlocutory decision or order shall be appealable only if it has the effect of finally determining the charge or suit. The suit includes a petition in the light of what the Court said in the case of **BLUELINE ENTERPRISES LIMITED VS EAST AFRICAN DEVELOPMENT BANK,** Civil Application No. 103 of 2003 (unreported).

As none of the parties disputed that the impugned Ruling and Order are interlocutory which we agree, however, parties locked horns on if they had the effect of finally determining the petition which was pending before the High Court.

In the case of **CHAMA CHA WALIMU TANZANIA VS THE ATTORNEY GENERAL** (supra) which was cited to us by the appellant's counsel the Court had the opportunity of expounding an injunction which had the effect of finally determining what is before the trial court. In that case, the

applicant had declared a trade dispute with the Government and it issued a strike notice of sixty days which was to commence on 15th October, 2008. The notice was pursuant to section 26 (2) (d) of the Public Service (Negotiating Machinery) Act No. 19 of 2003. Subsequently, the Attorney General successfully instituted and was granted a permanent injunction restraining members of the applicant from calling for and or participating in the planned strike. In considering if the temporary injunction carried the Hallmarks of finality the Court held as follows:

> *"We have dispassionately read the ruling of the Labour Court and the order extracted there from in the light of the order sought in the chamber summons.* ***We are of the firm view that the order was not interlocutory. It had the effect of conclusively determining the application.*** *The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant and its members were unequivocally restrained from "calling for and /or participating in the planned strike".* ***There was no other issue remaining to be determined by the Labour Court. Both in form and substance the issued injunction order carries the hallmarks of finality, as it was not granted pending any***

> ***further action being taken in those proceedings***... *The applicant therefore had an automatic right of appeal to this Court under section 57 of the Labour Institutions Act..."*

[Emphasis supplied]

In the case of **REGISTERED TRUSTEES OF NBC CLUB** (supra) which was relied upon by the appellant's counsel, the Court had the opportunity to determine whether the dismissal of the plaint which does not disclose cause of action contrary to Order VII Rule (1) (e) of the CPC amounts to a conclusive determination of the rights of the parties. Having considered the propriety or otherwise of the appeal for want of leave the Court held:

> *"Thus, although on the face of it the order appears to be dismissal of the plaint, yet in actual fact the learned trial judge conclusively determined the rights of the parties. In that respect we agree with Mr. Mhango learned counsel for the appellants that, the impugned decision amounted to a decree and that the appellants had a right of appeal under section 5 (1) (a) of the Act."*

In another case of **TANZANIA MOTOR SERVICES** (supra) referred to us by Mr. Mayenga, the appellants who were defendants before the trial

court, instead of filing a written statement of defence, they applied by way of petition for stay of proceedings in terms of section 6 of the Arbitration Ordinance. The learned trial judge dismissed the petition hence the appeal before the Court. Apparently, the respondent challenged the competence of the appeal by reason of section 5 (2) (d) of the AJA on the ground that, the decision was interlocutory as it did not finally determine Civil Case No 20 of 2002 therefore not appealable. Having considered the rights and obligations of the parties in the Contract under arbitration as determined by the High Court, the Court had to decide if the dismissal of the petition did finally dispose of the rights of the parties. In so doing, the Court adopted the test in the case of **BOZSON VS ARTINCHAM URBAN DISTRICT COUNCIL (**1903) 1 KB 547 wherein Lord Alverston stated as follows:

> *"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 final order; but if it does not, it is then, in my opinion, an interlocutory order."*

Having concluded that, the test adopted in Bozson case is in accordance with the language used in section 5 (2) (d) of the AJA as amended, thus

the Court in **TANZANIA MOTOR SERVICES LTD AND PSRC VS MEHAR SINGH t/a THAKER SINGH** (supra) finally held as follows:

> *"the decision of the learned judge refusing to stay proceedings in Civil Case No 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration.* ***The decision closed the doors to arbitration rendering provisions in contracts for arbitration meaningless..."***

[Emphasis supplied]

On the other hand, where an appeal or revision is sought against a interlocutory order which does not have the effect of determining the suit, the Court has not been hesitant to hold the same incompetent on ground that, it offends the provisions of section 5 (2) (d) of the AJA. The cases to that effect include **VIDYADHAR CHAVDA VS DR. INDIRA CHAVDA** (supra) where the Court made the following observation:

> *"it is further noted, as section 5 (2) (d) (supra) provides, that an interlocutory decision may be appealed against if it brings the matter to its finality before the High Court."*

In **BRITANIA BISCUITS LIMITED VS NATIONAL BANK OF COMMERCE AND DOSHI HARDWARE (T) LIMITED** (supra), the applicant had applied for revision against the order to deposit TZS. 100,000,000/= as security for costs by the High Court. The application was greeted with the preliminary objection challenging its competence that it did not have the effect of finally determining the suit which was pending before the High Court. In upholding the preliminary objection the Court found the application incompetent in terms of section 5 (2) (d) of the AJA and observed as follows:

> *" ... We are of the opinion that the Ruling and Order of the High Court sought to be revised is an interlocutory order...because in that order no where it has been indicated that the suit has been finally determined..."*

Finally the Court held that:

> *" ... we uphold the 2nd preliminary objection raised by the advocate for the respondent as well and find this application incompetent having arisen from an interlocutory order which is prohibited by section 5 (2) (d) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 25 of 2002."*

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 has the effect of finally determining the charge, suit or petition. In this regard, we shall revisit the objects and reasons behind the enactment of Act 25 of 2002 in due course.

In the present matter after the appellant had filed a petition seeking reliefs which we had earlier reproduced at the beginning of our Ruling, she unsuccessfully pursued an application for injunction pending the hearing and determination of her petition vide Miscellaneous Commercial Case No. 295 of 2017 as is evident at page 289 of the record of appeal which among other things, reflects the following:

> 1. *The Honourable Court be pleased to issue an interim order restraining continuation of arbitral proceedings and make an order suspending compliance with the orders for directions given in the arbitration proceedings initiated by the Respondent against the Applicant currently pending before His Lordship Dr. Willy Mutunga and Mtango Jothan Andrea Lukwaro*

*(the **Arbitrators**) and Prof Gamaliel Mgongo Fimbo (the **Umpire**), **pending the hearing and determination of the Applicant's Petition in Miscellaneous Commercial Case No 251 of 2017, currently pending before this Honourable Court;***

2. *Costs of this Application be provided for; and*
3. *Any other reliefs this Honourable Court may deem fit and just to grant."*

[Emphasis supplied].

In the light of the bolded expression it is clear that, the appellant had applied for the temporary injunction pending the determination of her petition. As earlier pointed out, after hearing the parties and having carefully considered the principles governing injunction, the High Court Judge dismissed the application with costs having concluded as follows:

> *"I find no merit in the applicant's application to exercise discretion in granting the restraining orders sought."*

Moreover, in the Drawn Order apart from reproducing the orders sought in respect of the temporary injunction, at page 495 of the record of appeal the following is evident:

"THIS COURT DOTH HEREBY ORDER THAT:

The application is dismissed with costs"

To address Mr. Mayenga's complaint we have deemed it crucial to reproduce what he considers to be the determination of the High Court in the impugned Ruling as follows:

> *On the question of irreparable loss, it is contended in the affidavit in support of the application that there is a risk of having conflicting decisions. It was also averred and argued in the submission that the fees payable to the arbitration are very high and non-refundable. It is trite law that the injury which the applicant shall suffer must be irreparable injury which cannot be atoned by award of damages as held in the case of* ***America Cynamid Vs Ethicon Limited [1975] AC 396.*** *With due respect to the*

applicant's assertion there is a danger of having conflicting decisions, it be noted that the issue brought forward by the petitioner before the High Court are not the same that are before the arbitral tribunal. In the petition it is alleged that the umpire and arbitrator usurp power hence this Court's intervention is sought for their removal. This is not before the arbitral tribunal. Regarding high fees to be incurred by applicant in the arbitral proceedings, it is my finding that this kind of loss which the applicant is likely to suffer can be compensated by way of damages.

As to the balance of convenience, having taken into account all the issues raised in this application, issuance of the interim injunction would mean that the proceedings at the tribunal which have reached at the stage of hearing will be halted. Parties would of necessity have to wait for the outcome of the Court's finding of the petition filed

by the applicant. This is contrary to the parties wishes. Parties by their agreement opted for their difference to be referred to arbitration. The interference of the court must be very minimal so as not to override a valid agreement to arbitrate. Russell in his book (supra) at 7-063 specifically stated:

"The power of (Court to grant injunctive orders) should only be exercised in exceptional circumstances, and with caution, because of the acceptance of the principle that the tribunal should usually (but not always) be the first to determine its own jurisdiction. Even if an applicant establish that one of its legal or equitable rights had been infringed or that the continuation of the arbitration was vexatious, oppressive or unconscionable, this may not be sufficient."

In the application at hand there are no exceptional circumstances, the argument that the umpire acted

as arbitrator cannot be said it is exceptional however oppressive it might be seen by the applicant."

Moreover, in the determination of the application for the temporary injunction orders sought the High Court relied on the case of **CHARLES D. MSUMARI AND 83 OTHERS VS THE DIRECTOR GENERAL OF TANZANIA HARBOURS AUTHORITY,** Civil Appeal No. 18 of 1997 (unreported) where the Court said:

"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only protect rights or prevent injury according to the above stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of them and their families without substantiating the same. They have to show that they have a right in the main suit which ought to be protected or there

is an injury (real or threatened) which ought to be prevented."

Apart from this not being the ultimate decision it is crystal clear that the High Court was evaluating the principles governing the grant or otherwise of a temporary injunction. In this regard, we think Mr. Mayenga missed the boat to pick the said portion as the ultimate decision of the High Court in the application contrary to what is found at page 490 of the record of appeal whereby the High Court in its Ruling and the Drawn Order dismissed the application. There is nowhere in the Ruling or Drawn Order the High Court Judge determined the reliefs sought in the petition as suggested by Mr. Mayenga. In this regard, with respect, we found Mr. Mayenga's submission wanting that the High Court Judge did determine the petition at pages 489 to 490 of the record of appeal when analyzing the principles governing the grant or otherwise of a temporary injunction orders.

Therefore, the Ruling and the Drawn Order apart from being interlocutory in nature did not at any rate have the effect of finally determining the pending petition. We therefore, agree with Mr. Ngalo that

the present appeal contravenes the provisions of section 5 (2) (d) of the AJA which regulates appeals against the interlocutory orders. The cases cited by the Mr. Mayenga cannot salvage the appellant's predicament because, in our considered view, with respect, they were indeed cited out of context because the grant of the temporary injunction orders herein were interlocutory and did not have the effect of finally determining the pending petition before the High Court.

As earlier on stated and to recapitulate the intention of the Legislature in enacting section 5 (2) (d) of the AJA we reiterate what we said in the case of **MAHANRAKUMAR GOVINDJI MOMANI t/a ANCHOR ENTERPRISES VS TATA HOLDINGS (TANZANIA) LTD AND ANOTHER**, Civil Application No. 50 of 2002 (unreported) where the Court held:

> *"One of the pertinent reasons for paragraph (d) of section 5 of the Appellate Jurisdiction Act, 1979 is to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals against interlocutory decisions or orders."*

Furthermore, having relied on the said case, the Court in **KARIBU TEXTILE MILLS LTD VS NEW MBEYA TEXTILE MILLS AND 3 OTHERS,** Civil Application

No 27 of 2006 (unreported) categorically said that, section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 was amended purposely to give effect to the provisions of Article 107 A (2) (b) of the Constitution of the United Republic of Tanzania, 1977 which categorically states:

> *"In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say:*
>
> *(a) Not applicable*
>
> *(b) Not to delay dispensation of justice without reasonable ground;*
>
> *(c) Not applicable;*
>
> *(d) Not applicable; and*
>
> *(e) Not applicable"*

Having fully subscribed to the said position and given that section 5 (2) (d) of the AJA has been in place for almost seventeen (17) years, we least expected an appeal of this nature on account of a crystal clear stated position of the law and considering that the appellant was represented by a seasoned advocate. We found this to be with respect, tantamount to

stalling the progress of the case before the High Court and flooding the Court with unnecessary appeal which has adverse impact in the timely dispensation of justice. In future this should not be condoned.

In view of the aforesaid, as the first limb of the preliminary objection is merited we are satisfied that, the present appeal is not competent because it is barred by the provisions of section 5 (2) (d) of the AJA. Thus, we shall not determine the second limb of the preliminary objection which was in the alternative. Finally, we proceed to strike out the incompetent appeal with costs.

DATED at **DAR ES SALAAM** this 17th day of June, 2019.

S.E.A. MUGASHA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL