IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 360 OF 2022

YARA TANZANIA LIMITED..... APPELLANT

VERSUS

DB SHAPRIYA & CO. LIMITED..... RESPONDENT

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

(Mteule, J.)

dated the 2nd day of December, 2021

in

Miscellaneous Commercial Cause No. 3 of 2019

.....

RULING OF THE COURT

20th Sept. & 18th Oct., 2023

SEHEL, J.A.:

The learned counsel for the respondent, Roman Masumbuko presented a notice of preliminary objection comprising of two points of law questioning the propriety of the appellant's appeal. In order to fully grasp the points of law raised in the notice of preliminary objections, we find it apt to give a brief background leading to the filing of the appeal and the subsequent preliminary objections.

The appellant, **Yara Tanzania Limited**, is a limited liability company registered in Tanzania and an affiliate to Yara International, a Norwegian chemical company dealing with agricultural products and environmental protection, including production of nitrates, ammonia, urea and other base chemicals for producing fertilizer. Basically, Yara International deals with the production of nitrogen fertilizer. On the other hand, the respondent, **DB Shapriya & Co. Limited**, is also a limited liability company registered in Tanzania dealing with construction business.

By a contract dated 23rd March, 2012, the appellant engaged the respondent to undertake the works of engineering, procurement, construction, installation, commissioning and performance testing of a fertilizer terminal project at Kurasini Terminal, Dar es Salaam, on a turnkey basis at a contract price of the United States Dollars Fifteen Thousand Six Hundred Sixty Thousand Four Hundred and Seven (US$ 15,660,407). The works were to be performed within a period of eighteen (18) months.

Under the contract, the respondent was to provide and did provide to the appellant two bank performance guarantees as a security for the due performance of the contract covering ten (10) percent of the contract price. The guarantees were from Bank (M) Tanzania Limited, a local bank and Commerzbank of Hamburg-Germany, a foreign bank.

It happened that the agreement between the parties did not go on smoothly. Hence, on 29th March, 2016, the respondent filed a suit, Commercial Case No. 37 of 2016, against the appellant before the High Court of Tanzania, Commercial Division at Dar es Salaam (henceforth "the High Court") and also filed Miscellaneous Commercial Application No. 55 of 2016 in the same court seeking restraining orders against the respondent from calling the money on the guarantees.

Upon being served with the summons, the appellant entered appearance before the trial court and sought an order for stay of proceedings pending reference of the dispute to an arbitration, in terms of section 6 of the Arbitration Act No. 2 of 2020. The High Court granted the prayer and stayed the proceedings for thirty (30) days. After the lapse of 30 days, none of the parties initiated arbitration proceedings

hence the High Court resumed proceedings of the main case and of the application for restraining orders.

Following the order for resumption of the suit, the respondent prayed for and was granted leave to amend the plaint. Accordingly, the amended plaint was filed. Immediately thereafter, the respondent filed a formal application, Miscellaneous Commercial Application No. 92 of 2016 seeking an order for stay of proceedings in Commercial Case No. 37 of 2016 contending that with the amendment of the plaint, a fresh suit had been introduced thereby entitling the appellant to apply for stay of proceedings pending reference of the dispute to arbitration. More so, the appellant did not file Written Statement of Defence. Consequently, a default judgment was entered against the appellant. Further, the High Court dismissed Miscellaneous Application No. 92 of 2016 on the ground that there was nothing to refer to arbitration as a default judgment had been entered in Commercial Case No. 37 of 2016.

In **Yara Tanzania Limited v. DB Shapriya & Co. Limited**, Civil Appeal No. 245 of 2018 [2020] TZCA 265 (henceforth Civil Appeal No. 245 of 2018), the appellant appealed against a default judgment. After

hearing parties' submissions, the Court observed that a party who is aggrieved by a default judgment is required to first apply to set aside the default judgment before approaching the Court on appeal. It thus proceeded to strike out the appeal on account that the appellant had an opportunity to move the trial court to set aside the default judgment.

Further, in **Yara Tanzania Limited v. DB Shapriya & Co. Limited**, Civil Appeal No. 244 of 2018 [2022] TZCA 293 (henceforth Civil Appeal No. 244 of 2018), the appellant appealed against the order for dismissal of the application for stay of execution. That appeal was struck out on the ground that it was prematurely filed as the Court observed that the appellant had wrongly assumed that Commercial Case No. 37 of 2016 was still pending. It thus advised the appellant to pursue its order in Civil Appeal No. 245 of 2018.

It suffices also to point out here that, on 15th July, 2016, the appellant invoked Clause 20.6 of the contract by initiating arbitration proceedings before the International Chamber of Commerce (the ICC). It filed before the ICC a request for arbitration in compliance with Article 4 (2) of the ICC Rules of Arbitration Rules. After the respondent was

served with the same, it raised a jurisdictional issue on the competency of the ICC, and thus, did not participate in the arbitration proceedings. Therefore, on 17th July, 2018, the ICC issued an award in favour of the appellant which was then lodged before the High Court to be registered as a decree of the High Court. The application by the appellant did not go through smoothly as the respondent filed an application to set it aside vide Miscellaneous Commercial Cause No. 3 of 2019, the subject of the present appeal.

Allowing the application with costs, the High Court said:

> *"Since it is not disputed that this court refused to stay proceedings pending the arbitration and since it is the finding of this court in this matter that the arbitrai award cannot co-exist with the decree of this court emanating from the same arbitrated dispute, I find that, uniess the decree in Commercial Case No. 37 of 2017 is set aside, the arbitral ward emanating from arbitration proceedings in Arbitration Case No. 22118/TO held in the International Chamber of Commerce (ICC) shail not have a legal force in this court. The petition is allowed to that extent with costs."*

As the appellant was aggrieved with the above decision, it lodged the present appeal advancing five grounds of appeal. As earlier on stated, the appeal was confronted with a notice of preliminary objection that:

> *"1. The Court is functus officio and the appeal is an abuse of court process as the appellant has already filed an application to set aside the default judgment in Commercial Case No. 37 of 2016 through Miscellaneous Commercial Application No. 72 of 2023.*
> *2. The appeal is an act of double jeopardy as the appellant cannot pursue two forums at the same time."*

At the hearing of the appeal, Messrs. Gasper Nyika and Roman Masumbuko, learned advocates, appeared for the appellant and the respondent, respectively.

As a practice of the Court to start hearing of preliminary objection before going into merits of the appeal, we invited Mr. Masumbuko to address us on the points of law he had raised.

On the first point of preliminary objection, Mr. Masumbuko submitted that the decision of the High Court in refusing to register the arbitral award was based on the fact that there is a default judgment in Commercial Case No. 37 of 2016. He went on to argue that, in Civil Appeal No. 245 of 2018, the Court pronounced itself that it refrained from further dealing with any allegations concerning the contract and/or arbitration proceedings until the appellant exhausts the available remedy of setting aside the default judgment. It was therefore the submission of Mr. Masumbuko that by such pronouncement, the Court is *functus officio* in respect of arbitration proceedings unless the default judgment is set aside.

The learned counsel for the respondent added that, in compliance with the Court order, the appellant filed an application to set aside the default judgment which is still pending before the High Court, and that, if the Court will proceed to hear and determine the present appeal, it will pre-empt the said application and bring confusion in the administration of justice.

On the second point of law, Mr. Masumbuko contended that the law requires that a litigant should not pursue two forums at the same time. It was his submission that since the appellant has filed an application to set aside a default judgment, then pursuing the present appeal, which intends to register the arbitral award, is synonymous to riding two horses at the same time. He added that such a move amounts to double jeopardy against the respondent. Relying on the decision of this Court in the case of **Sostenes Bruno & Another v. Flora Shauri**, Civil Appeal No. 249 of 2020 [2022] TZCA 350, Mr. Masumbuko argued that the appellant ought to follow the proper court hierarchy before resorting to this appeal, otherwise, a confusion and conflicting decisions of the courts on the same issue are likely to happen. At the end, Mr. Masumbuko urged the Court to strike out the appeal with costs.

Responding to the first objection, Mr. Nyika argued that the Court is not *functus officio* as it has not yet pronounced itself on the issue of refusal by the High Court to register the ICC award which is the subject of the present appeal. He contended that the order of the High Court

refusing to register the award is appealable as of right which the appellant has rightly exercised.

While admitting that the dispute in Commercial Case No. 37 of 2016 arose from the same contract, Mr. Nyika impressed upon us to find that the present appeal and Commercial Case No. 37 of 2016 dealt with two different matters. He also argued that Civil Appeals No. 244 and 245 of 2018 which arose from Commercial Case No. 37 of 2016 dealt with matters not at issue in the present appeal. He explained that in Civil Appeal No. 245 of 2018, the appellant appealed against a default judgment which was entered against it but the Court found that the appeal was prematurely filed because the appellant had not exhausted the available remedy for setting aside a default judgment.

Mr. Nyika asserted that, in Civil Appeal No. 244 of 2015, the appellant appealed against a dismissal order of its application, Miscellaneous Commercial Application No. 92 of 2018, wherein it sought to stay proceedings pending referral to arbitration. He conceded that the Court struck out the said appeal because there was direct relationship between refusal to stay proceedings and Commercial Case No. 37 of

2016. In that regard, he strongly submitted that the Court has not yet determined the issue on High Court's refusal to register the ICC award issued in favor of the appellant.

On the argument that the determination of the present appeal may result to confusion, Mr. Nyika replied that the fear is unfounded as any decision to be reached by this Court will not affect the High Court's decision in Commercial Case No. 37 of 2016. He however acknowledged that if an application for setting aside a default judgment is allowed, the present appeal will be redundant as, according to the decision of the High Court, the registration of the award was made subject to the setting aside the default judgment.

On the second objection, Mr. Nyika was very brief that the appellant was not riding two horses because it pursued this appeal as of right, and that, the proceedings in Commercial Case No. 37 of 2016 has no correlation to the present appeal. With that submission, he beseeched the Court to dismiss the preliminary objection with costs.

In the alternative, Mr. Nyika contended that, if the Court finds that the present appeal is connected with Commercial Case No. 37 of 2016,

the Court be pleased to stay the present proceedings pending hearing and determination of the application to set aside the default judgment in Commercial Case No. 37 of 2016. He made his prayer under Rule 4 (2) (a) of the Tanzania Court of Appeal Rules.

By way of rejoinder, Mr. Masumbuko reiterated his earlier submission that hearing and determination of this appeal will create confusion and complicate matters. He added that, since the appellant decided to comply with the Court order by filing an application to set aside the default judgment, the prayer for stay of this appeal cannot be granted.

We have carefully followed the submissions of the learned counsel on the two points of law and revisited the record of appeal, the issue for our determination is whether the appeal before us is competent.

We wish to start with an argument that the Court is *functus officio*. According to the **Black's Law Dictionary**, Nineth Edition, the term "*functus officio*" is defined at page 743 as follows:

> *"[Latin "having performed his or her office"] (19c)*
> *(of an officer or official body) without further*

authority or legal competence because the duties and functions have been fully accomplished."

From the definition given above, for the doctrine of *functus officio* to apply, the Court must have fulfilled its function by determining the question in dispute, and therefore, subject to the powers of review and correction of errors, of no further force or authority on the questioned determined.

It is on that respect, in the case of **Laemthong Rice Company Ltd v. Principal Secretary, Ministry of Finance** [2002] T.L.R. 389, when faced with a situation where the High Court Judge passed an *ex-parte* judgment but later on reconsidered, revoked and replaced it with an order different from the original *ex-parte* judgment, the Court said:

"A Judge *becomes functus officio once he has given his original order and cannot depart from it in the absence of an application for review*".

In the present appeal, counsel Masumbuko urged us to find that the Court is *functus officio* because of the two decisions of this Court, in Civil Appeals No. 244 and 245 of 2018, which involved the same parties

who litigated over the same contract. With due respect to his submission, we find the Court is not functus officio. This is because in Civil Appeal No. 255 of 2018, we dealt with an issue on whether an appeal against a default judgment, which was entered after the appellant had failed to file a written statement of defence, was proper before the Court. At the end, we were convinced that the appeal was prematurely filed as the appellant ought to have applied for an order to set aside the default judgment before approaching the Court on appeal. On that finding, we struck out the appeal.

In Civil Case No. 245 of 2018, we were grappling with a notice of preliminary objection premised on two points of law, **one,** that the appeal against the decision of the High Court refusing to stay proceedings in Commercial Case No. 37 of 2016 was *functus officio;* and **two**, the appeal was overtaken by events. We found both points of law unmerited hence were dismissed with costs. Nonetheless, we proceeded to strike out the appeal on a different ground which we shall revert back to shortly when discussing the complaint on confusion. Let us first state the obvious that, it is clear, from the facts of the two appeals, the Court

has never made any determination on the refusal by the High Court to register an award rendered by ICC in favour of the appellant. In that regard, we are settled in our mind that the Court is not *functus officio.* We therefore hold that the argument is devoid of merit and proceed to dismiss it.

Regarding the complaint that the appellant is riding two horses at the same time, we wish to point out that the present appeal arose from the decision of the High Court in Miscellaneous Commercial Application No. 2 of 2020 which refused to register the arbitral award. Further, in terms of section 5 (1) (a) of the AJA, a party who is aggrieved by the decision of the High Court exercising its original jurisdiction has an automatic right of appeal which the appellant correctly exercised in this appeal. We thus find that it was wrong to equate the right to appeal with the right to set aside a default judgment as riding two horses at the same time. At this point, we wish also to briefly state that, there can never be a double jeopardy to a party who is exercising his right of appeal provided by the machinery of law. We thus find that the second preliminary point of law is without merit and proceed to dismiss it.

We now revert back to the complaint that hearing and determination of the present appeal will result to confusion in the administration of justice. On this complaint, we appreciate the honesty shown by Mr. Nyika in conceding that if the default judgment is set aside the present appeal would be redundant. We are alive of Mr. Nyika's position that the appeal will be redundant because the High Court held that the registration of the award was subject to setting aside the default judgment. Nonetheless, common sense dictates that we should refrain from entertaining the appeal which is likely to result to confusion in the administration of justice. On this, we wish to reiterate what we said in Civil Appeal No. 244 of 2018 (supra) that:

> *"To do otherwise would be to apply the law without any sense of reason and the sequence of events in relation to that main case will be seriously muddled by proceeding to hear this appeal and decide it one way or the other, before the default judgment in Commercial Case No. 37 of 2016 is set aside. To proceed that way will not, as submitted by Mr. Masumbuko, augur with sound administration of justice."*

For the above stated reason, we strike out the appeal. Given the circumstances of the appeal, we order that each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 16th day of October, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 18th day of October, 2023 in the presence of Ms. Faiza Salah, learned counsel for the Appellant and Mr. Roman Masumbuko, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL