IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CIVIL APPLICATION NO. 231/16 OF 2019

BARCLAYS BANK (T) LTD.....APPLICANT

VERSUS

TANZANIA PHARMACEUTICALS INDUSTRIES LTD.....1st RESPONDENT

RAMADHANI MADABIDA.....2nd RESPONDENT

SALUM SHAMTE.....3rd RESPONDENT

ZARINA MADABIDA.....4th RESPONDENT

(Application for Revision of the Ruling and Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Nchimbi, J.)

dated the 2nd day of June, 2014

in

Commercial Case No. 147 of 2012

.....

RULING OF THE COURT

16th & 26th August, 2022.

FIKIRINI, J.A.:

On 2nd June, 2014, the trial Judge for the Commercial Division of the High Court of Tanzania at Dar Es Salaam (the Commercial Court) dismissed the suit for want of prosecution, against Barclays Bank (T) Ltd the applicant, for the applicant's failure to file witness statements which the

trial Judge equated to failure to procure witness attendance on the date fixed for hearing.

The applicant before the High Court in Commercial Case No. 147 of 2012, sued Tanzania Pharmaceuticals Industries Ltd (herein after referred to as 1st respondent) and the guarantors Ramadhani Madabida, Salum Shamte, and Zarina Madabida (hereinafter referred to as the 2nd, 3rd, and 4th respondents) for the credit facilities availed to the 1st respondent, seeking recovery of the utilized credit facilities amounting to approximately Tzs. 12, 000,000,000/= (Twelve Billion Only) at the time of institution of the suit.

According to the records availed to us, after pleadings were complete, the matter was scheduled for mediation. The mediation was unsuccessfully conducted on 31st July, 2013. Following the mediation failure and pursuant to Rule 48 and 49 of the High Court (Commercial Division) Procedure Rules, 2012 G.N. No. 250 of 2012 (the Rules), which came into force on 31st July, 2012, the parties were required to file witness statements within seven (7) days. As per the Rules, in the suit instituted by a plaint, its evidence in chief is mandatorily to be by way of witness statement(s) instead of oral evidence. In this particular instance, parties

were ordered to file their respective witness statements by or on 7th August, 2013. The respondents duly filed theirs, whereas the applicant did not.

The parties appeared before the trial Judge on 2nd September, 2013, for a final pre-trial conference, the matter was scheduled for hearing on 28th October, 2013, which did not commence, and on 6th November, 2013, again no hearing took place. The matter was then rescheduled for 1st and 2nd of April, 2014. This time the hearing was adjourned to 14th May, 2014, and on that day the court heard parties on the respondents' Notice of the Dismissal of the Suit which was duly served on the applicant on 8th November, 2013. The trial Judge in his ruling of 2nd June, 2014 dismissed the suit for want of prosecution, for the applicant's failure to file witness statements which was equal to failure to procure witness attendance on the date fixed for hearing.

Aggrieved by the decision, the applicant approached this Court by way of notice of motion predicated on section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and Rule 65 (1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) moving this Court to revise the ruling and order of the Commercial Court. The application is

supported by an affidavit deponed by Mr. Dilip Kesaria learned advocate. Contesting the application, Mr. Dennis Michael Msafiri learned advocate featuring for the respondents filed an affidavit in reply.

For the reason which will be apparent soon the grounds in the notice of motion will not be reproduced, even though Mr. Mpaya Kamara and Mr. Dennis Msafiri both learned advocates were invited to submit on their positions in respect of the notice of motion.

On the 16th August, 2022, before the hearing could commence, we implored the learned advocates to address us on the propriety of the application before us, that is, instead of an appeal the applicant has come to this Court by way of revision.

Mr. Kamara in addressing us prefaced his submission that the applicant had previously preferred an appeal which was registered as Civil Appeal No. 87 of 2015. The appeal was struck out after a notice of preliminary objection that the dismissal order was not appealable. However, this Court struck out the appeal the reason being incompleteness of the record of appeal. On the point raised by the Court *suo motu* Mr. Kamara argued that the matter dismissed on the account of default is not appealable as the dismissal order cannot be considered to be a decree.

Fortifying his position he referred us to our decision in the case of **Tanzania Electric Supply Company Limited ("Tanesco") v Interbest Investment Company Limited,** Civil Appeal No. 43 of 2012 (unreported). In the case the Court underscored that not all High Court orders are appealable, one of such orders are dismissal under section 95 of the Civil Procedure Code, Cap. 33 R. E. 2002 [now 2022] (the CPC).

Mr. Msafiri was short and straight to the point sharing the same view with Mr. Kamara that the order is not appealable. His position was reinforced by the position taken in **Tanesco case** (supra), when discussing section 75 of the CPC**.** According to him the Commercial Court dismissal order was not appealable with or without leave.

On our part, we hold a different view. While we agree with the decision in the **Tanesco's** case (supra) that not all High Court orders under the CPC are appealable to this Court, nonetheless, we are subscribing to the well settled legal position that any order which conclusively determines the rights of the parties culminates in a decree. And such order or decree is appealable. The difference between the term "decree" and "order" has been defined under section 3 of the CPC as follows:

> *"'decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include:-*
>
> *(a) An adjudication from which an appeal lies as an appeal from an order; or*
>
> *(b) Any order of dismissal for default."*

And the term "order" has been defined to mean:-

> *"the formal expression of any decision of a civil court which is not a decree."*

The distinction made in the two terminologies has well illustrated, the existing difference. From an "order" there is no determination of the controversy between the parties to its finality while from a "decree" the outcome is conclusively determination of the controversy between the parties. This is not the first time we dealt with such issues and therefore have settled legal position. Some of those decisions are **Salem Ahmed Hasson Zaidi v. Fuad Hussein Hemeidan** [1960] 1 EA 92 (CAA), **South**

British Insce Co. Ltd v. Mohamedali Taibji Ltd [1973] 1 EA 210 (CAM), **Ally Khalfan Mleh v. Attorney General**, Civil Application No. 40 of 2012, **Diamond Trust Bank Tanzania Limited v. Puma Energy Tanzania Limited**, Civil Application No. 40 of 2016 and **Rajabu Hassan Mfaume (the Administrator of the Estate of the Late HIJA OMARI KIPARA) v. Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children & 3 Others**, Civil Appeal No. 287 of 2019 (all unreported). In the case of **Salem Ahmed Hasson Zaidi** (supra) the erstwhile Court of Appeal for Eastern Africa had this to say:-

> *"It is well settled in India that the dismissal of the claim under Order XVII Rule 3 on account of the plaintiff's default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence, and that the subject matter of such a claim will be res judicata (Chitaley and Rao, Civil Procedure Code (6th Edn.), p.446....."*

The consequences of such dismissal order resulting into a matter be dubbed *res judicata* have been further exemplified in the case of **Ally Khalfan Mleh** (supra), where the Court observed:

> *"From the above discussion it will be accepted without further elaboration that the dismissal of the petition on 28th March, 2012 was a decision on the merits.* ***The applicant cannot institute another petition claiming the same reliefs unless and until the dismissal order has been quashed or vacated either on appeal by this Court or on review by the trial High Court. It goes without saying, therefore, that the dismissal order dated 28th March, 2012, amounted to a decree in terms of section 3 of the CPC....."***
> [Emphasis added]

Also, in **South British Insce Co Ltd** (supra), the Court had an opportunity to discuss the issue. In that case the trial Judge struck out the plaint and dismissed the suit with costs. And the Court deemed the dismissal order a decree, since it conclusively determined the parties' fate.

We say the dismissal order in Commercial Case No. 147 of 2012 had the same effect as dismissal in the above cited cases. Although in the Commercial Case No. 147 of 2012 the trial Judge did not cite any provision from the Rules governing Commercial cases or the CPC which governs civil proceedings in the High Court, but after the plaintiff had failed to comply with the dictates of Rules 48 and 49 of the Rules requiring filing of the

witness statements, no hearing could have proceeded bearing in mind that the witness statements were supposed to be filed before the hearing date. On the date fixed for hearing the witness would then appear for tendering of documents if any, cross-examination and re-examination, this could not happen in the absence of the applicant's filed witness statement (s).

Guided by the above cited decisions, we think that the concurrent submission by both learned advocates that the dismissal order dated 2nd June, 2014 did not amount to a decree is flawed. This is because the order conclusively determined the rights of the parties, hence the order amounted to a decree open to appeal and not revision.

In our decision in **D.B. Shapriya and Company Ltd v. Stefanutti Stocks Tanzania Ltd**, Civil Application No. 205/16 of 2018, after the applicant had approached this Court desirous to have the High Court decision revised, we, maintained our time-honoured principle that revision is not an alternative to appeal. Since the High Court Commercial Division acted in its original jurisdiction, the decree therefrom is thus amenable to appeal as of right under section 5 (1) (a) of the AJA, which states:-

> *"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-*

(a) Against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction."

For the reasons and explanation above, we find this application misconceived and proceed to strike it out with no order as to costs since the point was raised by the Court *suo motu*.

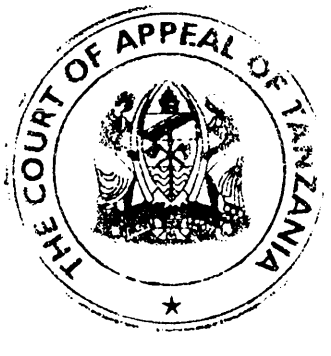
DATED at **DAR ES SALAAM** this 24th day of August, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered on this 26th day August, 2022, in the presence of Mr. Dennis Michael Msafiri, learned counsel for the applicant also holding brief for Mr. Mpaya Kamara, learned counsel for the Respondents is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL