

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 40 OF 2016

DIAMOND TRUST BANK TANZANIA LIMITED APPLICANT

VERSUS

PUMA ENERGY TANZANIA LIMITED RESPONDENT

**[Application for striking out a notice of appeal dated 12th May 2015 from the
Order of the High Court (Commercial Division) at Dar es Salaam]**

(Songoro, J.)

dated the 29th day of April , 2015

in

Commercial Case No. 39 of 2014

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RULING OF THE COURT

22nd July & 20th September, 2019

MWAMBEGELE, J.A.:

The million dollar issue which this ruling must answer is whether an order made after dismissal of a suit under the provisions of Order XVIII rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth the CPC) amounts to a decree which is appealable as of right under the provisions of section 5 (1) (a) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (henceforth the AJA) or it is appealable with leave of the Court falling under the provisions of section 5

(1) (c) of the AJA. This is the issue on which the parties to this application have locked horns in this application for striking out a notice of appeal made under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules). The applicant contends that the order, pursuant to section 5 (1) (c), is not appealable as of right and thus the applicant needed leave of the court which has not been sought and obtained to date and thereby amounting to failure to take an essential step towards the prosecution of the appeal. On the other hand, the respondent contends that the order amounts to a decree which, in terms of section 5 (1) (a) of the AJA, does not need leave of the court to lodge an appeal to this Court, thus no essential step towards the prosecution of the appeal has been flouted.

To appreciate the essence of the application, we find it apt to set out its relevant factual background, albeit briefly. It is this. The respondent Puma Energy Tanzania Limited was the plaintiff in Commercial Case No. 39 of 2014 instituted in the Commercial Division of the High Court in which suit the respondent was the defendant. That suit was dismissed on 29.04.2015 for want of prosecution in terms of rule 3 of Order XVII of the CPC. A copy of the relevant Court Order is appended to the notice of

motion. That order did not make the applicant happy. He thus lodged in the Court a notice of appeal on 12.05.2015 with a view to challenging it.

On 15.02.2016, the applicant lodged in the Court this application seeking to have the notice of appeal referred to in the foregoing paragraph struck out on the reason that the respondent has not taken an essential step of applying for leave to appeal, the order falling within the scope and purview of section 5 (1) (c) of the AJA. As already alluded to above, the respondent, on the other hand, contends that the order is one that falls within the scope and purview of section 5 (1) (a) of the AJA, hence no leave is required.

When the application was placed before us for hearing, while the applicant appeared through Mr. Dilip Kesaria, learned advocate, the respondent appeared through Mr. Sinare Zaharani, also learned advocate. The parties had filed written submissions and reply written submissions beforehand for or against the application, as the case may be, which they sought to adopt as part of their oral submissions before us.

In the said written submissions, the applicant has been relatively brief, and Mr. Kesaria, in their clarification before us, was very brief but to

the point. The applicant's written submissions and oral arguments revolve around what we have stated above as the issue on which the parties have locked horns. For the proposition that the order under discussion is appealable with leave under section 5 (1) (c) of the AJA, the learned counsel cited **South British Mechanical Installation and Engineering Co. Ltd v. Abubakar Ndenza Maporo and Another** [1987] TLR 44 (CA), **The Executive Secretary Wakf And Trust Commission Mambonsiige Zanzibar v. Saide Salum Ambar** [1991] TLR 198 (CA), **Tahfif Mini Super Market v. B.P. Tanzania Ltd** [1992] TLR 189 (CA), **Jose X Ferreira v. Mbaraka Salum** [1994] TLR 214 (CA), **Enock M Chacha v. Manager, NBC Tarime** [1995] TLR 270 (CA), **Italafrican Transporters Ltd v. Giafar M. Reder** [1999] TLR 251, **Karani v. Waruguru and another** [2006] 1 EA 92 (CAK), **Barclays Bank Tanzania Limited v. Tanzania Pharmaceutical industries Limited and 3 others**, Civil Appeal No. 87 of 2015 (CAT unreported).

Mr. Kesaria submitted that the decision of the Court in **Ally Khalfan Mleh v. Attorney General**, Civil Application No. 40 of 2012 (unreported) cited by the respondent, conflicted with **Barclays Bank** (supra). The learned Counsel was quick to implore us to follow the principle in **Arcopar**

(O.M.) S.A v. Harbert Marwa and Family & 3 Others, Civil Application No. 94 of 2013 (unreported) in which we held that in eventualities such as the present, the more recent decision should be followed.

Having argued as above, Mr. Kesaria urged us to allow the application with costs.

Responding, Mr. Zaharani was equally brief but focused in clarifying the reply submissions earlier filed. He submitted that the order made under Order XVII Rule 3 of the CPC by the High Court amounted to a decree and thus was appealable as of right; without leave of the court, pursuant to section 5 (1) (a) of The AJA. The learned counsel cited to us **South British Insce Co Ltd v. Mohamedali Taibji Ltd** [1973] 1 EA 210 (CAM), **Tahfif Mini Super Market** (supra), **Ally Khalfan Mleh** (supra) and **Salem Ahmed Hasson Zaidi v. Faud Hussein Humeidan** [1960] 1 EA 92 (CAA) to support his argument .

Regarding the conflict between **Ally Khalfan Mleh** (supra) and **Barclays Bank** (supra) referred to by the applicant, Mr. Zaharani argued that the two decisions were in no conflict at all. He submitted that, unlike in **Ally Khalfan Mleh** (supra), in **Barclays Bank** (supra), no decision was

made on whether a dismissal order under Order XVII Rule 3 of the CPC amounted to an order or a decree.

Mr. Zaharani also referred us to the definition of a decree under section 3 of the CPC which is:

"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"

In the case at hand, Mr. Zaharani went on to submit, the order of the court under Order XVII Rule 3 of the CPC, finally determined the rights of the parties before it and therefore it was a decree. The learned counsel underlined the words "proceed to decide the suit forthwith" in Rule 3 of Order XVII of the CPC to mean finally determining the suit. He referred us to what the Court held in **Salem Ahmed Hasson Zaidi** (supra) at p. 98 that an order made under Rule 3 of Order XVII of the CPC amounted to a

decree. With regard to the reported cases cited to us by the applicant, the learned counsel submitted that they had no bearing on the present case in that they did not deal with Order XVII Rule 3 of the CPC.

Having said the above, the learned counsel urged us to find the application without merits and dismiss it with costs.

In a short rejoinder, Mr. Kesaria submitted that the reported cases cited in the written submissions buttress the point that should the Court find that the appeal required leave under section 5 (1) (c) of the AJA, and so the appeal should be struck out as was the case in the cases under reference.

As made apparent in the above submissions by the learned counsel for the parties, this is not the first time the Court is grappling with the issue. As rightly pointed out by Mr. Zaharani, and ostensibly supported by Mr. Kesaria, the discussion whether an order of dismissal of a suit under Order XVII Rule 3 of the CPC amounts to a decree or not, was the subject of discussion in **Salem Ahmed Hasson Zaidi** (supra) in which the erstwhile Court of Appeal for Eastern Africa sitting at Aden, held at p. 98:

"It is well settled in India that the dismissal of a claim under O. XVII, r. 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"

And the Court of Appeal for Eastern Africa went on at p. 99:

"I see no reason to differ from the Indian decisions on the effect of a decision under O. XVII Rule 3 ... that such a judgment must be deemed to be a decision on the merits and must have the same effect as a dismissal upon evidence"

Likewise, the Court was caught up with an analogous situation in **Ally Khalfan Mleh** (supra). In that case, the Court was grappling with the issue whether the suit which was dismissed under Order XVII Rule 3 of the CPC was finally determined and hence subject of an appeal. The Court recited the above excerpt from the decision in **Salem Ahmed Hasson Zaidi** (supra) to hold that an order made under Order XVII Rule 3 of the CPC was a decision on the merits of the case and resulted into a decree

and hence falling under the scope and purview of section 5 (1) (a) of the AJA. 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 C.P.C.: see, for instance, **Olam Uganda Ltd v. T.H.A.**, Civil Appeal No. 57 of 2002 (unreported). This decree could only be vacated on an appeal or revision, by this Court."*

[See also: **The Hon Attorney General & 2 Others v. Southern Atlantic Grain Agent (Pty) Ltd**, Civil Appeal No. 53 of 2000 (unreported)]

Going by the principle in the above cases, we think, it is well established that an order of the court made under Order XVII Rule 3 of the CPC is one on the merits of the case and thus appealable as of right under the provisions of section 5 (1) (a) of the AJA.

We are alive to the position taken by the Court in **Barclays Bank** (supra). Mr. Kesaria intimated to the Court that **Barclays Bank** (supra) and **Ally Khalfan Mleh** (supra) are in conflict and, relying on the principle in **Arcopar (O.M.) S.A** (supra), urged us to follow **Ally Khalfan Mleh** (supra). On the other hand, Mr. Zaharani holds a diametrically opposite view; that is, the decisions in the two cases are not in conflict. With utmost respect, having dispassionately read **Barclays Bank** (supra), we are not prepared to swim Mr. Zaharani's current. As rightly submitted by Mr. Kesaria, we are satisfied that the **Barclays Bank** case (supra) is in conflict with **Ally Khalfan Mleh** (supra). We say so because, despite the fact that the Court in **Barclays Bank** case (supra) did not overtly make reference to Order XVII Rule 3 of the CPC, it point blankly stated that an order dismissing a case for want of prosecution did not result into a decree but into an order. The Court observed at p. 13 of the typed ruling of the Court:

"We agree with Mr. Msafiri that the High Court's dismissal of the suit by its ruling of 2nd June 2014 for want of prosecution did not amount to or result into a decree but an order."

With unfeigned respect to Mr. Zaharani, we are of the considered view that the **Barclays Bank** (supra) was decided without the advantage of previous decisions on the point which had fairly settled the position. We are alive to the fact that the parties in the case were represented but the learned counsel for the parties did not bring to the attention of the Court the decisions in **Salem Ahmed Hasson Zaidi** (supra) and **Ally Khalfan Mleh** (supra) as well as **Olam Uganda Ltd** and **Southern Atlantic Grain Agent (Pty) Ltd** (both supra). We are certain in our mind that had the learned counsel for the parties brought to the attention of the Court its decision in **Ally Khalfan Mleh, Olam Uganda Ltd** and **Southern Atlantic Grain Agent (Pty) Ltd** (all supra) and that of the erstwhile Court of Appeal for Eastern Africa sitting at Aden in **Salem Ahmed Hasson Zaidi** (supra), it would, certainly, not have decided the way it did. To the contrary, we are certain, it would have followed the position taken in **Salem Ahmed Hasson Zaidi, Ally Khalfan Mleh, Olam Uganda Ltd** and **Southern Atlantic Grain Agent (Pty) Ltd** (all supra). Deciding that the order dismissing the suit for want of prosecution did not result into a decree was, in the light of the authorities cited hereinabove, an unhappy situation which we cannot support.

For the reasons stated earlier, we find this application wanting in merits and dismiss it with costs.

It is so ordered.

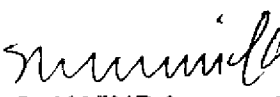
DATED at **DAR ES SALAAM** this 16th day of September, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered on 20th day of September, 2019 in the presence of Mr. Zacharia Daudi, counsel for the Applicant and in the absence of the respondent, is hereby certified as a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL