

TANZANIA / JUDGMENT

junior construction company limited others vs mantrac tanzania limited 2022 tzca 494 9 august 2022

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TZCADECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MKUYE. J.A., LEVIRA, J.A. And MWAMPASHI J.A.) CIVIL APPEAL NO. 252 OF 2019 JUNIOR CONSTRUCTION COMPANY LIMITED.....1st APPELLANT SULEIMAN MASOUD SULEIMAN.....2nd APPELLANT NCHAMBI'S TRANSPORTERS LIMITED.....3rd APPELLANT VERSUS MANTRAC TANZANIA LIMITED..... RESPONDENT (Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam) (Fikirini, 3.^ Dated the 14th day of August, 2019 in Commercial Case No. 10 of 2017 RULING OF THE COURT 7th June, & August, 2022 MKUYE. J.A.: This appeal originates from the judgment on admission by the High Court of Tanzania (Commercial Division) dated 6th July, 2018 in Commercial Case No. 10 of 2017. The facts leading to the appeal are that: the 1st appellant, Junior Construction Company Limited and the respondent, Mantrac Tanzania Limited, had on 12th May, 2015 entered into a sale agreement whereby the 1st appellant was to purchase fifteen (15) caterpillar machines for mining activities. The 2nd appellant, who was a Director of the 1st i appellant and 3rd appellant stood as guarantors of the 1st appellant in respect of the credit purchase of the machines. According to the agreement, the 1st appellant was to purchase the machines on credit at a purchase price of USD 7,500,277.00 out of which a sum of USD 2,400,000.00 was to be payable upfront prior to the delivery of the machines. Upon such payment, the 1st appellant was to issue post-dated cheques as security for the arrangement and the remaining balance was to be paid in sixteen (16) monthly instalments. According to the respondent, the 1st appellant defaulted in making payments and remained indebted to the respondent to the tune of USD 4,611,627.00. Efforts to ensure that the 1st and 3rd appellants pay the outstanding balance proved futile and, therefore, the respondent commenced civil proceedings against them in the High Court (Commercial Division). During the hearing of the case, the counsel for the respondent prayed for judgment on admission as the appellants had indicated in their Written Statement of Defence (WSD) evasive denials of the respondents' part of claims contained in the Plaint. The trial court considered the respondent's prayer and it found that, indeed, there were evasive denials by the appellants (former defendants) and as a result, a judgment on admission was entered in favour of the respondent and the trial court further ordered that the remaining part of the suit should go on trial when it is

ready. Aggrieved with that decision, the appellants lodged a notice of appeal. They also applied for and were granted by this Court a stay of execution of a decree in the decision of the High Court upon depositing in Court a bank guarantee or insurance bond of an amount of USD 3,091,864.16 which was to remain in force until a full hearing and determination of intended appeal on condition that in case they defaulted, the order of stay would lapse automatically. Before this Court, the appellants have lodged a memorandum of appeal on three (3) grounds which for a reason to become apparent shortly, we do not intend to reproduce them. Ahead of the hearing of the appeal, the respondent filed a preliminary objection (the PO), the notice of which was filed on 31st May, 2022 to the effect that: "1. This appeal cannot be entertained unless the appellant purges the contempt of the court order.

2. The present appeal is merely academic process as the appellants have already destroyed and removed the subject matter of the contract" The notice of PO also contains a brief written submission in relation to the two points of objection raised. At the hearing of the PO on 7th June, 2022, the appellant was represented by Mr. Imam Hassan Daffa, learned advocate while holding brief for Mr. Mwalongo with instructions to proceed; whereas the respondent had the services of Mr. Roman Masumbuko, also learned advocate. Both counsel submitted at length on the two points of PO for which we are grateful for their industry in the area. However, in the course of our preparation of the Ruling in respect of the points of PO it came to our knowledge that there is a recent decision of the Court which was handed down in Zanzibar in which the Court dealt with the issue whether a judgment on admission was appealable or not and at the end it decided that it was not appealable since it did not conclusively determine the rights of the parties. On that account, we found it appropriate to recall the parties on 27th July, 2022 in order to address us on the said issue whereupon Mr. Frank Mwalongo, learned advocate represented the appellant and the respondent enjoyed the services of Mr. Roman Masumbuko also learned advocate. It was Mr. Mwalongo who responded first. He contended that although the Court in the case of Zanzibar Electricity Corporation v. Infratech Limited and Another, Civil Appeal No. 100 of 2021 (unreported) has taken the position that a judgment on admission is an interlocutory order not subject to appeal under section 5 (2) (d) of the Appellate Jurisdiction Act, [Cap 141 R. E. 2019] (the AJA), however, applying the test of whether the judgment on admission disposes of the rights of the parties to the instant case, he said, the judgment on admission finally determined the rights of the parties as regards the amount to the tune of USD 3,091,569.16. He argued that, the said amount was not subject to any trial and, therefore, the judgment on admission and the decree thereof were executable on their own as they are not interlocutory in terms of section 5(2) (d) of the AJA. As regards the issue that this appeal relates to the other claims which were yet to be determined, he submitted that the said claims have been determined and there is another appeal pending to this Court premised on the remaining claim. However, he insisted that the two appeals do not relate to each other; they are on different issues since the amount which was involved in the trial had nothing to do with the amount 5 on judgment on admission. He was, therefore, of the view that the case of Zanzibar Electricity Corporation (supra) was decided erroneously since it misinterpreted the

provisions of section 5 (2) (d) of the AJA in relation to the finality or conclusiveness of the suit. He, therefore, argued that this Court is not bound with that decision and should consider to depart from it. When prompted by the Court whether the judgment on admission emanated from the same claim he conceded to it but insisted that the judgment on admission was conclusive in as far as the amount awarded was concerned and that the remaining claim stood on its own. He argued that under section 5 (1) (a) of the AJA a decree can be on preliminary orders. He also argued that the judgment on admission conclusively determined the rights of parties within the definition of judgment under the Civil Procedure Code [Cap 33 R.E 2019]. In response, Mr. Lamwai welcomed the position taken in case of Zanzibar Electricity Corporation (supra). He elaborated that since this appeal together with the other appeal originate from the claim raised in para 6 and 7 of the plaint relating to the credit sale agreement, it means that, the amount awarded in judgment on admission arose from the same claim in which the other claims were not yet determined. He 6 said, that is why even in the judgment on admission it was directed that the remaining claims should go on trial when it is ready. He contended that this judgment, therefore, did not determine the matter to its finality. He went on submitting that the gist of section 5 (2) (d) of the AJA is that the decree or order must have the effect of finally determining the suit in which case, he said, even USD 3,091,864.16 that was awarded in this case was a mere partial award. Mr. Lamwai also dismissed his counterpart's contention that the case of Zanzibar Electricity Corporation (supra) was erroneously decided and that the Court should consider to depart from it arguing that, that was not a correct opinion. He argued that, this Court is bound by that decision and at any rate, he said, there was no reason for taking that position. Regarding the contention that in Zanzibar Electricity Corporation's case (supra) the Court did not consider section 5 (1) (a) of the AJA which could have salvaged the appeal, it was Mr. Lamwai's argument that the test, under the circumstances of this case, the proper provision is section 5 (2) (d) only and not otherwise. He added that, the truth is that the judgment on admission determined part of the claim. He, therefore, insisted that this appeal is incompetent before the Court and should be struck out. In rejoinder, Mr. Mwalongo stressed that in Zanzibar Electricity Corporations case (supra) the Court did not consider section 5 (1) (a) of the AJA and that had it taken it into account or looked at the meaning of judgment and decree, it would have reached at a different conclusion that judgment on admission is not interlocutory since the rights of the parties were conclusively determined. He added that the finding of the Court in Zanzibar Electricity Corporation case (supra) that the judgment on admission was a preliminary decree or interlocutory order because it did not determine the other claims on the basis of Mr. Malima's submission was wrong as the law does not connote determination of all rights of the parties. Responding to the argument by Mr. Lamwai that the whole claim emanates from para 6 and 7 of the plaint he conceded to it. On being prompted by the Court as to the effect of the matter should this appeal be allowed, he said, the suit would be remitted back for retrial in the same Commercial Case No. 10 of 2017 on that aspect using the same pleadings. He, lastly, prayed to the Court to find that the appeal is competent before the Court. 8 Having considered the arguments from either side, we think, the issue for this Court's determination is whether or otherwise the judgment on admission,

subject of this appeal, conclusively determined the rights of the parties or rather had the effect of finally determining the suit to enable the appeal to stand. It is undisputable fact that this appeal originates from a judgment on admission in Commercial Case No. 10 of 2017 dated 14th August, 2019 in which the respondent was awarded payment of USD 3,091,864.16 to settle the balance on the purchase price of 15 caterpillars as agreed between the 1st defendant and the plaintiff. In that decision, the Court also directed that: "Remaing part of the suit should go on trial when it is ready". The point of controversy is that, while Mr. Lamwai is of the view that the judgment on admission was interlocutory as it did not determine the whole rights of the parties conclusively as per section 5 (2) (d) of the AJA, Mr. Mwalongo is of the view that it determined the rights of the parties in view of section 5(1) (a) of the AJA. Section 5 (1) (a) and (2) (d) of the AJA provide as follows: 9 "5(1) 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 preliminary decree made by the High Court in a suit under the Civil Procedure Code in the exercise of its original jurisdiction. "5 (2) Notwithstanding the provisions of subsection (1) -
- (a) - (c) N/A.
- (d) 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." [Emphasis added]. According to section 5(1) (a) of the AJA an appeal against a decree including a preliminary decree which is made by the High Court when exercising its original jurisdiction in a suit as per the Civil Procedure Code is appealable to this Court. This position was emphasized in the case of Tanganyika Motors Limited v. Transcontinental Forwarders Limited, Civil Appeal No. 44 of 1995 (unreported), where the Court expressed clearly that a decree will fall under section 5 (1) (a) of the AJA if it meets the following conditions: One, it must be made in a suit, Two, it must be made under the Civil Procedure Code, 1966. Three, it must be in the exercise of the original jurisdiction of the High Court." Our reading of section 5 (2) (d) of the same Act reveals that it provides for a contrast or exception to the preceding provisions including subsection (1) of that section by prohibiting the appeal or revision to lie against any preliminary order or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. In the case of Murtaza Ally Mangungu v. The Returning Officer for Kilwa and 2 Others, Civil Application 1680 of 2016 (unreported), the Court insisted that under the said provision there are two preconditions for the provision to come into effect. One, the decision or order in question must be interlocutory or preliminary; two, the decision or order must have the effect of finally determining the suit. Both conditions must co-exist for it to be invoked. This means that the law takes cognizance of the spirit under section 5 (1) (a) of the AJA. However, in spite of the existence of the said provision, it prohibits appeals or revisions in the circumstances provided for under section 5 (2) (d) of the same Act. We wish to emphasize that in order to get the proper

spirit of the provision it has to be read in whole and not in piecemeal as it appears Mr. Mwalongo did in this case. We must reiterate at this juncture that under the later provision, appeals or applications for revision are prohibited on preliminary or interlocutory decisions or orders unless they have the effect of final determination of the suit. From the above, we ask ourselves whether or otherwise the judgment on admission at hand had the effect of finally determining the suit. Having examined the record of appeal, we have noted that on 12th June 2019 (page 73 - 74 of the record of appeal), Mr Lamwai who represented the plaintiff (the respondent herein) made a prayer for a judgment on admission against the defendants (appellant inclusive) in terms of Order X rule 1 and Order XV rule, 1, 2 and 3 of the Civil Procedure Code [Cap 33 R.E. 2002, now R.E. 2019], together with rule 68

- (c) of the High Court (Commercial Division) Procedure Rules, 2012. After hearing the arguments in support and against the prayer by both parties, the trial judge delivered her Ruling on 14th August 2019 granting the prayer. The trial court thus, entered a judgement on admission and ordered for payment of the balance of USD 3,091,864.16 to settle the balance on the purchase price of 15 caterpillars as agreed between the 1st defendant and the plaintiff. It further ordered for the remaining part of the suit to go on trial when it is ready as alluded to earlier on. This Court has been recently confronted with akin scenario in the case of Zanzibar Electricity Corporation (supra) whereby it had to deal with an appeal which originated from a judgment on admission entered by the High Court of Zanzibar like the matter at hand. In that case, the Court relied on the case of Tanzania Motor Service Ltd v. Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005 (unreported) which quoted with approval the case of Bozson v. Artrincham Urban District Council [1903] 1KB 547 where Lord Alverston stated as follows: "It seem to me that the real test for determining this question ought to be this; Does the judgment or order finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." [Emphasis added.] See also Murtaza Ally Mangungu (supra) and Peter Noel Kingamkono v. Tropical Pesticides Research Institute, Civil Application No. 2 of 2009 (unreported). We have also considered Mr. Mwalongo's invitation that the Court should consider to depart from Zanzibar Electricity Corporation (supra) but we do not agree with him. We are not persuaded to do so because we find no error in the said decision; or that there are sufficient grounds to enable us depart from the said decision - See Ophir Tanzania (Block 1) Limited v. Commissioner General Tanzania Revenue Authority, Civil Appeal No. 58 of 2020 and Geita Gold Mining Limited v. Commissioner General, Tanzania Revenue Authority, Civil Appeal No. 132 of 2017 (both unreported). Besides that, it is our considered view that even if there were sufficient grounds to depart, this Court might not have such a mandate to do so as it is desirable to be so done by a bench of five judges - See Abually Alibhai Aziz v. Bhatia Brothers Limited, [2000] TLR 288. Being guided by the test expounded in the above authorities it is not in question that the judgment on admission was handed down while leaving the remaining claims in the same suit pending. This is clearly reflected in the order that was given by the trial court that "...the remaining part of the suit go on trial when it is ready." In fact, as was submitted by

both sides, the remaining part of the suit was concluded and there is an appeal which is pending before this Court. This, in our view, is a clear evidence that the judgment on admission which was appealed against fell under interlocutory order as it did not finally determine the entire claims of the parties. We wish to emphasize that, in order for the appeal to lie to this Court on interlocutory order or decision under section 5 (2) (d) of the AJA, it must satisfy the conditions we have stated herein above, that is, one the order or decision must be interlocutory or preliminary, and two, it must have the effect of finally determining the rights of the parties. The judgment on admission at hand was interlocutory which did not have the effect of finally determining the rights of the parties and as such an appeal therefrom is prohibited under section 5 (2) (d) of the AJA. The remedy proposed by Mr. Mwalongo should the appeal be allowed, we think, is absurd. We say so because we think that it does not argue with the public policy that litigation must come to an end more so 15 when taking into account that there is another appeal in this Court originating from the same suit. That said and done, we agree with Mr. Lamwai that the judgment on admission sought to be appealed against is interlocutory and, therefore, not appealable in terms of section 5 (2) (d) of the AJA. This appeal is, thus incompetent before the Court with the only remedy of being struck out as we hereby do. We so order. DATED at DAR ES SALAAM this 2nd day of August, 2022. R. K. MKUYE JUSTICE OF APPEAL M. C. LEVIRA JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL The Ruling delivered this 9th day of August, 2022 in the presence of Mr. Frank Mwalongo, learned counsel for the appellants and Ms. Velena Clemence, learned counsel for the respondent, is hereby certified as a true copy of the original. R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 16

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