

TANZANIA / JUDGMENT

nmb bank plc vs mexon japhta sanga another 2023 tzca 17903 29 november 2023

COURT
TZCADECIDED
29 November 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MOROGORO (CORAM: MWARIJA, J.A., MASH AKA. 3.A. And MAKUNGU. J.A. ^ CIVIL APPEAL NO, 369 OF 2022 NMB BANK P L C APPELLANT VERSUS MEXON JAPHTA SANGA1st RESPONDENT MEXONS ENERGY LIMITED..... 2nd RESPONDENT [Appeal from the Ruling and Draw Order of the High Court of Tanzania, Morogoro District Registry at Morogoro] f Nqwembe, J.^ dated the 11th day of March, 2022 in Land Case No. 3 of 2021 RULING OF THE COURT HP May, & 29h November, 2023 MASHAKA. 3.A.: The appellant NMB lodged the appeal against the ruling in Land Case No. 3 of 2021 dated 11th March 2022 of the High Court of Tanzania at Morogoro which had overruled the preliminary objection filed by the appellant that the suit was res sub judice. i Basically, the appellant had instituted a suit against the respondents before the High Court sitting at Morogoro in Land Case No. 3 of 2021. Before the High Court could proceed with hearing of the suit on merit, the appellant raised a preliminary point of objection that, "The suit was unmaintainable as the matter in issue therein are issues in Commercial Case No. 102 of 2021 which is pending in the High Court of Tanzania (Commercial Division) at Dar es Salaam and thus, (as such) the matter was sub judice." Both parties argued for and against the point of objection and the High Court ruled that the suit was not res sub judice, relying on the three tests namely; one, the matter in issue in the second suit is also direct and substantially in issue in the first suit; two, the parties in the second suit are the same parties under whom they or any of them claim litigating under the same title; and three, the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit. It was the holding of the High Court that, the parties in the present suit are not the same with those in the suit before the High Court Commercial Division. Likewise, the reliefs sought were not the same. In that context the High Court overruled the preliminary objection for lack of merit. Aggrieved, the appellant preferred this appeal predicated on three grounds. One, that the learned trial judge erred in law and fact in holding that Land Case No. 3 of 2021 was not sub judice in view of Commercial Case No. 102 of 2021 dealing with the same subject matter. Two, the trial judge erred and misdirected himself both in law and facts for failure to appraise the reliefs being sought in both suits to wit; Land Case No. 3 of 2021 and Commercial Case No. 102 of 2021 which all deal with the same subject namely credit facilities advanced to the second respondent and the securities executed thereof. Three,

the learned trial judge erred in law and fact in failing to analyze properly the two suits in Land Case No. 3 of 2021 and Commercial Case No. 102 of 2021 and failed to stay the suit in Land Case No. 3 of 2021 which was filed subsequently. On the 8th September, 2022, the respondents filed a notice of preliminary objection challenging the competence of the appeal on the ground that, the appeal is untenable for offending section 5 (2) (d) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019]. In arguing the point of objection raised, Mr. Daniel B. Welwel, learned counsel for the respondents submitted that, the instant appeal before the Court is untenable as it is in contravention of section 5 (2) (d) of the Appellate Jurisdiction Act, [Cap. 141 RE 2019] (the ADA), He prayed to the Court to strike out the appeal with costs, On the other hand, Mr. Seni Malimi, learned counsel for the appellant, besides conceding to the point of objection that the appeal is incompetent before the Court as it offends section 5 (2) (d) of the AJA, it was his submission that there exist exceptional circumstances surrounding the matter which necessitate the Court's interference to invoke its revisional powers under section 4 (2) of the A3A and to stay the proceedings of the case pending before the Morogoro High Court in Land Case No. 3 of 2021 which he claimed was commenced after Commercial Case No. 102 of 2021 was instituted. Apparently, the record of appeal before us arises from Land Case No. 3 of 2021. As the practice of the Court demands, we shall dispose the preliminary objection first, before the determination of the appeal on merit. Section 5 (2) (d) of the AJA provides that; "No appeal or application for revision shall 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]. It is trite law that no appeal lies to the Court against any preliminary or interlocutory order of the High Court unless such decision or order has the effect of finally determining the suit. The phrase 'finally determining the suit has been defined to mean a decision or order which has an effect of finally determining the rights and liabilities of the parties. See: JUNACO (T) v. Harel Mallac Tanzania Limited, Civil Application No. 473/16 of 2016, Vodacom Tanzania Public Limited Company v. Planetel Communications Limited, Civil Appeal No. 43 of 2018 and Jitesh Jayantilal Ladwa and Another v. Dhirajilal Walji Ladwa and Two Others, Civil Application No. 154 of 2020 (all unreported). In the cited decisions, the Court underscored that in terms of section 5 (2) (d) of the AJA, no right of appeal exists when the decision intended to be appealed against does not finally dispose of the matter by finally determining the rights of the parties. There is no dispute that, although the preliminary objection was overruled the suit is still pending before the High Court which will eventually determine the rights of the parties. Therefore, the dismissal of the preliminary objection did not in any way finally resolve the rights of the parties. For that reason, the ruling of the High Court and subject of this appeal is an interlocutory order and not appealable in terms of section 5 (2) (d) of the ADA. In the premises, the present appeal is not competent. Before determining the fate of this appeal, we shall address the concern raised by Mr. Malimi who invited us to invoke our revisional jurisdiction in order to stay the proceedings in Land Case No. 3 of 2021 as it was instituted after the filing of the Commercial Case No. 102 of

2021. We found this wanting given that as earlier indicated, the record before us and a subject of appeal arises from Land Case No. 3 of 2021 and as such, we are not seized with the record of the said Commercial Case No. 102 of 2021 which Mr. Malimi has been referring to in his submission before the Court. In this regard, we do not find any exceptional circumstances warranting us to invoke our revisional jurisdiction. See: Pardeep Singh Hans v. Merey Ally Saleh and Three Others, Civil Application No. 422/01 of 2018 (unreported). In conclusion, we have no hesitation in holding that the preliminary objection is merited and the purported appeal is accordingly struck out with costs. It is so ordered. DATED at DAR ES SALAAM this 23rd day of November, 2023. A. G. MWARIJA JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL Ruling delivered this 29th day of November, 2023 in the presence of Mr. Semi Malimi, learned counsel for the Applicant and Mr. Lusu Peter, learned counsel for the Respondents is hereby certified as a true copy of the original^”

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