

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 16 OF 1994

BETWEEN

CAPITAL DEVELOPMENT AUTHORITY APPELLANT

AND

SAABERG INTERPLAN GMBH RESPONDENT

(Appeal from the Judgment of the High
Court of Tanzania at Dar es Salaam)

(Mkude, J.)

dated the 18th day of August, 1993

in

Civil Case No. 1 of 1993

REASONS FOR JUDGEMENT

KISANGA, J.A.:

This is an appeal from the ex-parte judgement of the High Court (Mkude, J.) following the failure by the appellant/defendant to file a written statement of defence to the plaint. In this Court the appellant is represented by Mr. M. A. Ismail, learned advocate, while the respondent is represented by Mr. Y.K. Bwahama, learned advocate. After hearing submissions by counsel for both sides we allowed the appeal and reserved reasons for the judgement. We now proceed to give our reasons for the same.

The record shows that sometime after the plaint in this case was filed in the High Court. The appellant/defendant filed two applications to that Court.

The first application was for the setting aside of the order previously made by that Court for ex-parte proof by affidavit. The second one was brought under section 6 of the Arbitration Ordinance Cap. 15 for an order of a stay of proceedings in the suit. In both applications the hearing was requested for 20/7/93, but the court record shows that by consent of both counsel the hearing was re-scheduled for 21/10/93. However, acting unilaterally thereafter counsel for the respondent/plaintiff applied to Court under a certificate of urgency for an order for ex-parte proof by affidavit. The said letter to the Court was not copied to the other side and there is no evidence that a copy of that letter was otherwise sent to the other side. Nonetheless pursuant to such application, the case was fixed for hearing on 17/8/93 and on that day the Court gave judgement for the respondent/plaintiff upon ex-parte proof by affidavit in default of filing a written statement of defence by the appellant/defendant. According to the court record the ex-parte judgement was given in the absence of the opposite party or its advocate, and there is no indication that the opposite party or its counsel was served with summons to appear on that date.

In his submission before us, therefore, Mr. Ismail for the appellant, contended in effect that the proceedings were shortcircuited in that while the two interlocutory

applications scheduled for 21/10/93 were pending, the suit itself was prematurely and unilaterally disposed of on 17/8/93. This, he concluded, was against the principles of natural justice in as much as his client was denied a hearing. Mr. Bwahana alleged that Mr. Ismail was aware of all the steps which he (Mr. Bwahana) took to have the main suit disposed of before the interlocutory applications were heard. Such claim by Mr. Bwahana, however, is not supported by the record.

We are satisfied that the appellant was denied a hearing of its interlocutory applications, and no explanation is given or is apparent for that denial. This was a breach of rules of natural justice. On that ground alone we would hold that the ex-parte judgement pre-empting such applications as it did was invalid.

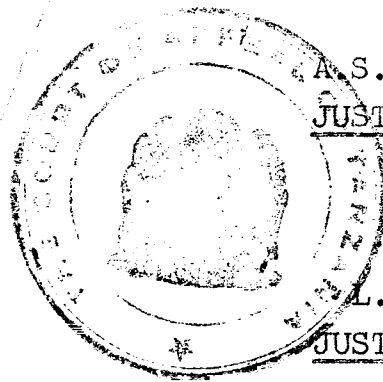
Furthermore, Mr. Ismail intimated that his application for a stay of the proceedings was aimed at seeking to have the matter referred to arbitration first, before testing it in court, in accordance with the terms of contract. If that is so this might have a bearing on the question of jurisdiction of the Court to entertain the matter at that stage, and hence the more reason for the Court to hear the interlocutory applications before purporting to dispose of the suit itself.

It is for these reasons that we allowed the appeal with costs, setting aside the ex-parte judgement with direction to the trial court to hear the interlocutory

applications now pending before it and thereafter to proceed in accordance with the law.

DATE at DAR ES SALAAM this 31st day of July, 1995.

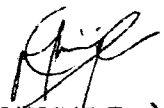
R.H. KISANGA
JUSTICE OF APPEAL



A.S.L. RAMADHANI
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M. S. SHANGALI)
DEPUTY REGISTRAR