IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUGAKINGIRA, J.A., And MROSO, J.A.)

CIVIL APPEAL NO. 46 OF 1999

BETWEEN

TANZANIA HARBOURS AUTHORITY . . . . . APPELLANT

AND

MATHEW MTALAKULE & 8 OTHERS . . . . . RESPONDENTS

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

(Mackanja, J.)

dated 15th June, 1999

in

Civil Case No. 358 of 1998

J U D G M E N T

RAMADHANI, J.A.:

This is an appeal from the Alternative Disputes Resolution (ADR) proceedings before the High Court at Dar es Salaam (MACKANJA, J.). Pleadings were completed by 23rd February, 1999, and the Registrar High Court fixed 15th June, 1999, as the mediation day. On that date all the nine respondents, who were the plaintiffs, and their learned advocate, Mr. Mwengela, were present but the appellant, then the defendant, was absent. None of the senior officers of the appellant corporation was present but their learned advocate, Mr. Mchome, was present and ready to proceed. He claimed that he had "been given full mandate to proceed with the mediation".

However, Mr. Mwengela canvassed a diametrically opposite view and, praying for judgment in default, he said:

.../2

> We oppose that Mr. Mchome has full mandate in these proceedings. Absence of a principal officer from the defendant is a way of avoiding the process. If a principal officer was present we could have discussed all the disparities in payment. The advocate is therefore not competent to negotiate a settlement.

That submission found purchase with learned judge who said:

> Because the absence of a principal officer from the defendant is totally unjustified I enter judgment with costs for the plaintiffs as prayed in the plaint.

The appellant is aggrieved by that decision. He came up with a notice of appeal containing five grounds of appeal and Mr. Mbuna, learned advocate, argued them on behalf of the appellant. We are of the decided opinion that the grounds could be reduced to four:

(1) The learned judge erred in finding that the learned advocate had no mandate to mediate on behalf of the appellant company.

(2) A default judgment should not have been entered when there was an advocate representing the appellant and when pleadings had been completed.

(3) There is no law, and none was cited, authorizing the learned judge to do what he did, that is, enter a default judgment.

.../3

(4) The appellant had applied for leave to serve a third party notice to NPF and NSSF and so, a default judgment should not have been entered.

It is our considered opinion that the third ground of appeal as formulated above disposes of the matter conclusively. To put the issue differently: is there a legal basis for the learned judge to have done what he did, that is, enter a default judgment?

Mr. Mbuna pointed out that mediation is under O VIIIA of the Civil Procedure Rules as amended by GN 422/94. The learned advocate submitted that Rule 5 governed the matter before the learned judge and he argued that that rule does not provide for what the learned judge did. Mr. Mjindo in reply submitted that Rule 5 gives wide powers to a judge including ordering costs. He also referred to paragraph 5 of the Notice of Mediation which provides for judgment in default.

To appreciate the problem facing us we have to quote O VIIIA R 5 fully:

> Where a party to a case or the party's recognized agent or advocate fails without good case (sic) to comply with a scheduling order, or to appear at a conference held under sub-rule (1) of Rule 3 or is substantially unprepared to participate in such conference, the Court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders.

.../4

.../5

It is abundantly clear to us that a judge can only act under that sub-rule if a party, its recognized agent and its advocate are all absent from a conference and without a good cause. In this case the party's advocate was present. So, the learned judge could not have acted under that sub-rule at all. That alone is enough to dispose of the matter but since a number of learned judges have done what was done in this case, we think we are duty bound to go further to settle this question once and for all, hopefully.

We have to consider what order a judge could give in case a party, its recognized agent and its advocate are all absent? That sub-rule provides that "a Court shall make such orders against a defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs". Admittedly, there is not a list of the sort of orders that might be given. Equally, the Court is given a very wide discretion of what orders it could give. The question is can a Court order a default judgment? We think not. The clause "including an order for costs" indicates to us that the legislature regarded costs to be more serious than "such orders" a Court could deem fit to give. It is abundantly obvious that a default judgment, and when it is against the defaulting party, is by far more serious than costs. So, default judgment cannot be given in such a situation.

Mr. Mjindo referred us to a document titled "Notice of Mediation" whose paragraph 5 provides for default judgments. We do not know under what provision of the law that Notice of Mediation was made and, therefore, we cannot say that it has any legal value worth of consideration by this Court or any court of

.../5

REGISTRAR

law at all. So, the learned judge should not have considered that Notice and use it to give a default judgment. We do not intend to say anything more on that Notice of Mediation.

We think that under O VIIIA R 5, in case of a defaulting or an unprepared party, a court could give any of the following orders, that is to say,

a) to adjourn the matter to another day; or

b) that the matter should go for a hearing before another judge.

The court could also order costs together with any of the two orders mentioned above.

So, for the reasons given above we quash the default judgment of 15th June, 1999, by MACKANJA, J., and we order that the matter be placed before another judge for the hearing of the suit. The appeal is, therefore, allowed with costs.

DATED at DAR ES SALAAM this 4th day of April, 2002.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

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

(N. M. MWAIKUGILE)
REGISTRAR