IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 105 OF 1998

BETWEEN

1. IGNAZIO MESSINA]
2. NATIONAL SHIPPING AGENCIES COMPANY LTD.] .... APPELLANTS

AND

WILLOW INVESTMENTS LTD.]
COSTA SHINGANYA] ..... RESPONDENTS

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

(Kalegeya, J.)

dated 19th day of November, 1998
in
Civil Case No. 4 of 1995

JUDGMENT OF THE COURT

MAKAME, J.A.:

This is the fourth time some aspects of this matter have been brought to this Court, following an exparte judgement by the High Court, (Kalegeya, J.). The learned trial judge remarked that counsel for the present appellants, Mr. Kalunga, and his clients, had deliberately refused to participate in a mediation process concerning a dispute over a consignment of beer from South Africa, destined for the then Zaire, via the port of Dar es Salaam. The present respondents' allegation was that the present appellants had

unlawfully detained the respondents' consignment of beer, for which the respondents had paid all the necessary charges, apparently because the appellants had mistaken the first respondent, WILLOW INVESTMENTS S.P.R.L., for another company, incorporated and based in Rwanda, WILLOW INVESTMENTS, which, it seems, had a consignment they had not cleared. As a result of the alleged bungling, which took several months to unravel, a company in Zaire which was to buy the respondents' beer refused to accept it because the monthly delivery schedule agreed upon had been fouled. As it turned out, the beer eventually transported to Zaire expired before an alternative buyer could be found.

As aforesaid, Kalegeya, J. entered judgement in favour of the present respondents. The appellants have come to this Court and their counsel filed a sixteen-ground Memorandum of Appeal. At the hearing, Mr. Mfalila and Miss Fatuma Karume, learned advocates, represented the first appellant, while Mr. Kalunga, learned advocate, appeared for the second appellant. The respondents were advocated for by Mr Rweikiza, learned counsel, as they had been also in the High Court, where there were some turbulent phases.

As remarked earlier, some aspects of this matter were dealt with by this Court on three other occasions. These were Civil Application No. 84 of 1998; Civil Reference No. 8 of 1999; and Civil Application No. 21 of 2001. In all the three, the present appellants lost.

Before us, counsel for the first appellant abandoned the first ground of appeal in which it was asserted that the learned High Court judge lacked jurisdiction; but on his part, Mr. Kalunga, for the second appellant, pursued the particular ground. Mr. Mfalila argued Grounds 2 and 7, which were mostly criticisms of the procedure the learned High Court judge adopted. Ms. Karume tackled Grounds 8 to 16, which related to substantive matters. Apart from Ground 1, Mr. Kalunga also addressed the Court on some of the other grounds. He vigorously challenged the introduction of Alternative Dispute Resolution and waddled through a number of other issues, attacked the plaint, and criticized the monetary awards made by the learned judge.

Mr. Rweikiza responded to all the arguments advanced by the three learned advocates for the appellants.

On procedure, Mr. Mfalila submitted that Mr. Kalunga refrained from taking part in the mediation proceedings because he felt that there were no prospects for success. Learned counsel added that it was wrong for the learned judge to castigate Mr. Kalunga and his clients, and proceed the way he did. Mr. Mfalila argued that it was not the occasion to proceed under Order 8, under which Mr. Rweikiza had made the application and that, even if that was merely lapsus calami, and what was in fact intended was Order 9, the latter would

also be inapplicable because its provisions could not be applied in respect of the mediation ordered for 17th November, 1998.

The record supplied to us did not disclose all that had transpired in the High Court and we had to call for the original record for better appreciating what was really before us. Having studied the lower court record carefully we are of the considered view that counsel addressing us spent time and forayed into substantive issues which anticipated our decision on the essential issue before us – whether the learned judge was right in seeking to set in motion the mediation process, whether Mr. Kalunga and his then clients were entitled to behave the way they did, and whether the learned judge erred in the course he adopted in response. It will be clear, at the end, why it is not necessary for us to consider most of the submissions made.

According to the original record supplied to us, in a Scheduling Conference on 14th July, 1995 Mr. Kalunga said

> "Since the pleadings are complete we ask for mediation at any time convenient to the court".

The then judge-in-charge, Maina, J. made the necessary order, fixing the matter for mediation on 1st August, 1995 before Kyando, J. As it turned out, the matter eventually came before Kalegeya, J. on 17th November, 1998 after Msumi, J.K. had handled an aspect of it

and after, later, a new date, 19th May, 1998 had been fixed for Mediation, by consent.

On 17th November, 1998 a rather unusual thing happened in court. It became clear that, although Mr. Kalunga's client was in the premises of the court, he would not take part in the mediation proceedings. Mr. Kalunga offered to go downstairs to look for his client and upon his return he reported to the court that he had not traced his client. When Mr. Costa Shinganya, then the second plaintiff, told the court that "I saw him (Mr. Kalunga's client) but he said he would not be coming to this session," is when Mr. Kalunga broke the news that his client would not play ball. We pause here and wonder: If before he went downstairs Mr. Kalunga had not yet been told by his client that the latter would not participate, where did he get the information if, as he said, he had not been able to trace his client? We conclude that Mr. Kalunga had already been told by his client, in which case he had no business to go downstairs, and waste the court's time. Mr. Kalunga went on to tell the court that "the parties are miles apart and I would wish to have the matter proceed to full trial so that issues are determined. We tried to settle without success at Sheraton."

We wish to remark that it is a laudable thing to try to settle a case out of court and it is an initiative which should be encouraged. It is too bad, however, if things do not work out well, but then there is a gulf of difference between such effort and the mediation process

provided for in terms of Government Notice No. 422 of 1994, which introduced some amendments to the Civil Procedure Code, 1966, to make specific accommodation for Alternative Disputes Resolution, including mediation, which is distinct from Sheraton efforts and the like.

Regarding the issue of locus standi. We wish to say that there was no appeal from the decision made by Msumi, J.K. so the matter must rest at that.

We are grateful to Mr. Kalunga for his views on the place and role of Alternative Disputes Resolution in our Civil Procedure Code and what should be done, or should have been done. For the present matter before us, however, we content ourselves by observing that Mediation was properly introduced into our system and the idea is to facilitate speedy resolution. There is no question of violating sections 81 and 82 of the Civil Procedure Code. We agree with Mr. Rweikiza that the Rules introduced are merely additional and are not inconsistent with the procedural framework. The way we read the changes introduced by Government Notice No. 422 of 1994, particularly the new Order VIIIA and Order VIIIB, impels us to hold the view that the specific judge or magistrate to whom a case is assigned is obliged to try to promote mediation, and on their part, parties, or their recognized agents or advocates must participate, unless they have a good reason. Order VIIIA rule 5 provides that if a party or his recognized agent or advocate "is

We are respectfully of the view that the learned judge rather jumped the gun when on the same day, 17/11/98, when Mr. Kalunga told him he wanted a full trial, he ordered

(1) Plaintiffs to prove their case exparte by affidavit

(2) The said affidavit to be filed by tomorrow upon which judgement would be pronounced (Our under-lining).

The learned judge might have rightly been irritated by what was done by Mr. Kalunga. Another judge might empathise. Having said that, however, we agree with Mr. Mfalila that the learned judge should not have converted the matter on 17th November, 1998 the way he did. Because the procedure adopted on that day was faulty and improper we allow the appeal and set aside the judgment of 19th November, 1998. We remit the matter to the High Court for continuation of the matter by way of mediation from the point mediation failed. Each step must be observed carefully. It is desirable, and we so order, that the matter be placed before a different judge.

Regarding the execution, monies realized from sales and not yet paid out should be deposited in court and there should be no

substantially unprepared to participate in such conference," or fails to do so without good cause, the court may make such orders against the defaulting or unprepared party etc., as the court deems fit. The question now is, in the circumstances of this particular case, what should the learned judge have done? There is a procedure provided. We are of the view that, essentially, Order VIIIA rule 3 was not breached. It was complied with by Maina, J. and, up to that stage, Mr. Kalunga and his client had not demonstrated any disinclination to participate. They were, however, later substantially unprepared to participate, even though they had earlier gone along in the spirit of Sub-rule 2 of rule 3 of Order VIIIA. Therefore whatever orders the learned judge wanted to make under Order VIIIA rule 5 would not preclude what he is required to do under Order VIIIB. The case remained unresolved. He should therefore, on top of orders under Order VIIIA rule 5, have attempted a final pre-trial settlement and Scheduling Conference, - in terms of sub-rule 1 of Rule 3, - Order VIIIB "for the purpose of giving the parties a last chance to reach an amicable settlement". Only when an amicable settlement is not achieved should the court frame the issues in terms of Order VIIIB rule 4. The court would do this after consultation with the parties, or their recognized agents or their advocates and this, according to the provisions of Order XIV of the Civil Procedure Code; thus transforming the process at that stage, into a suit readied for trial. It is only then could one appropriately talk of affidavits and manner of proof.

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Regarding the execution, monies realized from sales and not yet paid out should be deposited in court and there should be no

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further seizures and sales; pending the finalization of the proceedings.

We make no order as to costs.

Dated at Dar es Salaam this 21st day of June, 2002.

L. M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
DEPUTY REGISTRAR