THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(RAMADHANI, J. A.; MROSO, J. A.; And NSEKELA, J. A.)
CIVIL APPEAL NO. 122 OF 2005
BETWEEN
THE GOVERNMENT OF VIETNAM ... APPELLANT
AND
MOHAMED ENTERPRISE (T) LTD. ... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam,)
(Ihema, J.)
dated the 22nd day of July , 2005
in
Civil Case No. 8 of 2004

JUDGMENT

.....

RAMADHANI, J.A.:

Before the High Court there were twelve defendants, the current appellant being the twelfth. The respondent, who was the plaintiff, sued all twelve defendants, individually and severally, claiming US $ 1,750,000 being money paid to the 1st defendant for purchasing 6000 metric tons of rice pursuant to a contract between them and some US $ 24,000 for purchasing four rice whitening machines. However, both rice and the machines were not delivered to the respondent.

The respondent then used a clause in the contract providing for arbitration and went to the Vietnam International Arbitration Centre but at the end of the day the respondent failed to obtain any

payment because of limitation. So, the respondent sued the appellant:

> ... by virtue of the fact that it misrepresented to the Plaintiff on the effectiveness of the arbitration procedures in Vietnam, thus rendering the Plaintiff unable to recover its money in time.

We better also point out that the respondent applied for and was granted leave for substituted service by two publications in *The East African* newspaper. After that publication IHEMA, J. tried the matter and gave an *ex-parte* judgment for the respondent with costs against all twelve defendants. The appellant being aggrieved by that decision has appealed to this Court with a memorandum of appeal containing six grounds which were argued before us by Mr. Shyam Jadeja, learned counsel. The respondent was represented by Dr. Masumbuko Lamwai, learned advocate.

In ground one Mr. Jadeja submitted that the appellant enjoyed absolute state immunity. Then in ground two, it was canvassed that the appellant was not responsible for the respondent's delay in filling arbitration proceedings. In ground three the learned judge's finding of fraud on the part of the appellant was bitterly contested. The argument in ground four was that evidence by PW 1 did not prove appellant's liability. It was argued in ground five that substituted service through *The East African* did not constitute proper service. Lastly, in ground six, the jurisdiction of the High Court of Tanzania was questioned.

Mr. Jadeja argued the grounds with a lot of scholarship which was equally matched by Dr. Lamwai. However, we asked Mr. Jadeja whether it was proper for the appellant to come to appeal and not to go back to the High Court to set aside the judgment and have the matter heard inter parties. He replied that he could not be in a position at the High Court to argue some of the points he presented before us.

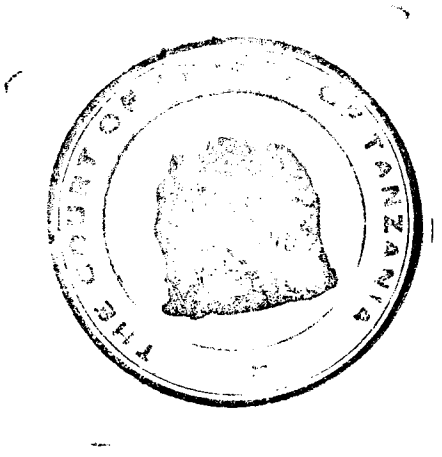
That could have been so but Mr. Jadeja wants us to step into the shoes of the High Court and make decisions purely from submissions from the bar without there being evidence. We have in mind, for instance, the finding of fraud. The learned judge accepted hook, line and sinker the findings of the Vietnam International Arbitration Centre in its award as proof of fraud on the part of the appellant. But was that proper? How was the award of a foreign tribunal admitted in those proceedings?

Then there is an issue of the jurisdiction of the High Court of Tanzania under section 18 of the Civil Procedure Act over the matter. Was there a cause of action on the part of the appellant? If there was did it arise in Tanzania to give the High Court jurisdiction?

It is our considered opinion that the determination of these questions, and others which we have not aired here, need evidence.

They are not matters for the determination of an appellate court but for a trial court. The proper course of action, therefore, was setting aside the *ex-parte* judgment and conducting a full trial. The appeal is, therefore, misconceived and we dismiss it with costs.

DATED at DAR ES SALAAM this 21st day of March, 2006.



A. S. L. RAMADHANI
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR