IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 144 OF 2015

M/S DARSH INDUSTRIES LIMITED ..... APPELLANT

VERSUS

M/S MOUNT MERU MILLEERS LIMITED ..... RESPONDENT

(Appeal from the Ruling and orders of the High Court of Tanzania at Arusha)

(Nyerere, J.)

Dated 28th day of November, 2012
in
Civil Case No. 18 of 2009

JUDGMENT OF THE COURT

21st & 27th October, 2016

MUSSA, J.A.:

This is an appeal against the Ruling and orders of the High Court of Tanzania, at Arusha (Nyerere, J.), dated the 28th day of November, 2012 in Civil Case No. 18 of 2009.

In the Civil case under reference, the appellant instituted a suit against the respondent in the High Court of Tanzania, at Arusha on the 10th day of August, 2009. In a nutshell, the appellant's claim against the respondent was for special damages amounting to a sum of

shs.1,222,667,150.00; general and punitive damages as well as injunctive orders plus costs of the suit.

In response, on the 3rd day of September, 2009 the respondent instituted a petition before the same court, under the Arbitration Act, Chapter 15 of the Revised Laws, impressing upon the court to order a stay of Civil Case No. 18 of 2009 pending reference to arbitration. As it were, the petition was successfully objected to by the appellant and, on the 17th day of October, 2012 the same was struck out by the High Court (Nyerere, J.) for being improperly filed. On the morrow of the striking out of the petition, that is, the 18th day of October, 2012 the respondent made an oral application for leave to file a Written Statement of Defence (WSD) with respect to the pending suit. Incidentally, the application was objected to by the appellant and a Ruling on the application was deferred to the 28th November, 2012 for delivery.

As it turned out, in its Ruling, which happens to be the one giving rise to this appeal, the High Court (Nyerere, J.), *suo motu* raised an issue pertaining to the viability of Civil Case No. 18 of 2009 which was not cavassed by the parties at the hearing of the application. In the course of

deliberating the issue, the court, *inter alia,* made the following observation:-

> *". . . per the provisions of Rule 8 of the Arbitration Rules (supra), the term "submission" extends to include a written agreement or its certified copy which has to be annexed to the petition stating on how far the parties have gone before an arbitrator. In other words, the plaintiff herein ought to have annexed the award or the special case to which the matter relates, or a copy of it certified by the petitioner or his advocate to be a true copy depending on the stage the matter has reached. All these are not available on the court record."*

In the upshot, the court took the following position:-

> *". . . since the plaintiff has neither annexed original (sic) copy of the "submission" meaning the agreement as required under both the principal legislation and the subsidiary legislation of the Arbitration Act (supra) and since nor had (sic) the plaintiff annexed a certified copy of the said "submission" as required, this court finds that even if this matter had been filed prematurely in contravention of the contents of paragraph 8.0 of the agreement entered between the parties herein annexed to the plaint marked annexture "D2" which required any*

conflicts or misunderstanding between the parties herein to be first referred to an arbitrator."

At the height of its deliberations, the High Court proceeded to strike out the plaint with an order for each party to bear his/her own costs. The appellant is aggrieved hence this appeal which is predicated on the following grounds:-

1. *That the High Court clearly erred in purporting to suo motu raise issues pertaining to attachment to the plaint of an agreement allegedly containing a clause requiring the parties to submit their dispute to arbitration and related issues and adversely decided on those issues against the appellant without according her a right to be heard*

   Only in the alternative:

2. *The High Court clearly erred in law in holding that, the plaintiff ought to have attached to the plaint a copy of the agreement or a certified copy thereof, allegedly, containing an agreement to refer the dispute to arbitration.*

3. *That the High Court clearly erred in treating the plaint in Civil Case No. 18/2009 as a petition seeking to stay an action pending in court and refer and or remit the same to arbitration.*
4. *That the High Court erred in law and fact in holding that Civil Case Number 18/2009 was filed in court prematurely allegedly on account of omission to refer the dispute to arbitration.*
5. *That having refused to stay the suit and refer the same to arbitration in terms of its decision rendered on the 17th day of October, 2012 the High Court erred in revisiting and constructively annulling its previous decision and without any application by any of the parties.*
6. *That the High Court clearly erred in holding that, the cause of action in Civil Case No. 18/2009 had its basis over alleged breach of the Settlement and General Release Agreement entered into between the appellant and the respondent on the 7th day of April, 2006.*

At the hearing before us, the appellant was represented by Mr. Elvaison Maro, learned Advocate, whereas the respondent had the services of Mr. Colman Ngalo, also learned Advocate. The learned counsel for the appellant commenced his submissions by abandoning ground No. 6 of the memorandum of appeal. He otherwise fully adopted the remaining grounds as well as the written submissions which he had lodged in support of the appeal.

Addressing us on the substantive first ground of appeal, Mr. Maro submitted that the trial court digressed itself into the wilderness when it *suo motu* raised the issue pertaining to non-attachment of an original copy of the *"submission"* to the plaint and thereby proceeding to strike out the plaint on that strength. The learned counsel for the appellant charged that the procedure adopted by the High Court was patently defective and cannot stand the test of time. To buttress his contention, Mr. Maro referred us to a plethora of authorities where the Court emphasised the need to accord the parties a full hearing ahead of making an adverse decision in line with the *audi alleram partem* rule of natural justice - viz - Civil Appeal No. 78 of 2012 - **Scan - Tan Tours Ltd Vs. the Registered Trustee of the Catholic diocese of Mbulu** (unreported); **Shomary**

Abdallah Vs. Hussen and Another [1991] TLR 135; **National Housing Corporation Vs. Tanzania Shoe and Others** [1995] TLR 251; **Ndesamburo Vs. Attorney General** [1977] TLR 137; Civil Appeal No. 25 of 2014 - **Anthony Ngoo and Another Vs. Kitinda Kimaro**; and Civil Application No. 157 of 2007 - **Truck Freight (T) Ltd Vs. CRDB Bank Ltd** (both unreported). In the case of **Scan - Tan Tours** (supra), the High Court had, on its own, raised an issue without involving the parties and ended up deciding the case on the strength of the raised issue. On appeal, this Court observed:-

> *"It is not disputed that under Order XIV Rule 5 (1) and (2) the trial judge has the power to amend, add or strike out an issue. However, when an issue being introduced is so pivotal to the whole case and would form a basis for the decision of the trial court, it is pertinent that the parties should be given a chance to address the court on the new issue."*

The learned counsel for the appellant urged that on account of not affording the parties an opportunity of being heard, the impugned decision of the High Court is a nullity and, accordingly the same should be set aside and the suit should be restored back.

Mr. Maro then consolidated the second and third ground and argued them together. Simply stated, the argument taken by the learned counsel with respect to the two grounds, was that the requirement to have a copy of the submission annexed applies only to a petition filed under the provisions of the Arbitration Act and not to a plaint filed in terms of Order IV Rule 1 (1) of the Civil Procedure Code. To that extent, he contended, the High Court manifestly and patently erred in treating the plaint as if it were a petition filed under the Arbitration Act.

As regards the fourth ground, Mr. Maro submitted that the High Court adopted a wrong approach by seemingly declining its own jurisdiction when it held that the law suit was prematurely lodged. The learned counsel for the appellant argued that the mere existence of an agreement to submit a dispute to arbitration is not a bar to a party to file a law suit and neither does such an agreement oust the jurisdiction of the court.

Finally, on the fifth ground, the learned counsel for the appellant contended that the decision of the High Court further complicated the rivalry between the parties. Although, he said, the Court, apparently, did not make a compulsive order to have the matter referred to arbitration,

nevertheless, the court effectively suggested that the parties should have referred the dispute to arbitration ahead of filing the law suit. Mr. Maro deplored the stance taken by the High Court which, he suggested, constructively annulled the previous order of the court through which the respondent's petition was rejected and struck out.

Thus, in sum, Mr. Maro alternatively, impressed us to allow the appeal but, on account of a kind of a *quid pro quo* which was, apparently, brokered between two the learned counsels, he relaxed his prayers and did not press for costs. Indeed, when he rose up, Mr. Ngalo did not resist the appeal and, we should suppose, quite understandably, the more so as, in the wake of the two decisions of the High Court, both parties were, seemingly, trapped in a catch – 22 situation.

Coming now to the merits, in particular, of the first ground of an appeal, we need only state that we entirely subscribe to the brief and precise submissions of Mr. Maro, just as we fully concur with the legion of authorities which he brought to our attention in support of his cause. We only wish to obtain further guidance from the unreported Civil Appeal No. 45 – **Mbeya – Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma,** where the Court observed:-

"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamiiifu."

In yet another unreported Civil Application No. 33 of 2002 – **Abbas Sherally and Another Vs. Abdul Fazalboy,** the Court emphasised the importance of the right to be heard as follows:

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasised by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

Thus, consistent with settled law, we are of the firm view that the decision of the High Court giving rise to this appeal cannot be allowed to

stand on account of being arrived at in violation of the constitutional right to be heard. That would suffice to nullify and put to rest the impugned decision and, for that matter, we need not decide this appeal more than is necessary for its disposal. That being so, we refrain from taking any stand with respect to the remaining grounds of appeal which were, after all, pleaded in the alternative. Having nullified the November, 28th decision, we order the restoration of the law suit which should resume before another judge of competent jurisdiction. In the spirit of the concession reached by the parties, we give no order as to costs.

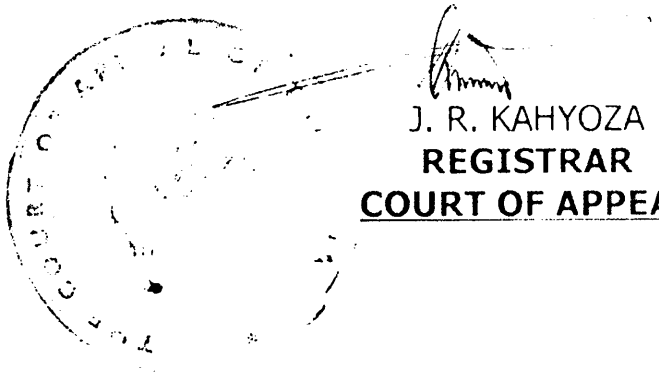
DATED at **ARUSHA** this 24th day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL