IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MMILLA, J.A., And LILA, J.A.)

CIVIL APPEAL NO. 139 OF 2006

NATIONAL HOUSING CORPORATION .....APPELLANT

VERSUS

ETTIENES HOTEL..... ..... RESPONDENT

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

(Ihema, J.)

Dated 7th day of September, 2000
in
Civil Case No. 139 of 1999

JUDGEMENT OF THE COURT

24th & 31st May, 2017

MBAROUK, J.A.:

This appeal arises from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Ihema, J) dated 7th September, 2000 in Civil Case No. 139 of 1999.

Briefly stated, the genesis giving rise to this appeal is that, on 29th April, 1999, the appellant filed a summary suit against the respondent for recovery of rent arrears (Tshs.

45,225,633.45), mesne profits, vacant possession, amongst other reliefs sought before the High Court. Thereafter, the respondent applied for leave to defend which was granted by the High Court on 29th October, 1999. On 8th December, 1989 the respondent filed its written statement of defence (WSD) together with a counter claim. In response, the appellant filed a reply to the WSD and defence to the counter-claim on 29th March, 2000 without seeking and obtaining an extension of time to do so. On 7th September, 2000 the appellant tried in vain to show its intention to apply for extension of time to file its reply to the counter-claim of the respondent. To appreciate as to what transpired on that day, we have found it proper to reproduce the proceedings as they appear on the record of appeal, which are as follows:-

> *"Date: 7-9-2000*
> *Coram: Ihema, J.*
> *For the Plaintiff: Mhingo*
> *For the defendant: Ringia/Nyange*
> *CC: Mavura*

Mhingo: *My Lord we have intended to apply for extension of time to file reply to counter claim of the Defendant.*

Ringia: *My Lord we do object to such a prayer in view of the lapse of time. In the circumstance we would urge the court to pronounce judgment on the counter claim as prayed.*

Mhigo: *my Lord I leave the matter in hands of the court.*

Order: *in terms of Order VIII Rule 14(2) as amended by GN 422 of 1994 judgment on the counter-claim by the defendant is granted as prayed.*

S.E.N. Ihema
JUDGE
7/9/2000".

Aggrieved by that order, the appellant preferred this appeal containing the following grounds of appeal, namely:-

"1. The Counter Claim was hopelessly time barred thus the Honorable Court had no jurisdiction to hear and determine it.

2. The Judgment of the Trial Court was erroneously pronounced against the Appellant without the court first hearing evidence in proof thereof from the Respondent.

3. That the Trial Court erred in law in granting judgment under Order VII Rule 14(2) of the ***Civil Procedure Code 1966*** *without requiring the Respondent to adduce evidence as required under the law.*

4. That the Trial court erred in law in granting a judgment that falls short of all attributes of a judgment as envisaged under Order XX Rule 4 of the ***Civil Procedure Code 1966****."*

In this appeal, the appellant is represented by Mr. Mpaya Kamara, learned advocate and Mr. Herbert Nyange learned advocate appeared for the respondent.

Looking at the grounds of appeal, we have found that, the crux of the matter can conveniently be disposed of by examining the 3rd and 4th grounds of appeal only.

At the hearing, submitting on the grounds of appeal, Mr. Kamara started by praying to adopt his written submissions filed earlier on. Mr. Kamara then proceeded by submitting that, Order VIII, Rule 14(2) of the Civil Procedure Code, 1966 (the CPC) contains Rule 14(2) (a) and (b). He further submitted that Order VIII, Rule 14(2) (a) of the CPC gives the High Court powers to enter a default judgment in favour of the plaintiff where the claim is for a liquidated sum **not exceeding** one thousand shillings without requiring him to prove his claim. Mr. Kamara added that the respondent's claim were running into huge amounts of millions of shillings, hence not within the contemplation and context of Order VIII, Rule 14(2) (a) of the CPC. Mr. Kamara was of the view that the trial court should have proceeded in terms of Order VIII Rule 14(2) (b) of the CPC, where trial court is empowered to proceed by fixing a day for ex parte proof of the case and thereafter to pronounce judgment on the proved claims or

dismiss the counter-claim in the event the respondent fails to prove its case.

As for the 4th ground of appeal, Mr. Kamara, submitted that, the fact that the trial court heard the matter ex parte and thereafter pronounce judgment did not mean that the trial court's statutory obligation to compose its judgment in terms of the requirements under Order XX, Rule 4 of the CPC is vacated or waived. He said, Order XX Rule 4 of the CPC requires a judgment to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, but the trial Judge failed to comply with those requirements. He also cited the decision of this Court in **Ali Abdallah Amour and Abdalla Ali Abdalla v. Al – Hussein Sefudin (Safi stores)** [2004] TLR 313 at 316 in support of his submission.

Mr. Kamara then urged the Court to find that, as the trial court misdirected itself for not having complied with

the requirement to fix a day for ex parte proof and then pronounce its judgment as required under Order VIII, Rule 14(2) (b) of the CPC and as the decision of the trial court dated 7th September, 1999 falls short of all the attributes of a judgment as envisaged under Order XX Rule 4 of the CPC, he urged us to quash and set aside the trial court order dated 7th September, 2000 and order the trial to be heard *de novo* before another Judge as Hon. Ihema has already retired.

On his part, Mr. Nyange started by praying to adopt his reply to the appellant's written submissions he filed earlier on. Arguing against the 3rd ground of appeal, Mr. Nyange basically was of the view that the High Court should have invoked Order VIII Rule 14(1) instead of Rule 14(2) of the CPC in its decision dated 7th September, 2000. However, he further submitted that, he strongly believed that, such an error was clerical and does not go to the root of the matter and can be corrected in terms of section 96 of the CPC.

In his reply to the submissions made by the appellant in the 4th ground of appeal, Mr. Nyange contended that, what is said to be a judgment is not a judgment, hence the issue should not be whether that decision satisfies the law or not. He therefore urged us to find that until such time when a judgment is written and delivered, the appellant cannot attack the judge's notes dated 7th September, 2000 as it does not contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. He then distinguished the decisions of this Court in the case of **Ali Abdalla Amour and Another** (supra) and **Samson Ngw'alida v. Commissioner General TRA,** Civil Appeal No. 86 of 2008 (unreported) with this case as the situation is different because in the cited cases there was a judgment unlike in this case where no judgment was composed. In essence, Mr. Nyange said that it is pre-mature for the appellant to have filed this appeal as there was no judgment.

Having examined the rival submissions in this appeal, we have found it proper to start by examining the contents of Order VIII Rule 14(2) of the Rules which was applied by the trial court in reaching at its decision on 7th September, 2000 subject of this appeal. The same reads as follows:-

> *"14 (2) in any case in which a defendant who is required under sub rule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to the sub rule, within the period of such extension, the court may-*
>
> *(a) Where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons, enter judgment in favor of*

the plaintiff without requiring him to prove his claim.

(b) In any other case, a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim."

Looking at the order of the High Court dated 7th September, 2000, it seems not to have stated specifically which part should apply, was it Rule 14(2) (a) or Rule 14(2) (b) of Order VIII of the CPC. On the face of it, that order cited by the trial court i.e. Order VIII Rule 14(2) of the CPC is vague and is the source of controversy in this matter.

We agree with Mr. Kamara that, as the respondent's counter-claim contained huge amounts of millions of shillings i.e. Tshs.45,225,633.45 which exceed one thousand shillings stated in Order VIII Rule 14(2) (a) of the CPC, the trial court ought to have applied Order VIII Rule

14(2) (b) of the CPC, and fix a day for ex parte proof and thereafter compose its judgment and pronounce it.

It should therefore be clear that, Order VIII Rule 14(2) (a) of the CPC applies in a situation where the amount claimed by a defendant in a suit or counter-claim does not exceed one thousand shillings and when he fails to present a written statement of defence within the time fixed upon proof of service, the trial court can proceed entering judgment in favour of the plaintiff without requiring him to prove his claim.

On the other hand, if the sum exceeds one thousand shillings and if the defendant fails to present his written statement in a suit or counter-claim the trial court can compose and pronounce judgment in favour of the plaintiff upon such proof of his claim as required by Order VIII Rule 14(2) (b) of the CPC, the provision which the trial court in

the instant matter should have applied. However, a point to be noted here is that the amount of one thousand shillings is now out dated, hence there is a need for it to be closely looked upon and be amended to suit the current situation.

On the other hand, we also agree with Mr. Nyange that the said order is not a judgment, hence until such a judgment is written and delivered a counter-claim in the High Court Civil Case No. 139 of 1999 is yet to contain a proper judgment.

As pointed herein above, after having examined those two grounds of appeal, we are of the view that, the same dispose of the appeal and we see no reason to examine the other grounds in this appeal. In the circumstances, and for the above stated reasons, we are compelled to invoke section 4(2) of the Appellate Jurisdiction Act and quash the proceedings of the trial court dated 7th September, 2000 and order the case to proceed

as it existed on 19th June, 2000 before another Judge. It is so ordered.

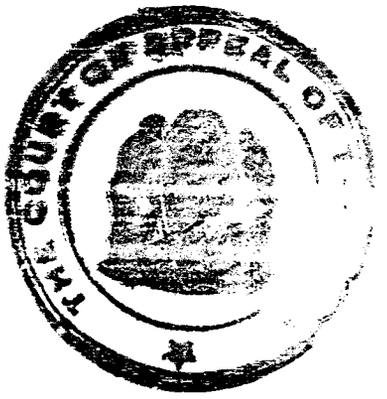
DATED at **DAR ES SALAAM** this 29th day of May, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL