IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MUGASHA, J.A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 107 OF 2015

1. INTERGRATED PROPERTY INVESTMENT (T) LIMITED
2. OMARI ABDI ALI **.... APPELLANTS**
3. SULEIMAN ABDI DUALEH

VERSUS

THE COMPANY FOR HABITAT AND HOUSING IN AFRICA ..... RESPONDENT

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

(Mansoor, J.)

dated the 6th day of July, 2015

in

Commercial Case No. 53 of 2015

JUDGMENT OF THE COURT

3rd September & 24th December, 2018

MWARIJA, J.A.:

The respondent in this appeal, the Company for Habitat and Housing in Africa (Shelter Afrique), was the plaintiff in the High Court of Tanzania (Commercial Division) at Dar es Salaam in Commercial Case No. 53 of 2015 ("the Suit"). It instituted the Suit against the appellants, Integrated Property Investment (T) Limited, Omar Abdi Ali and Suleiman Abdi Dualeh (the 1st -3rd defendants respectively in the trial Court); The Suit was instituted by way of summary procedure under O.XXXV of the

Civil Procedure Code [Cap.33 R.E. 2002]. (the CPC) The respondent claimed for the following reliefs:-

"(A) ***against the 1st Defendant for:-***

(a) the sum of USD 5,326,791.54 (United States Dollars Five Million Three Hundred Twenty Six Thousand Seven Hundred Ninety One and Fifty Four Cents);

(b) interest on the sum of USD 5,326,791.54 from the date of the Demand Letter at rates set out in clauses 7.1, 8.1 and 8.2 of the Loan Agreement amounting to USD 431,990.81 (Four Hundred Thirty One Thousand Nine Hundred Ninety and Cents Eight One at the date of this claim and continuing at a daily rate of USD 2390.84 (Two Thousand Three Hundred Ninety and Cents Eighty Four);

(c) interest on the decretal amount at the courts rate from the date of judgment until date of full and final payment;

(d) an order granting the Plaintiff vacant possession of the Property; and

(e) an order appointing Mr. Sadock Dotto Magai as Receiver Manager with power to sell, lease, enter into possession or collect the income of the Property;

(B) ***against the 2nd and 3rd Defendants:-***

(a) the sum of USD 5,326,791.54 (United States Dollars Five Million Three Hundred Twenty Six Thousand Seven Hundred Ninety One and Fifty Four Cents); and

(b) interest on the sum of USD 5,326,791.54 from the date of the Demands at rates set out in clause 6 of the Guarantee and clause 8.2 of the Loan Agreement amounting to USD 431,990.81 (Four Hundred Thirty One Thousand Nine Hundred Ninety and Cents Eighty One at the date of this claim and continuing at a daily rate of USD 2390.84 (Two Thousand Three Hundred Ninety and Cents Eighty Four);

(C) ***against the 1st, 2nd and 3rd Defendants jointly and severally for:-***

(c) interest on the decretal amount at the court's rate from the date of judgement until date of full and final payment;

(d) costs; and

(e) any other reliefs as this honourable court may deem fit"

From the contents of the plaint, the dispute arose from a loan agreement entered between the 1st appellant and the respondent ("the Agreement"). The appellants secured a loan of USD 5,000,000.00 from the respondent upon a legal mortgage over a property situated on plots Nos. 2, 3 and 5 Block 'A', Ununio/Kunduchi area in Kinondoni municipality within the Dar es Salaam City, held under Certificate of Title No. 44549 in the name of the 1st appellant, the 2nd and 3rd appellants, who were until the material time of the Agreement, the directors of the

1st appellant, guaranteed the loan through execution of personal guarantees thereof.

Following a dispute over repayment of the loan, the respondent instituted the Suit in the trial court. The appellants were subsequently served with summons in terms of O.XXXV r. 2(1) of the CPC informing them that they would, within twenty one days from the date of service of the summons, apply for leave to appear and defend the Suit.

On 5/6/2015, they filed an application to that effect, Misc. Civil Application No. 135 of 2015. The application was brought under O.XXXV r.3 (1) of the CPC. In response, the respondent raised a preliminary objection challenging the competence of the application. On 6/7/2015 when the application was called on for hearing of the preliminary objection, Ms. Madina Chenge appeared for the respondent. The appellants did not enter appearance and as a consequence the learned trial judge made the following order:-

> *"The applicants were aware of today's date for hearing of the application to appear and defend the suit, the Applicants have failed to enter appearance to pursue their application, and no reasons for the failure*

to appear have been shown consequently, the application for leave to appear and defend the summary suit is dismissed for non-appearance ...."

It is on record that on 9/6/2015 when the application was fixed for hearing on 6/7/2015, Ms. Samah Salah who appeared for the appellants, held the brief of Mr. Lutema for the respondent. On that same date after having dismissed the application, the learned judge went on to determine the Suit by entering a "default judgement." She ordered as follows:-

"The defendants failed to appear to defend the suit, and thus they have failed to obtain leave to defend the summary suit; therefore, the allegations in the plaint are deemed to be admitted, and the Plaintiff is entitled to a judgment and decree as prayed in the summary suit. The judgment is entered under O.35 Rule 2 (2) (a) of the CPC."

As a result, a decree, titled "default decree" awarding all the reliefs prayed in the plaint as enumerated above, was issued in favour of the respondent. Although the judgment was entered under Order XXXV rule 2(2)(a) of the CPC for the appellants failure to appear at the hearing of

their application for leave to defend the suit, the judgment ought to have been followed by a decree issued in accordance with the provisions of Order XX rule 6 and 7 of the CPC. The same was to be titled "decree" not "default decree." The defect is however not fatal as held in the case between the same parties to this appeal, Civil Application No. 162 of 2015 (unreported) in which the appellants in this case applied for stay of execution of the impugned decree. The defect had given rise to one of the grounds of the preliminary objection raised by the present respondent in the said application. Overruling that ground, the Court stated as follows:

> *"The terms of the decree are clearly ascertainable. We are therefore convinced that the inclusion of the word* ***default*** *in the decree was unnecessary and uncalled for, but in noxious."*

The appellants herein were aggrieved by the decision of the trial Court hence this appeal. In their memorandum of appeal, they had initially preferred seven grounds of their grievance. However, in their joint written submission, they abandoned two of the grounds and argued the remaining five as paraphrased below:-

"1. That the Honourable Trial Court erred in law and in fact in not holding that Commercial case number 53 of 2015 was not a summary suit.

2. That the Honourable Trial Court erred in law and in fact in not holding that from the statements appearing in the plaint the suit was barred by law to be designated as a summary suit.

3. That the Honourable Trial Court erred in law and in fact in not holding that there was no statement appearing in the plaint constituting the suit that obliged the 2nd and 3rd applicants to be sued summarily.

4. That the Honourable Trial Court erred in law and in fact in entering a summary judgment founded on failure of natural justice and blatant breach of procedures relating to resolutions of issues of law and facts.

5. The decision of the High Court (Land Division) (sic) is otherwise faulty and wrong in law in that it is founded on an order that was pre-maturely

issued by the Court without considering that what was before the Court was not an application but a preliminary objection."

At the hearing of the appeal the appellants were represented by Dr. Masumbuko Lamwai, learned counsel while the respondent had the services of Mr. Gasper Nyika, learned counsel. When arguing the appeal in Court, both Dr. Lamwai and Mr. Nyika adopted the written submissions which had earlier on been filed by the appellants and the respondent filed in compliance with sub-rules (1) and (8) of Rule 106 of the Tanzania Court of Rules, 2009 (the Rules), respectively.

With regard to the 1st and 2nd grounds of appeal, it is the appellants' contention that the learned trial judge should have found that the case against the appellant could not have been proceeded with under a summary procedure on account that the nature of the claim does not fall under any of the categories of suits stipulated under O.XXXV of the CPC. They contended further in the 3rd ground of appeal, that the 2nd and 3rd appellants were wrongly joined in the suit because as guarantors of the loan, the claim against them could not be brought by way of a summary suit.

It was argued by the appellants' counsel that the respondent's claims constitute two causes of action, the claim based on mortgage and that which is based on the contract of guarantee. He submitted therefore that, whereas it is proper to bring the claim based on mortgage by way of a summary procedure, the claim based on the contract of guarantee, which does not fall under any of the categories of the Suits stated under O.XXXV of the CPC, was wrongly brought under that Order against the 2nd and 3rd appellants. To that argument, Mr. Byamungu added that, as a result of joining the 2nd and 3rd appellants in the Suit, the trial Court gave reliefs which were beyond what was claimed by way of a summary suit.

On the 4th and 5th grounds of appeal, the appellants challenged the procedure which was adopted by the trial Court to enter the impugned judgment. It was argued, firstly, that since the appellants were ordered to file defence, the trial court had obviously treated the case as an ordinary Suit and for that reason; it wrongly proceeded with it under summary procedure. Amplifying that argument in his oral submission, Dr. Lamwai argued that, after having made an order requiring the appellants to file a written statement of defence, the trial court erred when it conversely issued a summons under rule 2(1) of

O.XXXV of the CPC informing the appellants about the requirement of obtaining leave to appear and defend the Suit.

It was submitted further in these grounds that, since the respondent had raised a preliminary objection against the application for leave to appear and defend, by virtue of the rule of practice, the same was to be heard first, and for that reason, the trial court erred in dismissing the application on the date of hearing of the preliminary objection. This is more so, he argued, because there is no proof that Ms. Samah Salah who held the brief of Mr. Lutema for the appellants on 9/6/2015, informed him on 9/6/2015, of the next date of hearing. The learned counsel argued also that the application was dismissed pre-maturely because, apart from the fact that on that date (6/7/2015) what was fixed for hearing was the preliminary objection, the respondent's counsel had prayed for adjournment due to the absence of the appellants' counsel. Dr. Lamwai stressed that in the circumstances, the appellants were denied the right of hearing hence a breach of one of the principles of natural justice.

In his reply, the respondent's counsel opposed the appeal. With regard to the 1st and 2nd grounds, he argued firstly, that from the

respondent's claims, the suit was properly brought by way of summary suit under O.XXXV of the CPC. According to the learned counsel, the fact that the 2nd and 3rd appellants were guarantors, did not bar them from being sued jointly with the 1st appellant in a summary suit. Relying on O.XXXV r. 1 (c) of the CPC, he contended that, since the suit arose from a loan which was secured by mortgage and because the respondent's claim was for "payment of monies secured by mortgage", the 2nd, and 3rd appellants were properly sued jointly with the 1st appellant who is the principal debtor.

On the 4th and 5th grounds, the respondent's counsel submitted that the same raise issues concerning the propriety or otherwise of the trial court's order dismissing the application for leave to appear and defend. He argued however that, since the appellants were served and were as a result, having a notice of the date of hearing of both the application and the Suit, the trial court rightly dismissed the application and entered the impugned judgment. He argued further that under O.XXXV r. 3(1) (a) of the CPC as amended by the Mortgage Finance Act, No. 17 of 2008, the trial Court properly invoked rule 2(2) (a) of the CPC to enter judgment for the respondent.

Having duly considered the submissions of the learned counsel for the parties, we wish to start by observing that, although upon institution of the suit, the learned trial judge ordered for issuance of summons to file defence but instead, a summons to obtain leave to appear and defend (summons to appear and defend) was issued, the irregularity is, in our view, not fatal. Since the case was filed as a summary suit, summons to appear and defend was properly issued under O. XXXV r. 2(1) of the CPC. Furthermore, the appellants were not prejudiced because they understood the nature of the suit and in response, they filed an application for leave to appear and defend the Suit.

Turning now to the substance of the appeal, the 1st – 3rd grounds thereof raise the issue whether or not the nature of the claim entitled the respondent to institute a Summary Suit under O. XXXV of the CPC. There is no dispute that the points raised in these grounds of appeal were not decided by the trial court. That court merely entered a summary judgment. In the circumstances therefore, since these grounds do not challenge the points which were argued and decided by the trial court, there is no material upon which this Court can act to make a decision thereon.

So, although a summary judgment is appealable under section 5 (1) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], in the particular circumstances of this case, the three grounds of appeal have been misconceived. This is because, as submitted by Mr. Nyika, Rule 93 (1) of the Rules provides clearly that the grounds of appeal must specify the points which are alleged to have been wrongly decided. The provision states as follows:

> *"93 – (1) A memorandum of appeal shall set forth concisely and under distinct heads, without narrative, the grounds of objection to the decision appealed against* ***specifying the points which are alleged to have been wrongly decided,*** *and the nature of the order which it is proposed to ask the Court to make."*
>
> [Emphasis added].

In this appeal, the appellants have raised the points which go to the merits of the case while the issues arising therefrom were not argued and determined. In fact, as submitted by the respondent's counsel, these grounds of appeal reiterate the matters which the appellants intended to rely upon in their dismissed application. Dr.

Lamwai submitted that the raised issues should be taken to have been constructively decided by the trial court. With respect, going by the mandatory provisions of Rule 93 (1) of the Rules, we are unable to agree with that proposition. The grounds of appeal must be based on the points which have already been decided.

As to the 4th and 5tn grounds, the same are challenging the procedure which was applied to enter the impugned judgment. It is contended, **firstly,** that the appellants' application for leave to defend was wrongly dismissed and **secondly**, that the judgment was wrongly entered on the date fixed for hearing of the preliminary objection. The appellants' complaint is that they were not afforded the right of hearing because there is no proof that Ms. Salah who held the brief of Mr. Lutema, the appellant's counsel on 9/6/2015, notified him of the date of hearing the preliminary objection, the date on which the trial court dismissed the appellants' application and entered the impugned judgment.

Given the nature of the points raised in these two grounds of appeal, we agree with Mr. Nyika that the same ought to have been decided in the application for leave to appear and defend. Since that application was not heard and because the appellants are discontented

with the dismissal of the application, it is our considered view that, the proper move was to apply to set aside the decree on the basis of the grounds complained in these two grounds of appeal so that the same could be heard and decided.

It is worth to state here that, a summary suit entered as a result of the defendant's failure to appear is akin to an *ex-parte* decision. Commenting on O. 37 r. 2 of the Indian Code of Civil Procedure which is in *pari materia* with O.XXXV r.2 of our CPC, the learned authors of **Mulla, The Code of Civil Procedure (Abridged),** 14th Ed, state that position in the following words:

> *"The language used in O. 37 r. 2 does not postulate the passing of an ex-parte decree as is provided under O. 9 r.6 and procedure to set aside that decree and if necessary, stay or set check out in O. 37 r. 4 leaves no doubt that the provisions contained in O. 9 r. 13 have no application to a decree passed in absentia of the defendant. A decree passed against the defendant for his not entering into appearance in terms of O. 37 r. 2 (3),* ***it is an ex-parte***

decree in the sense that the code has used, and the words as if admitted in sub-r (3) of r. 2 are only to make the decree effective. Such a decree does not cease to be an ex-parte decree in the sense of O. 9 r. 3 has used it. *The provisions of O.9 r. 13 are not applicable because O. 37 is self contained code regarding the summary procedure for the matters covered under it."* [Emphasis added]

Like an *ex-parte* judgment therefore, a summary judgment may also be set aside. The applicable provision to that effect is O. XXXV r. 8 of the CPC as amended by GN No. 256 of 2005. The provision states as follows:

"After the decree the Court may, in exceptional circumstances set aside that decree and if necessary, stay or set aside execution and may give leave to the defendant to appear to summons and to defend the suit, if it seems reasonable to the Court to do, and on such terms as the Court thinks fit."

On the basis of the above stated position therefore, we are unable to agree with the argument that once a summary judgment has been entered, the same cannot be set aside. Since the appellants are complaining that their application for leave to defend was dismissed without being afforded the right to be heard, to apply to set aside the decree is, in our view, a proper course which should have been taken by the appellants.

It is instructive to state further that, unlike in an *ex-parte* judgment entered in default of the defendant's appearance, a defendant against whom a summary judgment has been entered has to show firstly, that there were exceptional circumstances which prevented him from appearing in court and secondly, that he has a good defence in the suit. The learned authors of **Sarkars, The Code of Civil Procedure**, 11th Ed., comments as follows at pages 2248 – 9 on rule 4 of O.37 of the Indian Code of Civil Procedure, which is in *pari materia* with O. XXXV r. 8 of our CPC.

> "Under Rule 4 the defendant is obliged to explain the special circumstances which prevented him from appearing in the Court and seek leave to defend the suit within time. In addition he has

further to show that he has good, substantial and/or meritorious defence in the suit."

On the basis of the above stated reasons, it is our considered view that the appellants should have first applied to set aside the decree. As stated above, they would have the opportunity of arguing, not only the points which were raised in the 4th and 5th grounds, but also those raised in the 1st – 3rd grounds of appeal as intimated in their dismissed application. In case of dissatisfaction with the outcome, they could then appeal against that decision. We are guided in that view, by the court's decision in the case of **The Government of Vietnam v. Mohamed Enterprises (T) Ltd;** Civil Appeal No. 122 of 2005 (unreported). In that case, the appellant appealed against the *ex-parte* judgment of the High Court raising in the appeal, the grounds which required the Court to step into the shoes of the High Court and make decision on them, purely from the submissions of the parties' advocates from the bar. The Court held as follows:

> *"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...."

Given the particular circumstances of this case, we hold the same view as expressed in the above cited case. In the event, we find that this appeal has been misconceived. The same is therefore hereby dismissed with costs. The appellants are at liberty to apply to set aside the decree in accordance with the law.

DATED at **DAR ES SALAAM** this 20th day of December, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL