IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., KITUSI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 158 OF 2018

HAROON MULLA ---------- APPELLANT

VERSUS

PHILLIP DUBEAU ---------- RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

dated the 20th day of May, 2016

in

Civil Case No. 185 of 2008

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JUDGMENT OF THE COURT

3rd & 21st May, 2019

MWANGESI, J.A.:

In Civil Case No. 185 of 2008 which was lodged in the High Court of Tanzania Dar es Salaam District Registry, the respondent herein sued the appellant, alongside four other defendants namely, Usangu Safaris Limited, Abdulabasit Mulla, Gamshard Camdust and Zahir H. Mulla, claiming against them jointly and severally for the following reliefs that is:

> *(a) Judgment on admission for the sum of US Dollars One Hundred and Thirty- Nine Thousand and Two Hundred (139,200), and US Dollars One Hundred and Sixty-Four Thousand (164,000);*

(b) *Payment of the sum of US Dollars One Million Seven Hundred and Seven Thousand (1,707,000/=, being the remaining sum from the principal amount of the admission as per prayer (a) herein above,*

(c) *Payment of interest on (a) and (b) at 8% annually on the principal sum from the date the said instalment sums became due till full and final payment,*

(d) *Payment of general damages as shall be assessed by the Honourable Court.*

(e) *Interest on the decretal sum at Court rate from the date of award till full and final payment.*

(f) *Costs of the suit and interest thereon at the Court rate of 12% from the date of the suit till full and final payment; and*

(g) *Any other reliefs the Honourable Court may deem fit and proper to grant.*

The claim was resisted by all defendants in their respective written statements of defence and thereby, compelling the suit to go to full hearing. The decision of the learned trial Judge after hearing the testimony of the respondent, who did not call a witness, and the appellant, who also did not call a witness, went as follows:

(a) The first, second, third and fourth defendants shall be liable both jointly and severally for US Dollars 204,166, being difference between the principle (sic) loan amount of US Dollars 1,704,166 and the guarantee amount of US Dollars 1,500,000.

(b) That the fourth defendant pays to the plaintiff based on admission the sum of US Dollars 164,000.

(c) That the fifth defendant pays to the plaintiff the sum of US Dollars 1,336,000 based on the guarantee.

(d) Interest is granted at the rate of 8% of the decretal sum from the date the suit was filed up to the judgment date.

(e) Interest is granted at 7% from the date of judgment till the decree is satisfied in full.

(f) Costs are granted to the plaintiff.

The appellant, who happened to be the fifth defendant during trial, felt aggrieved by the decision of the learned trial Judge and hence, preferred the current appeal to challenge it, premising his appeal on five grounds. And to accentuate his grounds of appeal, on the 12th November, 2018, he lodged a written submission in terms of the provisions of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 **(the Rules)**. On the other hand, the

respondent, also lodged a written submission by virtue of Rule 106 (8) of **the Rules**, in opposition to the appeal.

For reasons which will be apparent soon, we have found it unnecessary to reproduce all the grounds of appeal by the appellant save the first one which reads:

> *"That, the learned trial Judge erred in law by proceeding without jurisdiction to entertain an incompetent suit beyond the 3rd day of May, 2011 following failure by the respondent to deposit a sum of USD 10,000 within time fixed by the Court, and hence making the proceedings and orders beyond 03rd May, 2011, a nullity."*

The foregoing ground of complaint by the appellant apart, we also noted from the proceedings that, even though according to the plaint which was filed by the respondent on the 31st December, 2008, the case was against five defendants, the whereabouts of the other defendants, do not feature in the proceedings except in the judgment which was delivered by the learned trial Judge, on the 20th June, 2016.

At the hearing of the appeal before us on the 3rd day of May, 2019, Mr. Wilson Ogunde, learned counsel, entered appearance for the appellant whereas, the respondent enjoyed the services of Mr. Deogratius Ringia, also

learned counsel. Before we embarked on hearing the learned counsel from either side, on the merits and demerits of the appeal, we *suo motu* asked them to address us on what appeared to us to be anomalies as pointed out above that is, **one,** whether or not the Court had jurisdiction to proceed with the suit after the respondent had failed to furnish security as ordered by it. **Two**, whether or not, it was legally proper for the Court to proceed with the suit to its finality in the absence of the other four defendants.

Responding to the first quest, Mr. Ogunde, submitted that in terms of the provisions of Order XXV rule 1 (1) of the Civil Procedure Code, Cap. 33 R.E 2002 **(the Code**), an order may be made by the court, either through an application by the defendant, or, *suo motu,* requiring a plaintiff who resides outside Tanzania, and does not possess any immovable property within the jurisdiction of Tanzania, to deposit security for costs. And once the order has been made, compliance by the plaintiff within the period fixed by the court is mandatory as the word "**shall**" has been used, failure of which renders the suit subject to either being dismissed by the court, or, the plaintiff withdrawing it in terms of sub-rule 2 (1) of the same Order of **the Code**.

Referring us to page 115 of the record of appeal, Mr. Ogunde, submitted that the respondent herein who is not a resident of Tanzania, and also does not own any immovable property within Tanzania, was on the 3rd day of March, 2011 ordered by the Court to deposit USD 10,000 as security for costs within a period of two months from the date of the order. The suit was then scheduled for mention on the 3rd May, 2011, which was the date in which the period for depositing the security would expire probably, with a view of the Court, counterchecking compliance with its order.

Come the 3rd May, 2011, there was no security for costs deposited by the respondent, as it had been ordered by the court. Thereafter, the suit continued to be attended in Court till on the 17th September, 2012 that is, after the lapse of about eighteen months and a half (18. 5), from the date when the order was given, when the respondent deposited in Court the security. In the view of the learned counsel for the appellant, the proceedings beyond the 3rd May, 2011 which was after the respondent had failed to comply with the order of the court, were a nullity because the court lacked the requisite jurisdiction to entertain the suit.

In regard to the second issue wherein the suit proceeded *ex parte* against the other defendants, Mr. Ogunde, argued that while there was an

order made by the court on the 16th February, 2016 to proceed with the suit ex parte against the second and third defendants, the proceedings are silent regarding the first and fourth defendants. In the circumstances, it was his firm view that the first and fourth defendants were condemned unheard, an act which vitiated the entire proceedings. On the basis of such irregularity, the learned counsel for the appellant implored us to quash the proceedings of the trial Court, and set aside its judgment and the consequential orders.

On his part, Mr. Ringia was at one with his learned friend that, indeed the suit proceeded *ex parte* against the other four defendants. He however hastened to add that, the same was occasioned by sheer negligence on the part of the defendants, who after Mr. Korosso, learned counsel, had withdrawn his service to them on the 26th July, 2013, as reflected on page 141 of the record of appeal, they did not take trouble to make a follow up to their suit. Furthermore, the learned counsel went on to submit, the judgment given by the learned trial Judge, did not condemn the first and fourth defendants. As such, their absence in the proceedings had no meaningful effect.

It was the further argument of the learned counsel for the respondent that, the fact that the judgment which was given by the learned trial Judge

centered on exhibit P1, which was the guarantee given by the appellant to pay the debt involving the other defendants to the respondent, nothing wrong was committed by the trial court in proceedings against the appellant alone. It is no wonder therefore, to find that it is only the appellant, who has preferred this appeal and not the other defendants, who were not affected by it, argued Mr. Ringia. We were therefore strongly urged by the learned counsel, not to fault the proceedings of the trial court.

With regard to the jurisdiction of the court to proceed with the suit after the respondent had failed to deposit security as ordered by the court, in the view of Mr. Ringia, the failure did not oust the jurisdiction of the court. This was so for the reason that the jurisdiction of the High Court, has been conferred by the Constitution of which, the court is very jealous. The said jurisdiction can only be ousted through an enactment of the Parliament in a statute, and nothing else.

On the effect of the failure by the respondent to furnish security for costs within the time fixed by the Court, the learned counsel argued that, the same was mere failure to comply with the time frame fixed by the court, the remedy of which could be by way of extending it at the discretion of the court. That has been the practice and the Court has done it time and again.

In that regard, the trial Court correctly exercised its discretion as reflected at page 135 of the record of appeal, where it extended the time for the respondent to deposit security for costs in Tanzanian Shillings. In any event, Mr. Ringia, concluded his submission by urging the Court, to do away with technicalities and focus on substantive justice.

In brief rejoinder, Mr. Ogunde, argued that the record of the trial Court is clear that, the first to fourth defendants, lodged written statements of defence which were prepared by themselves. There was no any point in time when they were represented by any advocate in court. That being the case, the argument by his learned friend that there was an instance when the first to the fourth defendants were represented by advocate Korosso, is not correct because the said advocate is from his firm, which had never been engaged by the first to the fourth defendants.

The learned counsel for the appellant, did as well dispute the contention by his learned friend that the judgment of the trial Court, did not condemn the first and fourth defendants. He referred us to page 282 of the record of appeal, where the fourth defendant has specifically been condemned to pay the respondent US Dollars 164,000. Besides, the purported liability of the appellant against the respondent is through the

other defendants. Under the circumstances, it was argued by Mr. Ringia, that it was imperative for the other defendants to fully participate in the suit by either resisting or admitting to the claimed amount by the respondent, before such liability could be shouldered by the appellant. He thus reiterated his previous prayer that, the suit be nullified for being conducted contrary to the law.

As we earlier on pointed out above, there are two issues that stand for our deliberation and determination that is, **first**, whether the Court had jurisdiction to proceed with the suit beyond the 3rd day of May, 2011 after the respondent had failed to deposit security for costs, and **two,** whether the trial Court was legally proper, to proceed with the suit *ex parte* against the other defendants, without proof of service.

We propose to dispose of the issues seriatim. The provisions of Order XXV rule 1 of **the Code,** which is relied upon by the learned counsel for the appellant in his argument on the first issue reads *verbatim* thus:

> *"(1) Where, at any stage of a suit, it appears to the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of Tanzania, and that such plaintiff does not, or that no one of such plaintiffs does, possess any*

sufficient immovable property within Tanzania other than the property in suit, the court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant."

It is common knowledge that in the instant appeal, an application was made by the appellant during trial of the suit, requesting the court to order the respondent who was not a resident of Tanzania, to deposit security for costs in respect of the suit which he had instituted against the defendants. It was also not disputed that, the order of the court was not complied with within the time which had been fixed by the court. At this juncture, it was the argument of Mr. Ogunde that, the provision of sub-rule 2 (1) of Order XXV of **the Code** ought to have been brought into play by the trial Court. The said provision stipulates in full that:

"2. Effect of failure to furnish security-

(1) In the event of such security not being furnished within the time fixed, ***the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.***

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant." [Emphasis supplied].

Since the catch word used under sub-rule (1) of the provision quoted above is 'shall', in terms of section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2002, compliance was imperative. In its own words the provision stipulates that:

"(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

On the basis of the wording in the above quoted provision, we are inclined to side with Mr. Ogunde that, after the respondent had failed to furnish security within the period of two months which had been fixed by the

court, the court was obligated in terms of Order XXV rule 2(1) of **the Code,** to dismiss the suit or in the alternative, the respondent was required to withdraw the suit from the Court. As such, the act by the court to proceed with the suit, was in our view, legally improper. In the case of **Uniliver PLC Vs Hangaya** [1990 – 1994] 1 EA 598, an order for furnishing security was appealed against for the reason that, the suit could not proceed without its being furnished. In dismissing the appeal this Court held that, it was necessary for the appellant to furnish security for costs in compliance with the order of the Court.

Also, in **Fedha Fund Limited and Two Others Vs George T. Vaghese and Another,** Civil Appeal No. 8 of 2008, the Court had an occasion to discuss the competence of a suit subsequent to the failure by the applicant to furnish security in compliance with the court's order, where having recourse to the provisions of the Civil Procedure Code, stated thus:

> *"In our view, an application for security for costs is of direct relevance, because in terms of Order XXV rule 2,* ***its non-compliance affects the competence of the suit.*** *"* [Emphasis supplied]

With regard to the contention by Mr. Ringia that, there was extension of time granted to the respondent at the discretion of the Court on 6th September, 2012 for the respondent to furnish security and that, even though a long time had passed, the learned trial Judge correctly exercised his discretion, we are unable to buy the idea for reasons that **one**, the alleged discretion was exercised in contravention of the law. The law required him to dismiss the suit as per the dictates of sub-rule (1) of Order XXV of **the Code. Two**, the powers available to the Judge was in terms of sub-rule (2), which was to set aside the dismissal order for whatever grounds that might convince him so to do. This discretion by the Judge was however, subject to the condition under sub-rule (3) of the same Order whereby, the defendants had to be served with the application for restoration.

On the contrary, on the 6th day of September, 2012 when the purported application for extension of time was orally made on behalf of the respondent to the trial Judge, there was no evidence to establish that notice of the said application was served on the first to the fourth defendants, and as a result, the grant of the said extension, besides being legally improper, was also made in the absence of the first to the fourth defendants. In the event, even if the alleged extension of time was to be given weight, it still remained to be invalid as it was illegally obtained. To that end, we answer

the first issue which we posed above in the negative that, the proceedings of the appeal beyond the 3rd day of May, 2011 when the order for furnishing security expired, proceeded illegally because the court had no jurisdiction.

The second issue is whether the court properly proceeded with the hearing of the suit in the absence of the first to the fourth defendants. It is common knowledge from the record that, all the defendants lodged their written statements of defence resisting the claim against them by the respondent, but defaulted appearance during trial. It is the law as provided under the provisions of Order IX rule 6 (i) of **the Code** that, where on the date fixed for hearing, the defendant who was duly served fails to appear, the hearing of the suit can proceed against him *ex parte.* What we had to ask ourselves, is whether such position was the case in the instant appeal.

Mr. Ringia, impressed on us to hold that the failure by the first to the fourth defendants to appear during trial of their case, was a result of their own negligence after failing to make a follow up to their case following the withdrawal of the services of Mr. Korosso, learned counsel. On our part, upon dispassionately going through the record of appeal, we think the argument by the learned counsel is not backed by the proceedings available in the record. It is clear from the record that, from the preparation and lodgment

of the written statements of defence, the defendants stood on their own. Such position is fortified by the different applications which were made on behalf of the respondent to effect service on the defendants by publication, which were however, not effected.

Among the orders given by the court, was that given by Utamwa, J., on the 22nd July, 2014, which stated that:

> *"No order on the 6th November, 2013 directed that the matter should proceed ex parte against the first to the fourth defendants though the plaintiff made that prayer. This court cannot thus proceed ex parte. The first to the fourth defendants must first be served for the hearing and proof on service be filed in Court before the court proceeds ex parte."*

Another order for service to the first to fourth defendants by publication on widely circulated newspapers of Daily News and Mwananchi, was made by the court (Muruke, J.), on the 10th April, 2014, and yet, there is nothing reflected on the record to indicate compliance with the order, until when the hearing of the suit took off on the 16th February, 2016. With the foregoing situation, it is evident that the first to the fourth defendants were not accorded a hearing in the matter concerning the fate of their rights.

The learned counsel for the respondent had yet another string left to his bow. He contended that the hearing of the suit *ex parte* against the other defendants had no effect to them, because the decision of the trial court did not condemn them. With due respect to the learned counsel, we think his proposition is devoid of merit on two reasons. **First**, it was categorically stated in the reliefs which were granted to the respondent by the court that, the first to the fourth defendants, were liable to pay the respondent US Dollars 204,166. And further that, the fourth defendant was to pay the respondent US Dollars 164,000. Under the circumstances, it could not be said that they were not condemned in the judgment.

Secondly, the liability of the appellant to the respondent was founded on the basis of the other defendants, meaning that the claim by the respondent against the first to the fourth defendants had to be established first, before their liabilities could be shifted to the appellant. To that end, there is no gainsaying in holding that, the first to the fourth defendants were not accorded a hearing before the fate of their rights got determined, which was a fatal irregularity. Either, the argument by Mr. Ringia, that the court should do away with technicalities and focus on substantive justice, is unmaintainable because the irregularity occasioned in the instant appeal,

was not a technical one as it infringed the basic right of the defendants to be heard.

It is a constitutional right under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977, as amended from time to time that, where the right of a person is to be determined, he has to be fully accorded the right of being heard. In **Truck Freight (T) Limited Vs CRDB,** Civil Application No. 157 of 2007 (unreported), the Court vacated its previous decision which had been arrived at, by considering an issue which had been raised *suo motu* by the Court, without calling advocates, who were representing the parties, to address it on the said issue.

And, in **the Judge In-charge, High Court of Tanzania at Arusha, and the Attorney General Vs N. I. N. Munuo** [2004], where the challenge was on the decision against the first appellant, the Judge In-charge, who had suspended the respondent advocate, for misconduct without hearing him, the Court in dismissing the appeal stated that:

> *"Section 22 (2) (b) of the Advocates Ordinance which gives a Judge of the High Court to suspend an advocate, does not dispense with the right to be heard and the current trend and tempo of human*

rights demand that there should be a right to be heard even for such interim decision."

See also: **Albeila International Limited Vs National Bank of Commerce and Two Others,** Civil Appeal No. 101 of 2008 (unreported).

On the basis of what we have endeavoured to demonstrate above, we are settled in our mind that, the proceedings leading to the judgment and decree being challenged by the appellant in this appeal, were flawed and hence, a nullity. We therefore, nullify the entire proceedings of the trial court, and quash its judgment and the resultant orders. In lieu thereof, we order that the suit be tried *de novo*.

Order accordingly.

DATED at **DAR ES SALAAM** this 10th day of May, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

R.K. KEREFU
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL