IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 96 OF 2015

PANGEA MINERALS LTD.. APPELLANT

VERSUS

1. PETROFUEL (T) LIMITED
2. POWER ROADS (T) LIMITED .... RESPONDENTS
3. LYCOPODIUM TANZANIA LIMITED

(Appeal from the Exparte Judgment and Decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Nchimbi, J.)

dated the 24th day of October, 2014
in
Commercial Case No. 29 of 2012

RULING OF THE COURT

27th March & 15th April, 2020

KEREFU, J.A.:

The appellant herein, Pangea Minerals Ltd, is challenging an *ex parte* judgment and decree of the High Court of Tanzania (Commercial Division), at Dar es Salaam (Nchimbi, J.) dated 24th October, 2014 in Commercial Case No. 29 of 2012. In that case, Petrofuel (T) Limited, the first respondent sued Power Roads (T) Limited, the second respondent, Lycopodium Tanzania Limited, the third respondent and the appellant for payment of a sum of TZS

199,931,520.00 being unpaid invoices for diesel fuel supplied to the first respondent. The first respondent also claimed for payment of compound interest at the tune of TZS 515,072,528.00, general damages TZS 300,000,000.00 and costs of the suit.

The material facts giving rise to the suit and later this appeal as obtained from the record of appeal indicate that, on 15th October, 2007 the second respondent entered into a business agreement with the company known as Fuchs Oil (T) Limited to supply 2,000,000 litres of Automotive Gas Oil (diesel fuel) to the second respondent. On 4th January, 2008 Fuchs Oil (T) Limited executed an Assignment Deed with the first respondent for the latter to supply the said diesel fuel to the second respondent, which she did, but was not paid. The third respondent vide her letter dated 5th September, 2008 with Ref. No. 1327-BUZ-023-2006, acting on behalf of the appellant, guaranteed payment of the diesel fuel supplied. It was alleged that, the first respondent had persistently demanded for payment of the said monies from the appellant without success. As such, the first respondent decided to institute the suit as indicated above.

It is on record that, upon being served with the plaint, the appellant and the second respondent filed their defences, but the third respondent did

not file any defence as she was not served and the trial court had her served through substituted service. It is also on record that the appellant managed to file witnesses' statements, while the second respondent did not. The final pretrial conference was conducted on 12th March, 2014 before all parties where the hearing date was scheduled for 13th May, 2014. However, on that date it was only the first respondent who entered appearance, thus the suit proceeded *ex parte*. At the end, the learned trial Judge decided the suit in favour of the first respondent and ordered the second and third respondents together with the appellant to pay to the first respondent jointly and severally, the following amounts:-

(a) Total sum of TZS. 16,500,000.00 and compound interest of TZS. 30,946,128.00 for diesel fuel supplied to Buzwagi;
(b) TZS. 292,679,126.00 for fuel supplied to Buzwagi with the accrued interest;
(c) Interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of full and final satisfaction of the decree;
(d) TZS. 100,000,000.00 general damages; and
(e) Costs of the case.

Aggrieved, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant has raised ten (10) grounds of appeal. It is noteworthy

that, the second respondent was also dissatisfied with the said decision and she lodged a cross appeal also comprised of ten (10) grounds. However, for reasons to be apparent in due course we shall not reproduce the said grounds herein.

Both, the appeal and the cross appeal were confronted with a notice of preliminary objection raised by the first respondent that the impugned judgment being an *ex parte*, the appeals are incompetent for failure by the appellants to exhaust remedy available before the trial court which passed it. Thus, the appeal and the notice to cross appeal were lodged in violation of Order IX rule 13 (1) of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) and the rule laid down by the Court in **Jaffari Sanya Jussa and Ismail Sanya Jussa v. Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 and **Paul A. Kweka and Hilary P. Kweka v. Ngorika Bus Services and Transport Company Limited,** Civil Appeal No. 129 of 2002 (both unreported).

At the hearing of the appeal, the appellant was represented by Ms. Caroline Kivuyo, learned counsel. The first respondent had the services of Messrs. Killey Mwitasi and Bavoo Junus, learned counsel. The second

respondent was represented by Mr. Sylvester Shayo and the third respondent by Ms. Linda Bosco, also learned counsel.

As the practice of the Court demands, the preliminary objection has to be disposed first before determination of the appeal and cross appeal on merit. Having that in mind, we invited the counsel for the parties to address us on the preliminary objection raised by the first respondent.

Mr. Mwitasi argued that, the appeals were lodged prematurely because the impugned judgement being an *ex parte*, the appellants were required, under Order IX rule 13 of the CPC, to first apply to the High Court for an order to set it aside. He clarified that, the CPC is applicable in the Commercial Court under Rule 33 of the High Court (Commercial Division) Procedure Rules, 2012. He submitted further that, an *ex parte* judgment is not appealable unless the aggrieved party has exhausted all remedies available, notably, setting aside that judgement. To bolster his position, he cited the case of **Jaffari Sanya Jussa** (supra).

Mr. Mwitasi submitted further that, the appellant can only challenge an *ex parte* judgement if is challenging findings of the trial court. He said, in this case, the main appeal and cross appeal, among others are both challenging the trial court for proceeding *ex parte*. As such, Mr. Mwitasi

urged us to strike out the appeal and cross appeal with costs for being lodged prematurely, thus incompetent.

In response, initially Ms. Kivuyo, strongly disputed the preliminary objection and the submissions made by Mr. Mwitasi arguing that the appeal is challenging the findings of the trial court. However, later upon perusal of the first ground of appeal and with much hesitation, she conceded to the objection that the first ground is challenging the trial court for proceeding *ex parte.* However, she urged us to invoke section 3A of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA), as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act, No. 8 of 2018) and instead of striking out the entire appeal to only expunge the first ground and allow the appeal to proceed on merit on the remaining grounds.

On his part, Mr. Shayo spiritedly objected to the preliminary objection and strongly argued that under section 5 (1) (a) of the AJA parties have rights to appeal against an *ex parte* judgment. It was his view that, an appeal being a constitutional and statutory right cannot be barred by any provision(s) of the law and the Court has jurisdiction to hear appeals and correct errors made by subordinate courts. He challenged the submissions made by Mr. Mwitasi and argued that Order IX rule 13 of the CPC only

provides for a statutory remedy and not otherwise. To substantiate his preposition he cited section 70 (2) of the CPC and Order 40 rule 1 (d) of the CPC. He finally prayed for the preliminary objection to be overruled with costs to the second respondent.

Ms. Bosco associated herself with the submissions made by Mr. Shayo and added that Order IX rule 13 of the CPC is optional as it uses the word '*may*' and not '*shall*.' She said, in this case the parties had two options (i) to apply for the setting aside of the *ex parte* order or (ii) to appeal to this Court. To support her position she cited **Jaffari Sanya Jussa** (supra) at page 8 and argued that in that decision the Court categorically stated that a party cannot go for both. It was her view that, since the appellants herein have decided to appeal, the preliminary objection has no merit. She distinguished the case of **Paul A. Kweka** (supra) by arguing that facts in that case are not relevant to the current appeal. She said, in that case the issue involved an order of the trial court refusing to set aside an *ex parte* judgment which is not the case herein.

In rejoinder, Mr. Mwitasi challenged the prayer made by Ms. Kivuyo of expunging only the first ground and determines the appeal on merit on the basis of the remaining grounds. He urged the Court to disregard the said

prayer because it is intended to pre-empt the preliminary objection raised. He contended that, since Ms. Kivuyo has conceded to the objection, the remedy is to strike out the appeal. He further argued that, even the principle of overriding objective she relied upon cannot apply as the same is not designed to disregard the mandatory provisions of the procedural law. To buttress his position, he cited to us the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries and 4 Others,** Civil Appeal No. 66 of 2017 (unreported).

As for the interpretation of section 5 (1) (a) of the AJA given by Mr. Shayo and supported by Ms. Bosco, Mr. Mwitasi argued that the same is not proper because that section though clothing the Court with appellate jurisdiction to hear appeals from *ex parte* judgments, subject that right to other laws. He said, one of the referred laws is the CPC, among others. Mr. Mwitasi also challenged the interpretation of the word *'may'* under Order IX rule 13 of the CPC given by Ms. Bosco and argued that, options given by that section as interpreted by the Court in **Jaffari Sanya Jussa** (supra) is either to apply for an order to set aside an *ex parte* judgment or not to. He thus reiterated that the preliminary objection be sustained and the two appeals be struck out with costs.

On our part, having examined the record of appeal and the oral submissions advanced by the counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the objection raised is meritorious.

Pursuant to Order IX rule 13 (1) of the CPC relied upon by Mr. Mwitasi, the remedy available to a defendant to a suit determined *ex parte* is to apply to the court which passed the said order, that he had sufficient reasons for his non-appearance and pray for the said order to be set aside. For the sake of clarity, Order IX rule 13 (1) of the CPC provides that:-

> *"**In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside**; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, **the court shall make an order setting aside the decree** as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit." [Emphasis added].*

This Court in several occasions has interpreted the above provision and provided guidance on the procedure of setting aside an *ex parte* judgment and decree. Some of these decisions have been cited to us by Mr. Mwitasi but we wish to add on the list few more, such as; **Government of Vietnam v. Mohamed Enterprises (T) Ltd,** Civil Appeal No. 122 of 2005 and **MIC Tanzania Limited v. Kijitonyama Lutheran Church Choir,** Civil Application No. 109 of 2015 (both unreported). Specifically in **Jaffari Sanya Jussa** (supra) the Court when considering the applicability of Order XI rule 14 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD which is in *pari materia* with Order IX rule 13 of the CPC) and section 5 (1) (a) of the AJA held that:-

> *"First O.* ***XI R. 14 is the only provision specifically and singularly for setting aside an exparte decree.*** *We have already said that* ***section 5 (1) (a) of the Appellate Jurisdiction Act covers more situations than setting aside an ex parte decree. In that case,*** *it is our considered opinion that,* ***that provision should be invoked first and foremost.*** *Second, O XI R. 14 operates in the High Court (and subordinate courts) because the CPD does not apply to this Court (see section 1 (2) of the CPD). It is our settled view that one should only come to this Court as a last resort after*

> *exhausting all available remedies in the High Court. Finally, it appears to us that,* ***in the case of concurrent jurisdiction under the Appellate Jurisdiction Act, 1979, the sequence of actions is to start in the High Court and subsequently to this Court."*** [Emphasis added].

On the basis of the above provision and authorities, it is settled that where a defendant against whom an *ex-parte* judgment was passed, intends to set aside that judgment on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to file an application to that effect in the court which entered the judgment.

In the instant appeal, there is no doubt that both the main and cross appeals are, among others, challenging the trial court for proceeding with the matter *ex parte.* This can be evidenced from the first ground in the main appeal which is couched thus:-

> *"The trial Judge erred in law and in fact in ordering the hearing of the suit to proceed ex parte without finding out and or ascertaining whether the appellant and the 2nd and 3rd respondents were aware or duly notified of the hearing date."*

Furthermore, the first, second and third grounds in the notice of cross appeal by the third respondent are to the effect that:-

1. *The learned trial Judge erred in law and fact in proceeding with the case without service on the 3rd respondent;*
2. *That, to the extent that the 3rd respondent was never served with any summons to appear and defend the suit the learned trial Judge erred in law in condemning the 3rd respondent unheard;*
3. *That the learned trial Judge erred in law and in fact in proceeding with the case despite noting at page 286 of the record of appeal that the 3rd respondent who was named the 2nd defendant in Commercial Case No. 29 of 2012 had never been served because there was no record evidencing the same."*

We are however aware that in her submissions, Ms. Kivuyo though conceded to the preliminary objection, she invited us to invoke the principle of overriding objective to expunge the first ground of appeal and proceed to determine the appeal on merit. With respect, we are unable to agree with Ms. Kivuyo and we decline the invitation as such move, as argued by Mr. Mwitasi, is intended to pre-empt the preliminary objection already raised by the first respondent. This is evident from the decisions of this Court in a number of cases including **Juma Ibrahim Mtale v. K.G Karmali [1983]**

TLR 50, Damas Ndaweka v. Ally Saidi Mtera, Civil Appeal No. 5 of 1999 and **Bahadurali E. Shamji and Another v. The Treasury Registrar and 6 Others**, Civil Appeal No. 4 of 2003 (both unreported) where the Court emphasized that once a notice of preliminary objection had been lodged, it is no longer open to the parties to remedy the deficiency complained of. We are increasingly of the view that, even the principle of overriding objective cannot be applied on this matter. See **Mondorosi Village Council and 2 Others** (supra).

We are also aware that the provisions of Order IX rule 13 used the word '*may*' and appellants had two options to either apply to set aside an *ex parte* judgment or appeal to this Court to challenge findings of the trial Judge, as argued by Mr. Shayo and Ms. Bosco. The two learned counsel cited section 5 (1) (a) of the AJA, suggesting that there is concurrent jurisdiction between the Court and the High Court on this matter. With respect, on the strength of Order IX rule 13 of the CPC and the decision of this Court in **Jaffari Sanya Jussa** (supra) we find this line of argument to be misconceived. We wish to emphasize that one should only come to this Court as a last resort after exhausting all available remedies in the High Court. We also find section 70 (2) and Order 40 rule 1 (d) of the CPC cited

to us by Mr. Shayo to be irrelevant in this appeal as the same are not applicable in this Court.

In the circumstances, we are satisfied that the appellants have lodged the appeal and the cross appeal prematurely without exhausting all the available remedies in the High Court, hence rendering the same incompetent. Eventually and for the foregoing reasons, the incompetent appeal and the cross appeal are hereby struck out with costs.

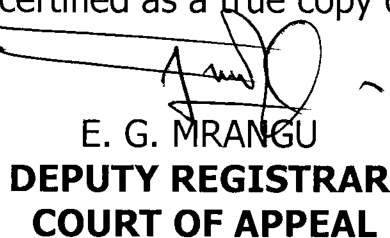
DATED at **DAR ES SALAAM** this 9th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 15th day of April, 2020 in the presence of Ms. Caroline Kivuyo, learned Counsel for the Appellant and Mr. Bavoo Junus, learned Counsel for the 1st Respondent and in absence of Counsel for the 2nd Respondent despite being dully served and Ms. Linda Bosco, Counsel for the 3rd Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL