IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., AND KWARIKO, J.A.)

CIVIL APPEAL NO. 245 OF 2018

YARA TANZANIA LIMITED ..... APPELLANT

VERSUS

DB SHAPRIYA & CO. LIMITED ..... RESPONDENT

[Appeal from the Ruling issuing a Default Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Mruma, J.)

Dated the 30th day of August, 2018
in
Commercial Case No. 37 of 2016

.....

RULING OF THE COURT

23rd March & 22nd April, 2020

MWAMBEGELE, J.A.:

This is a ruling in respect of a preliminary objection by the respondent, DB Shapriya & Co. Limited, whose notice was lodged in Court on 12.03.2020 against the appeal by the appellant, Yara Tanzania Limited. The notice has only one point which reads:

> *"That the appellant has a remedy in the High Court to move it to set aside the default*

Judgment/Decree of 24th September, 2018 which is the subject of these proceedings, through the mandatory application under Rule 23 (1) and (2) (a) and (b) of the High Court (Commercial Division) Procedure Rules, 2012"

When the appeal was placed before us for hearing on 23.03.2010, both parties were represented. Mr. Nuhu Mkumbukwa, learned counsel appeared for the appellant and Mr. Roman Masumbuko, also learned counsel, appeared for the respondent. As the notice of preliminary objection was in place, it was resolved that the preliminary objection be disposed of first before going into the determination of the appeal on its merits.

It was Mr. Masumbuko who kicked the ball rolling submitting for the preliminary objection that the appellant seeks to challenge the default judgment entered against her under rule 22 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012; we shall henceforth refer to them as the Commercial Court Rules. He argued that there is a remedy provided by rule 23 (1) and

(2) (a) and (b) of the Commercial Court Rules. He went on to submit that the appellant was supposed to exhaust that remedy first before coming to the Court on appeal. Mr. Masumbuko was insistent that the error complained of in the appeal must be addressed by the High Court in an application for setting aside the default judgment before coming to the Court. To buttress the proposition that a proper remedy against a default or summary judgment is an application to set it aside, the learned counsel cited to us our decision in **Integrated Property and 2 others v. The Company for Habitat and Housing in Africa**, Civil Appeal No. 107 of 2015 (unreported). For the point that an appellant must exhaust all remedies available in the lower courts before resorting to an appeal or a revision to the Court, he cited **Regional Manager – TANROADS (Lindi) v. DB Shapriya**, Civil Appeal No. 86 of 2010 and **National Investment Co. Ltd and Another v. Public Service Pensions Fund (PSPF) and 6 Others**, Civil Application No. 154 of 2012 (both unreported decisions of the Court).

Mr. Masumbuko cautioned us that in the unlikely event the Court overrules the preliminary objection, the decision will render rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules of no consequence and, as a result, the Court will be inundated with unnecessary appeals or revisions. He prayed that the preliminary objection be upheld and the appeal be struck out with costs.

Resisting the preliminary objection with some force, Mr. Mkumbukwa submitted at the very outset that the objection was misconceived. He submitted that in the circumstances of the case, rule 23 (1) of the Commercial Court Rules is not an alternative. He narrated the background of the case at some considerable length underlining in that process that there was an arbitration clause to which the parties must go before submitting to the jurisdiction of the court. The learned counsel argued that under s. 6 of the Arbitration Act, it was not open for the appellant to go to court to set aside the default judgment for that course of action would have blocked all the efforts to go to arbitration as the appellant would have submitted herself to the jurisdiction of the court thereby blocking his way to go

to the arbitration tribunal. He added that under rule 23 of the Commercial Court Rules, a party applying to set aside a default judgment must be ready to file a written statement of defence. That, he reiterated, would have taken away their right to go to arbitration and all applications pending in court would have been rendered nugatory.

The learned counsel clarified that before the High Court entered a default judgment, it heard them on matters that would be argued in an application for setting aside the default judgment thus, in the circumstances, he argued, it was impractical for them to take that route because the Court could be *functus officio*. That is to say, he clarified, the parties were fully heard on whether they should file a defence while section 6 of the Arbitration Act bars such a course if a party intends to pursue his right to arbitration.

The learned counsel submitted further that the cases cited by Mr. Masumbuko are on *ex parte* judgments and not default judgment of the nature under discussion. They were thus distinguishable. He submitted that the **Regional Manager – TANROADS (Lindi)** case

(at p. 8) is distinguishable in that, there, unlike here, the parties were not heard. The **Integrated Property** case was about a summary judgment and, unlike here, there the grounds of appeal were not canvassed in the ruling giving rise to the summary judgment and that **National Investment Co. Ltd** was also distinguishable because, there, the Court of Appeal had to grapple with a situation where the appellant had filed an application to set aside the judgment in the lower court and an application for revision in the Court. The decision was due to non-appearance despite being served and an arbitration clause was not the subject, hence distinguishable.

The learned counsel argued that the decision they are complaining of is final, it cannot therefore be set aside. As for the argument that arguing the appeal will make rule 23 (1) redundant, the learned counsel was of the view that it would not. He added that when rule 23 (1) was enacted, an arbitration clause was not anticipated. The rule must accommodate that situation, he added. To buttress the proposition that the appellant could not proceed with arbitration if he filed a written statement of defence, the learned

counsel cited **Niazsons (K) Ltd v. China Road and Bridge Corporation** [2001] 2 EA 502.

The learned counsel thus implored us to overrule the preliminary objection and proceed to hearing of the appeal on the merits.

We acknowledge that the learned counsel brought to the fore some serious argument imputing fraud on the proceedings and the record being tampered with after the default judgment and that the respondent had never at any given time been ordered to file a written statement of defence and that the default judgment was entered despite an application pending in Court. However, with profound respect to Mr. Mkumbukwa, we think these arguments will not be useful at this stage. We shall therefore disregard them in the meanwhile.

In a brief rejoinder Mr. Masumbuko submitted that merits of the case should have been brought to the attention of the judge in an application for setting aside the default judgment. He contended that the impugned judgment was but a default judgment under rule 22 (1) of the Commercial Court Rules to which an application to have it set

aside was necessary before coming to this Court on appeal. Mr. Masumbuko thus reiterated his prayer to have the appeal struck out for having been instituted without the appellant exhausting the remedy provided for by the provisions of rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules.

We have subjected the rival arguments by the learned advocates for either side; Mr. Masumbuko for the respondent on the one hand who filed the preliminary objection, the subject of this ruling and Mr. Mkumbukwa for the appellant on the other who resisted it. Indeed, the learned counsel are at one that once *an ex parte* or summary or even a default judgment is entered, an aggrieved party should not come to this Court on appeal or revision unless attempts to set it aside, or all alternative remedies, have been made in the High Court. The only issue on which the learned counsel for both sides have locked jaws, is whether the impugned ruling or judgment is a default judgment to which rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules should have been resorted to before knocking the doors of

this Court. We shall advert to this issue at a later stage but in the meantime, we find it apt to articulate the law on the point.

As good luck would have it, the law on what should be done in case a party is aggrieved by an *ex parte* or default judgment is fairly settled. The Court has traversed on this issue in a number of occasions, some of which have been cited by the learned counsel for the parties. In **Regional Manager – TANROADS (Lindi)** we were confronted with an akin situation where an appellant came to the Court before exhausting the remedies available in the High Court. We recited our previous stance we took in **Jaffari Sanya Jussa & Another v. Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 (unreported) that:

> *"...O. XI R. 14 is the only provision specifically and singularly for setting aside an ex parte decree. We have already said that section 5 (1) 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) ...* ***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*** *....″*

We reiterated the position above with regard to a summary judgment in **Integrated Property** (supra) in which we underscored that a summary judgment is essentially an *ex parte* judgment in that it is entered without hearing an adverse party. We, at p. 15, reproduced the following excerpt from the learned authors of **Mulla, the Code of Civil Procedure (Abridged),** 14th Ed., to buttress the standpoint:

> *"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"

We took the same position in the **National Investment** case (supra) in which we reiterated:

> *"We think the law is settled that a party can only come to this Court on appeal or revision after exhausting the remedies that are available in the High Court"*

In the light of the above discussion, we do not hesitate to hold that a default judgment, like a summary judgment, is essentially an *ex parte* judgment inasmuch as it is entered without hearing an adverse party. In the premises, the position of the law articulated above

respecting summary and *ex parte* judgments, is applicable to default judgments as well.

So much for the law on the point. To recap, it is now settled that when a party is aggrieved with an *ex parte*, summary or default judgment of the High Court, he must first exhaust the alternatives or remedies available in the High Court before coming to this Court on revision or appeal. If that is not done, the revision or appeal to the Court will be rendered misconceived and prone to be struck out.

As already alluded to above, the foregoing position of the law does not seem to be at issue between the learned counsel for the parties in this appeal. The bone of contention is on the issue whether the impugned judgment or ruling is one that falls within the scope and purview of an *ex parte*, summary or default judgment as to fall within the realm of the requirement to have it set aside in the High Court before coming to this Court on appeal. As already stated, Mr. Masumbuko argued that it is a default judgment to which the settled law recapitulated above must apply. However, to the contrary, Mr. Mkumbukwa submitted that it is not. To Mr. Mkumbukwa, the

impugned judgment or ruling is a peculiar one to which the settled law above will not apply. We now turn to consider the question whether the impugned judgment or ruling is one that the settled law articulated above would apply.

The main reason why Mr. Mkumbukwa contends that the matter at hand is of a peculiar nature to which rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules would not apply, as already hinted above, seems to hinge on the fact that there is an arbitration clause in the agreement between the parties which the appellant would wish to exhaust before filing a defence in the High Court. He argues that should the appellant apply to have the default judgment set aside she will lose all the prospects to arbitration as she will be compelled to file a defence which will be tantamount to taking steps in the proceedings. Mr. Mkumbukwa adds that the appellant cannot go back to the High Court as it is *functus officio* in that all the matters they will argue in an application to set aside the default judgment were heard and a ruling made which gave birth to the default judgment; the subject of the appeal from which the preliminary objection emanates. For his part,

Mr. Masumbuko is persistent that the arguments presented in this Court were supposed to be presented before the High Court in an application for setting aside the default judgment.

We must confess that this issue has taxed a great deal of our mind. In the memorandum of appeal, the appellant, is categorical that he is aggrieved by the "Ruling issuing default judgment and the default decree of the Commercial Case dated 30th August, 2018 and delivered on 24th September, 2018". That ruling appears at pp. 1037 – 1051 and the default decree thereof appears at pp. 1053 – 1055(a) of the record of appeal. A big chunk of the ruling narrated what the High Court referred to as a chequered history of the case and answered two issues; **one**, whether, following the order of the court refusing to stay proceedings pending arbitration and its order for continuation of the hearing of the suit in court, the appellant was obliged to file her defence and, **two**, if the answer is in the affirmative, whether the respondent was entitled to a default judgment pursuant to the provisions of rule 22 (1) of the Commercial Court Rules. The learned Judge addressed the matter at some

considerable length and at the end of the day, he answered the first issue in the affirmative. Having so done, at p. 1049 of the record, the High Court observed and concluded:

> *"The Defendant did not file defence and the Plaintiffs have filed an application for a default judgment as per Form No. 1 set out in the Schedule to the High Court (Commercial Division) Procedure Rules. I have carefully gone through the application which was filed on 30th June, 2016, vide ERV receipt No. 1169222 dated 30th June, 2016, and I am satisfied that the plaintiff is entitled to a default judgment as follows:-*
>
> 1) *Refund of USD 450,000.00 which was unlawfully demanded and unlawfully received by the Defendant in Advance Payment Guarantee No. 01/GTEE/0127/13 issued by M/S Barclays Bank (T) Ltd.*
>
> 2) *Refund of USD 1,566,041.00 unlawfully demanded and unlawfully received by the Defendant in Advance Payment*

Guarantee No. HK DAV 70208378001 issued by MS Commercial Bank of Hamburg Germany.

3) Payment of USD 1,967,173.74 being the balance of the contract price which was not yet paid to the Plaintiff."

The learned judge then, for the reasons he assigned, proceeded to; first, refuse general damages, secondly, award interest at the rate of 3% per annum from the date of filing the suit to the date of judgment, thirdly, award interest at the rate of 1% on the decretal sum from the date of judgment to the date of satisfaction in full and, fourthly, costs of the suit. Thereafter, a decree thereof titled "Default Decree" was extracted and accordingly signed as it appears at p. 1053 of the record.

The foregoing default judgment and its concomitant decree is what irked the appellant and filed the present appeal. Was this a default judgment? We hasten to remark that it was, for it was made in terms of the provisions of rule 22 (1) of the Commercial Court Rules. It is a default judgment to which the settled position of the law

articulated above is applicable. That is to say, it was incumbent upon the appellant to invoke the provisions of rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules to apply to have it set aside before coming to the Court on appeal. Even though we agree with Mr. Mkumbukwa that the circumstances of this case have some peculiarities, we are certain that the peculiarities do not remove it from the realm of default judgments to which the provisions of rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules may not apply. We are settled in our mind that, since the appellant is complaining against the ruling in which an application for default judgment was granted in terms of rule 22 (1) of the Commercial Court Rules, the appellant is essentially challenging the default judgment together with the flanking default decree and the proper course of action to take was that provided for by rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules. It is in that application where the appellant would state why she did not file a defence.

For the avoidance of doubt, we refrain from commenting on the contention by Mr. Mkumbukwa that the High Court is *functus officio*

for obvious reasons that we may, in that process, preempt any future decision by the High Court on the point.

In view of the above, we wish to recap that, we are settled in our mind that the decision sought to be challenged is the judgment which was entered after the appellant failed to file a written statement of defence. That is nothing but a default judgment which was entered without the appellant defending it, neither by a written statement of defence nor by making an oral defence. Without mincing words, that is what is called in legal parlance as a default judgment. The appellant, therefore, in view of the settled law articulated above, ought to have exhausted the remedies available in the High Court and the remedy we have in mind here is, but not limited to, invoking the provisions of rule 23 (1) and (2) (a) and (b) of the Commercial Court Rules. That was not done and, for that infirmity, we think, the respondent is quite right to assert that this appeal is misconceived. We therefore accede to Mr. Masumbuko's prayer that this appeal should be struck out.

For the reasons we have assigned, we are of the considered view that the appeal was filed prematurely. We thus find the preliminary objection meritorious and, consequently, strike out the appeal with costs.

DATED at **DAR ES SALAAM** this 17th day of April, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of April, 2020 in the presence of Mr. Nuhu Mkumbukwa, learned counsel for the Appellant and Mr. Roman Masumbuko, learned counsel for the Respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL