

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 13 OF 2021

**DANGOTE INDUSTRIES LTD TANZANIA APPELLANT
VERSUS**

WARNERCOM (T) LIMITEDRESPONDENT

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

(Nangela, J.)

**dated the 13th day of May, 2020
in
Commercial Appeal No. 1 of 2020**

JUDGMENT OF THE COURT

11th & 17th day of February, 2022

MAIGE, J.A.:

In the Court of the Resident Magistrate of Dar es Salaam at Kivukoni/ Kinondoni (the trial court), the respondent sued the appellant for payment of TZS 200,000,000.00 as specific performance of the contract and TZS 200,000,000.00 as general damages for a breach of contract. As the appellant did not file a written statement of defence within time despite being served on 16th July, 2019, when the matter came for mention on 9th September, 2019, the respondent

prayed for a judgment on default. The appellant contested on account that in the nature of the suit, *an ex parte* hearing instead of a judgment in default was appropriate. While the matter was still pending for ruling, the appellant filed a notice of preliminary objection to the effect that the matter was not within the jurisdiction of the trial court. On 13th December, 2019, the trial court declined to entertain the preliminary objection for the reason that it was improperly before the Court and ordered that, the suit be heard *ex parte*.

Upon *ex parte* hearing, the trial court pronounced an *ex parte* judgment awarding the respondent TZS 200,000,000.00 as specific performance of contract and TZS 150,000,000.00 as general damages for a breach of contract. Aggrieved, the appellant appealed to the High Court of Tanzania (Commercial Division) at Dar es Salaam (the first appellate court) challenging the decision on merit. In opposition to the appeal, the appellant filed a notice of preliminary objection to the effect that, the appellant had no *locus* to appeal against an *ex parte* judgment as the same is not appealable. On the basis of the preliminary objection, the first appellate court dismissed the appeal for being premature. In the view of the learned High Court Judge, which was

based on his understanding of the principle in **Jaffari Sanya & Another v Salehe Sadiq Osman**, Civil Appeal No. 119 of 2014 and **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (both unreported), one cannot appeal against an *ex parte* judgment before attempting to set it aside. Once again aggrieved, the appellant has preferred this appeal faulting the decision of the first appellate court on the following grounds:-

- 1. The High Court Judge erred in law for holding that the appellant had no locus standi to appeal while a serious question of jurisdiction of the trial court had not been determined on merit.*
- 2. The High Court Judge misdirected himself when he dismissed the Appellant's appeal and ruled that the ex parte judgment was not appealable whilst the appellant was appealing against the ex parte judgment on its merit.*
- 3. The High Court Judge erred in law and fact in dismissing the appeal for reason that the appellant ought to have applied to set aside ex parte judgment without considering the fact that time for applying for extension of time to file written statement of defence had expired and therefore such application would have no meaning in law.*
- 4. The High Court Judge misdirected himself when he dismissed the Appellant's appeal and ruled that the ex parte judgment was not*

appealable whilst the appellant was appealing against the ex parte judgment on its merit.

5. *The High Court Judge erred in law and fact in refusing to exercise its revisional jurisdiction and allow an ex parte judgment entered by a subordinate court with no requisite jurisdiction.*

At the hearing before us, the appellant was represented by Mr. Thomas Sipemba assisted by Mr. Lukas Elingaya, both learned advocates. Mr. Alex Mashamba Balomi, also learned advocate, appeared for the respondent. In their brief written submissions, each of the counsel adopted the contents of his written submissions to read as part of his oral submissions with few highlights. We have given the rival submissions due consideration and we shall hereinafter consider the merit or otherwise of the appeal.

From the memorandum of appeal and counsel's submissions, two issues have to be addressed in resolving the controversy. **First**, whether an *ex parte* judgment can be appealed against without first attempting to set it aside. **Second**, whether in view of the jurisdictional issue raised, the first appellate court ought to have invoked its jurisdiction and quash the *ex parte* judgment in question.

For the reasons which shall be apparent as we go along, we shall only consider the first issue.

In his submissions, Mr. Sipemba while appreciating the position in **Jaffari Sanya & Another v. Saleh Sadiq Osman** (*supra*) that, an appeal against an *ex parte* judgment cannot lie while there is an option for setting aside the same; was of the contention that, since the appellant was not faulting the decision of the trial court to proceed *ex parte* but rather the correctness of the decision itself, the said authority does not apply and as such the appellant had an automatic right, under section 70(2) of the Civil Procedure Code [CAP 33 R.E. 2019] (the CPC,) to appeal against the decision.

In his submission in rebuttal, Mr. Balomi, relying on the authorities in **Jaffari Sanya & Another v. Saleh Sadiq Osman** (*supra*) and **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others** (*supra*), supported the proposition by the first appellate court that, an appeal against an *ex-parte* judgment under section 70(2) of the CPC is conditional upon the appellant attempting to have the same set aside in terms of Order 9 rule 13 (1) of the CPC.

We have taken time to study the judgments and proceedings of both the trial court and the first appellate court in line with the grounds of appeal and the rival submissions. The issue, it would seem to us, is not whether an *ex parte* judgment is appealable but rather whether the same can be appealed against without first attempting to set it aside.

The procedure for setting aside an *ex parte* judgment in both the High Court and subordinate courts is set out under Order 9 rule 13 (1) of the CPC according to which an *ex-parte* judgment may be set aside if the judgment debtor assigns good cause that prevented him to enter appearance on the date when the court allowed the decree holder to proceed *ex-parte*. Further, under order XL rule 1 (d) of the CPC, an order refusing to set aside an *ex parte* judgment is appealable.

Conversely, an *ex-parte* judgment is appealable under section 70 (2) of the CPC which provides that "*an appeal may lie from an original decree passed ex-parte*". Section 70 (2) of the CPC, unambiguous as it is, does not impose any condition for appealing against an *ex-parte* judgment.

It is a cardinal principle of statutory interpretation that, where the wording of a statute is clear and unambiguous, it does not need interpretation. Therefore, in **the Board of Trustees of the National Social Security Funds vs the New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004, (unreported), this Court observed that:

"It occurs to us that where the provisions of a statute are plain and unambiguous, there is no need to resort to rules of construction"

It has to be noted also that, the right to appeal under the respective provision is not only available to the defendant at the trial court, it is as well available to the plaintiff if he is aggrieved by the decision. It would follow therefore that, if an *ex parte* judgment was only appealable upon the aggrieved party attempting to set it aside as suggested by the counsel for the respondent, an aggrieved plaintiff would not have such right. Thus, the requirement that an aggrieved party should not appeal before attempting first to set aside an *ex parte* judgement, does not apply where the appellant is not interested to challenge the order to proceed *ex parte* or was the plaintiff at the trial court. This position was clearly stated in the case of **Jaffari Sanya &**

Another v. Saleh Sadiq Osman (*supra*) where it was stated as follows:-

"This rule of setting aside an ex parte decree will only benefit a defendant. But there are two possible scenarios in an ex parte decree. One, a defendant might not want to set aside an ex parte decree but may wish to contest the findings of the award. Two, a plaintiff notwithstanding that the decree is in his favour, might nevertheless wish to challenge the finding of the award.

Order XI R. 14 will not assist either of the two persons mentioned above. In such a case the remedy would appear to be appeal under section 5(1)(a) of the Appellate Jurisdiction Act, 1979....."

In our considered opinion therefore, as the provision of section 70 (2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an *ex-parte* judgment, it is not for the court to narrow down its scope by implying that the legislature intended that such an appeal would be conditional upon there being an attempt to set the *ex parte* judgment aside. We can thus hold without any hesitation that, the right to appeal against an *ex parte* decree is automatic and does not depend upon there being a prior proceeding to set aside the *ex parte* judgment.

It was submitted for the respondent that, the requirement that an appeal against an *ex parte* judgment must be preceded by an application to set the same aside has been laid down in the case of **Jaffari Sanya & Another v. Saleh Sadiq Osman** (*supra*) which was followed in **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others**. We have very carefully read the authorities and with respect, we do not think that, they are in support of that proposition. We shall explain.

It would appear to us to be the principle in the said authorities that, where the defendant intends to challenge both the order to proceed *ex parte* and the merit of the findings in the *ex parte* judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the *ex parte* judgment first. This principle is based on the long standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. He has to exhaust all available remedies to the lower court first. For the Court of Appeal, this principle is stated in rule 44 of the Tanzania Court of Appeal Rules, 2009 (the Rules) whereas for the High Court and subordinate courts, it is stated in section 13 of the CPC.

In **Jaffari Sanya & Another v. Saleh Sadiq Osman** (*supra*), the appellant lodged both a notice of appeal against the *ex parte* judgment and an application to have the *ex parte* judgment set aside. The contention by the counsel for the appellant was that, both the right to appeal and set aside the *ex parte* judgment could simultaneously be invoked as both the High Court and Court of Appeal had concurrent jurisdiction. The Court, while in agreement with the counsel that both the trial court and the appellate court enjoy concurrent jurisdiction to deal with an *ex parte* judgment, it was of the view that, since the jurisdiction to set aside an *ex parte* judgment is exclusive to the trial court as much as the jurisdiction to appeal is exclusive to the appellate court, the appellant cannot pursue both actions at the same time. It henceforth concluded that;-

"Therefore, the applicants ought to have applied for setting aside the ex parte decree in the High Court and should not have simultaneously filed an appeal in this Court. That move was undoubtedly irregular".

This was, in our reading, the same position in **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others** (*supra*), where the appellant though did not pursue both the actions simultaneously, it

combined, in the memorandum of appeal, grounds which fault an order to proceed *ex parte* and those faulting the merit of the *ex parte* judgment. This Court was saying, basing on the authority in its previous decision in **Jaffari Sanya & Another v. Saleh Sadiq Osman** (*supra*) that, as the jurisdiction to set aside an *ex parte* judgment is exclusively conferred to the trial court, it cannot be addressed by way of an appeal. If we can quote from page 11 of the ruling, the Court observed as follows:-

"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 that entered the judgment".

In this case, we have observed from the record and the parties are not in dispute that, neither of the grounds of appeal raised in the first appellate court sought to challenge the order by the trial court to proceed *ex parte*. Obviously therefore, the principle in the two decisions under discussion was inapplicable and the first appellate court was legally wrong in dismissing the appeal for being premature.

In the circumstance, we find the appeal meritorious and we allow it with costs. The decision of the first appellate court is hereby quashed and set aside. The file is thus remitted to the first appellate court for determination of the appellant's appeal on merit before another Judge.

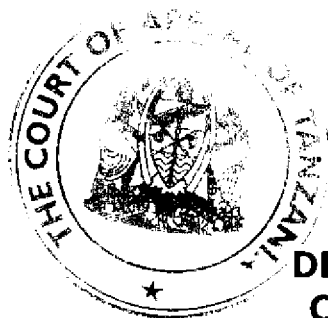
DATED at DAR ES SALAAM this 16th day of February, 2022.

M. A KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered on 17th day of February, 2022 in presence of Mr. Faraja Maulid, learned counsel for the appellant, Mr. John Byaruba, Principal Officer and Mr. Alex Balomi, learned counsel for the respondent is hereby certified as true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL