IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 181 OF 2016

HASHI ENERGY (T) LIMITED ..... APPELLANT

VERSUS

KHAMIS MAGANGA ..... RESPONDENT

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

(Mwambegele, J.)

Dated the 14th day of June, 2016
in
Commercial Case No. 149 of 2014

.....

RULING OF THE COURT

27th April & 26th August, 2022

WAMBALI, J.A.:

The appellant, Hashi Energy (T) Limited, who was the plaintiff in Commercial Case No. 149 of 2014 before the High Court of Tanzania (Commercial Division) sued the respondent, Khamis Maganga (the fourth defendant) and three others, namely; Richol Company Limited, Singida Copel Petro Station and KCB Bank Tanzania Limited (not parties to the appeal) who were the first, second and third defendants respectively. In that suit, according to the amended plaint, the

appellant's main cause of action against the respondent was that he unlawfully took the petroleum products which the appellant was entitled to as an unpaid seller. Overall, among other general claims, including interests and costs, the appellant claimed the following reliefs: **One**, payment of TZS. 829,960,000.00 by the defendants jointly and severally being unpaid price of petroleum products sold to the first and second defendants. **Two**, a declaration that the third defendant who undertook a bank guarantee was liable for payment of TZS. 850,000,000.00 to the appellant. **Three**, a declaration that the respondent was liable to pay a sum of TZS. 231,060,000.00 being the value of petroleum products he illegally took from the appellant. In the alternative, the appellant prayed that the respondent be ordered to return to the appellant 76,000 litres of Premium Motor Spirit (PMS) and 37,000 litres of Automotive Gas Oil (AGO).

The respondent denied every allegation contained in the amended plaint. It is noteworthy that on 19th May, 2015 the respondent filed a written statement of defence to the amended plaint which also contained a counter claim, in which, he prayed for judgment and decree against the appellant for an order that the appellant should return 113,000 litres of petroleum products or pay him TZS. 228,050,000.00

being the value of the petroleum products. The respondent categorically stated that the said 113,000 litres belonged to one **CHARLES PIUS TUNGU**. The respondent also claimed for payment of TZS. 109,440,000.00 being loss due to non use of three trucks and three trailers for a period of eight months, together with interest, general damages and costs. It is further revealed in the record of appeal that the appellant did not file a written statement of defence to the counter claim within the prescribed time. As such on 17th June, 2015 the appellant lodged Miscellaneous Commercial Application No. 143 of 2015 applying for enlanglement of the time to file the same in terms of Rule 20(2) of the High Court (Commercial Division) Procedural Rules, 2012 (the Commercial Division Rules). The ruling in respect of that application was delivered on 14th December, 2015. In short, the High Court dismissed the applicant's application on account that the appellant failed to show sufficient reasons for her failure to file the written statement of defence to the counter claim on time.

Ultimately, as the appellant defaulted to file a written statement of defence to the counter claim, the respondent made an application for default judgment. Consequently, on 14th June, 2016 the High Court, in terms of rule 22(1) of the Commercial Division Rules entered a default

judgment on the counter claim as prayed by the respondent. It is noteworthy that todate the main suit which was lodged by the appellant remain undetermined by the High Court as the appellant was aggrieved by that decision and preferred the present appeal. The memorandum of appeal contains eight grounds of appeal and one ground was also added later after the appellant applied for the leave of the Court which was granted. However, for the purpose of this ruling, and for the reason to be apparent shortly, we do not intend to recite the grounds of appeal herein below.

At the hearing, Mr. Mpaya Kamara and Capt. Ibrahim Mbiu Bendera, both learned advocates, appeared for the appellant and respondent respectively.

It is noted that before we heard the appeal on merits, Capt. Bendera sought leave of the Court to argue a point of law, which he had raised in the written submissions regarding the competence of the instant appeal.

Upon being granted permission to address the Court, Capt. Bendera submitted that pursuant to rule 23(1) of the Commercial Division Rules, the appellant is barred to appeal to the Court before

exhausting the remedy set out under that rule. He argued that under the said rule, the appellant was firstly required to approach the High Court to apply to set aside the default judgment entered on 14th June, 2016 before lodging the appeal to the Court.

In the circumstances, Capt. Bendera strongly urged the Court to strike out the appeal with costs for being incompetent on account of the appellant's failure to exhaust the remedy provided under rule 23(1) of the Commercial Division Rules.

Responding, Mr. Kamara submitted that the appellant lodged the present appeal because she could not have approached the High Court again after an application for extension of time within which to lodge the written statement of defence to the counter claim was refused by the same court. In his submission, after a ruling was made on that matter, the High Court became *functus officio* and thus, it would not have been possible to approach the same court pursuant to rule 23(1) of the Commercial Division Rules to apply for setting aside the default judgment as argued by the respondent's counsel. He added that, such application under the said rule would have been frivolous and an abuse of the process of the High Court which had became *functus officio*. Mr.

Kamara emphasized further that such an application could have been made in vain without a purpose.

In the circumstances, Mr. Kamara submitted that considering the complaints of the appellant in the grounds of appeal on the impropriety of the default judgment entered by the High Court on a counter claim before the determination of the main suit, the appellant is entitled to appeal to the Court without resort to the provisions of rule 23(1) of the Commercial Division Rules. Besides, he stated, the said rule does not make the provisions of Order VIII Rule 12 of Cap 33 inapplicable. Mr. Kamara therefore pressed us to overrule the respondent's preliminary point of law on the competence of the appeal with costs and proceed to determine the appeal on merits.

At this juncture, the issue for our consideration is whether the instant appeal against the default judgment entered by the High Court is competent having regard to the provisions of rule 23(1) of the Commercial Division Rules.

According to the record of appeal, it is not doubted that a default judgment on account of the appellant's failure to file the written

statement of defence to the counter claim was entered in terms of rule 22(1) of the Commercial Division Rules.

On the other hand, rule 23(1) of the Commercial Division Rules provides that:

> *"23(1) Where a judgment has been entered pursuant to rule 22, the court may, upon application made by the aggrieved party, within twenty-one days from the date of the judgment, set aside or vary such a judgment upon such terms as may be considered by the court to be just".*

It is apparent from the reproduced rule that the remedy available to a party who is aggrieved by a default judgment passed by the trial court is to apply to set it aside. Indeed, once a default judgment is set aside or varied, a successful party is entitled to file a written statement of defence to enable the trial court to determine the suit as stipulated under rule 23(3) of the Commercial Division Rules.

In **Yara Tanzania Limited v. DB Shapriya & Co. Limited**, Civil Appeal No. 245 of 2018 (unreported), after the Court considered the provisions of the Civil Procedure Act [Cap. 33 R.E. 2002 now R.E. 2022] and rule 23(1) of the Commercial Division Rules, it stated as follows:

> *"To recap, it is now settled that when a party is aggrieved with an exparte, 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 this is not done, the revision or appeal to the court will be rendered misconceived and prone to be struck out".*

We are alive to the contention of the appellant's counsel that an application to set aside a default judgment before the High Court would not have been preferred under the provisions of rule 23(1) of the Commercial Division Rules because that court had become *functus officio* after it had dismissed the appellant's application for extension of time within which to lodge a written statement of defence to the counter claim.

Though the above argument might sound attractive, with respect, we do not share the learned counsel stance, primarily on account of the fact that an application for extension of time is distinct from that of setting aside a default judgment. Basically, in application for extension of time the High Court is concerned with satisfying itself on whether the applicant has demonstrated sufficient reason for the delay by considering several factors to enable it to exercise the discretion to grant

or refuse it. On the contrary, in an application for setting aside a default judgment, the High Court mostly considers the particular circumstances of each case with regard to the failure of a party to file the defence and timeliness of the application in order to decide whether it is just to relieve the defendant from the consequences of his or her default. In this regard, rule 23(2)(a) and (b) of the Commercial Division Rules, provides that:

> *"23(2) Among the factors to be considered are whether the aggrieved party has;*
> *(a) applied to the Court within the period specified under sub-rule (1); and*
> *(b) given sufficient reasons for failing to file a defence."*

Indeed, the factors to be considered in such an application are not to be treated as rigid rules. For instance, the presence of an arguable defence on the merits may justify the High Court to exercise its discretion to set aside the default judgment, even if the other factors are unsatisfied in the whole or in part. As stated by the Supreme Court of Canada in **Bank of Montreal v. Chin** (1994),1994 CanLII 7246 (ONSC), 17 O. R. (3d) 691 (Gen. Div.):

> *"To set aside a default judgment, the defendant should show that his or her defence has an air of reality and that there is a genuine issue requiring a trial."*

It is acknowledged that, the rationale for treating an application for setting aside a default judgment along the reasons stated above is based on the premise that even where a plaintiff has successfully obtained default judgment, that does not mean the law suit is necessarily over. The defendant may always be allowed, upon an application before the same court to set aside a default judgment.

The stand is also based on recognition that the court system acknowledges that it is always in the best interest of justice, that a judgment is obtained after a judge hears both sides of the dispute unless it is impracticable to do so, for example, where the defendant will fully avoid to show up to defend the suit at the trial.

In the circumstances, we agree with the respondent's counsel that the appellant was required to exhaust the remedy provided under rule 23(1) of the Commercial Division Rules, before preferring the instant appeal to the Court. We also hold that the High Court was not *functus officio* to entertain an application to set aside the default judgment

merely because it had dealt with and refused an application of the appellant for extension of time to file the written statement of defence to the counter claim. Moreover, we are of the settled view that in the circumstances Order VIII Rule 12 of Cap 33 would not have applied to disapply the provision of rule 23(1) of the Commercial Division Rules as argued by the appellant's counsel.

In the circumstances, we wish to reiterate what the Court stated in **Yara Tanzania Limited v. D.B. Shapriya & Co. Limited** (supra):

> *"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 of Appeal.*
> *...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".*

In the final analysis, we uphold the respondent's preliminary point of law and hold that the instant appeal is incompetent on account of the failure by the appellant to comply with the requirement of the provisions of rule 23(1) of the Commercial Division Rules. In the event, we strike out the appeal with costs.

DATED at **DAR ES SALAAM** this 26th day of August, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 26th day of August, 2022 in the presence of Ms. Hawa Turhia, holding brief of Mr. Mpaya Kamara, learned counsel for Appellant and Mr. Ibrahim Bendera, learned counsel assisted by Nuru Jamal, learned counsel is hereby certified as a true copy of the original.

C.M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL