IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL CASE NO. 221 OF 1993

GUEST & CHRIMES LIMITED — APPLICANT

VERSUS

NATIONAL URBAN WATER AUTHORITY — RESPONDENT

R U L I N G

KALEGEYA, J.

Mr. Uzanda, learned Counsel for the Plaintiff, Guest and Chrimes Ltd, has prayed for judgement by admission in terms of O.XII, Rule 4 of the Civil Procedure Code, and also for leave to prove interest on the principal sum by affidavit. The reason he advanced for the latter prayer is that his client is in London, and that this mode of action will save time. As for the former he contended that the Court of Appeal held that there is no dispute regarding the principal sum, and that that finding together with what is contained in para. 3 of the written statement of defence entitle him to necessary orders under O.XII, R.4 CPC.

For clarity it is necessary to give a brief history of this matter. On 30\12\93 the Plaintiff sued the Defendant for the "sum of £ 31,999.90 due owing and payable by the Defendant to the Plaintiff being the agreed and\or reasonable price of goods sold and delivered by the Plaintiff to the Defendant during 1989...". On 16\6\94 the Defendants' Counsel succesfully took up a preliminary objection that the matter had been filed in breach of the terms of contract between the parties, which terms prescribed that in case of dispute recourse should first be sought through arbitration and not court action. The court held,

> ".....these proceedings have commenced quite prematurely. The suit is accordingly dismissed with a direction that the dispute be submitted for arbitration.....".

Mr. Uzanda could not stomach the said finding. He succesfully appealed to the Court of Appeal (C.A.T Civil App.No.15\95) which concluded

> "...we agree that there was no dispute between the parties which necessitated recourse to arbitration and dismissal of the suit. In the event the High Court judgment is hereby set aside. The hearing of the suit to proceed before another judge".

That is how the present case reverted to the High Court and came before me.

Mr. Uzanda has strenously argued that though there is a difference of 50 cents between the figure stated by Plaintiff and that stated by Defendant, the Defendant admitted £ 30,349.92 for which judgement should be entered.

As for Admission of the debt, Mr. Uzanda calls para. 3 of the written statement of Defence and the last paragraph of the Court of Appeal judgement on page 4 to his aid. In order to appreciate his arguments and the decision of the court to be arrived at let met reproduce the relevant parts of the above stated.

Para. 3 of the Written Statement of Defence, among others states,

> "3.....the Defendant admits that there was a contract for supply of goods worth £ 31,991.90 between the Plaintiffs and Defendant but the Defendant strongly denies that it owes the Plaintiff a total sum of £ 31,999.90 and the Defendant shall put the plaintiff to very strict proof of this allegation.
>
> a) The Defendant shall further aver that in or about July 1989, the Plaintiff issued credit note No. 169 dated 10.7.1989 for £ 1,1641.98 in favour of the Defendant;.....
>
> .....
>
> .....

(b) The Defendant shall also aver that in or about July, 1992, the Defendant paid to the Plaintiff a total sum of £16,640.00 .....
.....

(c) From what is stated in paragraphs (a) and (b) above, the Defendants owes the Plaintiff a total sum of £13,710.42 only out of the contractual price of £31,991.90 for the goods supplied by the plaintiff to the Defendant".

As regards the last para. on page 4 of the Court of Appeal judgement in CIVIL APPEAL NO. 15 of 1995 (between Guest and Chrimes Ltd and National Urban Water Authority), the relevant excerpt reads as follows,

".....we are not concerned with the closure of the credit note: we are concerned with the refusal by NUWA to pay the existing debt and the reasons given for this refusal between the parties. This admission in written statement of Defence that errors were rectified puts an end to the dispute, so whatever was owed by the respondent to the appellant must be paid back". (emphasis added).

As for the order under which Mr. Uzanda applies for judgement on admission, the same states,

(O.XII, R.4 CPC)

"Any party may at any stage of a suit, where admissions of fact have been made either on the pleadings, or otherwise, apply to the court for judgement or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgement as the court may think just".

With respect to Mr. Uzanda, learned Counsel for the Plaintiff, neither the paragraph of the Court of Appeal judgement

quoted above nor para. 3 of the written statement of defence can be interpreted to mean that the defendants have admitted the debt to the tune of £30,349.92 for which this court should pass judgment under O.X.II, Rule 4 CPC. It is true that the Defendant admit having contracted with Plaintiff for supply of goods worth the sum stated (although for reasons which are not clear defendant cites a figure which is 50 cents above the contractual sum) but clearly he does not admit the outstanding debt to that tune. The issue is not whether the Defendant admits the existence of the contract between them but whether he has paid the contractual amount.

The opening wording in para. 3 of the written statement of Defence; para. 3(b) and (c) do not require any expert in English language in order to inform anyone who wishes to be informed, that the defendant does not admit the sum of £30,349.92. At most, if Mr. Uzanda was minded to employ the provision of O.XII, Rule 4 CPC, he would have applied for judgment on admission for the sum of £13,710.42 which the defendant categorically admits in Para. 3(c) of the written statement of defence, for he says that the remainder sum has already been paid. The balance therefore is a subject of contest between the parties and clearly falls out of the ambit of O.X.II, R.4 CPC. It does not matter whether the defendant is telling lies or not - so longer as it is a contenstible issue the stated provision of the law do not apply. Again with respect to Mr. Uzanda, the Court of Appeal judgement did not conclude that the sum owed is £30,349.92 - the words

"...so whatever was owed by the Respondent to the Appellant must be paid back" are very far from that alleged definity. The pleadings were before that very court and naturally the justices must have seen para. 3 (b) and (c) hence the general wording used.

For the clear reasons explained above the first prayer for judgement by admission in the sum of £30,349.92 is rejected. As hinted upon above, the prayer could have had base if it had been

limited to the sum of £13,710.42. Mr. Uzanda did not make his application for this sum. A judgement on admission under OX-II Rule 4 can only be entered upon application by a party. Mr. Uzanda is still at liberty to make a fresh application for the relevant sum.

As for the prayer to prove interest by affidavit, even if his first prayer had been granted, I respectfully say that I have failed to see the basis for the same. That the Plaintiff is in London is irrelevant - for he who alleges must prove regardless of the costs involved. Direct evidence can be substituted in fitting situation and very exceptional circumstances. Suffice to say that Mr. Uzanda has not bothered to establish any.

The case was remitted to the High Court for hearing. What Mr. Uzanda should have properly applied for (for non-appearance of the Defendants) was leave to proceed exparte once it was proved that the defendants were served - O.IX, Rule 6 CPC. For clarity, even for this avenue, it would not have related to the interests alone but to what is claimed and disputed in the whole suit.

For the reasons given above both prayers are accordingly refused.

(L. B. Kalegeya)
JUDGE
4\12\97

Ruling delivered today the 4th December, 1997 in the presence of Mr. Uzanda.

(L. B. Kalegeya)
JUDGE
4\12\97

Mr. Uzanda I pray for leave to appeal.

(L. B. Kalegeya)
JUDGE

Court: The right of appeal is a party's right and Mr. Uzanda can happily utilise it.

AT DAR ES SALAAM
4TH DECEMBER, 1997

(L. B. Kalegeya)
JUDGE