

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 168 OF 2014

SALEM CONSTRUCTION LIMITED PLAINTIFF

VERSUS

SYMBION POWER LLC DEFENDANT

14 & 15th July, 2016

DEFAULT JUDGMENT

MWAMBEGELE, J.:

This is a default judgment. Its history is rather chequered. By a plaint filed on 29.12.2014, the plaintiff Salem Construction Limited through his lawyer Kennedy Fungamtama, learned counsel, instituted the present suit claiming for

1. A declaration that the defendant breached the Service Agreement;
2. An order against the defendant to pay USD 466,482.73 being principal outstanding payment for work done;
3. An order against the defendant to pay the plaintiff USD 87,414.44 being interest and delayed payment;

4. An order against the defendant to pay the plaintiff USD 50,000.00 being compensation for costs incurred for legal services in pursuit of the claim;
5. An order against the defendant to pay the plaintiff interest on the decretal sum at the court's rate of 12% per annum from the date of institution of the suit until payment;
6. An order against the defendant to pay the plaintiff costs and incidental to the suit; and
7. An order against the defendant should pay the plaintiff interest on costs at the court's rate of 12% per annum from the date of judgment until payment in full.

The defendant did not defend this suit from the outset. It intended to employ an arbitration clause. Through the services of a law firm going by the name Asyla Attorneys, the defendant filed a petition under the provisions of section 6 of the Arbitration Act, Cap. 15 of the Revised Edition, 2002 praying for, *inter alia*, stay of this case; Commercial Case No. 168 of 2014 to pave way for reference of the dispute between the parties to arbitration. That petition, which was christened Miscellaneous Commercial Cause No. 12 of 2015, was struck out on a preliminary objection.

The defendant re-filed the petition. It was then christened Miscellaneous Commercial Cause No. 128 of 2015. Once again, the defendant was unsuccessful. That application was dismissed with costs and the present case was ordered to proceed for hearing.

Undeterred, the defendant filed yet another application – Miscellaneous Commercial Cause No. 26 of 2016 – seeking, *inter alia*, stay of proceedings in this case; Commercial Case No. 168 of 2014 pending final determination of

the appeal against the decision of this Court in Miscellaneous Commercial Cause No. 128 of 2015. As bad luck would have it for the defendant, that application was also dismissed. This case was ordered to proceed to a next step.

When the case was called on for necessary orders on 11.07.2016, Mr. Fungamtama, learned counsel appeared for the plaintiff and Mr. Mponda, learned counsel appeared for the defendant. Mr. Mponda, learned counsel intimated to the court he still want to pursue the appeal regarding arbitration but because my decision of refusing to refer the matter to arbitration was interlocutory hence not appellable, he decided to keep quiet and wait for an opportunity to challenge the decision of this court. He stated that he did not intend to file any defence, for that course, I think rightly so, would mean taking steps into the suit and that will close the doors to arbitration, a path which he was still intending to pursue.

The defendant having not filed any defence, Mr. Fungamtama, for the plaintiff prayed for a default judgment under the provisions of rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 - GN No. 250 of 2012 (henceforth "the Rules") applied for a default judgment. I asked the learned counsel to follow the letter of the law which required him to file an application by filling the relevant form which he promised to do.

On 12.07.2015 the learned counsel for the plaintiff walked the talk; he filed an application under the Rules:

The provisions of rule 22 (1) of the Rules provide, *inter alia*, that where any party required to file written statement of defence fails to do so within the specified period, the court shall, upon proof of service and on application by

the plaintiff in Form No. 1 set out in the Schedule to the Rules, enter judgment in favour of the plaintiff. There is no dispute that the plaintiff filed the suit against the defendant. Equally undisputed is the fact that the defendant has not filed any defence and does not intend to file one so that she can exercise her right of pursuing the course for arbitration. It is also indisputable that the defendant is waiting for the default judgment as an opportune moment to challenge the course taken by this court refusing her to go to arbitration. The plaintiff is therefore entitled to a default judgment as prayed.

Accordingly, in terms of rule 22 (1) of the Rules, I enter judgment for the plaintiff and, in terms of rule 67 (3) of the same Rules, proceed to declare and decree as follows:

1. The defendant breached the Service Agreement;
2. The defendant shall pay the plaintiff USD 466,482.73 being principal outstanding payment for work done;
3. The defendant shall pay plaintiff USD 87,414.44 being interest and delayed payment;
4. The defendant shall pay the plaintiff USD 50,000.00 being compensation for costs incurred for legal services in pursuit of the claim;
5. The defendant shall pay the plaintiff interest on the decretal sum at the court's rate of 12% per annum from the date of judgment until satisfaction in full; and
6. The defendant shall pay plaintiff costs of the suit.

For the avoidance of doubt, the last prayer (prayer 7 in the plaint) is disallowed for lack of legal basis upon which to grant the same.

In terms of rule 22 (2) (a) and (b) of the Rules, I further direct that the decree in this case shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this default judgment, published a copy of the decree in at least two (2) newspapers of wide circulation in the country and after a period of twenty-one (21) days from the date of expiry of the said period of ten (10) days has lapsed.

Order accordingly.

DATED at DAR ES SALAAM this 15th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE