IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 243 OF 2016

(Arising from the decision of Kilombero District Court dated 17th October, 2016 in Civil Case No. 4 of 2016)

ROBERT MNYETI.....1ST APPELLANT

SAMSON LUNYUKU.....2ND APPELLANT

DAUD LUCK.....3RD APPELLANT

VERSUS

ALEX NDALAHWA..... RESPONDENT

JUDGMENT

14 December, 2017 & 2 March, 2018

DYANSOBERA, J:

This appeal is directed against the decision of the District Court of Kilombero sitting at Ifakara given on 17th day of October,

2016 awarding the respondent Tshs. 9,487,965.93 as principal sum, Tshs. 3,000,000/- as general damages, interest at 15% interest at court rate and costs of the suit. The appeal, according to the petition of appeal, contains four grounds, namely:

1. That, the learned trial District Court Magistrate erred both in law and fact to order default judgment against the appellants under Order VIII Rule 14 (1) of the Civil Procedure Code, Cap. 33 [R.E.2002] contrary to the procedures to order the same.
2. That, the learned trial District Court Magistrate erred both in law and fact to award court interest rate of 15% on the decretal sum from the date of filing the suit to the date of full payment
3. That, the learned trial District Court Magistrate erred both in law and fact to make an assessment of general damages to the tune of Tshs. 3,000,000/=
4. That, the learned trial District Court Magistrate erred both in law and fact to enter judgment against the wrong party (appellants herein)

The appeal has been resisted by the respondent.

Briefly, the historical back ground of the matter is this. The parties are Sukuma by tribe residing in Kilombero District. A group known as Family Friend Group was formed, registered and a bank account with NMB at Ifakara opened. The respondent joined in 2012. He paid registration fees of Tshs. 100,000/= and thereby became a member who was also contributing the subscriptions. It seems, in between 2014 and 2015, a misunderstanding between the respondent and the appellants arose. By the time, the three appellants were, respectively, a chairman, secretary and treasurer.

Due to the said misunderstanding, the respondent instituted a suit in the District Court of Kilombero at Ifakara against the appellants claiming the following reliefs:

i. That the defendant be ordered to pay Tshs. 9,487,965/= being amount claimed by the plaintiff,
ii. That this Honourable court be pleased to order just, fair and equitable distribution of the money contribution in the group

iii. An order for payment of interest at court rate on the decretal sum from the date of filing this matter to the date of full settlement.

iv. An order for general damages to the tune of 5,000,000/=

v. That costs be provided for

vi. Any other relief(s) may this court deem fit, just and equitable to grant.

The plaint was duly filed in court on 15th day of March, 2016 and registered as Civil Case No. 4 of 2016. A prayer to amend the plaint was made and granted and the amended plaint was filed on 4th May, 2016 as evidenced by the ERV 6225604 where the reliefs in the original plaint were changed to read Tshs. 9,487,965.93 in (i) and Tshs. 3,000,000/= as general damages in (iv). The appellants were required to file written statement of defence to the amended plaint on 4.5.2016. It seems, the said written defence was not filed as ordered. The respondents applied for extension of time within which to file their defence. The application was granted and they were required to file the same on 16.5.2016. Apparently, the written

statement of defence was not filed within the time ordered by the court. A preliminary objection was thus raised on part of the respondent that 'the written statement of defence is bad in law for time barred'. That was on 25th day of May, 2016. The trial Resident Magistrate heard the preliminary objection, upheld it and struck out the appellants' written statement of defence.

On 17th October, 2016, Mr. Malema, counsel for the respondent prayed for default judgment. On 18th November, 2016 default judgment was, accordingly entered.

At the hearing of the appeal, the appellants were represented by Mr. Edwin Enos, learned counsel while for respondent stood Mr. Simon Mkwizu, learned advocate holding brief for Mr. Richard. It was agreed that the appeal be disposed of by way of written submissions and the court granted leave.

Submitting in support of the appeal, learned counsel opted to commence with the fourth ground of appeal that the respondent had sued a wrong party. It was contended on this ground that the appellants were mere leaders with no powers to decide for the group in their personal capacities and asked the court to use its

revisionary power *suo motu* under section 79 (1) of the Civil Procedure Code arguing that it is a legal point which could be raised any time. The reasons given in support of this ground are that the appellants were not accorded a hearing, the respondent had failed to prove the case against the appellants and the appellants were not beneficiaries of the contributions.

Regarding the first ground of appeal, it was argued that the legal requirements were met as there was no order to issue summons within seven days, the written statement of defence was filed in time, that the invocation of Order VIII Rule 14 (1) of the CPC was a grave misinterpretation of law and finally, that the ex parte proof was required by either affidavit or oral evidence.

On the second ground of appeal, it was contended on part of the appellants that the interest of 15% went contrary to O. XX rule 21 (1) of the CPC and further that it was unreasonable, unjustified and on the high side.

As to the third ground of appeal, counsel for the appellants told this court that the trial court did not adhere to the principles of

assessment of general damages and that this court can interfere if the trial court acted on wrong principles.

Replying to the submission in chief, counsel for the respondents told this court that the appellants are liable as they are the sole leaders of the group. He said that the appellants were represented by an advocate, they were given the right to be heard and despite extension time they failed to file their written statement of defence within the time given. Learned counsel concluded that the respondent had proved his claims against the appellants.

The grounds of appeal considered in their totality raise one issue that is whether the default judgment was properly entered against the appellants.

A default judgment is normally a judgment entered against a party who has failed to defend against a claim that has been brought against him in a court of law.

In our jurisdiction, the law governing such procedure is contained in the Civil Procedure Code [Cap. 33 R.E.2002], Order VIII rule 14, in particular.

It is provided under Order VIII rule 14 (1) and (2) (a) (b) of the Code as follows:

> **(1) Where any party has been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of this order and fails to present the same within the time fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.**
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> **(2) In any case in which a defendant who is required under sub rule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that sub rule, within the period of such extension, the court may–**
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> **(a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons,**

enter judgment in favour of the plaintiff without requiring him to prove his claim;

(b) in any other case, fix a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.

Order VIII rule 1 sub rule (1) of the same Code on written statement of defence provides that:

(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.

(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence:

Provided that the Court may, within twenty-one days of expiration of the prescribed period, grant an

extension of time for presentation of the written statement of defence on application by the defendant.

My understanding of the provisions of Order VIII rule 14 (1) of the Code is that pronouncing judgment against the defendant where he has failed to present a written statement of defence under sub-rule (1) of rule 1 presupposes that the court must, under rule 1(1) of Order VIII have first issued a summons to appear. Here, the defendant has an option of filing a written statement of defence or not filing it hence the word, '**may**'. However, where the court requires him to file his written statement of defence, he has no discretion but to file it. This he has to do within 7 days before the first hearing.

The record of the trial court reveals that the amended plaint was filed on 4th May, 2016 as evidence by ERV No. 62256604 dated 4.5.2016. There was neither proof of service of summons to appear nor an order requiring the appellants to file their written statements of defence within 7 days of the first hearing. There is, however, an order of the court dated 12th May 2016 requiring them to file amended written statement of defence on 16.5.2016, within two

days only! Nonetheless, the appellants filed their joint written statement of defence on 17th May, 2016 vide ERV No. 6225641. The record is silent on when was the first hearing so that it could be said that the appellants did not file their written statement of defence within 7 days of the first hearing. The preliminary objection raised at the trial by counsel for the respondent that the written statement of defence was filed out of time was a misconception and the striking out of the written statement of defence by the trial court was unjustified and illegal. The judgment by default entered against the appellants was illegal and occasioned miscarriage of justice as the appellants were condemned unheard. I agree that the judgment entered purportedly under Order VIII rule 14 (1) of the Civil Procedure Code was legally improper. I think this first ground of appeal is sufficient of disposing of the whole appeal and discussing the rest grounds would be amount to a mere academic exercise, the move I decline to take.

The appeal is allowed, the decision of the trial court is quashed and set aside. The respondent is at liberty to pursue his

legal rights in accordance with the laws of the land, if he so, desires.

The appeal is allowed with no order as to costs.

Order accordingly.

W. P. Dyansobera,

JUDGE

2.3.2018

Delivered this 2nd day of March, 2018 in the presence of Mr. Edwin Enos, learned counsel for the appellants and Mr. Richard Kinawale, learned advocate for the respondent.

W. P. Dyansobera,

JUDGE