IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 66 OF 2020

(Arising from judgment and Proceedings of the Resident Magistrates Court of Dar es salaam at Kisutu in Civil Case No. 45 of 2017)

PRIME II CO. LTD.....1ST APPLICANT

CHACHA JACKSON MARWA .....2ND APPLICANT

VERSUS

KAMAKA CO. LTD ..... RESPONDENT

RULING

12th May, 2021 & 11th June, 2021.

E. E. KAKOLAKI J

This is a ruling in respect of revision application preferred by the applicants inviting this court to call for the records and inspect the proceedings of the Resident Magistrates Court of Dar es salaam at Kisutu in Civil Case No. 45 of 2017 and the judgment on admission handed down by the trial court on the 29th day of June, 2018. The application has been brought under section 30(1)(a) and section 44(1)(b) of the Magistrates Courts Act [Cap. 11 R.E 2019] supported by affidavit of the 2nd applicant who is also the principal officer (Managing Director) of the 1st applicant. The same is vehemently contested by the respondent who filed the counter affidavit affirmed by

Bakari Juma, the respondent's advocate. All parties are represented and when the matter came for hearing by consent and with leave of the court agreed to dispose of the matter by way of written submissions, the submissions which were filed in time. The applicants hired the services of Mr. Nehemiah Gabo learned advocate whereas the respondent was dully fended by Mr. Bakari Juma learned counsel.

Briefly, on 23/02/2017, before the trial court in Civil Case No. 45 of 2017, the respondent sued the applicants for payment of Tshs.140,847,620/= being outstanding money for the supply of building materials to the applicants on credit basis, payment of interests to the decreed amount, costs of the suit and any other reliefs as the court would deem fit and just to grant. The applicants denied all of the claims by filing a written statement of defence save for claim of Tshs. 40,000,000/= out of the total claims which was admitted in paragraph 3 of applicants' written statement of defence. When the matter came up for mention on the 10/05/2017 Mr. Msemwa advocate for the respondent informed the court of the applicants' admission of liability of Tshs. 40,000,000/= and their readness to settle it as pleaded in paragraph 3 of the WSD and prayed for judgment to be entered in favour of the respondent in terms of Order XII Rule 4 of the Civil Procedure Code, [Cap. 33 R.E 2002] (CPC) and the rest of the claims be proved by evidence. In response Mr. Mkoma Emmanuel advocate for the applicants/defendants while admitting the applicants admission of their liability in the WSD as submitted by the learned counsel for the respondent, sought leave of the court under Order VI Rule 17 of the CPC to be allowed to amend the pleadings on the claim that there were receipts proving part payments made to the alleged admitted claims which were discovered after filing the WSD,

the prayer which was fiercely resisted by Mr. Msemwa advocate for the respondent. At the end of the day the trial court rejected the applicants' prayer and entered judgment against them for payment of the admitted amount of Tshs. 40,000,000/= to the respondent and the remaining balance be proved through evidence, in its ruling handed down on 19/06/2017. The case was thereafter set for 1st Pre-Trial Conference (PTC) though the applicants' advocate had informed the court of their intention to appeal against the ruling delivered on 19/06/2017, the intention which unfortunately remained a mere wish.

On the 03/04/2018 when the matter came for 1st PTC after several adjournments, and in absence of the applicants or their advocate, counsel for the respondent Mr. Bakari Juma prayed the court to enter default judgment against the applicants on the remained claims as they had defaulted appearance in court several times. The trial court having heard the submission from the respondent set the matter for ruling on the 14/05/2018 and on the said date in the absence of the applicants entered judgment on admission instead, against the applicants, under Order VIII Rule 5 of the CPC, for payment of the outstanding amount of Tshs. 100,847,620/= to the respondent plus costs of the suit. The decree was not settled by the applicant as a result the respondent filed execution proceedings which ended up with the issue of arrest warrant to the 2nd applicant so as to be presented before the court to satisfy the decree. On the 27/11/2019 when the 2nd applicant was brought before the executing court to explain as to why he should not be sent to prison as civil prisoner for failure to satisfy the decree, it was agreed by both parties and the court order was issued directing the Judgment debtor (applicants) to pay to the respondent Tshs. 2 million at

every end of the month from 30/12/2019 till satisfaction of the decreed amount and in case of default 2nd applicant be taken to prison as a civil prisoner. On that development and having noted that they were out of prescribed time to file the appeal against the judgment on admission entered against them, the applicants vide Misc. Civil Application No. 683 of 2019 filed to this court and obtained extension of time within which to file Revision against the said judgment on admission in its ruling dated 04/09/2020, the revision which was filed before this Court as Civil Revision No. 52 of 2020. Unfortunately the said application for revision did not survive in court as it was found to be defective and withdrawn by the applicants themselves on 03/12/2020, before the present one was preferred on the 24/12/2020.

In the present application the applicants have raised five grounds in support of the revision application going thus:

1. The 2nd applicant was unlawfully sued prior to lifting corporate veil of the 1st applicant.
2. The Applicants were denied the right to be heard in judgment on admission dated 26/06/2018 contrary to principles of natural justice.
3. Judgment on admission dated 26 June, 2018 is illegal for not being in compliance with the law.
4. The execution proceedings were heard and determined by a Magistrate without jurisdiction.
5. The trial court denied the applicants to amend their written statement of defence (WSD).

Mr. Gabo for the applicants argued all grounds in seriatim. On the first ground he said, it is the established principle of the law as per the case of

Salomon Vs. Salomon (1897) AC 22 as adopted in our jurisdiction in the case of **Yusuph Manji Vs. Edward Masanja and Abdallah Juma** (2006) TRL 127, that shareholders/directors of a limited company cannot be sued prior to lifting of corporate veil of the company as the company is a different person from subscribers. Basing on that principle he submitted, it was wrong for the respondent to sue the 2nd applicant without first lifting veil of the 1st applicant, thus the proceedings, judgment on admission and execution order by the trial court dated 19/06/2017, 26/06/2018 and 27/11/2019 respectively were rendered null and void.

With regard to the 2nd ground he stated, the judgment on admission entered by the trial court on the 26/06/2018 denied the applicants of their right to be heard as they were unaware of the decision until when they appeared in execution proceedings in person following their advocate's withdrawal from the conduct of the case without their knowledge. Thus the said decision deserve nothing than to be quashed, he contended. On the 3rd ground it was argued Hon. Shaidi-PRM who was neither the Resident Magistrate in-charge with supervisory, administrative and or judicial function or authority as per section 15 of the CPC nor executing officer, presided over execution proceedings without jurisdiction, thus rendering the whole execution proceedings a nullity. And on the last ground, Mr. Gabo contended the trial magistrate misconstrued the law as provided under Order VI Rule 17 of the CPC when denied the applicants to amend their WSD which amendment was aimed at withdrawing the appllicants' admission in the WSD basing on discovery of new evidence, instead wrongly invoked the provision of Order XLII of the CPC and proceeded to enter judgment on admission of 19/06/2019.

In rebuttal Mr. Juma for the respondent submitting against the 1st and 5th grounds as jointly submitted by the applicants stated, the same were not raised in the affidavit in support of the application. Relying on the case of **Hassan Kapera Mtumba Vs. Salim Suleiman Hamdu**, Civil Application No. 505/12 of 2017 (CAT-unreported) he argued, the submission by the applicants on the grounds are mere statements from the bar for not being grounded on affidavit as submissions are not evidence. Since the same were not deposed in the affidavit so as to avail the respondent with time to counter them, then this court should not rely on them to base its decision, Mr. Juma submitted. On the second ground he responded, the assertion by the applicants that judgment on admission was entered without according them the right to be heard is unfounded as they were represented and given time to file their WSD and complied with, save that they defaulted appearance during the 1st Pre-Trial Conference several times the acts which entitled the trial court to enter judgment on admission under Order VIII Rule 5 of the CPC (before 2019 amendment). He added the contention that, their advocate withdrew representation without their knowledge does not hold water as it is not support by the court record.

On the 3rd ground where it is complained that, the trial magistrate could have ordered for ex-parte hearing under Order IX Rule 6 of the CPC instead of opting for judgment on admission under Order XII Rule 4 of the CPC, he countered the averment was not correct. He said, under Order XII Rule 4 of the CPC, the trial magistrate has unfettered discretion to make any order including judgment on admission against the party who has failed to appear in court during 1st PTC. And with regard to the 4th ground he submitted like in the 1st and 5th grounds in this ground the applicants did not raise it in their

affidavit, thus the case of **Hassan Kapera Mtumba** (supra) is applicable to them too. To sum up it was his submission that the application has no merit and thus the same should be dismissed with costs and so prayed.

In his rejoinder submission Mr. Gabo on the submission that 1st and 5th grounds were not pleaded in the affidavit, said the same are covered with averments in paragraph 7 of the affidavit whereby illegality and irregularities are alleged to taint the judgement on admission. He therefore submitted the case of **Hassan Kapera Mtumba** (supra) relied upon by the respondent is distinguishable in the circumstances of this case. Regarding the respondent's reply submission on the 2nd ground he reiterated his earlier submission on that ground. With regard to the 3rd ground Mr. Gabo argued, Order VIIIA Rule 5 of the CPC does not confer power to the court to enter judgment on admission in default of appearance of the applicants and their advocate simply because they admitted part of their previous claims. And lastly on the 4th ground, it was his rejoinder submission that paragraph 11 of the affidavit made it clear that the execution order was entered by the magistrate who is not an execution officer and in contravention of the law. So it is not true as alleged by Mr. Juma that the same was not stated in the affidavit. Apart from that piece of rejoinder submission Mr. Gabo reiterated his earlier prayers.

Having narrated in extensor the facts that gave raise to this application and having travelled through both parties' pleadings before the trial court, proceedings, the impugned judgment, ruling and orders and having paid the deserving weight the fighting arguments by the parties, I now proceed to determine the merits or demerits of the application. The issue for determination before this court is whether there are material illegalities or

irregularities in the proceedings, decisions or orders on record for this court to revise. To answer that question I will start with the 1st and 5th grounds in support of the application where Mr. Juma is alleging there is no materials stated by the applicants in the affidavit for this court to base its decision on, the fact which is challenged by Mr. Gabo in that the same are covered in the facts stated in paragraph 7 of the affidavit. For easy of reference and fair disposal of these grounds I quote paragraph 7 of the applicants' affidavit:

> *7. That we are advised by the lawyer that judgment on admission dated 26th day of June, 2018 is tainted with irregularities and illegalities worth consideration of the High Court of the land.*

My reading and construction of the cited paragraph makes remain without a grain of doubt and therefore agree with Mr. Juma, that in as far as the 1st and 5th ground are concerned, the applicants never averred any material facts in the affidavit to support them. There is nothing therein making reference to the complaint of failure to lift company's veil before suing the 2nd applicant and denial of the applicants to amend their WSD as alleged in the 1st and 5th grounds respectively. The law requires that for the applicant to rely on certain fact or ground in the application, the same must be pleaded first in the affidavit otherwise the court should refrain from considering it for being a mere statement from the bar coming by way of submission since submission is not evidence but rather mere arguments. In the case of **Hassn Kapera Mtumba** (supra) when the Court of Appeal was faced with more or less similar issue to the present one on failure of the applicant to state the facts relied on in his affidavit had this to say:

> *"Mr. Chanjarika submitted firther that, it was the respondent who will suffer the most, as since 2nd September, 2013, it is the applicant who is collecting rents and benefiting from the disputed property.* ***With respect, we find the submissions by Mr. Chanjarik on this point to be a mere counsel's statement from the bar. Mr. Chnajarika ought to have submitted those facts in the affidavit in reply.*** *" (Emphasis supplied).*

On the issue of submission not forming part of evidence, the Court of Appeal in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41 stated that:

> ***"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence****. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged front the submission and totally disregarded."* [emphasis supplied]

In the light of the above cited authorities and the fact that the grounds in the 1st and 5th points are mere statements coming from the bar and not evidence reduced from the applicant's affidavit, it is my conviction that the same have no value and cannot be considered by this court.

With regard to the 2nd ground as submitted by the applicants, I am also at one with Mr. Juma's submission that, the complaint that the applicants were

not accorded with the right to be heard before the judgment on admission was entered for defaulting appearance during 1st PTC on 03/04/2018 is unfounded. My firm finding is fortified with the fact that, applicants were represented by Mr. Mkoma advocate before who according to his letter in the court record with Ref. No. FA/DL/02/2017 dated 11/09/2017, received on 12/09/2017 with court seal, the trial court was informed of his withdrawal from the conduct of the case and copied it to the applicants. With such proof of the letter copied to the applicants they cannot be heard claiming that, they had no knowledge of the withdrawal of their advocate from the conduct of the case as they had enough time of more than six (6) months to either appear in person or engage another advocate before judgment on admission was entered against them. Assuming they had no knowledge of the alleged withdrawal of their advocate which has no proof, still I could hold they were negligent enough for failure to follow up the progress of their case. With that finding the complaint of applicants' denial of the right to be heard therefore has no merit and I dismiss it as by not appearing in court on the 03/04/2018, they waived their right to be heard by the trial court on whether judgment on admission should be entered or not.

I now turn to the 3rd ground where the appellants' complaint is that the trial magistrate did not apply the law correctly when entered judgment on admission against the applicants under order XII Rule 4 of the CPC basing his decision on what he termed the maxim of **"silence means consent"** instead of ordering for ex-parte hearing under Order IX Rule 6 of the CPC. The typed proceedings reflects no facts on what happened before the date of 1st PTC, I am therefore forced to refer the hand written ones. The hand scripted proceedings lights up that when the case came for 1st PTC on the

03/04/2018, Mr. Bakari Juma advocate holding brief for Mr. Peter Lyimo advocate for the plaintiff/respondent prayed the trial court to enter judgment on default under Order VIIIA Rule 5 of the CPC for want of appellants' appearance, as they had defaulted appearance several times. Responding to that prayer on the 26/06/2018 the trial court proceeded to enter judgment on admission as alluded to above basing on the maxim **"silence means consent"**. The provision of Order VIIIA Rule 5 of the CPC before its amendment brought in under GN. 381 of 2019, in which the trial court was moved with to enter judgment against the applicants, reads:

> *5. Where a party to be a case or the party's recognised agent or advocate fails to without good cause to comply with a scheduling order, or to appear at a conference held under subrule (1) of rule 3 or is substantially unprepared to participate in such conference, the Court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders.*

It is Mr. Juma's submission that basing on the above cited provision, the trial court had unfettered discretion to make any order against the applicants including judgment on admission for their failure to enter appearance during the 1st PTC session, the submission which is contested by Mr. Gabo in that it had no such powers instead it ought to have ordered for ex-parte hearing against the appellants under Order IX Rule 6 of the CPC and not judgment on admission as provided under Order XII Rule 4 of the CPC. It is true and I agree with Mr. Gabo that under Order VIIIA Rule 5 of the CPC the trial

magistrate had no powers to enter judgment on admission and I would add not even judgment in default as prayed by the respondent since the same are governed by different provisions of the law. I say so because judgment on admission is governed by the provisions of Order XII Rule 4 of the CPC when admissions are made by any party to the suit either on the pleadings or otherwise in the course of the proceedings whereas judgment in default is entered under Order VIII Rule 14(1) of the CPC where the defendant has defaulted to present his written statement of defence. Order XII Rule 4 of CPC provides:

> *"Any party at any stage of a suit, where admission of fact have been made either on pleading, or otherwise, apply to the court for such judgment or order as upon such admission 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 judgment, as the court may think just."*

And the provision of Order VIII Rule 14(1) of the CPC before amendment under GN. 381 of 2019 states that:

> *"14(1) Where any party has been required to present a written statement of under subrule(1) of rule 1 or 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."*

As alluded to herein above since there are specific provisions of the law that empower the court to enter judgment on admission or judgment in default as provided under Order XII Rule 4 and Order VIII Rule 14(1) of the CPC respectively, I hold the trial magistrate misdirected himself to enter judgment on admission against the applicants under Order VIII Rule 4 as requested by the respondent, since the said order is meant for other orders such as striking out of the written statement of defence which consequently leads the plaintiff's case to ex-parte hearing as submitted by Mr. Gabo. I further hold the said error is fatal thus incurable, the result of which is to render the said judgment on admission dated 26/06/2018 and other subsequent proceedings and orders resulting from it a nullity. In other words the decree extracted from the said judgment on admission and all execution proceedings of the said decree should follow suit for being null and void. This ground, I find has merit and has the effect of disposing of this matter as I see no need of wasting court's precious time to discuss the remaining 4th ground for being academic exercise which I am not prepared for at the moment.

In the circumstances and for afore stated reasons this application has merit and is hereby granted. I therefore invoke the revisional powers bestowed to me under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and proceed to quash the proceedings of the trial court from 03/04/2018 and other subsequent proceedings including the execution proceedings and set aside the judgment on admission and other subsequent orders thereto. I further remit back to the Resident Magistrates Court of Dar es salaam at Kisutu the case file in Civil Case No. 45 of 2017, for the case to proceed with the necessary steps of preparations for hearing before another competent

magistrate. For avoidance of doubt proceedings should continue from the stage of First Pre-Trial Conference.

Costs to follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 11th day of June, 2021.

E. E. KAKOLAKI

JUDGE

11/06/2021

Delivered at Dar es Salaam in chambers today on 11th day of June 2021 in the presence of Mr. Josephine Assenga advocate for the 1st and 2nd applicants, the 2nd applicant in person, Mr. Bakari Juma advocate for the respondent and Ms. Monica Msuya, court clerk.

Right of appeal explained

E. E. KAKOLAKI

JUDGE

11/06/2021