

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 735 OF 2024

(Originating from Civil Case No. 217 of 2023)

IGOZOMO MINERAL COMPANY LIMITED.....APPLICANT

VERSUS

FEMA MINING AND DRILLING LTD.....RESPONDENT

RULING

2nd & 27th February, 2024

MWANGA, J.

This is a ruling in respect of a preliminary objection raised by the learned counsel Mr. Jerome Msemwa that, this court has no jurisdiction to entertain the application as there is no ex-parte judgment was entered by this court on 14th December 2023.

The preliminary objection came after the prayer of the Respondent, **FEMA MINING AND DRILLING LTD** to set aside exparte judgment for this court dated 14th December 2023.

For ease of follow-up on this matter, let me give some brief background giving rise to this application. Sometimes in 2023 Respondent filed a suit in this court on breach of contract. The matter was fixed for hearing in the Civil Case sessions on 13th -14th November 2023. On the same date, the Plaintiff's case was heard and closed in the presence of both the Plaintiff's and the defendant's counsel. Then the matter was set for hearing of the defendant's case in the next day i. e. on 14th November 2023. On that particular date, the Defendant did not appear hence the matter was fixed for judgment under Order IX, rule 8 of the Civil Procedure Code. And on 14th December, 2023 the Judgment was pronounced.

Now, in this application, the applicant is invoking order IX rule 9 of the CPC asking this court to set aside the judgment entered. But the counsel Mr. Msemwa argued that the court has no jurisdiction to entertain the matter since the judgment entered on 14th December 2023 came after the hearing of both parties in the plaintiff's case. Hence, it was not an ex parte decision. He added that the Applicant cross-examined the Respondent's witnesses in the main suit. Therefore, he prayed the court to dismiss the application with cost.

Per contra, Mr. Marwa counsel for the Applicant submitted that, no definition of *exparte* judgment in the CPC. However, the counsel referred to the definition in Black's Law Dictionary to mean the one which is made out of the benefit of one side/one-sided. He then submitted that since the applicant did not enter the defence, the decision of this honorable court is one-sided and therefore, *exparte*. According to the counsel, for one to understand his position, the intention of the legislature when drafting the relevant order be looked at. He cited the case of **James Burchad Rugemalila versus Republic**, Civil Appeal No. 391 of 2017.

Another stance taken by the counsel is that this court should apply the principle of overriding objectives as provided under Section 3A of the CPC.

To make his submissions more relevant, the counsel cited cases of **Tanzania Breweries Limited versus Eden Tanzania Limited, Commercial Case No. 2 of 2019**, and **Nas Hauliers Limited versus Yamuna Petroleum Ltd Misc. Commercial Appeal No. 165 of 2021** where all these two cases show that the defendant may cross-examine the plaintiffs' witnesses and failure for the defendant to bring witnesses still renders the judgment to be *exparte* judgment. He cited

the case of **Yara Tanzania Limited versus DB Shapriya & Co. Limited Civil Appeal No. 245 of 2018.**

In the end, the counsel prayed to the court to allow the application. In his rejoinder, Mr. Msemwa maintained his earlier position and submitted that the cited cases and the cases subject to the application are distinguishable.

I have considered the submissions of both learned counsels and the relevant authorities. To appreciate the aforesaid contentions of the counsels for the parties, I wish to quote the provision of Order IX rule 8 of CPC which the impugned judgment was entered on 14th December 2023. Order IX rule 8 thus reads;

“Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time of pronouncing judgment, make such order as it thinks fit concerning the defendants who do not appear:”

Given the above provision of the law, this court pronounced judgment after the applicant had failed to appear and enter the defence. In other words, the defendant did not bring the evidence or witnesses to defend

the case even though the applicant cross-examined the witnesses in the Plaintiff's case.

Without much ado, I entirely agree with the counsel for the applicant that the decision entered by this court after the applicant has failed to enter the defense is an *ex parte* judgment, notwithstanding that the judgment is not named *ex parte* judgment. Under Order 1X rule 8 which the court relied on to enter the judgment only required the court to pronounce judgment. Whether the judgment is *ex parte* or not would decide whether it was decided on one-sided or not. In the decision of this court in the case of **Nas Hauliers Limited versus Yamuna Petroleum Ltd**, Misc. Commercial Appl No. 165 of 2021, and I quote ;

Whenever a judgment is rendered when the defendant fails to defend the suit either because of his absence or failure to file a witness statement or s per the case at hand because the sole witness statement filed was struck out by the court's order, **that judgment is known to be an *ex parte* judgment and the decree drawn based on that judgment is known as *ex parte* decree.**

Given the above, I hasten to state that the decision delivered on 14th December 2023 in Civil case No. 217 of 2023 was an ex parte judgment since the defendant did not bring evidence due to his absence and it was heard under Order IX rule 8.

As rightly approached this court, the counsel for the applicant is correct in saying that the remedy that the defendant has if the judgment is delivered without him entering the defense is provided for under Order IX rule 9, which provides;

In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

As a result, therefore, the preliminary objection lacks merits, and is therefore dismissed. This court has the jurisdiction to entertain the application. No order to costs.

Order accordingly.



H.R. MWANGA

JUDGE

27/02/2024