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

COMMERCIAL APPEAL NO.2 OF 2012

ADVANS TANZANIA LTD.....1ST APPELLANT

MAJEMBE AUCTION MART LTD.....2ND APPELLANT

VERSUS

HANCE MALI.....RESPONDENT

(Appeal from the Judgment and Decree of the Resident Magistrate's Court of Dar es Salaam at Kinondoni (Hon. Wambura-RM) dated 12th April 2012 in the Civil Case No.4 of 2012)

Date of last Order: 13/07/2012
Date of final submissions: 25/07/2012
Date of Judgment: 20/11/2012

JUDGMENT

MAKARAMBA, J.:

This is a decision on an appeal, the Appellants lodged in this Court on the 5th day of June, 2012 against the *ex parte Judgment* of the Kinondoni District Court in Civil Case No.4 of 2012 (Hon. Wambura-RM).

The Respondent/Plaintiff had filed a suit at the Kinondoni District Court. The Appellants/Defendants failed to file their Written Statement Defence as required by the law. The presiding Resident Magistrate ordered the matter

to proceed *ex parte*. On the date the matter was set for *ex parte* proof the Appellants/Defendants also appeared in Court, and sought leave to cross-examine the Respondent/Plaintiff. The presiding Resident Magistrate refused to grant the prayer and on the 12th day of April 2012 judgment exparte was entered against the Appellants/Defendants in favour of the Respondent/Plaintiff, that among other things the Defendants/Appellants jointly and severally to pay the Plaintiff/Respondent Tsh.20,000,000/= being the value of confiscated merchandise. The Appellants/Defendants were aggrieved by that decision and appealed to this Court appeal against the decision.

The Appellants/Defendants have set the following grounds in their Memorandum of Appeal:-

1. *That the Hon. Resident Magistrate erred in law and fact when she allowed the Respondent to proceed ex parte without giving the 1st Appellant's Principal Officer chance to cross examine the Respondent.*

2. *That the Hon. Resident Magistrate erred in law and fact in awarding the specific damages to the Respondent whose particulars had not been pleaded in the plaint and the said damages were not proved without proof of the same.*

The Appellants are seeking for the following reliefs, that:-

a) The Appeal be allowed;

b) The decision of the lower court be set aside;

c) *The Lower Court be ordered to hear the case inter-parties;*

d) *The Respondent be condemned with costs of this appeal; and*

e) *Any other relief(s) as that this Honourable Court may deem fit to grant*

The appeal, by consent, was disposed of by way of written submissions by **Mr. MARWA**, learned Counsel for the 1st and 2nd Appellants and **Mr. SALEHE NJAA,** learned Counsel for the Respondent.

When the matter came before me for mention on the 13th day of June, 2012, I noted that the first ground of appeal as set out in the Memorandum of Appeal, was seeking to challenge the *ex parte Judgment* which was entered by the lower Court emanating from failure by the Defendants to file a Written Statement of Defence as per law required. I therefore beseeched the indulgence of the learned Counsel for the parties when submitting on the grounds of appeal to also address this Court on *whether an ex parte judgment can be a subject of an appeal or is amenable only to be set aside.*

Addressing the Court on the preliminary point as raised by this Court, Mr. Marwa, learned Counsel for the Appellants argues that the provisions of Section 70(1) and (2) of the Civil Procedure Code, Cap.33 R.E. 2002 state inter alia that an *ex parte* decree passed by the District Court in the exercise of its original jurisdiction is appealable as of right to the High Court. In support of his argument, Mr. Marwa referred this Court to the case of **JAFFARI SANYA JUSSA & ISMAIL SANYA JUSSA AND SALEHE SADIQ OSMAN, Civil Appeal No. 54 of 1997 (unreported),**

where the Court of Appeal of Tanzania sitting at Zanzibar held at page 7 as follows:

> *"This rule of setting aside an ex parte decree will only benefit a Defendant. But there are two possible scenarios in an ex parte decree: One, a defendant might not want to set aside an ex parte decree but might wish to contest the findings or the award. Two, a plaintiff notwithstanding that the decree is in his favour, might nevertheless wish to challenge the findings or the award.*

According to Mr. Marwa, the Appellants are appealing against the findings of the case by the Kinondoni District Court particularly on the right to cross-examine the witness, and on awarding specific damages without having been specifically pleaded and proven. And therefore, according to Mr. Marwa, an appeal against an *ex parte decree* is allowed by the law.

In his response, Mr. Salehe, learned Counsel for the Respondent, argues that, if the Appellants were dissatisfied with the *ex parte* decision of the trial court, they could have applied to set it aside, but not to appeal against it, which appeal is in fact against the legal procedures involved in reaching the ex parte decision. Mr. Salehe argues further that, Order IX Rule 13(i) of the Civil Procedure Code, Cap.33 R.E. 2002 clearly stipulates the need for a defendant dissatisfied with an *ex parte judgment* and *decree* to apply to set it aside within the prescribed time limit. Mr. Salehe submits further that, the phrase ***"...save where otherwise expressly provided in the body of this code"*** appearing in section 70(1) (2) of the Civil Procedure Code, if read together with Order IX Rule 13(1) of the Civil Procedure

Code, clearly shows that an *ex parte judgment* and *decree* should be set aside and not to be appealed from. Mr. Salehe submits further that, there is no any decided case either by the High Court of Tanzania or the Court of Appeal of Tanzania which can be taken as an authority to justify the issue of appealing against an *ex parte judgment* and *decree* originating from the District Court/Resident Magistrate Court.

Responding on the decision in **Civil Appeal No.54 of 1997 between JAFFARI SANYA JUSSA & ISMAIL SANYA JUSSA AND SALEHE SADIQ OSMAN** (unreported), which Mr. Marwa cited in his submissions (a copy was availed to this Court), Mr. Salehe argued that it seems that that decision has only 6 pages while in its reality it contains more than 6 pages. According to Mr. Salehe, the second paragraph of page 6 in that case shows that the issue of appealing against *ex parte judgment and decree* can only be had in cases originating from the High Court as a court of the first instance, and could be appealed to the Court of Appeal. Mr. Salehe argues further that, Order IX Rule 13(1) of the Civil Procedure Code, Cap.33 R.E. 2002 emphasizes that, the High Court and Subordinate Court when they have decided a case *ex parte* the relief available to a dissatisfied party is to apply to the Court to set it aside.

In his rejoinder, Mr. Marwa submits that, Order IX Rule 13 of the Civil Procedure Code does not apply to *ex parte judgment* entered for failure to file a written statement of defence rather it applies to a situation where a written statement of defence is filed but the defendant does not appear at the hearing of the suit. It is noteworthy that even where a Defendant who

has filed a defence but fails to appear at the hearing and the *ex parte judgment* has been entered for his failure to appear, can still challenge the merits of the judgment by way of appeal, Mr. Marwa further insisted. Mr. Marwa added that, the only remedy available to a defendant who has failed to file a defence is to apply for extension of time to file the same within 21 days, after the expiry of the statutory period for filing a defence. This remedy must be exercised before the Court proceeds under Order VIII Rule 14 of the Civil Procedure Code Mr. Marwa reiterated. One cannot challenge the merits of an *ex parte judgment* in an application to set it aside, since the trial Court would already have been *functus officio* and therefore it cannot reopen its judgment so as to alter it, Mr. Marwa surmised and reasoned.

As a matter of general principle, an appeal may lie from an original decree passed *ex parte*. This is in terms of section 70(2) of the Civil Procedure Code, which stipulates thus:

> *"70.-(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction.*
>
> *(2) An appeal may lie from an original decree passed ex parte."*

The substance of the provisions of section 70(2) of the Civil Procedure Code on appeal lying from original decree passed exparte finds emphasis in the book by B.D. Chipeta, ***"Civil Procedure in Tanzania: A Student's Manual"*** at page 273 that:

"It should be noted that an appeal may lie from an original decree passed after a full trial and ***also from an original decree passed ex parte.***" (emphasis supplied).

In the renowed treatise on civil procedure by Mulla, **"The Code of Civil Procedure," 16th Ed.** it is clearly stated at page 1055 that:

"...An appellant in an appeal against ex parte decree can question the propriety of refusal to adjourn and proceeding with the suit ex parte since the corrective jurisdiction of the power, of an appellate court includes consideration of procedural errors. Where no application under O9, r 13 (which is pari material to Order IX Rule 13 of the Civil Procedure Code of the Tanzanian laws) was moved for setting aside ex parte decree in an appeal against such decree under s 96(2), ***an error, defect or irregularity which has affected the decision of the case, can be challenged. Such an appeal cannot be converted into proceedings for setting aside the ex parte decree.*** (emphasis supplied)

I am at one with the submissions of Mr. Salehe that an *ex parte* judgment or decree under Order IX Rule 13 of the Civil Procedure Code is not appealable but may be set aside by the court which passed the decree upon application by the defendant. Order IX Rule 13 of the Civil Procedure Code stipulates very clearly that:

"13.-(1) ***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 the summons was not duly served or 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:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also." (emphasis supplied)

The content of Order IX Rule 13 has been judicially interpreted by the Court of Appeal of Tanzania in **Civil Appeal No. 129 of 2002 between PAUL A. KWEKA AND HILLARY P. KWEKA vs. NGORIKA BUS SERVICES AND TRANSPORT COMPANY LTD** (CAT) (Arusha) (Lubuva, Rutakangwa, and Kimaro, JJJ.A. (unreported) at page 11 thus:

"It is our view that an order under Order IX, Rule 13 of the Civil Procedure Code is not appealable, as is the case in India. The reasons which led the legislature to bar an appeal against the order of the District Court and/or Resident magistrates' Courts setting aside ex parte decrees should be applied indiscriminately to bar such appeals from orders issued by the High Court in identical situations."

In that decision the Court held at page 13 as follows:

"It is provided in Order XL, Rule 1 (d) that an appeal shall lie only from an order under rule 13 of Order IX ***rejecting an application for an order to set aside a decree or judgment passed ex parte*** *(in a case open to appeal)." (emphasis added).*

The Courts also stated further at page 13 of that;

"....an order under Order 9, rule 13 setting aside an ex parte decree is not an order that affects the merits of the case, such an order merely ensures a hearing upon the merits."

It is worth noting however, and as Mr. Marwa, correctlky submitted that Order IX Rule 13 of the Civil Procedure Code, Cap.33 R.E. 2002 is not applicable in this case. In this apperal the Appellants are not challenging procedural issues on how the Resident Magistrate reached the decision to order the matter to proceed by way of *ex parte* proof. Rather, in this appeal the Appellants are challenging the decision of the trial court on its merits. I am alive to the decision of this Court in **EXIM BANK (T) LTD VERSUS WALTER BUXTON CHIPETA, Commercial Appeal No.4 of 2009**, where following failure by the Defendant to present Written Statement of Defence, the Ilala District Court entered an *ex parte* judgment and decree against the Defendant. The Defendant successfully appealed in this Court against the decision of Ilala District Court on its merits. A similar position had eralier presented itself before Oriyo J. in the case of **NIKO INSURANCE (T) LTD VERSUS L-LINE CORPORATION, Commercial Appeal No.1 of 2008** where the Appellant was also challenging the exparte decision of the District Court of Kinondoni in Civil Case No.8 of 2008 on its merits in that the trial court erroneously decided the case *ex parte* without having jurisdiction to do so. Oriyo, J., decided the appeal on its merits and quashed the decision of the Kinondoni District

Court. I am also highly persuaded by the decision in the Indian case of **BIMLA DEVI VERSUS AGHORE CHANDRA MALLICK ARID & OTHERS [1974] AIR (Cal) 80** where it was held that:

> *"...when a suit has been decided ex parte the remedy by way of appeal from the ex parte decree as well as the remedy by way of an application under Order 9, Rule 13 are both open to the person against whom the decision was passed."*

In the decision of the Court of Appeal of Tanzania in **Civil Appeal No.54 of 1997 between JAFFARI SANYA JUSSA AND ISMAIL SANYA JUSSA AGAINST SALEHE SADIQ OSMAN**, which Mr. Marwa cited in his submissions and availed a copy to this Court, Ramadhani, J.A stated as follows:

> *"This rule of setting aside as exparte decree will only benefit a defendant. But there are two more possible scenarios in an exparte decree: One,* ***a defendant might not want to set aside an ex parte decree but might wish to contest the findings or the award****. Two, a plaintiff notwithstanding that the decree is in his favour, might nevertheless wish to challenge the finding of the award." (emphasis supplied).*

As I intimated to earlier in the present appeal, the Appellants are not appealing because they had good reason for not filing their written statement of defence or for their non-appearance, but they are appealing because they think that an *ex parte* decree was erroneous on its merits. In

my considered view and given the position of the law as it obtains in Tanzania and the case authorities cited in support, the doors are open to the Appellants to pursue their appeal in this Court. This essentailly disposes of the preliminary point I had posed before the learned Counsel for the parties and for which they put a lot of industry and skill to address this Court, namely, *whether an ex parte judgment can be a subject of an appeal or is amenable only to be set aside.*

I now revert to consider the substantive arguments of the learned Counsel for the parties on the substantive grounds of appeal. The first ground of appeal is that *the Hon. Resident Magistrate erred in law and fact when she allowed the Respondent to proceed ex parte without giving the 1st Appellant's Principal Officer chance to cross examine the Respondent.*

Arguing the first ground of appeal Mr. Marwa for the Appellants submitted that, on the date set for *ex parte* hearing, the Principal Officer of the 1st Appellant was present in Court but the Hon. Trial Magistrate did not give him the opportunity to cross examine the witness of the Respondent on his testimony in chief. Mr. Marwa is of the strong opinion that the right to cross examine is "as of right" and should have been given to the Principal Officer of the 1st bAppellant who was present in Court while the Respondent was proving his case *ex parte*. In support of his view, Mr. Marwa made reference to MULLA, **THE CODE OF CIVIL PROCEDURE 16th Ed 2** by Solil Paul and Anupam Srivastava at page 2007, which states that:

> *"Since the right to appear is a distinct right, a defendant, though he has failed to file his written statement, within the time allowed has*

nevertheless the right to appear at the hearing of the suit. If on the day for filing the written statement, the suit is not heard and postponed to another date, the defendant can appear at such next hearing and can cross-examine the plaintiff and his witness on facts deposed by them in the examination in-chief. He would not, however, be allowed to cross-examine on other facts which by his failure to file the written statement he has not pleaded."

Mr. Marwa submitted further that, failure to file a written statement of defence does not justify the denial of the opportunity to cross examine the Respondent when the Appellant is present during the *ex parte proof*.

In his response, Mr. Salehe for the Respondent submitted that, the provisions of Order VIII Rule (1)(2) of the Civil Procedure Code provide for legal procedures which should be followed in conducting civil cases. Those procedures having not been followed, the Hon. Trial Magistrate ordered the matter to proceed by way of *ex parte* proof in accordance with order VIII Rule 14(2)(b) of the Civil Procedure Code, Mr. Salehe reiterated. During an *ex parte* hearing, the representative of the Appellant personally came in late while the *ex parte* proof had already been done, Mr. Salehe pointed out. The Appellant was very much aware and had the chance to pray before the trial court for an extension of time to file the Written Statement of Defence, but unfortunately they have ignored the legal procedures and waited for the appeal which is contrary to the settled legal procedures, Mr. Salehe surmised.

In his rejoinder, Mr. Marwa submitted that, the right to cross examine should have been given to the representative of the 1st Appellant who was present in Court. Failure to file the Written Statement of Defence does not justify the denial of the opportunity of the Appellant to cross examine the Respondent, when the Appellant was present during *ex-parte proof*. The Appellants were not given the opportunity to cross examine the Plaintiff and that led to the denial of justice, Mr. Marwa surnised.

The gist of the court fixing a case for ex parte hearing could not have been captured so well than in the persuasive American case in **BRAMPY vs. PERIS, D.C. Colombo, 9,016**, where the Court stated thus:

> *"Where a Defendant takes time to answer but fails to answer on the appointed, day, the Court may fix the case for* ***ex parte hearing. At such hearing the defendant has, under the Civil Procedure Code, no right to cross-examine the Plaintiff or his witness****."* *(emphasis supplied).*

In a more persuasive authority in the Indian case of **S.B TRADING CO. LTD VERSUS OLYMPIA TRADING CORPORATION LTD AND OTHERS, AIR [1952] Cal 685** at page 1 and 2, the Learned Counsel for the Defendants argued that his clients' defence having been struck out, the suit is being heard *ex parte* against them, and therefore he is entitled to cross-examine and to address the Court, and he proposed to do so not as counsel but as agent of his clients. Mr. Roy for the Plaintiff has contended

that the *ex parte* hearing contemplated in this rule is the *ex parte* hearing provided under the Original Side Rules...The *ex parte* hearing contemplated in these rules takes place when the Defendant does not either enter appearance or fails to file a written statement. The Appellate Judge stated that:

> *"....it seems to me that* ***if I allow the Defendants in this case to cross-examine the Plaintiff's witness on their evidence as to the facts*** *establishing the claim to ejectment and to address the Court with regard to that claim,* ***I am really allowing the Defendants to defend the claim against ejectment."***

In that case, the Court held that:

> *"I have not been able to persuade myself to take the view that a suit can only be defended by filing a written statement or by "entering appearance" under the Rules...****A defendant in my judgment may ably and successfully defend a suit against him by cross-examination and arguments.*** *For this reason I am unable to hold that the defendants are in this case entitled to cross-examine the plaintiff's witness and address me on that part of this case which is concerned with their ejectment."*

The persuasive authority in **S.B TRADING CO. LTD VERSUS OLYMPIA TRADING CORPORATION LTD AND OTHERS, AIR [1952] Cal 685** which I have cited above seems to point to the direction that where the Defendant does not either enter appearance or fails to file a written statement and the matter is allowed to proceed ex parte against that Defendant, to allow that defendant to cross-examine the Plaintiff's witness on their evidence as to the facts establishing the claim would amount to allowing the Defendant to defend the claim against them. Furthermore, a suit can be defended not only by filing a written statement or by "entering appearance" but equally allowing a defendant to cross-examine and making arguments. This is the reason why in a case such as the present one where the defendants failure to file written statement of defence despite the presence of the representative of the 1st Appellant's/Defendant's in court would disentitle the defendant from cross-examine the plaintiff's witness.

On the submission of Mr. Marwa specifically his reference to the legal position obtaining in India as observed in MULLA, on **THE CODE OF CIVIL PROCEDURE,** with due respect that cannot be the position in Tanzania. The Defendants having failed to file their Written Statement of Defence, as per the law, they have no locus to appear in court to defend their case and for that matter to be entitled to cross-examie the Plaintiff's witness in his examination in chief.

It is for the above reasons that the first ground of appeal fails.

The second ground of appeal is that *the Hon. Resident Magistrate erred in law and fact in awarding the specific damages to the Respondent whose particulars had not been pleaded in the plaint and the said damages were not proved without proof of the same.*

Making his submissions on the second ground of appeal, Mr. Marwa for the Appellants argued that, it was erroneous for the learned Trial Magistrate to award special damages while it had neither been specifically pleaded nor proven by the Plaintiff. Mr. Marwa submitted further that it is a well established principle that specific damages must be particularized in pleadings and proved as it was held in the case of **BAMPRASS STAR SERVICE STATION LTD VERSUS MRS FATUMA (2000) T.L.R. 390** that:

> *"It is trite law that special damages being "exceptional in their character" and in which may consist of "off-pocket and loss of earnings incurred down to the date of trial" must not only be claimed specifically but also "strictly proved."*

Mr. Marwa also referred this Court to the case of **TANZANIA SARUJI CORPORATION VERSUS AFRICAN MARBLE COMPANY LTD (2004) TLR 155**, where the Court of Appeal of Tanzania held that:

> *"When the precise amount of a particular item has become clear before that trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this loss must be pleaded as special damage."*

Mr. Marwa submitted further that, the leraned Trial Magistrate stated at page 3 of the typed judgement that:

> *"Since the list of confiscated merchandise is not brought to this Court, it is therefore not known the exact value of the same."*

According to Mr. Marwa, Court having stated that it was not aware of how much the confiscated merchandise was valued, the Plaintiff was erroneously awarded Tshs.20,000,000/= as the value of the confiscated merchandise.

In his response, Mr. Salehe submitted that, during the *ex parte* hearing, the Respondent orally and comprehensively proved the damages suffered and that the Appellant is still in the possession of the confiscated goods. Therefore the Respondent has suffered damages. Mr. Salehe added that, the decision of the trial court is extremely correct in accordance with Order VII Rule 7 of the Civil Procedure Code. The Appellant is employing delaying tactics at the expense of the Respondent and therefore this Court should not be turned into a playing ground where people are allowed to sit on lawful Court orders at the expense of what is seen to be just, Mr. Salehe insisted.

In rejoinder, Mr. Marwa submitted that, Mr. Salehe has failed to distinguish between general damages and special damages, as among of reliefs which can be sought under Order VII Rule 7 of the Civil Procedure Code. Mr. Marwa reiterated his submissions in chief that it is trite law that special damages or specific damages must be stated/pleaded and proved

specifically. In the present suit the Respondent didn't specifically prove his special damages and further that special damages cannot be estimated as the learned Trial Magistrate did, Mr. Marwa further submitted.

I am at one with the submissions by Mr. Marwa that it is trite law that special damages must be specifically pleaded and proved. This legal position has been stated time and again in a host of cases; **ZUBERI AUGUSTINO VERSUS ANICET MUGABE [1992] TLR 137** at page 139; **STANBIC BANK TANZANIA LTD VERSUS ABERCROMBIE & KENT (T) LTD Civil Appeal No.21 of 2001** (unreported) at page 7 & 8; and the case of **THE ATTORNEY GENERAL VERSUS N.I.N. MUNUO NG'UNI, Civil Appeal No.45 of 1998** (unreported) at page 11.

The decision of the learned Trial Magistrate on the specific damages, as correctly submitted by Mr. Marwa, does not show if the Plaintiff strictly proved the damages as required under the law. As rightly pointed out by Mr. Marwa during his submissions and as the record on appeal would indicate, the learned Trial Magistrate seems to suggest at page 3 of the *ex parte* judgment that since the list of the confiscated merchandise was not brought to the Court, its exact value was therefore not know. This being the case then on what basis the learned trial magistrate arrived at the decision to award specific damages is not know. At best it was merely an estimate, which in my view is contrary to the established principles of determining the award of specific damages. Contrarry to general damages which need not be specifically pleaded and proven, specific damages have to be strictly proved.

It is for the above reasons that the second ground of appeal succeeds.

In their Memorandum of Appeal, the Appellants have prayed, among other prayers, that the Appeal be allowed; the decision of the Lower Court be set aside; and that the Lower Court be ordered to hear the case inter-parties. Much as this Court has determined that the appeal has partly succeeded, it can only quash and set aside the *ex parte* judgment of the Lower Court but cannot make an order for the case to be heard interpartes by the lower Court. In this appeal, the Defendants have not challenged the order of the learned Trial Magistrate as to the matter to proceed by *ex parte* proof as against the Defendants/Appellants and the Appellants have not accounted for sufficient reasons as to why they failed to present to Trial Court their Written Statement of Defence as required by law.

In the whole and for the reasons explained above the appeal partly fails and partly succeeds to the extent as shown above. The decision of the Lower Court is hereby quashed and set aside. The Appellants shall have their costs in this appeal. It is accordingly ordered.

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R.V. MAKARAMBA

JUDGE

20/11/2012

Judgment delivered this 20th day of November, 2012 in the presence of:

For the Appellants: M/S Jacquiline Stewart, Advocate

For the Respondent: M/S Jacqueline Stewart for E. Marwa, Advocate.

R.V. MAKARAMBA

JUDGE

20/11/2012

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