IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 171 OF 2015

(Arising from Miscellaneous Commercial Cause No. 8 2013)

FODEY SECURITY & ALARM SYSTEM (T) LTD ..... APPLICANT

VERSUS

OPEN SANIT COMPANY LIMITED ..... RESPONDENT

13th October& 12th November, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for setting aside the *exparte* judgment delivered by this Court (Hon. Nyangarika J.) on 20.11.2013. The application has been made under Order IX rule 13 (1) & (2) and section 95 of the Civil Procedure Code, Cap. 33 the Revised Edition, 2002 (henceforth "the CPC") and pursuant to an order of this court dated 29.06.2015. It was taken at the instance of DIRM attorneys and supported by an affidavit sworn by Ayan Ahmed. Through this application the application seeks to have the *exparte* judgment entered against it set aside.

I note from the case file record that the judgment stem from an *exparte* proof which was ordered by this court following unreasoned absence of the

applicant; then defendant. The statements in the supporting affidavit of the said Ayan Mohamed are to the effect that non-appearance was actuated by the belief that the case was no longer in court. This, as per his statements, was due to an agreement to settle the claim which was allegedly signed between them at the Ministry of Home Affairs on 28.01.2013. According to his statements the agreement was to the effect that a total of 32 million shillings should be paid by the applicant to the respondent in consideration whereof the latter would drop the said Commercial Case No. 8 of 2013; from which this application stems. To their surprise, continues the deponent, the applicant was served with a notice of execution after the case was conducted *exparte* behind applicant's back and therefore without his knowledge. It also states that the applicant stands to suffer irreparably if the application is not granted.

On the other hand Mr. Gabriel Maros, an advocate of this court and courts subordinate thereto except the Primary Court, through a counter-affidavit, vehemently opposes the application. He depones in effect that the said agreement was entered at the Ministry of Home Affairs after institution of the suit but it never had blessings of this court. It is also further to the effect that the applicant was aware of the existence and continuation of the case even after the said agreement was executed because, the applicant had filed its WSD and attended mediation. He finally surmised that the applicant had all along been notified of every stage but decided to disobey the orders of this court after mediation and therefore there was no misleading of any kind.

Mr. Dismas Raphael and Mr. Gabriel Maros, learned counsel, appeared to argue the application on 13:10.2105 for and against the application

respectively. They both had earlier filed their skeleton written arguments pursuant to rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. To Mr. Raphael, learned counsel, the non-appearance on the date fixed for hearing was caused primarily by the said agreement to settle the claim. According to him, the parties having agreed to settle the claim by paying Tshs. 32M/= and the respondent having received the same, the applicant was mislead to believe that the case was withdrawn in terms of the agreement.

Another ground as submitted by the learned counsel for the applicant is that the respondent sought to execute the amount more and above that which was decreed by the Court. He then went on to cite the case of ***Said Salim Bakhressa*** [1996] TLR 339 regarding setting aside a judgment obtained through fraud and misrepresentation. He also stated that in line with ***Victor Sungura Toke Vs PSRC and another***, Civil Appeal No.134 of 2002 (unreported), the applicant in this case has sufficiently given the reason for setting aside the judgment that she was told by the respondent that the case had been withdrawn. He finally invited this court to set aside the *exparte* Judgment complained of.

Mr. Maros launched his onslaught by stating that in terms of Order 1X Rule 13 (1) of the CPC, the court is allowed to set aside its own decision where the applicant shows that he was not duly served or where other sufficient cause have been shown. Further submissions of the learned counsel are basically to the effect that the applicant was aware of the existence of the case as she had filed a written statement of defence and attended mediation proceedings which ultimately failed. It is also to the effect that the amount of Tshs.

75,430,120/= cannot be settled by Tshs. 32M/= and further that applicant's failure to appear was not caused by misrepresentation but due to her own negligence and disrespect to this court's orders.

He also submitted that the settlement relied on by the applicant was part of his defence which was filed on the 27.05.2014 and further that the amount declared was Tshs. 43,430,120/= plus 7% interest and costs of the suit which altogether amounts to Tshs. 100,170,023/=.

With regard to the ***Bakhressa*** and ***Sungura Toke*** cases, the learned counsel submitted that they are distinguishable for the reason that they dealt with fraud and misrepresentation and that in this case the applicant filed WSD, entered appearance and attended a first PTC and mediation, and disappeared after that. He finally prayed for dismissal of the application with Costs.

In a short rejoinder, Mr. Raphael submitted that the case was filed on 17.01.2013 and some days later, the said agreement was concluded in January, 2013 and endorsed on 04.02.2013. According to him, the agreement was clear that the respondent could advise its lawyers to withdrawal the case complained about. It was his further submission that advocates as officers of the court are supposed to tell the court the truth and only the truth so that it can arrive at a just decision. He asserted that had the advocate for the respondent told the court the truth on the agreement this case would not be in existence. Instead, surmised the learned counsel, the respondent took advantage of the situation with that mind to enriching themselves.

I have heard the contending views and arguments by the learned advocates for the parties regarding this application. The question coming to the fore and which constitutes the task of this court in this ruling is whether the reasons fronted by the applicant warrant setting aside the judgment entered *exparte* against it on 20.11.2013.

The law on setting aside a judgment which has been issued *exparte* for the reason of non-appearance of the defendant is now settled and is as stated by Mr. Maros, learned counsel that the applicant must show that she was not duly served or that there are other sufficient grounds which prevented it from non-appearance. Whereas the former condition can be discharged factually by proving that there was no summons issued to that effect to the applicant, the latter can only be discharged according to the circumstances. Thus, there is no hard and fast rule to determining that which constitute sufficient cause but each case is determined on its own merits.

In the present case as between the two conditions it does not come out clearly from both the affidavit and submissions as to which actually prevented the applicant from entering appearance on the date the matter was fixed for hearing. It is not clearly indicated as to whether the applicant was not informed of the hearing date or was prevented by special circumstances or both. The general statements made however inclines more to the latter condition, that there are special circumstances which prevented the applicant from appearance.

I am, however, disappointed by the lack of clarity and specificity in those statements. All that comes out is that the applicant was not aware at all of the existence and continuation of Commercial Case No. 8 of 2013 after the conclusion of the settlement agreement at the Ministry of Home Affairs.

Having scanned the entire record of the case file, I find that general statement lacking in sincerity. It is neither factually backed, nor circumstantially substantiated. A list of some chronological events relevant to this case as stated by Mr. Maros, learned counsel, and corroborated by the court record will save as a live demonstration:

1. The case was instituted on the 17.01.2013;

2. The said agreement was entered on the 28.01.2013 and signed on the 4.02.2013;

3. A written statement of defence by the applicant/defendant was entered on 27.05.2013;

4. First PTC was held on 20.08.2013 in the presence of Mr. Stanley Luoga, learned counsel for the plaintiff and Mr. Hussein Mohamed, learned counsel for the defendant;

5. Mediation was attempted and marked failed on 20.09.2013 in the presence of the same Mr. Stanley Luoga and Mr. Hussein advocate for the plaintiff and defendant respectively;

6. A notice of final PTC was issued by this court on 26.09.2013 and received by the defendant on 30.09.2013 through its one A. Jackson. Only Stanley Luoga appeared on 02.10.2013 for PTC in absence of the defendant; and

7. Finally the case came up for hearing on 23.10.2013 in absence of the applicant/defendant and without any reason.

I have noted through the affidavit and counter-affidavit filed as well as the submissions by the learned counsel for the applicant and respondent that all of the above facts are not disputed. The applicant has sketchily avoided those facts which points to her being aware of what was transpiring in court of law up to the stage s of mediation and final PTC which ultimately led to *exparte* proof of the case.

To be more specific on this take, to the extent of mediation and its failure, the allegation that the applicant was made to believe that the case no longer existed after the conclusion of the settlement agreement is negated *in toto*. The applicant has, for her own reasons, circumvented the said facts both in his affidavit and his submissions. He strenuously relied on the agreement to prove that all what went on in court in respect of the case were done behind her back. This, as per court record, is an utter lie calculated to benefit the applicant out her own wrongs.

I harbour such a view because, despite its being present and filing the written statement of defence, and further partaking in mediation proceeding which failed after all techniques known had been applied by my Brother at the

bench (then mediator judge Makaramba, J.), I fail to comprehend as to how the case continued behind the applicant's back and thus without his knowledge.

I am of the settled mind that since allegations of fraud and misrepresentation carries criminality in themselves the standard of proof thereof in civil case is much higher than that required in proof of civil cases. Accordingly, the applicant was duty bound to prove above the preponderance of probabilities with concrete evidence as to how the respondent defrauded her and the court altogether to the extent of obtaining an *exparte* judgment.

To this end, a settlement agreement which was concluded and signed at the Ministry of Home Affairs after the institution of the case, and which was never considered during mediation or at least during the pre-trial conferences and which formed part of the defence cannot be relied on as a reason for non-appearance in court when the case was set down for hearing.

That apart the variance between the amounts decreed and that sought to be executed cannot be a ground sufficient to set aside the *exparte* judgment and decree. The learned counsel should be aware and is irrebutably presumed so to be, that a default judgment is set aside in terms of order IX Rule 13(1) not otherwise. Accordingly, such ground will not be considered as relevant in determining whether to grant such application or not. I find no scintilla of merit in that ground for seeking setting aside of the judgment.

The totality of the circumstances favours the arguments raised by the counsel for the respondent that non-appearance was caused by the applicant's negligence and disappearance and his disobedience to the court orders.

In fine therefore, the answer to the above posed question is answered in the negative. That is to say, I find nothing credible in the affidavit by the applicant which constitutes sufficient cause for non-appearance on the date of hearing. Indeed, the allegations that there was misrepresentation and fraud on the part of the respondent as well as the fact that from the date of signing the settlement at the Ministry of Home Affairs the applicant was made to believe that the case was withdrawn is a sheer lie calculated at abusing the court processes and the integrity of the bar alike. It is for these reasons I find the application seriously wanting in merit and proceed to dismiss the same with costs.

Order accordingly.

DATED at DAR ES SALAAM this 12th day of November, 2015.

J. C. M. MWAMBEGELE
JUDGE