IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPL. NO. 165 OF 2021

(Originating from Commercial Case No.55 of 2020 before Hon. Kisanya J)

NAS HAULIERS LIMITED.....APPLICANT

VERSUS

YAMUNA PETROLEUM LTD.....RESPONDENT

Date of the Last Order: 22/03/2022
Date of the Ruling: 29/04/2022

RULING

NANGELA, J.;

On the 08th day of October 2021, this Court, acting under Order 56 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended), struck out the Defendant's witness statement and, ordered the matter to proceed ex-parte and Judgment be delivered, based on the Plaintiff's witness adduced in Court.

On the 18th day of October 2021, Judgment was delivered in favour of the Plaintiff. Following the striking out of the Defendant's witness statement and the granting of Judgment based on the Plaintiff's witness statement, and, there being futile efforts by the learned advocate for the Defendant to restore the Defendant's witness statement, the Applicant herein filed this Application.

The Application has been brought by way of a chamber summons under rule 43 (2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended on 2019, Order IX Rule 9, Section 68 (e) and Section 95 of the Civil Procedure Code R.E 2019. The same was supported by an affidavit of one Titus Aaron, learned advocate for the Defendant who had the conduct of the matter before Kisanya, J.

In its chamber summons, the Applicant seeks for the following orders of this Court:

1. That the Honourable Court be pleased to set aside ex-parte judgment entered on 18th of October, 2021.
2. Costs to abide the event.
3. Any other relief(s) as the Court may deem fit and just to grant.

Upon service, the Respondent filed a counter affidavit deponed by Mr. John Mfangavo to challenge the application. When the matter came up for its hearing, the parties prayed that it be disposed of by way of written submissions. This Court issued a schedule of filing and the parties have duly complied with it, hence this ruling. Mr. Titus argued the application on behalf of the Applicant while the Respondent enjoyed the legal services of Mr. John Mfangavo, Learned Advocate.

Submitting in support of the prayers sought, Mr. Titus adopted the contents of the Applicant's affidavit

as forming part of his submission. He submitted on the issue of non appearance of the witness for cross examination, which was the basis for striking out the witness's statement on the 8th of October 2021, that, the intended witness failed to appear before the Court because he had travelled to Tanga and was supposed to arrive on 6th October 2021. He submitted that, the Applicant's advocate prayed for an adjournment which was denied by the trial judge.

He further stated that, non-appearance of the Applicant for the cross examination should not be let to do injustice to the applicant and, by striking out his witness statement, it all culminated into a total denial of the right to be heard in the defense of the Defendant's side of the case. He contended, therefore, that, such was an act which is contrary to law and even a breach of the Applicant's constitutional right.

Mr Titus insisted that, it is a legal principle that the Court has to hear and determine matters on the basis of the evidence availed to it from both parties before delivering judgment. He drew the attention of the Court to the book of MULLA, Vol.1 p. 748, where, referring to Order 9, rule 13 of the Indian Civil Procedure, he observed that, setting aside ex-parte decree is not an order that affects the merits of the case, such an order merely ensures the hearing upon the merit.

The Applicant has further drew the attention of the Court to the cases of **Bhai vs. Siara (Civil Revision No. 25 of 2014) [2016] TZCA 35** which cited the case of **Hadmor Productions vs. Hamilton (1982) 1 All E.R 1042,** and also, cited the case of **Dishon John Mtaita vs. The DPP Criminal Appeal No. 132 of 2004** and **Abbas Sherally & another vs. Abdul S. H. M Fazalbay,**

Civil application No. 33 of 2002 (unreported), all of these being cases relied upon to put emphasis on the need to hear both parties, failure of which, the decision cannot stand.

In addition, the Applicant's learned counsel submitted that, the law requires, if the other party will suffer no damage, the case be heard by both parties on merit and justly. To support his contention, reliance was placed on what section 3A (1) of the Civil Procedure Code Cap 33 R.E 2019 (as amended by section 4 of the Written Laws (Miscellaneous Amendments) No.3 Act, 2018) , provides.

To end his submissions, he insisted that, the right to be heard is, not only a principle of common law (natural justice), but also, a fundamental constitutional right enshrined under Article 13 (6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time). As such, he

urged this Court to set aside the default judgment, and allow the application with costs.

For his part, Mr. Mfangavo was completely against the granting of the prayers sought in this application. Having adopted the contents of the Respondent's counter affidavit to form part of his submission, Mr. Mfangavo submitted that, the Applicant's advocate claim that his witness was sick and admitted during the material date when the Court struck out the witness statement of his, was an afterthought.

According to Mr. Mfangavo, such a fact was never raised before the trial court and, the outpatient's record brought as evidence in this Application was not true as it was not even signed by a specialist who attended the witness nor his title indicated to prove if that witness was truly treated or admitted at Tabata Dispensary.

Besides, it was the Respondent's counsel submission that, on the date when the matter was fixed for hearing by the trial judge, while the plaintiff's counsel (the Respondent herein) had appeared in Court prepared with his witness, the Defendant's advocate (Applicant) came without any witness and sought for an adjournment on the ground that, his witness had travelled to Tanga for burial ceremony while there was not any evidence to prove the same.

Mr. Mfangavo submitted to this Court that, the Court did grant the prayer and the case was set for hearing on another date. However, on the material date when the matter was set for its hearing, the same advocate prayed for yet another adjournment of which the Court declared the reasons for such adjournment were insufficient and, hence, the Court had to proceed by striking out the witness statement.

In his further submissions, the Respondent's counsel added that, an order made in an application to **set aside ex-parte Judgment** is indeed a remedy for an aggrieved party, but that remedy is not an automatic one. There must be sufficient grounds which will convince the Court to exercise its discretionary powers and set aside its decision. To support his submission he put reference to Rule 43 (2) of the *High Court (Commercial Division) Procedure Rules (as amended in 2019).*

Mr. Mfangavo cited, as well, the case of **Mbezi Fresh Market Ltd vs. Shaban J. Rajabu Labour** Revision No. 690 of 2019 (unreported). In this case it was emphasized that, there must be sufficient grounds for the Court to set aside an ex-parte award. Mr. Mfangavo contended, therefore, that, the Applicant's claims of being denied right to be heard was improper.

He contended, instead, that, it was the Applicant's own choice not to bring the witness to the Court on the appointed date, and, therefore, he waived his right to be heard. Besides, and, as regards the issue interest of justice, Mr. Mfangavo was of the view that, natural justice must always be exercised but subject to other laws and interest of justice on both parties and, not just a one-way traffic.

To support his position on that, he cited the case of **Techlong Packaging Machinery Limited and Hong Kong Hua Yun Industrial Limited vs. A-One Products and Bottlers Limited,** Misc Commercial Application No. 131 of 2019 (un reported). In view of that, he urged this Court to dismiss the application with costs.

In a brief rejoinder, Mr. Titus reiterated his submission in chief. He rejoined, stating that, the facts regarding the sickness of the Defendant's witness was

a true fact and has availed before this Court evidence regarding such a fact and even the Applicant made an application to restore the witness statement, but the application was denied by the trial Judge and the Court proceed to set a date for judgment, hence, making that initial application nugatory.

Mr. Titus rejoined further that, since the Applicant was not afforded the right to be heard, which fact is against the constitution, laws of the land and even natural justice, it is appropriate for the Applicant to be heard in order to allow the court to arrive at substantial justice to both parties. To support his view, reliance was placed on the case of **Mbeya-Rukwa Auto and Transport Ltd vs. Jestine Mwakyoma (2002) TLR 251.**

I have carefully gone through the rival submissions set out herein; and, I find that, the issue

which I am called upon to determine is whether the Applicant's application is meritorious.

Ordinarily, whenever a judgment is rendered when the Defendant fails to defend the suit, either by reason of his absence or failure to file witness statement or, as per the case is at hand, due to the fact that the sole witness's statement filed was struck out by the Court's order, that judgment is known to be an ex parte judgment and the decree drawn on the basis of that judgment is known as an ex parte decree.

In such a judgment, the Court has to apply its mind to the pleading, relief claimed there-under, the evidence and arrive at a conclusion. Such a judgment rendered ex parte and its decree, is, open to challenge by way of an appeal or could be set aside by the same Court. And, in case that judgment and decree become

final without there being any appeal, the decree is executable.

It is worth stating that, where the Court proceeds ex-parte an extra carefulness is required in such a case as the Court must not only consider the pleadings and evidence before arriving at a finding as to whether the plaintiff has made out a case for a decree, but must as well afford the Defendant an opportunity to cross-examine.

In the context of the matter at hand, all those precautions were taken on board and the learned counsel for the Defendant had the opportunity to cross-examine the Plaintiff's witnesses throughout the Plaintiff's case but only failed to prosecute the defence case following the striking out of the witness statement of the sole defendant's witness.

The effects of striking out a witness statement from the record of the Court were considered in the

case of **International Commercial Bank (T) Ltd vs. Yusuf Mulla and Shahidi Mulla,** Commercial Case No.108 of 2018 (unreported) (Ruling delivered on 12/03/2020). In that case this Court was of the view that:

> "a witness statement is evidence in chief because, what follows in Court after its filing, is cross-examination of the witness and re-examination, as per the Procedure Rules of this Court. If then a Witness statement is struck out, it means that, there is no witness called to counteract the Plaintiff's case. The written statement of defence will therefore be left without someone elaborating its averments by way of further proof... although, at the end of the day, the Court will consider

their Written Statement of Defence when it composes its final decision."

In the first place, it is worth noting that, the Applicant in this application, applied for this Court to set aside ex-parte Judgment which was delivered after the failure of her sole witness to appear in Court for cross-examination and, hence the reason for striking out the witness statement.

However, much as the Defendant's witness statement was struck out, the Defendant (Applicant)'s counsel had time to cross examination the Plaintiff's witness and the Defendant's statement of defence remained intact on record.

Secondly, what I gathered from the Applicant's affidavit and from his counsel's submission is that, on the day when his witness was to appear he had applied for an adjournment on the 04th of October

2021 on the ground that his witness was away in Tanga and was to return on the 6th of October 2021.

According to the Applicant, the Court proceeded to here the Plaintiff's case and scheduled the defence case to commence on the 08th of October 2021.It was also submitted that, when the witness returned he fell sick and hence on the 08th of October 2021 he failed to appear. However, this Court was told by Mr. Mfangavo that, the plea for adjournment on the 08th day of October 2021 was rejected and no evidence was adduced to show that the witness was really sick and admitted.

In view of all those facts and the circumstances pertaining to the matter as set out herein, I am in agreement with the submission of Mr. Mfangavo, the Respondent's advocate that, the applicant raised the fact which was never raised during the proceedings of the trial.

When looking on the record for the material date, the counsel prayed for an adjournment because he was not aware of the whereabouts of his sole witness. This is the fact although in his affidavit supporting the Application, the Applicants Counsel raised the issue of sickness and his admission at Tabata dispensary and, has even tried to attach with the outpatient record. However, since on the 8th of October 2021 there was no such prayer or evidence of the witness's sickness, I cannot at this stage accept such proof.

As it was stated in the case of **Techlong Packaging Machinery Limited and Hong Kong Hua Yun Industrial Limited** (supra), although interest of justice may have been pleaded by the Applicant as a reason why I should grant the application, the same has to be applied in two-ways traffic.

In my humble view, I find no cogent reasons as to why I should accept the Applicant's reasoning and submissions. To me, all such reasons are afterthoughts which cannot and should not be entertained.

It follows, therefore, that, this application must, and, I hereby proceed to dismiss it with costs for lack of merit.

It is so ordered.

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HON.DEO JOHN NANGELA

JUDGE

29/04/2022