IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 109 OF 2022

INTERNATIONAL COMMERCIAL BANK TANZANIA LIMITED…… PLAINTIFF

VERSUS

EURO DESIGN LIMITED……DEFENDANT

07/03/2023 & 28/04/2023

DEFAULT JUDGMENT

NANGELA, J.

This is a default judgment. It has risen from a suit filed in this Court by the Plaintiff on 23rd September 2022. In that suit, the Plaintiff prayed for Judgment and Decree against the Defendant as follows:

(a) An order compelling the Defendant to remit that sum of TZS 200,000,000/= after the agreement between the parties being declared void by this Honourable Court;

(b) That this Honourable Court to lift the corporate veil and held the Defendant Director's personally liable.

(c) Payment of interest on (a) above at commercial rate of 19% from the date of judgment up to the final and full payment;

(d) Interest of the decretal sum at the Court's rate per annum from the date of judgment till final and full payment

(e) General damages as shall be assessed by this Honourable Court.

(f) Costs of this suit: and

(g) Any other relief(s) that the Honourable Court may deem fit and just to grant.

I will briefly narrate the facts constituting this case. The Plaintiff claims from the Defendant TZS. 200,000,000 after a loan facility agreement entered on 19th May, 2012 by the parties herein was declared void by this Honourable Court. The said loan agreement was purportedly secured by a Mortgage on plot No. 33 Block C, Tittle No. 80752, Kunduchi Mtongani area, Kinondoni Municipality, Dar es salaam in the name of Richard Ruben Mtaita and was also purportedly secured by joint and several guarantees

of Richard Ruben Mtaita, Lulanga Stanley Mapunda and Tracy Richard Mtaita.

The Defendant defaulted in repayment of the loan. Although the Plaintiff strived to recover the loaned amount advanced to the Defendant, such efforts became futile and the Plaintiff was forced to file a suit against the Company and its Directors. The respective suit was styled as **"Commercial Case No. 143 of 2014"**. While still within its line hearing and determination, the parties reached an amicable settlement out of Court and a settlement deed was filed in Court.

The agreed terms of settlement were not honoured by the Defendant as she breached them hence forcing the Plaintiff to apply for execution. She also prayed for attachment and sale of the mortgaged property on Plot No. 33 Block C. While pursuing execution, the spouse of the late Richard Ruben Mtaita, the Director of the Defendant, initiated objection proceedings in **Miscellaneous Commercial Application No. 88 of 2020** wherein this Court was requested to investigate the legality of the Decree in respect of Commercial Case No. 143 of 2014 issued on 13th May 2015 and execution order dated 19th March 2020.

Upon scrutiny, this Court made a finding and held that, the loan agreement between the Plaintiff and Defendant was void because it was tainted with illegality as one of the alleged directors who signed for the Company was minor and incapacitated by law to enter into agreements. Besides, the documents which secured the loan, i.e., the mortgage deed and loan facility were a product of the fraudulent transaction and therefore the proceedings in Commercial case No. 143 of 2014 were found to be a nullity.

The Plaintiff averred that, since the credit facility contract was declared void, the parties are supposed to revert to their previous original position as the law requires that, no one should benefit from void contract. The Plaintiff has averred that, despite taking various steps to claim the above stated sum of money from the Defendant, it has been utterly futile and, hence, this suit.

On the 24th day of January 2023, Mr. Bahati Makamba, learned counsel for the Plaintiff appeared in Court and told this Court that, the Plaintiff has not been able to trace the Defendant's offices, and hence prayed for a substituted service of the summons. The prayer was granted and service by way of publication effected on Mwananchi newspaper dated 1st February 2023 and the Citizen

newspaper dated 1st February 2023. The copies of the respective newspapers were filed in Court.

Up to the 28th day of February 2021, no defense was filed in this Court. In view of that, the Plaintiff moved this Court, pursuant to Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012, GN. NO. 250 of 2012 as amended by GN. No. 107 of 2019 (the Rules), applying for a default judgment. This Court granted the payer and directed the Plaintiff to file Form No.1. The Plaintiff has complied by filing Form No.1 with its requisite supporting affidavit and annexures to prove the claims and this Court fixed a date for this judgment.

As I pointed out hereabove, the Form No.1 filed in this Court was accompanied by an affidavit of Mr. Vitalys Evarist Salimu, the Principal Officer of the Plaintiff, conversant with the facts of this case. I have looked at the affidavit regarding proof of the claim and the annexures *ICB-1, ICB-2, ICB-3, ICB-4, ICB-5, ICB-6,* and *ICB-7* attached to the affidavit. The issue which I am called upon to determine in this case is *whether the Plaintiff is entitled to the prayers and reliefs sought in form No.1 filed in this court.*

The filing of Form No1, seeking for a Default Judgment in favour of Plaintiff in a case where the Defendant has declined to

defend his case is a matter of right. Such particular right is provided for under Rule 22(1) of the High Court (Commercial Division) procedure Rules, 2012 (as amended, 2019). The said Rule 22 (1) provides as follows:

> (1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended accordance with sub rule (2) of rule 20, within the period of that extension, the court may, upon proof of service and on application by the plaintiff in form No. 1 set out in the schedule to these Rules accompanied by an affidavit in proof of claim, enter judgment in favour of the Plaintiff."

In this particular suit before me, the Plaintiff filed form No. 1 and affidavit as required by the above cited Rule 22 (1). In the case of **A-One products Machinery Ltd vs. Hong kong Hua Yun Industrial Ltd**, Commercial case No. 105 of 2017 (unreported), this Court, Magoiga, J., citing the earlier case of **Nitro Explosive (T) Ltd vs Tanzanite on Mining Ltd**, Commercial Case No. 118

of 2018, observed that, the grant of a Default judgment is made possible upon proof of the following:

(a) That, there was a proof of service to the defendant but who failed to file written statement of defence.

(b) That, the Plaintiff has made an application to the Court in the prescribed Form No.1 to the First schedule to the Rules.

(c) That, the said Form No. 1 is accompanied by an affidavit in proof of the claim.

The authorities I have cited herein above, further laid emphasis on the fact that, the affidavit filed "must be self-explanatory proving every claim in the plaint and exhibits must as well be authenticated and the ingredients must co-exist for judgment in favour of the plaint to be given". It is also a cardinal principle that the one who alleges must prove. What that means, therefore, that, even in a case where one seeks a default judgment as herein, the Plaintiff has to prove his case as provided under sec.110, 111 and 112 of the Tanzania Evidence Act, Cap 6 R.E 2002 (the Evidence Act).

As noted from the facts of this case, the suit is premised on a claim of monies advanced as a loan and which, for reasons of illegality which rendered the whole transaction a nullity, ought to be remitted back to the lender in full by the Defendant. Since it a legal principle that no one should be allowed to benefit from a void contract, there is a justification that the Defendant should be required to remit the money advanced to her as a loan, the transaction underlying to it having been declared void.

The amount which was supposed to have been remitted to the Plaintiff is TZS 200,000,000. It has been demonstrated, both as per the affidavit and the settlement deed annexed to it, that, the Defendant did indeed apply for and was granted a loan by the Plaintiff to the tune of TZS 200,000,00/= on 19th May 2012. The repayment period was for 12 months and to date the loan was never re-paid.

Having gone through Form No. 1, the affidavit as well as the plaint filed in this Court, and having examined the original documents of the annexures attached to the affidavit, I am fully satisfied that the plaintiff has met the conditions set out in the law and authorities I earlier cited.

In particular the plaintiff filed Form No. 1 and the supporting affidavit are all self-explanatory and the averments herein are fully supported by the annexures whose original copies were availed to the Court. All these, when read together, give a true sense of the claim and justify the granting of some of the prayers sought by the Plaintiff.

I do say some of the prayers because, one of the prayers sought is that of lifting the veil of incorporation of the hold the Directors of the Defendant liable. The principle regarding the lifting of the veil of incorporation is one enunciated over some centuries ago in the case of **Salomon v. Salomon & Co. Ltd**. (1897) A.C.22.

In that case, Salomon, a one-time successful and prosperous entrepreneur who owned a business of a leather merchant, converted the business into a limited company. Unfortunately, the company ran into financial difficulties and went into liquidation. While its assets were sufficient to discharge the debenture, nothing was left for the unsecured creditors.

When the matter landed before the English Court of Appeal, the Court held Salomon liable. However, upon appeal to the House of Lords, the Court of Appeal's decision was reversed and

the House of Lords held that, the company being a legal person its members including Salomon were not liable for its debts. As per Lord Macnaghten the House of Lords at page 49, *inter alia,* held:

> "The company is at law a different person altogether from the subscribers ...., and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape "or form, except to the extent and in the manner provided by the Act".

In this case, the first person from whom the Plaintiff is to pursue the refund claims is the borrower who is the Defendant company. Any attempts to lift or pierce the veil of incorporation will only be made possible if the circumstances that call for such are fully exhibited since, as per the celebrated case of **Solomon vs. Solomon & Co. Ltd** (supra) acts or omissions of the company

should only be attributed to the company and not its members. In view of that, I will decline the second prayer for the time being.

Further, I will also decline the third, fourth and the fifth prayer owing to the fact that, the agreement upon which the monies were advanced to the Defendant was found to be void *ab nitio*. Since each part has to be restored to the status qua ante, nothing like interests or damages should be claimed from the Defendant. Save for what have just stated hereabove, it follows, therefore, that, in terms of Rule 22 (I) of the High Court (Commercial Division) Procedure Rules, 2012 R.E 2019, a Default Judgment and Decree in favour of the Plaintiff should be entered as I hereby do and to the extent stated hereabove. In view of that, this Court settles for the following orders:

1. That the Defendant herein is ordered to remit to the plaintiff a sum of TZS 200,000,000/= being a refund of the loan illegally advanced to the Defendant by the Plaintiff.
2. That the Defendant is shall pay costs of this case.

Further Order:

That in terms of Rule 22 (2) (a) and (b) of the High Court (Commercial Division) Procedure Rules, 2012 as amended, 2019 the courts makes further orders that the decree emanating from this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this default judgment, publish a copy of it (decree) in at least two widely circulated newspapers in the country and after a period of twenty one (21) days from the date of expiry of the said ten (10) days has elapsed.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 28th DAY OF APRIL 2023

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DEO JOHN NANGELA
JUDGE

RIGHT OF APPEAL EXPLAINED