

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA**

(DC) CIVIL APPEAL NO. 03 OF 2022

(Arising from the District Court of Dodoma in Civil Case No. 14 of 2022)

**KIMWAGA MOTORS WORKS
COMPANY LTD..... PLAINTIFF**

VERSUS

**THE BOARD OF TRUSTEES OF
THE NATIONAL SOCIAL SECURITY FUND.....EFENDANT**

RULING

Last Order: 25th March 2024.

Date of Ruling: 19th April 2024.

MASABO, J:-

This ruling is in respect of a preliminary objection raised by the respondent challenging the appellant's appeal. The sole limb of the preliminary objection is that the appeal is bad in law for contravening the provision of Order XXXV Rule 8 of the Civil Procedure Code.

Hearing of the preliminary objection was done by way of written submissions as ordered by this court on 25th March 2023. Submissions by the respondent were drawn and filed by Ms. Lightness Mwasongwe, learned State Attorney whilst those of the appellant were drawn and filed by Mr. Moses Cyril Masami, learned counsel.

Before I go to the submissions by the parties, for purposes of appreciation of the facts leading to this appeal, it is apposite, I think, to briefly narrate

its background which goes as follows. On 2nd September 2022, the respondent instituted a summary suit against the appellant before the District Court of Dodoma in Civil Case No. 14/2022. His claims against the appellant was for payment of Tshs.69,613,330/= (Tshs. Sixty Nine Million Six Hundred Thirteen Thousand Three Hundred Thirty Only) being unremitted members' social insurance contribution plus accumulated penalties due and payable to the respondent by the appellant. She also claimed interest on a decretal sum from January 2018 to the date of judgment at an overall lending rate of 15% per annum; interest on judgment debt at the prescribed court rate of 7% from the date of delivery of judgment until the same is fully satisfied, costs of the suit and any other relief the trial court could have deemed fit to grant. Upon being served with a notice of summary suit, the appellant filed an application for leave to appear and defend the suit. Her application was registered as Misc. Civil Application No.67 of 2022 but it was later dismissed for want of prosecution on 30th June 2023.

Thereafter, the respondent on 13th July 2023 prayed for the summary judgment in terms of Order XXXV of the Civil Procedure Code and section 74 of the National Security Fund Act Cap. 50 R.E 2018 and on the same day, her prayer was granted and a judgment and decree was entered accordingly. Aggrieved by the summary judgment, the appellant filed the present appeal in this court based on two grounds. One, the trial court had no jurisdiction to entertain and adjudicate on the matter summarily as the Attorney General was not joined to the suit, and two, the respondent had no cause of action against the appellant. In objection to the appeal, the respondent raised the preliminary objection contending

that it is bad in law as it contravenes the provision of Order XXV, Rule 8 of the Procedure Code Cap. 33 R.E. 2019.

Back to the submissions of the parties, Ms. Mwasongwe submitting in support of the preliminary objection argued that the remedy available to a party aggrieved by a decision entered by the district court exercise of its powers over summary suit under Order XXXV Rule 3(1) (b) of the Civil Procedure Code, is to apply for setting the summary judgment and not to appeal to this court. The remedy, she argued, is provided for under Order XXXV Rule 8 of the Civil Procedure Code. In fortification of her submission, she cited the cases of **Integrated Property and 2 Others vs. The Company for Habitat and Housing in Africa**, Civil Appeal No. 107 of 2015 [2018] TZCA 349 TanzLII and the case of **Regional Manager Tanroads (Lindi) vs. DB Shapriya**, Civil Appeal No. 86 of 2010[2017] TZCA 233 TanzLII and **Yara Tanzania Limited vs. DB Shampriya and Company Limited**, Civil Appeal No. 245 of 2018 [2022] TZCA 293 TanzLII. Based on this, she submitted and prayed that the appeal be dismissed with costs for incompetence.

In reply, Mr. Msami subscribed to Ms. Mwasongwe's submission that once an ex parte, summary or default judgment is entered, an aggrieved party should not appeal or file an application for revision unless he attempts to set aside the ex parte judgment. However, he submitted that much as this is the position of law as it stands, the circumstances of the present appeal are peculiar and distinguishable as the case from which the present appeal emanated did not qualify to be filed as a summary suit and the appellant herein is not challenging the merit of the application but the jurisdiction of the trial court. Her contention is further that, she was not

a proper party as was not registered as a contributing employer for the respondent. The one registered was Kessy Ramadhani Kimwaga t/a K.Motors Works and not Kimwaga Motor Works Co. Ltd the appellant herein. Thus, it was wrong for summary judgment to be entered against her. Supporting his submission he cited the case of **Jomo Kenyatta Traders Limited and Five Others vs. National Bank of Commerce Limited**, Civil Appeal No. 18 of 2016 [2020] TZCA 212 TanzLII and the case of **Prime Catch (Export) Limited vs. Diamond Trust Bank Tanzania Limited**, Civil Appeal No. 273 of 2019 [2022] TZCA 613TanzLII. In conclusion, he prayed that the objection be overruled with costs.

In rejoinder, Ms. Mwasongwe reiterated her submission in chief and added that the preliminary objection raised is purely on point of law as it covers all principles narrated in the famous case of **Mukisa Biscuit** (1969) EA 696. It was submitted further that the case of **Jomo Kenyatta Traders Limited** (supra) cited by Mr. Masami is distinguishable from the case at hand as the issue in the said case was whether the suit qualified to be filed under summary procedure and not the remedy available to the party aggrieved by summary judgment as it is in the instant case.

I have carefully considered the submissions by the parties. The issue awaiting determination is whether the appeal is competent. For the respondent, it has been argued that it is incompetent as it contravenes Order XXV, Rule 8 of the Civil Procedure Code and whereas for the appellant, it has been argued that, much as a remedy against summary judgment is the provided for under rule 8, the appellant herein is not

precluded from appealing as he was not the registered contributing employer for the respondent hence, the respondent has no cause of action against him as she was wrongly sued instead of Kessy Ramadhani Kimwaga t/a K. Motors Works. I have thoroughly read the authorities cited by both sides. Order XXXV rule one on which the preliminary objection is based provides that, after a summary judgment has been entered, the court may, in exceptional circumstances and if necessary, stay or set aside the decree and if necessary and reasonable, give leave to the defendant to appear to and to defend the suit. Applying this provision in the case of **Integrated Property** (supra) the Court of Appeal stated that, a summary judgment is essentially an ex parte judgment in that it is entered without hearing the adverse party. The party who is aggrieved by a summary judgment must exhaust the alternative remedy before exercising his right to appeal or revision and if this is not done, the appeal or revision will be struck out. The Court specifically stated that:

“It is instructive to state further that, unlike in an ex-parte judgment entered in default of the defendant's appearance, **a defendant against whom a summary judgment has been entered has to show firstly, that there were exceptional circumstances which prevented him from appearing in court and secondly, that he has a good defence in the suit.** The learned authors of Sarkars, **The Code of Civil Procedure, 4th Ed.**, comments as follows at pages 2248 - 9 on rule 4 of 0.37 of the Indian Code of Civil Procedure, which is in pari materia with O. XXXV r. 8 of our *CPC*.

"Under Rule 4 the defendant is obliged to explain the special circumstances which prevented him from appearing in the Court and seek leave to defend the suit within time. In addition he has further to show that he has good, substantial and/or meritorious defence in the suit."

On the basis of the above stated reasons, it is our considered view that the appellants should have first applied to set aside the decree. As stated, they would have the opportunity of arguing, not only the points which - were raised in the 4th and 5th grounds, but also those raised in the 1st - 3rd grounds of appeal as intimated in their dismissed application. In case of dissatisfaction with the outcome, they could then appeal against that decision. "

Also in **Yara Tanzania Limited** (supra), it was held that:

To recap, it is now settled that when a party is aggrieved with an ex parte, summary or default judgment of the High Court, he must first exhaust the alternative remedies available in the High Court before coming to this Court on revision or appeal. If that is not done, the revision or appeal to the Court will be rendered misconceived and prone to be struck out.

From these explicit and instructive authorities, it is crystal clear that the remedy available to a party, such as the present, who is aggrieved by a summary judgment is to apply for setting aside of the summary judgment

and if he is aggrieved further, appeal to this court. He cannot prefer an appeal unless he has exhausted the said remedy.

Turning to the two cases cited by Mr. Masami, I have observed that, indeed, as he has correctly argued, the two appeals emanated from summary suits and were both entertained by the Court of Appeal on the reason that, the original suit did not qualify to be summary suits as the appellant were wrongly sued. While reading the two judgments, I observed that in holding that the appellants were not precluded from instituting the appeal as they were not parties to the mortgage, the Court invoked its powers under Section 5 of the Appellate Jurisdiction Act which in subsection 1(a) provides that:

5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a) against every decree, **including an ex parte** or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction [emphasis added].

With respect to the counsel, this Act and its respective provisions do not apply in this court. The law regulating civil appeals from district courts and courts of the resident magistrates is the Civil Procedure (see section 70 and order XXXIX of the Civil Procedure Code) and, in respect of summary suit, it is Order XXXV rule 8 which as stated above, explicitly vests the court with powers to set aside its summary judgment if it is satisfied that the circumstances that prevented the applicant from

entering appearance in court were exceptional and that he has a good defence in the suit. As per this provision and the authorities above, it is crystal clear that the present appeal has been prematurely instituted before the applicant exhausted the remedy available to him under rule 8. The point raised by Mr. Masami in persuading this court to hold in his favour, cannot be determined at this stage. He must first raise them before the trial court while exercising the right under rule 8 and in the event he does not succeed and he is still disgruntled, he can then come to this court.

In the foregoing, I agree with Ms. Mwasongwe that the appeal was prematurely filed and hence incompetent. The preliminary objection is therefore upheld and the appeal is consequently struck out with costs.

DATED and **DELIVERED** at **DODOMA** this 19th day of April 2024.



A handwritten signature in blue ink, appearing to be 'J. L. MASABO', written over a circular stamp.

J. L. MASABO
JUDGE