IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 446/16 OF 2020

EXIM BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

TRULITE INVESTMENT LTD ..... 1ST RESPONDENT
MKUU GENERAL TRADERS LTD ..... 2ND RESPONDENT
MILAN MAHENDRA PATEL ..... 3RD RESPONDENT
CHANDINI SAILESH SHAH ..... 4TH RESPONDENT

(Application for revision of the Ruling and Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Fikirini, J.)

dated the 2nd day of November, 2020
in
Misc. Commercial Application No. 112 of 2020
.....

RULING OF THE COURT

20th March & 4th April, 2023

KITUSI, J.A.:

These proceedings are for revision of the ruling and order of the High Court dated 2nd September, 2020 in Miscellaneous Commercial Application for Review No. 42 of 2020. The application has been brought by a notice of motion under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 (hereafter the AJA), and supported by an affidavit taken by

Edmund Aaron Mwasaga, the Principal Officer of the applicant, a financial institution.

The scope of the application is narrow but it needs one to know the background in order to appreciate that. It is briefly that in about 5th September 2006 and 14th February 2007, the applicant advanced to an entity known as *2000 Industries Limited (under liquidation)* credit facilities of Tshs 1,000,000,000 and USD 395,2000 respectively. The said *2000 Industries Limited (under liquidation)* executed credit facility agreements dated 20th September, 2006 and 18th February, 2007 respectively.

According to the applicant's plaint in Commercial Case No. 47 of 2019, these moneys were not paid and as of 31st March 2019 the total amounts had soared to Tshs. 16,938,919,376.61 and USD 2,098,774.55 respectively. The applicant alleged that the respondents were the guarantors of the loans so she preferred the said Commercial Case No. 47 of 2019 against them.

When normal service against the respondents for them to appear and defend the suit had proved futile, the applicant was, on request, granted leave to effect substituted service against them by publication. The respondents neither entered appearance nor filed any written

defences, whereupon the applicant successfully prayed to proceed under rule 22 (1) of the High Court (Commercial Division) Procedure Rules GN No. 250 of 2012.

The said rule provides:-

> *"22- (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 in accordance with sub rule (2) of rule 19, within the period of such extension, the Court shall upon proof of service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules enter judgment in favour of the plaintiff."*

In terms of the above rule, the applicant filed an affidavit of Edmund Aaron Mwasaga the Principal Officer of the applicant as earlier indicated, and sat back to wait for judgment.

However, in her judgment the learned trial judge dismissed the suit basically on the ground that the documents attached to the affidavit could not, in law, form a basis of a finding in favour of the plaintiff. The reasons for so holding were that the documents offended the provisions of section 66 of the Evidence Act, hereafter referred to as the Act, which requires only primary evidence to be admitted.

The learned judge went on to observe in addition, that the documents used by the applicant were mere copies, and that resort to them had not complied with sections 67 and 68 of the Act. Further that even if they had been originals, the trial court still doubted those documents, mainly bank statements, because they did not indicate the bank account numbers, names and address of the account holders nor the dates of printing. The learned judge suspected that with the current technological advancement, the possibility of the documents being fabricated and unauthentic could not be ruled out. Therefore, the learned judge concluded that, as the affidavit was not accompanied by certificates of authenticity as per sections 78 and 79 of the Act, they had no evidential value. She dismissed the suit with no order as to costs.

The applicant sought to have that judgment reviewed by the trial court arguing that sections 67 and 68 of the Act were wrongly applied in the case where no hearing in terms of Order XVIII of the Civil Procedure Code (the CPC) was conducted. Again, the learned judge ruled against the applicant. One of the reasons for the decision, according to the learned judge was that, the grounds that purported to support the application were more suitable for an appeal than review. Citing **Atilio**

v. Mbowe [1970] H.C.D. 3 the learned judge held that an error of law constitutes a ground of appeal, rather than a ground for a review.

Before us, Mr. Gabriel Simon Mnyele, learned advocate for the applicant prayed for the hearing to proceed in the absence of the respondents and provided proof that once again, service on the respondents was effected through publication. Publication was done in four newspapers although the Court order dated 26th August, 2022 granting that mode of service had directed publication in three newspapers. We allowed Mr. Mnyele to argue the application in the absence of the respondents.

The application raises three interrelated grounds of revision which are first that, the High Court erred in not granting the application for review, two that, the High Court misapplied the law of evidence and three that, the High Court erred in not entering judgment for the applicant who had complied with the law regarding proof in civil cases. Upon our consideration however, we are satisfied that the application turns on the question whether the learned High Court Judge correctly dismissed the application for review and if so what should be the remedy.

Mr. Mnyele's address was brief but he made his point. The learned counsel who had earlier filed written submissions argued that the Act does not cover affidavits therefore he faulted the learned judge for subjecting the supporting affidavit to the best evidence rule in terms of sections 78 and 79 of the Act. The learned counsel cited two decisions; **Life Insurance Corporation of India v. Panesar** [1967] E. A. 614; and **Bruno Wenselaus Nyalifa v. Permanent Secretary, Ministry of Home Affairs & Another**, Civil Appeal No. 82 of 2017 (unreported), to support his argument.

Mr. Mnyele prayed that this application be granted. Counsel was however, a bit undecided as to what reliefs he really wanted from the Court. While in the notice of motion and written submissions he prayed for an order setting aside the ruling and order in Miscellaneous Commercial Application No. 42 of 2020, quashing the default judgment in Commercial Case No. 47 of 2019 and entering judgment in her favour, before us Mr. Mnyele prayed for a fresh hearing of the main suit that resulted in the default judgment.

We have read the provisions of the law and cases to which Mr. Mnyele drew our attention. As alluded to earlier, the main reason for the High Court not attaching evidential value to the affidavit, is violation

of sections 78 and 79 of the Act. The said provisions require production of original bankers books or their copies subject to meeting certain stipulated conditions. Mr. Mnyele submits that the Act does not apply to affidavits as per section 2 of the Act which provides: -

> " *2. Except as otherwise provided in any other law this Act shall apply to judicial proceedings in all courts, other than primary courts, in which evidence is or may be given* ***but shall not apply to affidavits presented to any court*** *or officer not to arbitration proceedings."*
> (Emphasis ours).

The above provision is unambiguous, in our view, that affidavits are excluded from the application of the Act, therefore the learned Judge could not have been right in applying it against the applicant's affidavit. With respect, Mr. Mnyele is correct in arguing that unless the documents were tendered in a trial, they could not be original as required under the Act. For apart from the express provision of section 2 of the Act on that point, in the case of **Bruno Wenceslaus Nyalifa** (supra), we had the following to say:-

> *"We find further that the documents which were annexed to the appellant's affidavit should not*

have been disregarded on the ground that they were not tendered in evidence. Thls ls for the obvious reason that affidavit is evidence and the annexture thereto is intended to substantiate the allegation made in the affidavit".

We hold as we did in the case cited above, that in determining Commercial Case No. 47 of 2019, the learned Judge should not have disregarded the affidavit for the reason that the annextures were copies or had not been tendered in evidence.

In the circumstances, the next question is whether the learned Judge was correct in dismissing Misc. Commercial Application No. 42 of 2020. We have already said that the judge took the view that the grounds raised by the applicant would better be raised in an appeal.

The application was pursuant to O.XLII Rule (1) (b) and 3 of the CPC which provides: -

"1- (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the

exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any ***other sufficient reason****, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order"*(emphasis ours).

One of the grounds raised by the applicant was an error on the face of the record predicated on a number of factors including inapplicability of the previsions of sections 67 and 68 of the Act on a matter that does not go to trial, as well as sections 78 and 79 of the Act in relation to affidavit. The learned judge relied on an earlier decision of the High Court in **A-One Products and Bottlers Limited v. Techlong Packaging Machinery Limited & Another,** Commercial Case No. 105 of 2017 (unreported) to insist her position that an affidavit of proof under rule 22 of the Rules, needs to be self-sufficient, therefore it was proper for her to subject it to scrutiny. She held an alternative view that if the applicant thought there existed an error on a point of law, that constituted a ground of appeal rather than a ground of review. Hence, she dismissed the application.

We wish to take a closer look at that reasoning. First of all, the learned judge did not pronounce herself on the provisions of section 2 of the Act and whether in view of that provision it was correct for her to disregard the affidavit, more so in a case which did not go for trial. Secondly, in the case of **A-One Products and Bottlers Limited** (supra) though a decision of the High Court which would not override the decisions of this Court cited by Mr. Mnyele, the court did not consider and address itself on the effect of section 2 of the Act. We are satisfied, with respect, that the conclusion of the learned judge did not stand on firm grounds and cannot be sustained.

The application for review sought to have the default judgment set aside on the grounds referred to above. In our view, the inclusion of affidavits in the applicability of the Act contrary to the clear provisions of section 2 of that Act, was a patent error that ought to have been considered to be *'a sufficient reason'* for reviewing the court's decision. We think this is partly because the parties were not invited to address the court on it, a point we will comment on, later.

Since it was an apparent error and there was no decision on whether or not affidavits are excluded, it was proper to raise it by way

of a review, therefore the dismissal of the application for review was erroneous.

Upon our further reflection, it dawns on us that the ruling and order in Commercial Case No. 47 of 2019 were adverse to the applicant, but the said applicant was not accorded the right of a hearing on the issue that ultimately led the learned Judge to the conclusion. This is the point we promised to discuss at a later stage.

We note that the learned judge raised the issue of the annextures being copies and being of no evidential value in the course of composing judgment and proceeded to determine it. Sadly, this approach had double disadvantages. First, it is against settled law which requires a person to be given an opportunity of being heard before adverse orders are made against him. See; **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (unreported) and **Mbeya – Rukwa Autoparts & Transport Limited v. Jesca George Makyoma** [2003] T.L.R 251**.** Secondly, by not hearing the parties, the learned judge denied herself information which might have assisted her to arrive at a different decision.

Aware that this is an old matter that need not be delayed further, we make the following orders to meet the ends of justice. We nullify the

default judgment for having been reached without according the applicant a hearing on the point that decided the matter adversely against her. We also quash the ruling and orders that dismissed the application for review for not appreciating that there was an error apparent on the face of the record in the default judgment. We order that on the material available, another default judgment be composed by another judge with jurisdiction.

This application is granted with costs.

DATED at **DAR ES SALAAM** this 3rd day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 4th day of April, 2023 in the presence of Mr. Gabriel Simon Mnyele, learned counsel for the applicant and in the absence of the Respondents is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL