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

## COMMERCIAL APPEAL NO. 1 OF 2020

*(Originating from Judgement and Decree of Resident Magistrate's Court of Dar es Salaam at Kivukoni/Kinondoni (Hon. Hudi, RM), Dated 2nd January 2020 in Civil Case No. 176 of 2019)*

**DANGOTE INDUSTRIES LTD TANZANIA .....APPELLANT**

**VERSUS**

**WARNERCOM (T) LIMITED .....RESPONDENT**

**RULING**

2nd April 2020 & 13th May 2020

**NANGELA, J.:**

This is a ruling arising from a preliminary objection on a point of law which was raised by the legal counsel for the Respondent, one Charles Shipande, Advocate. The objection raised by the Respondent was, that:

> "The Appellant has no locus to appeal against the *ex parte* judgement dated on the 2nd day of January 2020, as the *ex parte* Judgement is not appealable, consequently, the appeal is bad in law and incompetent before the Court."

By way of a brief background, the matter before the Court, from which the ruling arises, is an appeal against the decision of the Judgement and Decree of Resident Magistrate's Court of Dar Es Salaam at Kivukoni/Kinondoni (Hon. Hudi, RM), in a Civil Case No.176 of 2019, dated 2nd January 2020.

In that civil case, having been served with the plaint and summons to file a written statement of defence, the Appellant herein failed to do so within the time. The trial court made an order that, the matter should proceed *ex parte*. Prior to the *ex parte* hearing, the appellant raised a preliminary objection which was struck out on 11th November 2019. The suit proceeded *ex parte*, and, thus, an *ex parte* judgement was entered against the Appellant, who thereafter preferred to file an appeal in this Court.

When this appeal was called on for necessary orders before me on 2nd April 2020, the counsel for the Appellant, Mr. Thomas Sipemba, informed the Court that the Respondent had preferred and raised a ground of objection.

As a matter of prudence and practice, when a preliminary point of law is raised in an abjection to the filed matters before the Court, the objection needs to be determined first. As such, the learned counsel for the Respondent, Mr. Angros Ntahondi, requested that the parties be allowed to argue the preliminary objection by way of filing written submissions.

Since Mr. Sipemba was in agreement with that prayer, the Court acceded to the prayers made the following orders:

1. That, the preliminary objection be argued by way of written submissions.

2. That, the written submissions be file in the following order:
    (a) The Respondent to file its written submission on or before 9th April 2020.
    (b) The Appellant to file its reply to the Respondent's written submission on or before 16th April 2020.
    (c) Rejoinder submission if any be filed on or before 24th April 2020.
    (d) Ruling to be delivered on 13th May 2020.

On 6th April 2020, the Respondent dutifully filed its written submission in support of the preliminary objection. Earlier, the

Respondent had filed skeleton arguments in anticipation that the preliminary objection it had raised would be argued orally. In its three pages submission, the Respondent requested the Court to adopt its filed skeleton arguments as well.

Briefly, the gist of the Respondent's submission is that the appeal is untenable for the reason that it is an appeal against an *ex parte* judgement which, as a matter of law is not appealable. The learned counsel for the Respondent contented that, the only remedy available to the appellant was to seek for an order setting aside the *ex parte* judgment and decree and not appealing against it.

It was also argued that, since the *ex parte judgement* arose from the fact that the Appellant did not file a Written Statement of Defence before the trial Court, then the Appellant lacks *locus standi* in these subsequent proceedings.

To further buttress his averments, the Respondent's legal counsel called to aid and placed reliance on the cases of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd**

[1969] E.A 696 and **The Managing Director of NITA Corporation v Emmanuel Bishanga** [2005] TLR 376.

Relying on those cases, the learned counsel for the Respondent's view was that, the objection raised is fittingly within the requirements set out by law regarding a preliminary objection. He further submitted, that, as long as the *ex parte* judgement and decree were not vacated by the trial court, and, given that it was the appellant's own choice not to file a defence, despite being aware of and attending the trial Court's proceedings, the Appellant lacks *locus* to address this Court at this stage of an appeal. He prayed, therefore, that, the preliminary objection be upheld by this Court and the appeal be dismissed with Costs.

On 16th April 2020, the Appellant's Advocate, Mr. Sipemba, filed a five page reply to the written submissions by the Respondent. He strongly opposed the objection filed in this Court as lacking merit and requested this Court to dismiss the objection with costs.

He pegged his tent of arguments on the assertion that, under the provisions of the Civil Procedure Code, Cap. 33 [R.E. 2002], the

Appellant has two options to deal with an *ex parte* judgement and decree: one is to appeal against it, and, the second is to have it set aside by the court that issued it. He referred this Court to section 70 (2) of the Civil Procedure Code, Cap. 33 [R.E. 2002], arguing that it allows appeals against original decrees passed *ex parte.* In view of the above provision, he argued that, since the decree appealed against is original decree passed *ex parte*, appealing against it was proper in law.

As regards the second option which was open to the Appellant, Mr. Sipemba referred this Court to the provisions of Order IX rule 12 (1) of the Civil Procedure Code, (hereafter to be referred to as the "CPC") (as amended by *Civil Procedure Code (Amendment of the first Schedule) Rules, 2019).*

To strengthen his submissions, Mr. Sipemba argued that, in both options, i.e., the appeal option under section 70 (2) of the CPC and the option to apply for the setting aside of the *ex parte decree* under Order IX rue 12 (1) of the CPC, the operational word used is "**may**" which, in terms of the Interpretation of Laws Act, Cap.1 [R.E.2002] it means that the party is at liberty to choose from the

two. He referred this Court to the decision of the Court of Appeal in the case of **Jaffari Sanya & Another v Salehe Sadiq Osman**, Civ. App. No.54 of 1997 (CAT) (Zanzibar) (unreported). He argued that the decision sanctions the two options.

Reference was made and reliance was also placed on **Mulla, The Code of Civil Procedure**, 16th edn, Vol.2 in regards to Order IX rule 13 of the Indian Civil Procedure Code. Mr. Sipemba argued that according to **Mulla**, the right of appeal and the right of setting aside an *ex parte* decree are concurrent.

He argued that, the Appellant had opted for an appeal and so he is entitled since that was the only plausible option given that, the Appellant had no other opportunity to file his defence even if the ex-parte decree was to be set aside. He maintained that, the trial court would have still proceeded with an *ex parte* hearing because it would not have powers to extend time to file the written statement of defence, the 21 days having lapsed.

Mr. Sipemba distinguished the case relied upon by the Respondent's counsel, the case of **The Managing Director of NITA Corporation v Emmanuel Bishanga** [2005] TLR 378. He

argued that, the case had been held *per in curium* given that the Court did not take into account section 70 (2) of the CPC and further that, the same is not binding on this Court since it also did not take into account the case of **Jaffari Sanya & Another v Salehe Sadiq Osman**, Civ. App. No.54 of 1997 (CAT) (Zanzibar) (unreported).

Mr. Sipemba argued that, the latter case being a decision of the Court of Appeal, stated the right and correct position of the law. He referred this Court to the decision of **Tanzania Breweries Ltd v Anthony Nyingi**, Civil Appeal No.119 of 2014, CAT (Mwanza), (unreported), and the case of **Peter Keasi v Director Mawio Newspaper and Another**, Civil case No.145 of 2014 (HC).

Further, Mr. Sipemba argued that, if this Court is to be convinced and follow the decision in the case of **Managing Director of NITA Corporation v Emmanuel Bishanga (supra)**, then, it should, for purposes of all fairness, proceed to determine the matter, anyhow as it was done in that decision, because the main contention was on the issue of jurisdiction of the trial Court.

He further argued, that, in that case, the Court struck out the proceedings as they contained an error apparent on record. He argued that, the main matter in this Appeal being jurisdiction of the trial court, then, this Court should adopt a similar approach.

Finally, Mr. Sipemba prayed for the dismissal of the preliminary objection, with costs, noting that the mode of preferring an appeal instead of applying for the setting aside of the trial court's *ex parte* judgement was the right approach as the trial court would not have the ability to extend time to file defence.

In a brief rejoinder, Mr. Ntahondi, the counsel for the Respondent submitted that, the submissions made regarding section 70 (2) of the CPC were contextually wrong. He argued that, section 70 (1) of the CPC was wrongly interpreted as it firstly subjects the process of appeal against an original decree (including one passed *ex parte*) to any other express provisions in the Code.

It was Mr. Ntahondi argued that, what is provided for in the body of the Code is that Order IX rule 13 (1) caters for the setting aside of an *ex parte* decree. In his views, therefore, the correct interpretation of section 70 (1) of the CPC is that it should be

applied regard having been had to what Order 9 rule 13 (1) of the CPC provides. He argued, therefore, that, the appropriate approach was to apply for the setting aside of the *ex parte* decree first.

In an attempt to bolster his submissions, Mr. Ntahondi sought to aid and placed reliance on a recently issued decision of the Court of Appeal in the case of **Pangea Minerals Ltd v Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (delivered on 15th April 2020).

In conclusion, Mr. Ntahodi, learned counsel for the Respondent submitted that, the above decision, together with that of **Jaffari Sanya Jussa and Another v Salehe Sadiq Osman** (supra) referred to by the Appellant, supports the position held by the Respondent that the Appellant cannot appeal against the ex parte judgement/decree but should have first sought to have it set aside by the trial court. He, therefore, prayed that the objection raised be upheld and the appeal be dismissed with costs.

On my part, having considered the authorities cited and gone through the arguments of the counsel for the parties, the issue I am

called upon to address is whether the preliminary objection raised by the Respondent is meritorious.

To begin with I am grateful to both learned counsel for the submissions and authorities laid before me. Both learned counsels for the parties herein have referred to the CPC, and relied on section 70(1) and (2) and Order IX rule 13 (1) of the Code.

Section 70(1) and (2) of the CPC provides as follows:

> "70.-(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction.
>
> (2) An appeal may lie from an original decree passed ex-parte."

According to Order IX rule 13 (1) of the CPC, the law provides that:

> " 13.-(1) In any case in which a decree is passed *ex parte* against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him

> upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

As it may be noted in this case, the whole fracas started when the Appellant failed to file its written statement of defence and failed to apply for an extension of time within which to file its defence. That deliberate failure to abide by the requirements of the law entitled the trial court to proceed *ex parte* and issued an *ex parte* judgment in favour of the Respondent.

In his submissions, Mr. Sipemba has argued, that, the Appellant was not, and, could not have been able to file its defence because time had already time lapsed. However, and with respect, it is my understanding that, always the law has a room to accommodate a belated filing of a defence, provided that an application for that is made, and, there are sufficient reasons disclosed to convince the court to extend time.

The proviso to Order VIII Rule 1 (2) of the CPC reads as follows, regarding the possibility to extend time:

> "Provided that the court may, within 21 days of expiration of the prescribed period, grant an extension of time for

presentation of the written statement of defence on an application by the defendant.

Condoning a belated filing of a written statement of defence, therefore, is a possibility which the law recognizes in the interest of justice provided that good reasons are given. As it is well known an extension of time to do some acts outside the legally prescribed period, is always a matter of discretion of the Court upon sufficient reasons being disclosed.

Thus, even if time may have lapsed, as argued, still Courts will always prefer to construe procedural rules in a manner that will promote justice and prevents miscarriage thereof. It is indeed a well settled view, that, the rules of procedure are made to advance the cause of justice and not to defeat it. Consequently, to argue that the Appellant could not have sought for an extension of time to file its defence because of being time barred, is to tread on an erroneous path of legal reasoning and entertaining laxity on the party of the Appellant.

Secondly, the learned counsel for the Appellant has argued that the case of **Managing Director of NITA Corporation v**

**Emmanuel Bishanga (supra)** was held *per in curium* as it did not take into account the case of **Jaffari Sanya & Another v Salehe Sadiq Osman**, (supra). In my view, Mr. Sipemba is wrong on this.

The decision of the Court in the case of **Managing Director of NITA Corporation v Emmanuel Bishanga (supra),** cannot be faulted as being held *per in curium*. In that case, the Court held that an appeal does not lie from a judgement of the Court passed *ex parte* as the proper course for the appellant to take was to apply to the resident magistrate court under Order IX rule 13 (1) of the CPC for the setting aside the judgement.

In my view, that reasoning of the Court is in line with what the Court of Appeal, in the case of **Jaffari Sanya & Another v Salehe Sadiq Osman**, (supra) and **Pangea Minerals Ltd v Petrofuel (T) Limited and 2 Others** (supra), stated. Both cases laid emphasis on the principle that, the setting aside of an *ex parte* judgement should be the first and foremost option to be taken by an aggrieved party.

In particular, and after citing several other judgments of the Court of Appeal, Kerefu, JA had this to say, on page 11 of the

Court's decision, in the case of **Pangea Minerals Ltd v Petrofuel (T) Limited and 2 Others (supra):**

> "...it is settled that where a defendant against whom an *ex parte* judgement was passed, intends to set aside that judgement on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to file an application to that effect in the court which entered the judgement."

According to the earlier decision of the Court of Appeal in the case of **Jaffari Sanya & Another v Salehe Sadiq Osman**, (supra) (which also the latter decision of the Court of Appeal referred to), the Court of Appeal, (Ramadhani, JA (as he then was), while referring to Order XI rule 14 of the Civil Procedure Decree, which is equivalent of Order IX rule 13 of the CPC, was emphatic that:

> **"...First, Order XI rule 14 is the only provision specifically and singularly for setting aside an *ex parte* decree .... In that case, it is our considered opinion that, that provision should be invoked first and foremost ....** It is our settled view that one should only come to this Court as a last resort after exhausting all available remedies...." (**Emphasis added**).

In the above quoted reasoning of the Court of Appeal, in the two cases, one can gather from it the principle which was applied in the case of **Managing Director of NITA Corporation v Emmanuel Bishanga (supra)**, and which, as I said, cannot be faulted. As emphasized by the Court of Appeal, the first and foremost remedy to seek is to set it aside the *ex parte* judgement, by way of filing an application to the resident magistrate court that passed the decision.

The above approach is, in my view, in line with what section 70 (1) of the CPC provides. As quoted earlier, section 70 (1) of the CPC provides that:

> "70.-(1) **Save where otherwise expressly provided in the body of this Code** or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction. (Emphasis added.)

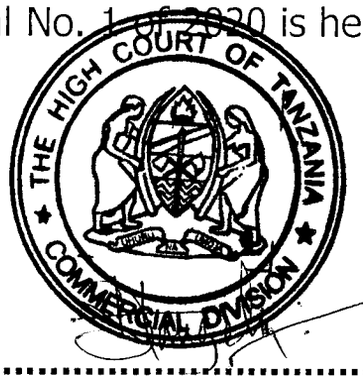
As the above provision indicates, where the CPC has made a provision directing otherwise, that other provision of the Code must be considered first. In our case, Order IX rule 13 (1) of the CPC has

expressly directed what should be done. One has to apply to the court by which the decree was passed for an order to set it aside.

And, as emphasized by the Court of Appeal in **Jaffar's case** (supra) and reiterated in **Pangea's case** (supra) that provision should be invoked first and foremost, meaning that one cannot in the first place rush to an appeal.

In view of the above reasoning and decisions of the Court of Appeal, I am in agreement with the learned counsel for the Respondent, that, the preliminary objection filed is meritorious and should be upheld. In the upshot, the objection is hereby upheld and the Commercial Appeal No. 1 of 2020 is hereby dismissed with costs to the Respondent.

**It is so Ordered.**

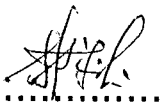



.....

**DEO JOHN NANGELA**
**JUDGE,**

**High Court of Tanzania (Commercial Division)**
**13 / 05 /2020**

Ruling delivered on this 13th day of May 2020, in the presence of the Advocate for the Appellant and the Advocate for the Respondent.



.....

**DEPUTY REGISTRAR,**
**High Court of Tanzania (Commercial Division)**
**13/ 05 /2020**