IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MWARIJA, J.A., And MKUYE, J.A.)

CIVIL APPEAL NO. 86 OF 2010

REGIONAL MANAGER – TANROADS, LINDI ..... APPELLANT

VERSUS

DB SHAPRIYA & COMPANY LTD ..... RESPONDENT

(Appeal from the decision and decree of the High Court of Tanzania at Dar es Salaam)

(Makaramba, J.)

Dated the 27th day of July, 2010

in

Miscellaneous Commercial Case No. 6 of 2010

JUDGMENT OF THE COURT

24th April & 5th June, 2017

MWARIJA, J.A.:

This appeal is against the order of the High Court, Commercial Division, dated 23/8/2010. The decision arose from the proceedings taken by the High Court after it had received an arbitral award submitted to it for filing under S.12 (2) of the Arbitration Act [Cap. 15 R.E. 2002] (the Act).

The facts leading to the appeal can be briefly stated as follows: On 28/9/2006 the appellant and the respondent entered into the contract in which the respondent was to undertake the works of rehabilitating the Tingi – Kipatimu road in Lindi Region (the Contract). During the execution of the Contract, a dispute arose concerning *inter alia,* the payable amount of the performed works as certified by the project consultant. The parties were also at issue on whether or not any of them had breached certain terms of the Contract.

As a consequence, the respondent/claimant referred the dispute to the Adjudicator who allowed most of the claimant's claims. The appellant was aggrieved and thus made a reference to the Arbitrator who upheld the findings of the Adjudicator. Having made his award on 1/3/2010 (the Award), the Arbitrator instructed Hallmark Attorneys to file the same in court.

Following the letter by Hallmark Attorneys dated 31/5/2010 through which the Award was forwarded for filing, the High Court opened Misc. Commercial Case No. 6 of 2010 and commenced

proceedings by issuing a notice to the parties to appear in court, apparently for hearing an application for filing the Award. Having received the notice, the appellant filed a petition under s. 16 of the Act seeking to set aside the Award. He also challenged the manner in which the same was submitted for filing contending that rules 3 and 4 of the Arbitration Rules, G.N. No. 427 of 1957 (the Arbitration Rules) were violated. On that contention, apart from his application for setting aside the Award, the appellant prayed for an order *"dismissing the purported filing of the arbitral award dated 1st March, 2010 for incurable legal irregularities."*

The respondent filed an answer opposing the petition raising therein a preliminary objection consisting of three grounds:

> *"(a) That the petition to set aside the Award is time barred.*
>
> *(b) The Affidavit verifying the petition is incurably defective in that the name of the Advocate who allegedly provided the*

information stated therein is not disclosed.

(c) *The Petitioner referred to herein above is not a Petitioner in this matter. The Respondent should have filed a separate Petition to have the Award set aside."*

On 20/7/2010, Mr. Boniface Mtinangi and Mr. George Kilindu, appeared in court representing the appellant and the respondent respectively. Mr. Kilindu made his submission in support of the preliminary objection. He argued all the three grounds of the objection. Mr. Mtinangi could not, however, respond to the submission. He prayed to be allowed to do so at a later date. The High Court granted his prayer and adjourned the matter to 27/7/2010. According to the record, on that date, the appellant's counsel did not appear and the learned judge proceeded to make the following order:-

"(a) The Preliminary objection is upheld.

(b) The Award be filed in this court as found by the Arbitrator is declared to be a decree of this Court.

(c) The Petition filed in this court is time barred and is hereby dismissed with costs."

As stated above, it is against this order that this appeal has been preferred by the appellant. The appeal was instituted after the appellant had applied and obtained leave of the High Court on 23/8/2010. In challenging the order, the appellant had raised five grounds in its memorandum of appeal. In arguing the appeal however, Mr. Mtinangi abandoned the 5th ground. The remaining four grounds which were argued are as follows:-

"(i) That the Honourable Judge erred in law by entertaining the matter while it was not properly moved for lack of petition to file the award in Court and

in violation of the filing procedures stipulated by Rules 3,4,5, and 6 of the Arbitration Rules, G.N. 427 of 1957.

(ii) *That the Honourable Judge erred in law by dismissing the Appellant's Petition to set aside the arbitral award on ground that it was time barred while he ought to have held that it was within allowable time of 60 days.*

(iii) *That the Honourable Judge erred in law in upholding submission by the respondent's counsel that time to challenge and set aside the arbitral award started to run from the date the award was ready for collection from the Arbitrator (that is 5th April 2010) while he ought to have held that time started to run from the date of notification by the court of filing the award in court (date of receipt of summons on 4th June 2010).*

(iv) That the Honourable Judge erred in law by declaring the arbitral award to be a decree of the court while he ought to have found the award was improperly procured against the Appellant who is not a body corporate capable of suing or being sued by virtue of section 3 (6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finance Act No. 18 of 2002."

On account of the reasons which will be apparent herein, we do not intend to consider the appeal on merit. In his written submission, Mr. Kilindu argued that the impugned order, is in essence, a default judgment and therefore, under O.IX r. 13(1) of the Civil Procedure Code [Cap. 33 RE.2002] (the CPC), the appellant had the option of applying to set aside the order before he preferred this appeal. In his oral submission, he stressed that since that option has not been taken, the appeal has been filed pre-maturely. The argument was opposed by the learned counsel for the appellant.

He argued that the order is not a default judgment because he was in court when the arguments in support of the preliminary objection were made and the date on which the ruling was pronounced.

The issue concerning the nature of the impugned order need not detain us. As pointed out above, the learned counsel for the appellant was not heard in reply to the arguments made in support of the preliminary objection. According to **Black's Law Dictionary,** 9th Ed. at page 657, the term *ex parte* means:-

> *"Done or made at the instance and for the benefit of one party only, and without notice to or* ***argument by any person adversely interested;*** *of or relating to court action taken by one party without notice to the other..."*
> [Emphasis added].

In our view an order made against one of the parties in a proceeding falls in the description of an *ex parte* judgment or decree.

Going by that definition therefore, the impugned order is an *ex parte* decision. From the nature of the order, the appellant had

two ways of challenging it. **Firstly,** as argued by Mr. Kilindu, he had the option of applying to set it aside under O. IX r. 13 (1) of the CPC. The provision states in part as follows:-

> *"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..."*

Secondly, the appellant could prefer an appeal as it did in this case. Under S. 5(1) (b) (vi) of the Appellate Jurisdiction Act [Cap.141 RE. 2002] (the AJA), an order filing or refusing to file an award in an arbitration without the intervention of the High Court is appellable. Since however, the impugned order was made *ex parte,* such an appeal is subject to the leave of the Court or the High Court under S. 5(1)(c) of the AJA.

The pertinent issue is whether or not the appellant ought to have applied first to set aside the order. In the case of **Jaffari Sanya Jussa & Another v. Saleh Sadiq Osman,** Civil Appeal No. 54 of 1997, the Court considered the import of O. XI r. 14 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD) which is in *pari materia* with O. IX r. 13 of the CPC. It observed that:-

> *"...O. XI R. 14 is the only provision specifically and singularly for setting aside an ex parte decree. We have already said that section 5(1) of the Appellate Jurisdiction Act covers more situations than setting aside an ex parte decree. In that case it is our considered opinion that that provision should be invoked first and foremost. Second, O. XI R. 14 operates in the High Court (and Subordinate courts)...* ***It is our settled view that one should only come to this Court as a last resort after exhausting all available remedies in the High Court..."***
>
> [Emphasis added].

The import of O.XI R. 14 of the CPD equally applies to O.IX r. 13(1) of the CPC. In this case therefore, the appellant should have

invoked that provision before coming to this Court by way of an appeal. This is more so because in his grounds of appeal he included matters which were supposed to be raised in the High Court. In grounds (ii) and (iii) for example, the appellant contends that the petition was filed within time. He argued that the limitation period started to run from the date when the appellant was served with a summons after receipt by the High Court, of the Award for filing. According to the learned counsel, the summons was served to the appellant on 4/6/2010. On its part, the respondent contended that the period of limitation is to be reckoned from 5/4/2010 when the Arbitrator notified the parties that the Award was ready for collection.

The arguments raised by the learned counsel for the appellant in this appeal were not made in the High Court, yet they involve matters of fact including the question as regards the date on which service was effected on the appellant. As stated above, the proper course of action by the appellant in the circumstances, is to apply to set aside the impugned order so that, if his application is granted,

the preliminary objection is heard on merit whereupon the decision would be made after hearing both parties.

On the basis of the reasons stated above, we find that the appeal is misconceived. In the event, we hereby strike it out with costs.

DATED at **DAR ES SALAAM** this 29th day of May, 2017.

B.M LUANDA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL