IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 04 2020

(Arising from Miscellaneous Commercial Application No. 136 of 2019)

BETWEEN

MULTICHOICE TANZANIA LTD.....APPLICANT

Versus

MAXCOM AFRICA PLC.....RESPONDENT

Last Order: 30th July, 2020

Date of Ruling: 27h Aug, 2020

RULING

FIKIRINI, J.

In this application for review preferred under section 78 (a) and Order XLII 1 (1) (b) and (c) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC), the claim was that the ruling of the Court in the Miscellaneous Commercial Application No. 136 of 2019manifested serious errors of the fact and misrepresentation of the law on the face of the record resulting into serious procedural irregularities and thus miscarriage of justice occurred due to the following:

a. The Court has ruled to set aside default judgment and decree dated 17th October, 2019 under the provision of the law which entitles the defendant to apply for setting aside default judgment after showing sufficient cause as to

why the written statement of defence was not filed in Court while confirming that the grounds submitted are afterthoughts.

b. That the Court has ruled to set aside default judgment and decree dated 17th October, 2019 under misapprehension of facts, procedure and law applicable to the default judgments.

c. That the ruling of the Court has ignored and overlooked the noticeable fact that the underlying grounds advanced for setting aside the default judgment are not direct connected and relevant to the application and relief claimed under the said application.

d. That the ruling of the Court has serious errors, and is inconsistent and thus occasioning injustice to the applicant.

e. That the ruling of the Court has serious errors of law in that it has ordered to the effect that failure to issue and serve the summons for the date of judgment is one of the grounds to set aside default judgment despite the fact that the judgment was published pursuant to the law.

2.The applicant requested the Court for an Order that the cost incidental to this application for review are paid to the applicant by the respondent.

Parties through their respective learned counsels Mr. Jovison Kagirwa and Philemon Mrosso argued the review by way of written submissions. In his submission Mr. Kagirwa contended that there was an error apparent on face of record occasioned by misapprehension of the law because the decision for setting aside default judgment was granted on the ground that Order XX Rule 3A was not complied with since the respondent was not notified of the judgment date, whereas according to the law, the grounds to be considered to reach the decision would have been on the following grounds

: (i) whether the application was made within 21 days as prescribed by the law; and (ii) whether the applicant has adduced sufficient cause as to why the defence was not filed in time.

He further submitted if there was no misapprehension of the law and fact and also if the Court had paid attention and considered the above grounds, a different verdict could have been reached based on the following reasoning:

(i) By publication of the decree within 10 days from the date of default judgment under Rule 22 (2) (a) of the Commercial Court Rules, the anomaly would have been cured.

(ii) The inapplicability of Order XX Rule 3A to default judgment pursuant to Rule 22 (2) (a) which required publication of the decree would have been known.

(iii) The respondent admitted learning of the default judgment through publication, as averred in paragraph 4 of the affidavit of Ahmed Lusasi dated 4th November, 2019, and from there steps were taken.

(iv) The Court should have noted that as compliance to notify the respondent, and hence could not set aside the default judgment.

(v) Issuance of summons for judgment or its failure could not have rescued the defendant from not filing defence neither was it a ground for setting aside default judgment.

(vi) The Rules under which the application was brought was only applicable and limited to the applications to set aside default judgment after the defendant has satisfied the Court why written statement of defence was not filed in time.

(vii) The decision of the Court entered relied on the decision of the Court applicable in *Ex parte,* under the CPC and not default judgment as provided by the Commercial Court Rules which are different legal aspect.

It was his submission more that the Court set aside the default judgment on the ground that the respondent was not served with summons which was provided for under Order XX 3A of the CPC which was not ground for setting aside default judgment under the Rule 23 (1) of the Commercial Court Rules. On that basis, Mr. Kagirwa argued that the Court acted under the misapprehension of law and fact which were grounds for review. Bolstering his submission, he referred this Court to the cases of **Patty Interplan Ltd v TPB Bank Plc, Civil Application No. 103/01 of 2018** and **Ottu on behalf of P.L. Assenga & 106 Others v Ami (Tanzania) Limited, Civil Application No. 20 of 2014** (unreported) which adopted the decision in **Autodesk Inc. v Dyson (No. 2)-1993 HCA 6; 1993 176 LR 300,** whereby while the Court underscored public interest in the finality of litigation, had this to state further

> *"The public interest in finality of litigation will not preclude exceptional step of reviewing or rehearing an issue when a court has good reason to consider that; in its earlier judgment it has proceeded on a misapprehension as to the facts or the law."*

In addition, to the above submission, Mr. Kagirwa made reference to the decision by this Court in the case of **Emmanuel Jagero & 3 Others v Multimodal**

Transport Africa Limited, Review No. 02 of 2012, in which the Court elucidated on guiding principles when dealing with review. In the decision the Court pointed out the following that, there has to be an aggrieved party by the decision; that there was discovery of new and important matter of evidence, which was not within the knowledge of a party at the time of judgment and decree was passed; and that there was an error apparent on the face of the record or any other sufficient reason. Meaning an application for review can based on any one of those grounds or combination of them all, as stated in the case of **N.S.C v Cosmas M. Mukoji [1986] T. L. R. 27**, underlined the counsel.

Concluding his submission, Mr. Kagirwa, explored that review which involved reconsideration of the decision by the same court and judge, had its origins from the equity, the concept not known to common law. While the remedy has remarkable resemblance to a writ of error, the philosophy was acceptance of human *fallability,* and that mistakes or errors must be corrected to prevent miscarriage of justice, under the spirit that justice was above all. The exercise was thus to correct error and not disturb finality. On the basis of his submission, Mr. Kagirwa humbly prayed for the application for review be allowed.

Mr. Mrosso, was not left behind in countering the submission by Mr. Kagirwa, and he prefaced his submission by citing the case of **Bulyankulu Gold Mine Limited**

& 2 Others v Isa Limited & Another, Miscellaneous Commercial Review No. 01 of 2018 (unreported) but copy attached, in which the case of **East African Development Bank v Blueline Enterprises Tanzania Ltd, Civil Application No. 47 of 2010, Court of Appeal** decision, which cited with approval the case of **Chandrakant Joshubhai Patel v R [2004] T.L.R. 218,** in which reasoning in **Mulla 14th Edition, p. 2335-6**, illustrating on grounds warranting a review were considered.

His submission went on pointing out three grounds which can lead to review under Order XLII Rule 1 (1) (b) of the CPC, as discussed in the case of **Boniface Sigaye & 72 Others v Tanzania Revenue Authority, Civil Appeal No. 185 of 2002 (unreported) but copy attached, p.6-7.**

Challenging the applicant's ground that setting aside the default judgment under Order XX 3A of the CPC, was an error of the law requiring correction, which Mr. Mrosso found it appropriate and urged the applicant if they wish to challenge the decision on point of law a right of appeal can be exercised by appealing to the Court of Appeal on a ruling in Miscellaneous Commercial Application No. 136 of 2019 and not by way of review as the one presently before the Court.

Maintaining that the right to be notified the date of judgment was mandatory requirement of the law, failure of which is considered as violation of statutory right

to be present when judgment was being delivered, and that the effect of such decision is, it will be declared as null and void. The Commercial Court Rules are silent on that, and when there is a lacunae in the Rules, the CPC has to be applied as provided under Rule 2 of the Commercial Court Rules, and hence that is why the same was applied by invoking Order XX Rule 3A of the CPC. To fortify his stance, he cited the case of **Cosmas Construction Co. Ltd v Arrow Garments Ltd [1992] T.L.R 127.**

Controverting, the submission that the provision of Order XX Rule 3A of the CPC was not applicable to default judgment, it was his submission that the assertion was misleading, as the provision did not categorize the kind of judgments which require notice to be issued and which did not. He underscored the fact that it was mandatory in all Commercial cases in the High Court (Commercial Division) for notice to be issued and Order XX Rule 3A made it mandatory requirement for the Court to issue notice to the parties of the date of judgment.

On application and effect of Rule 22 of the Commercial Court Rules, which provided for mandatory requirement to publish decree of a default judgment within 10 days of the decision that it was for the purpose making the decision valid, that was misconception and misleading to the Court, since the requirement under Rule 22 (2) (a) of the Rules, was to make the decision executable and at the same time

inform the public or interested parties to know there was such decision which has been delivered, and in case they want to react or take action in accordance with the decision if they wanted. Mr. Mrosso as well disputed the submission that ex parte judgment under the CPC and default judgment under Commercial Court Rules were different aspects was misleading and misconceived. In both the CPC and Commercial Court Rules neither the term *ex parte* nor default judgment has been defined. At most the terms were used interchangeably depending on the circumstance of the case. The counsel proceeded to define the two terminologies, default judgment through the **Black's Law Dictionary, 9th Edition, p. 480** and *ex parte* judgment through the case of **Moshi Textile Mills v B.J De Voerst [1975] L.R.T. No. 17.**

Based on the definition of the term default judgment as per the Black's law Dictionary and Court's definition of the term *ex parte* judgment, the terms were used interchangeably and both were result of failure of any party to a proceeding to act or comply with Court order, submitted Mr. Mrosso.

Winding up his submission, Mr. Mrosso discussed the grounds for review advanced by the applicant based on an arguable point of law that it was not an error apparent on the face of the record. The error apparent on the face of record envisaged under Order XLII Rule 1 (1) (b) of the CPC, must be obvious one that

strikes in the eyes immediately after looking at the records and which did not require a long drawn process of reasoning. He went on stressing that the envisaged error should be clear and self-evident which would not need unnecessary matter to show its existence, and which no court would leave it to remain on records.

In conclusion, he impressed upon the Court that the applicant has failed to point out the error or irregularity apparent on the face of the record which would call for a review and hence urged this Court to dismiss the application for review.

The remedy for review sought by the applicant as acknowledged by counsels for both parties is provided for under Order XLII Rule 1 (1) (b) of the CPC. Under the provision of Order XLII Rule 1 (1) (a) and (b), the grounds, for applying for review, have been clearly stipulated: For easy of reference the provision is reproduced below:

> 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 mine]

From the provision it is clear that the criteria for review extends only to the following circumstances: (i) when there is 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 (ii) on account of some mistake or **error apparent on the face of the record,** or (iii) 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.

The illustration are as well reflected in the cases **of Emmanuel Jarego; N.S.C** v **Cosmas** cited by the applicant in their submission and that of **Bulyanhulu Gold Mine** which cited other two cases and **Boniface Sigaye & &2 Others,** (supra) by the respondent.

The provision of the Order XLII Rule 1 (1) (a) of the CPC, in my view is restrictive in entertaining an application for review. Borrowing from a case law, an error apparent on face of record must be an error that is obvious, but not something that can be established by a long drawn process of learned argument. In the case of **Chandrakant Joshughai Patel v R, [2004] T. L. R. 218,** the Court had this to state adopting reasoning in Mulla 14th Edition:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which they may conceivably be two opinions..... A mere error of law is not a ground for review. That a decision is erroneous in law is no ground for ordering review.....It can be said an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."*

But for more clarity on what is a fit case for review a decision in the case of **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR,** can succinctly provide a guided principle when it stated:

"..... A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. ***The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.***

In the instant case ***the matter in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy*** *and exercised his discretion in favour of the respondent.* ***If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.*** *Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.* ***An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it"*** [Emphasis mine]

The above decision has clearly elucidated under what circumstances a review can be preferred. Applying the principle to our present situation, I find the intended application for review cannot be entertained before this Court. **One,** there are legal issues which need to be resolved and the appropriate forum is the appellate court and by way of an appeal. The issue such as whether publication of the decree within the 10 days after the default judgment has been pronounced under rule 22 (2) (a) of the Commercial Court Rules, was a notice or summons indicating the date on when the judgment is to be delivered, and hence was sufficient notice or summons to the respondent as she could act or she acted, as argued by the applicant.

Two, whether the Order XX Rule 3A of the CPC is applicable for default judgment since the applicant considers it not applicable as default judgment are covered under Rule 22 (2) (a) of the Commercial Court Rules, even though nothing has been stated in the rules in relation to notice or summons to a party requiring mandatorily to be notified of the judgment date, but this is a right of which failure to observe it nullifies the judgment. And since, there is that lacunae, ordinarily resort is to the CPC, which the applicant detested. **Three,** distinction made by the applicant on default judgment viz a viz *ex parte* judgment, cannot be dealt with by way of review as envisioned by the applicant, as this exercise will invite a laborious work of analyzing, discussing and researching on the point, which is not

what review is about. **Four,** while I agree issuance of summons or notice of the date of judgment could not have rescued or cured the defendant/respondent's position of not filing written statement of defence, however, the provision of Order XX Rule 3A of the CPC, was not for that purpose. The provision was so as to allow the party who has failed to enter appearance to be told when the judgment is delivered. As pointed out in the case of Cosmas Construction (supra), by the Court of Appeal when it held:

> *"A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte,* ***but has to be told when the judgment is delivered so that he may, if he wishes, attend to take it as certain consequences may follow."***

Since the provision of Order XX Rule 3A of the CPC is specifically crafted to cover all Commercial cases, the cases resulting into default judgment are in my view not an exception as understood by the applicant, but included, and hence making issuance of notice or summons of the date of judgment which includes rulings mandatory.

The grounds of review raised are in my considered opinion arguable points of law rather than errors apparent on the face of record. Entertaining any of the raised

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points, will amount to I, be sitting on my own appeal, which is not permissible under the law. The best option is for the applicant to prefer an appeal to the Court of Appeal.

In view of the above, I proceed to dismiss with costs the application for review for being devoid of merit. It is so ordered

P. S. FIKIRINI

JUDGE

27th AUGUST, 2020