**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 179 OF 2019**

**ABDULKADIR M BUJET.....1st APPELLANT**

**MAS HOLDINGS & CONTAINER DEPORT.....2nd APPELLANT**

**VERSUS**

**SALIM MBARUKU..... RESPONDENT**

(Arising from the decision of Temeke District Court,)

**(Batulaine, Esq- RM.)**

Dated 28th August 2019

in

Misc. Civil Application No. 181 of 2018

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**JUDGEMENT**

12th February & 18th March 2021

**AK. Rwizile, J**

This appeal traces its origins in Civil Case No.12 of 2016 filed before the District Court of Temeke. The respondent instituted the suit against the appellant on a claim of USD 9,500.00. He further claimed interest at the court commercial rate, among other prayers.

Although the record is not clear as to what transpired, but it is apparent that the appellants upon being served with the summons, did not file a defence. All efforts to filed the same failed leading to a default judgement against the appellants. Following

the judgement, the appellants were not satisfied. They filed an application to set the default judgment aside. The same was heard and dismissed on ground that the appellants ought to file an appeal. The ruling aggrieved the appellants and have preferred this appeal. Two grounds of appeal were preferred;

i. That the learned trial magistrate erred at law in dismissing an application to set aside a default judgement on the ground that the remedy available was to appeal against a default judgement and not to apply to set it aside while the said holding is contrary to the provisions of order IX rule 13(2) of the Civil Procedure Code [Cap 33 R.E 2002]
ii. That the trial court having granted the extension of time to file an application to set aside a default judgement was *functus officio* to reconsider whether the remedy available to the party aggrieved by default Judgement was an appeal and not to file an application to set the default Judgement.

The appeal was heard by written submissions. The appellant was represented by Mr. Victor Kikwasi of Law Associates advocates and Mr. Mulamuzi Patrick Byabusha of Eagle Law Chambers Advocates. In his submission, Mr. Kikwasi was of the view that the trial court was wrong when it held that the remedy on dealing with a default judgement was to appeal. He submitted that the decision conflicted with Order IX Rule 13(2) of the CPC [R.E 2002].

The learned counsel pointed out that following the 2019, amendment of the CPC, the default judgement entered cannot be entered without exparte proof even when there is a default of filing a WSD. It was his view that because the decision impugned was delivered after the amendment and so the trial court ought to have considered the current position of the law which is evident in the case of **Lala Wino vs Karatu District Council**, Civil Appeal No. 132/02 of 2018 CA (unreported). Going by that decision, he said, since the amendment was on procedural issues, it has a retrospective effect. The court therefore ought to have applied it.

The learned advocate did not end there, he referred **Mulla Code of Civil Procedure** at Pg. 773-774, when dealing with order 8 rule 10 of the India Civil Procedure Code,

which is *parimateria* with order VIII Rule 14(2), which provides that the orders made under this order can be set aside to avoid unnecessary costs of appeal.

Mr. Kikwasi submitted further that failure to file WSD has similar effect as when the judgement is entered exparte, it should be set aside in the similar way. He asked this court to be fortified by the decision of the court of Appeal in **Integrated Property Investment(T) Ltd and 2 others vs The Company for Harbit and Housing Africa**, Civil Appeal No. 107 of 2015. The learned counsel finally submitted that the court was not justified to entertain the impugned application after it had allowed Civil Application No. 226 of 2017, which granted an extension of time to file for setting aside the default judgement. He clearly pointed out that dealing with whether the remedy was to appeal or setting it aside was reconsidering the matter. The Res Judicata doctrine applies here, in his view.

Mr. Mulamuzi learned counsel asked this court to dismiss this appeal because it has been overtaken by events. What he was after, is that the decree the appellant intends to set aside has been executed. He referred to the copies of the execution proceedings and a proclamation for sale. He too, raised an issue of res judicata. Elaborating on it, he cited Misc. Civil Application No. 153 of 2017, that it was dismissed and not struck out. Submitting further on this point, he said, before the 2019 amendment in the CPC, default judgement was a subject of appeal or revision as the appellant did but the same was dismissed by this court. (This is by Civil revision No. 14 of 2017). As well, he said, the judgement the applicant is planning to set aside was entered in 2016, three years before the amendment, that is why it is inapplicable.

As if that is not enough, the learned advocate added that the appellant is wondering in court and has filed a lot cases to defeat ends of justice. He asked this court to dismiss this appeal with costs.

In a rejoinder, the appellant was of the submission that the annexures attached to the submission should be disregarded since submissions are a summary of arguments which cannot be used to introduce evidence, as it was held in the case of **TUICO at Mbeya Cement Company vs Mbeya Cement Company Ltd and NIC(T) Limited** [2005] TLR 41.

It was also contended that execution in Civil Case No. 12 of 2016 is not done yet because there are revision proceedings pending before this court on the same subject. It was further said that res judicata does not apply in this case because there was no application that was determined on merit. He also submitted that the matter was for setting aside an exparte judgement and another for setting aside a default judgement which rules out the question of res judicata.

According to the learned council, as per **Ngoni Matengo Cooperative Marketing Union Ltd vs Alimahomed Osman** [1959] EA 577, where it was held that a case not heard on merit should be struck out. It was his last submission on re-joinder that the amendment made into the law ought to consider because even before the amendment, provisions of order IX rule 13(2) of the CPC provided for setting aside the same under order VIII rule 14(2) of CPC. He therefore asked this court to allow this appeal with costs.

In a very strange way, the respondent also made a rejoinder, which I do not intend to delve into. It is not only out of procedure but also it raised nothing material worth consideration.

Having heard rival submissions of the parties in respect of this appeal, I have to say that the appeal on first ground challenges the decision of the trial court for entering a default judgement following the appellants failure to file his defence. The reasons for failure to do so were not stated because the trial court dismissed the impugned application which sought to set it aside. It has been submitted that the decision of the trial court was contrary to order IX rule 13(2) of the CPC. The same states as hereunder;

> *Order IX. R 2*
>
> *(1)……*
>
> *(2) Where judgment has been entered by a court pursuant to paragraph (ii) of sub-rule (1) of rule 6 of this Order or sub-rule (2) of rule 14 of Order VIII it shall be lawful for the court, upon application being made by an aggrieved party within twenty-one days from the date of the*

*judgment, to set aside or vary such judgment upon such terms as may be considered by the court to be just*.

It is apparent from the law that the sub rule refers again to sub rule 1 of rule 6 of order IX or sub rule 2 of rule 14 of order VIII. It is clear from it that the first option under rule 6 of order IX does not apply because that deals with situations where the Attorney General is a party. The remaining option cover situations that fall under sub-rule 2 of rule 14 to order VIII. It is this order that the appellant banked his application and has formed the same as a ground of appeal. In order to appreciate his stance, the law used states as follows;

> *14.-(1) Where any party has been required to present a written statement under sub-rule (1) of rule 1 or a reply under rule 11 of this order and fails to present the same within the time fixed by the court,* ***the court shall pronounce judgment against him*** *or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.*
>
> *(2) In any case in which a defendant who is required under subrule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that sub-rule, within the period of such extension, the court may-*
>
> *(a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons, enter judgment in favour of the plaintiff without requiring him to prove his claim;*
>
> *(b) in any other case, fix a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.* (emphasis added)

My construction of order VIII based under rule one is that, there are two types of the summons. **One** is summons to appear, and **second**, summon to file defence. Each of them has its distinct directives to the defendant. In case of the summon to appear,

the defendant if required by the court as a matter of procedure to file his defence on the time given by the court or file the same within 7 days preceding the first hearing. But when it is, a summons to filed defence, the same is within 21 days or as may be specified by the summons. The practice has it that, usually in subordinate courts, summon to file defence is issued which specially requires the defendant to file his defence within 21 days of service.

It follows therefore that the nature of action to be taken by the court before deciding to enter default judgement or proceed exparte depended **First,** on the nature of summons issued and **second** the amount of money involved. Therefore, the remedies available in situations falling under IX rule 13 (2) as shown above. This falls under the head, setting aside decrees exparte. The pertinent point to tackle is whether, a default judgement is not an exparte decree. In my view, exparte decrees are obtained in two ways. **One** is by default judgement as in this case. The CPC does not define an exparte decree or judgements. But it can be deducted from the above, where a party does not appear to defend the case whether a defence was filed or not, the decision given in his absence provides an decree exparte. It was held in **Moshi Textile Mills vs B.J De Voest** [1975] LRT 17, there is no appearance if the party has neither filed a written statement of defence nor appeared personally or by his advocate. **Two,** where the defence was filed but the defendant did not prosecute the case. An exparte proof was conducted and a decision made.

The centre of dispute is therefore whether, default judgement has the remedy of being set aside as the appellant has chosen to, instead of appealing which is the shared view of the respondent and the trial court.

The court reasoned out so on inspiration derived from section 74 read with order XL (1) (b) of the CPC. I have read the arguments of the parties in this respect. The respondent has with certainty submitted so. The appellant in order to avoid the decision of the trial court has come with a finding that before the amendment of the CPC that came in 2019, the only remedy was to appeal. But since the coming into force of the amendment which did away with default judgement the trial court was enjoined to follow the current legal regime since it affected the rules of procedure.

Here he wanted this court not only to follow the decision of Court of Appeal in the case of **Lala Wino** (supra), but also to be bound by it.

Without going into details of the finding of the court in the case of **Lala Wino.** I think I have to state that the law relied upon is clear and states as hereunder;

Order XL (1) (b) of the CPC

> *An appeal shall lie from the following orders under the provisions of section 74, namely-*
>
> *(a) …*
>
> *(b) an order under rule 14 of Order VIII pronouncing judgment against a party.*

It should be noted that the finding of the trial court was that a default judgement was entered under rule 14 of order VIII and therefore the only remedy available is appealing. Therefore, applying to set aside the same order was not a proper path to go by. I have shown before that rule 14 (1) of order VIII, where the summons has been issued to file a written statement of defence and the defendant does not do so, the court has an option of pronouncing the judgement against him. This is what the trial court did in Civil Case No. 12 of 2016.

Therefore, going by the wording of order XL(1)(b), I am tempted to hold that the appellant was, at law required, to appeal against that decision. What is not appealable in my considered view, is an order made under Order IX, rule 13 of the C.P.C. This appeal is against the decision entered under order VIII rule 14 of the C.P.C. Appealing is creature of the statute. Where that right is barred by the statute the right of appeal cannot therefore be given. This analysis is enough to dismiss the first ground of appeal as having no merit.

The second ground of appeal is somewhat strange, the applicant complains that since the decision was made by the court to granting an application for leave to file for setting aside an exparte decree, then it was bound to grant it. I do not think the learned counsel for the appellant was right. I am saying so because, an application for leave is different from the impugned application.

While the former deals with reasons for delay to file such and application, the latter, the court deals with merits of it including whether it was proper for it to be brought before it in the way it was. I have no reason to think that the court was functus officio. This ground of appeal lacks merit. It is dismissed. Having said what I have said, I dismiss this appeal as having no merit. The appellants has to pay costs of the appeal.

**AK Rwizile**
**JUDGE**
**18.03.2021**

Delivered in the presence of the respondent and his advocate. The appellants are absent, this 18th day of March 2021

**AK Rwizile**
**JUDGE**
**18.03.2021**

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY