IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 175 OF 2019

NITRO EXPLOSIVES (T) LIMITED ..... APPELLANT

VERSUS

TANZANITE ONE MINING LIMITED..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division), at Dar es Salaam]

(Magoiga, J.)

dated the 13th of June, 2019
in
Commercial Case No. 118 of 2018
.....

JUDGMENT OF THE COURT

26th October & 3rd November, 2021

MWAMBEGELE, J.A.:

The background facts leading to this appeal are very simple and not difficult to comprehend. The appellant was the plaintiff in Commercial Case No. 118 of 2018 in the Commercial Division of High Court sitting at Dar es Salaam (the High Court). She sued the respondent for, *inter alia*, payment of USD 141,935.61 and Tshs. 71,167,875/25 which were outstanding amounts arising from the sale of explosives to the respondent. It was alleged in the plaint that the appellant and the respondent were parties to an agreement in which the appellant was to supply explosives to

the respondent for her mining sites in Mererani area, in Manyara Region. According to the appellant, she supplied the explosives as agreed and gave out invoices to the respondent for each supply, whereas, the respondent promised to remit the payments on the same within sixty working days from the date each invoice was issued.

The appellant continued supplying the explosives to the respondent as agreed but stopped on 22.11.2017, as the respondent had not cleared payment for the invoices sent to her. The appellant sent several demand notices to the respondent to no avail, hence the suit.

The appellant duly served the respondent with a copy of the plaint as appearing at p. 9 of the record of appeal but the respondent never filed a Written Statement of Defence (WSD). In consequence whereof, the appellant filed an application for a default judgment in terms of rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (the Commercial Court Rules). In its "default" Judgment, the High Court dismissed the suit on the ground that the appellant failed to establish her claim as she failed to attach important documents and that the affidavit relied upon by the appellant was not self-explanatory as it did not contain all the details required to prove the case and also that the

documents attached were not authentic as they did not show who prepared them as well as who certified them as to their correctness. Moreover, it was the High Court's view that the agreement itself was not clear if it was an oral or written agreement which raised doubt as to whether there was such an agreement in the first place. The High Court therefore went on to dismiss the suit with no order as to costs.

The appellant was aggrieved by the decision of the High Court. She thus lodged an appeal to the Court with four grounds of complaint which may be paraphrased as under:

1. That the trial court erred in law and fact by holding that on a balance of probabilities the appellant failed to establish her claim;
2. That the trial court erred in law and fact by failing to take into consideration and analyzing annexture 2 in which the respondent admitted to the principal amount owed to the appellant;
3. That the trial court erred in fact by holding that the annexures in the affidavit in proof of the claim were not certified while they were certified; and
4. That the Trial court erred in law and fact by dismissing the appellant's claim.

When the appeal was called on for hearing before us on 26.10.2021, Mr. Salimu Juma Mushi, learned advocate, appeared for the appellant. The respondent, though duly served, defaulted appearance. Given the state of affairs, Mr. Mushi successfully prayed to proceed with the hearing of the appeal in the absence of the respondent in terms of rule 112 (2) of the Tanzania Court of Appeal Rules.

Mr. Mushi had earlier on lodged written submissions in support of the appeal which he sought to adopt as part of his oral submissions.

In the written submissions, Mr. Mushi contended in respect of the first ground that the High Court erred in holding that the appellant failed to establish her claim. He added that the appellant deposed in the affidavit that she had an agreement with the respondent for the supply of explosives and that she did supply the respondent explosives worth USD 141,935.61 and Tshs. 71,167,875/25. He contended that the respondent admitted the claim through a letter dated 20.06.2018 which was a reply to the demand notice. That letter, he submitted, was annexed to the affidavit and the appellant craved leave of the court for it to be part of the affidavit. That, he argued, was enough proof of the case on the balance of probabilities.

With regard to the second ground of appeal, Mr. Mushi submitted that the High Court erred in not taking into consideration the contents of the letter; annexture 2 in which the respondent admitted to owe the appellant the principal amount claimed. That, he pleaded at paragraph 8 of the affidavit that the respondent admitted to the claim but that he never made good the amount claimed. He argued that it was an error on the part of the High Court to ignore the letter under discussion. The learned counsel supported his submission on the point with our decision in **Bruno Wenceslaus Nyalifa v. The permanent Secretary, Ministry of Home Affairs & Another**, Civil Appeal No. 82 of 2017 (unreported) in which the Court held that annextures to the affidavit should not be ignored.

In the third ground, Mr. Mushi submitted that the High Court erred in holding that the annextures attached to the affidavit in proof of the claim were not certified while in fact they were. He added that the documents were certified to be true by advocate Joseph Yahaya Mbogela on 01.06.2019. It was Mr. Mushi's submission that the High Court's assertion to the effect that the appellant did not show who prepared the statements was not justified because they were prepared on the letter heads of the appellant thereby showing that it was the appellant who prepared them.

After all, he contended, the question as to who prepared them was irrelevant.

The last ground of appeal is a complaint that the High Court erred in dismissing the appellant's claim because there was evidence that the respondent defaulted appearance and a default judgment ought to have been entered against the respondent. As distinct from an *exparte* judgment, a default judgment is given automatically, he submitted. He reproduced a definition by **Black's Law Dictionary** of what a default judgment is and added that a default judgment is given against a defendant and not otherwise. He went on to submit that had the High Court found that the appellant failed to prove her case, it should have ordered to prove it *ex parte*.

Having submitted as above, Mr. Mushi prayed that the appeal be allowed with costs.

We have considered the submissions of the appellant's counsel. The main issue for our consideration is whether the High Court erred in dismissing the appellant's claim. We will address this issue in the course of considering the first two issues conjointly.

We start by a statement that the Commercial Court Rules are applicable to proceedings in the Commercial Division of the High Court. In terms of section 2 thereof, the Civil Procedure Code, Cap. 33 of the revised Edition, 2019 (the CPC) is only applicable when there is a lacuna in the Commercial Court Rules. Under rule 22 (1), a plaintiff is entitled to apply for a default judgment by filling Form No. 1 set out in the schedule to the Commercial Court Rules. It provides:

> *"(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 20, within the period of such extension, the Court may, upon proof of service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgment in favour of the plaintiff."*

In compliance with this rule, the appellant in the case at hand, having seen that the respondent was duly served but did not file a WSD, he sought, and was granted, the indulgence to invoke rule 22 (1) of the Commercial Court Rules. In the affidavit that accompanied Form No 1, Johannes Jacobus Viljoen, principal officer of the appellant, deposed, *inter alia*, that the respondent owed the appellant the amount claimed and

attached a demand notice thereof. The demand notice claimed USD 41,935.61 and Tshs. 71,167,875/25 short of which a suit would be preferred in court to claim the sum. The appellant also deposed that the respondent replied to that demand notice agreeing that she owed the appellant the principal amount and that she was willing to settle the matter without recourse to litigation. For clarity, we reproduce the respondent's response to the demand notice; the letter bearing Ref. No. EA/TOA/2018/6/13 dated 20.06.2018:

"REF: EA/TOA/2018/6/13 *20th June 2018*

The Managing Partner (Salim Mushi),
Elite Attorneys,
P.O. Box 1976, Arusha

RE: DEMAND NOTICE FOR AN OUTSTANDING PAYMENT AND NOTICE OF INTENTION TO SUE

Reference is made to the above captioned matter.

We have taken note of your demands and acknowledge the principal amount owed to your Client. As you may be aware, for the past 10 months we have not been in operation due to matters beyond our control. As a result, we have not been in a position to generate funds to pay a large part of our suppliers, your client being one of them.

This past month we successfully concluded negotiations with the Government of Tanzania, whereby a new frame-work of

operations will commence. Setting up this new framework takes time, we anticipate commencing operations sometime in the coming month or two.

We would like to inform your client that we have started internal processes to raise finances for kick-starting our operations. At the time of drafting this letter, our request for a facility from a financial institution has been partly granted. We request to update and furnish your client with a concrete re-payment schedule in the following two weeks.

Kindly note, that it our intention to settle this matter without the need of recourse to litigation. We thank your client for their continued support and we assure them to have this matter finalized in the coming weeks. Together we have fostered a good-working relationship and your client remains an integral part of our operations for years to come.

Sincerely,

Signed
Kisaka Eneza Mnzava – Company Secretary"

Mr. Mushi submitted before us that the High Court should not have disregarded this admission by the respondent. With profound respect, we think Mr. Mushi is right. The letter reproduced above was a response to the demand notice by the appellant bearing Ref. No. EA/TOA/2018/6/13 of 13.06.2018. Had the High Court considered this letter, we are certain it would not have made the verdict it did. In **Bruno Wenceslaus Nyalifa**

(supra), like here, the trial court ignored the documents which were annexed to the affidavit under the pretext that they were not tendered in evidence. We articulated at pp 9 – 10 of the typed judgment of the Court:

> *"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. This is for obvious reason that, affidavit is evidence and the annexture thereto is intended to substantiate the allegations made in the affidavit. Unless it is controverted therefore, the document can be relied upon to establish a particular fact."*

We went on:

> *"... it was wrong for the learned judge to disregard the documents which were annexed to the appellant's affidavit on account that the same were not tendered in court at the time of hearing the application."*

In the instant case, given that the respondent admitted the claim in a letter which was appended to the affidavit forming part of it, admitting not only indebtedness but also inability to settle the amount claimed for the reasons stated therein, and a proposal to settle the matter out of court, the

High Court erred in holding that the appellant did not prove her claim. The contents of the letter; annexture 2 to the affidavit, if we are to digress, are plain enough to constitute admission which, had the suit been tried in a court other than the Commercial Court, would have entitled the appellant to apply for a judgment on admission in terms of Order XII rule 4 of the CPC. The High Court asked itself a lot of questions relating to the agreement between the parties whether it was oral or written, failure by the appellant to annex the said agreement if it was written, failure by the appellant to append invoices, etc. With profound respect, we do not think these document were relevant in view of the respondent's admission in the letter referred to above. We thus find justification in the appellant's complaint in the first and second grounds of appeal.

The third ground of appeal is a complaint on the annextures to the affidavit. The High Court held that they were not certified. We have had a glance at the annextures. They are certified as true copies of the original by Joseph Yahaya Mbogela and a rubber stamp impression appearing on each of the annextures shows that the said Joseph Yahaya Mbogela is an advocate, notary public and commissioner for oaths. We thus find justification in the appellant's complaint on this ground as well.

Having answered the first three grounds as meritorious, it follows that the last ground must be meritorious as well. That is, the High Court erred in dismissing the appellant's claim.

In the upshot, we find merit in this appeal and allow it. As a result, we set aside the dismissal judgment of the High Court and substitute it with a default judgment for the claimed amount. This appeal is allowed with costs in this Court and the court below.

DATED at **DODOMA** this 2nd day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of November, 2021 in the presence of Mr. Kelvin Mgendera, learned counsel holding brief for Mr. Salim Juma Mushi, learned counsel for the Appellant and in the absence of the Respondent who was duly served, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL