IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CIVIL REVISION NO. 2 OF 2012

1. **ABUTWALIB MUSA MSUYA**
2. **JAMUHURI ABDALLAH TAGALALA**
3. **EVARIST MUTA** .....**APPLICANTS**

VERSUS

1. **CAPITAL BREWERIES LTD**
2. **GIRISH T. CHANDE**
3. **CHARLES B. RWECHUNGURA** ..... **RESPONDENTS**

(Application for Revision (suo motu) from the decision/Exparte Judgment and Decree of the High Court of Tanzania at Dodoma)

(Kyando, J.)

dated the 18th October, 2000
in

Civil Case No. 5 of 1998

JUDGMENT OF THE COURT

20th &25th April, 2016

JUMA, J.A.:

This *suo motu* revision proceeding was initiated by the Court under section 4(3) of the Appellate Jurisdiction Act Cap 141 **(AJA)** following a letter of complaint to the Chief Justice. Mr. Girish T. Chande who appears as the second defendant to a suit, Civil Case No. 5 of 1998 in the High Court at Dodoma, wrote a letter dated 5th May, 2012 which he titled:

"Illegality and Procedural Irregularity at the High Court Dodoma in Civil Case No. 5 of 1998".

Three matters stand out in the letter as requiring urgent intervention of the Court. **First,** that the three plaintiffs (Abtwalib Mussa Msuya, Jamali Abdallah Tagalala and Evarist Mutta) should not have lodged their suit against both the limited liability Company (Capital Breweries Ltd) and himself as a Director. This joining violates the cardinal principle that Directors are not liable for the acts of their companies unless the criminality of the Directors is proved. **Second**, since a Receiver Manager (Mr. Rwechungura) had by 6th August, 1999 been appointed and acknowledged by the plaintiffs when they joined him in their amended plaint, the plaintiffs cannot in law still sue the company under receivership (i.e. the first defendant) and its Directors (like Mr. Chande) over any debts owed by the company under receivership. **Third,** he complained that while the record of the High Court indicated that Mr. Chande could not be found for purpose of personal service of court processes, the Plaintiffs and the court broker were able to locate him for the purpose of the execution of the arrest warrant.

To avoid the mixing up of names and parties due to so many turns and corners through which the suit subject of our examination has gone through, we shall refer to parties in their names and status they had in the High Court, whether as plaintiffs or as defendants. In the High Court, the plaintiffs were Abtwalib Mussa Msuya (now deceased), Jamali Abdallah Tagalala and Evarist Mutta. The defendants were Capital Breweries Ltd **(CBL)**, Girish T. Chande and Mr. Charles R.B. Rwechungura (Receiver Manager of Capital Breweries Ltd).

As matters now stand in the High Court, after the plaintiffs had filed their amended plaint on 9th August, 1999 the **CBL** and Mr. Chande did not manage to file their written statements of defence. Instead, matters spiralled out of control of the two defendants. In order to understand the context of the complaints by Mr. Chande, including the outstanding warrant of his arrest, it is appropriate to revisit the salient stages of the proceedings as chronologically as we possibly can.

In their amended plaint three plaintiffs had claimed that they were employees of first (CBL) and second (Mr. Chande) defendants and they were employed to work in Dodoma. The first plaintiff was employed as a

Route Sales Supervisor. The second and third plaintiffs were both employed as Sales Clerks. In their suit, plaintiffs disclosed several distinct claims against their employer CBL. These include, transport allowance, house rent allowance, responsibility allowance, meal allowance, allowances in *lieu* of annual leave they did not take, repatriation allowance, etc.

The record of proceedings on 20/8/1999 shows that the first and second defendants (CBL and Mr. Chande) were represented by Mr. Deus Nyabiri learned counsel. On that day, the learned counsel acknowledged the receipt of the amended plaint and prayed for more time to study the document. When the suit came up for a mention before Kyando, J. on 11/11/1999, Mr. Nyabiri and the two defendants were absent. Only Mr. Nyangarika learned counsel was present for the plaintiffs. The record does not disclose what was said to prompt the trial Judge to allow Mr. Nyabiri to withdraw his services of representing CBL and Mr. Chande. On the same occasion, the trial Judge issued two orders. The first Order allowed Mr. Nyabiri to excuse himself from representing the first and second defendants to the suit. The second Order dispensed with personal service on CBL and Mr. Chande in favour of substituted service by publication in "MAJIRA Newspaper".

On 7/12/1999 which was the scheduled date for a Mention, Mr. Nyangarika informed the Registrar (P.B. Khaday-DR) that the first and second defendants *"had been served through MAJIRA newspaper"*. Later on 18/2/2000 when the suit was presented before the trial Judge, Mr. Nyangarika disclosed that CBL and Mr. Chande had already been served by substituted service by publication in MAJIRA newspaper. Kyando, J. ordered the suit against CBL and Mr. Chande to proceed *ex parte*, and proof of the suit to be by way of affidavits.

On 18/10/2000 Nyangarika appeared before Kyando, J. and informed the trial court that the plaintiffs had already filed their respective affidavits and prayed for the judgment. Kyando, J. granted the plaintiffs an *ex parte* judgment when he briefly stated that *"...Upon examining the Affidavit for ex parte proof of the plaintiffs' suit I enter judgment for the Plaintiffs as prayed in the Plaint."*

Sometime in May 2001 the plaintiffs filed the Miscellaneous Civil Application No. 21 of 2001 for the execution of the decree by arresting Mr. Girish Chande and commit him as a civil prisoner. On 19/6/2001 Mr. Chande was served with the Notice to appear and was later on served with

another Notice to show cause, why the warrant of arrest should not issue against him.

It was after being served with notice of his impending arrest when Mr. Chande engaged the services of Mr. Cuthbert Tenga from the Law Associates. Mr. Tenga applied for two orders. First, he sought an order for extension of time to apply for an order to set aside the *ex parte* judgment of 18/10/2000. Secondly, he applied for an order for a stay of execution in respect to the *ex parte* judgment. Kaijage, J. (as he then was) heard the application. In his Ruling he delivered on 2/12/2003, Kaijage, J. stayed the execution proceedings (i.e. the Miscellaneous Civil Application No. 21 of 2001) pending the hearing of Mr. Chande's application to set aside *ex parte* judgment.

A series of rescheduling of hearing dates followed till 6/3/2007 when Masanche, J. set 20/3/2007 to be the date for him to issue what he described as—*necessary orders*". On that date, he dismissed the application for extension of time within which to file an application to set aside *ex parte* judgment and directed the execution proceedings to continue in the following way:

"The application for extension of time within which to file an application to set aside ex parte judgment of this court (Kyando, J.) is dismissed. Judgment of this court (Kyando, J.) delivered on 18/2/2000, is operational. Execution proceedings to proceed."

The high water mark in the record of proceedings before us is the warrant of arrest dated 9/11/2010. It commanded the Director of Criminal Investigation to cooperate with the Interpol to secure the attendance of the defendant Girish T. Chande:

*"...the **defendant [GIRISH T. CHANDE]** was ordered by decree of the court dated the 18th day of October, 2000 to pay the above-named plaintiffs the sum of Tanzanian shillings 92,662,126/26 (now accumulated by way of interest to Tshs. 527,019,847.71).... **THESE ARE TO COMMAND YOU to arrest the said defendant** who currently resides and works for gain in Russian Federation as the Chief Executive Officer of a Company known as Cyrudrick Commercial Services Ltd....."* [Emphasis].

When the parties appeared before us for this Revision on 20th April, 2016, all the three plaintiffs appeared in person without assistance of learned Counsel. Ms Saidan Hassan Msuya (appeared as an administrator

of the Estate of the late Abtwalib Mussa Msuya). Other plaintiffs in attendance were Jamali Abdallah Tagalala (the second plaintiff) and Evarist Mutta (the third plaintiff). The first and second defendants were represented by learned Counsel Mr. Cuthbert Tenga. On the other hand, though duly served, Mr. Charles R.B. Rwechungura (Receiver Manager of the CBL) did not enter any appearance.

Mr. Tenga submitted that section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 **(AJA)** empowers the Court to call on its own motion, for the record of the High Court to determine if there are illegalities worth being rectified by way of revision. He submitted further that there are several illegalities appearing on the face of the record of Civil Case No. 5 of 1998 which will occasion injustice to the first and second defendants if the Court does not intervene by revision. He referred us to the Amended Plaint which the plaintiffs filed where in its paragraph 4; the plaintiffs had acknowledged that the first defendant (CBL) was under Receivership. He wondered why, the plaintiffs still pursued the two defendants. He urged us to find this as an irregularity which has occasioned injustice to Mr. Chande who is subject of an arrest warrant.

Secondly, Mr. Tenga attacked the way the trial Judge (Kyando, J.) had readily ordered the first and second defendants to be served by way of substituted service without first attempting personal service. The learned Counsel also faulted the *ex parte* judgment which does not furnish reasons and fails to meet the statutory conditions befitting a Judgment of the court under Order XX of the Civil Procedure Code, Cap. 33. With the judgment falling short of legal requirements, no valid decree can be extracted therefrom, he submitted.

Mr. Tenga also had some reservations over legality of the proof of the suit by affidavit. He submitted that although he did not find supporting authorities, he staked his position that it was a defect in the procedure for the trial Judge to allow the plaintiffs to prove their claims by way of affidavits. He similarly blamed Masanche, J. for dismissing the two defendants' application for extension of time within which to file an application to set aside *ex parte* judgment. He argued that parties had not been summoned before Masanche, J. to be heard and to receive his order.

When they were invited to submit, Ms Saidan introduced herself as the first plaintiff's widow and his legal representative in these proceedings.

She preferred to let the other plaintiffs to submit on her behalf. Jamali Abdallah Tagalala (second plaintiff) submitted that he saw nothing wrong with the *ex parte* Judgment and the subsequent execution proceedings against the first and second defendants. Mr. Evarist Mutta (the third plaintiff) agreed with his colleague and questioned why the instant revision was not initiated by a Notice of Motion under Rule 65 of the Tanzania Court of Appeal Rules, 2009.

From the foregoing chronology of events in HC Civil Case No. 5 of 1998 and submissions made to us by the Plaintiffs and Mr. Cuthbert Tenga, it is appropriate to observe that the Court enjoys wide powers on its own motion to call for the records of the High Court in order to satisfy itself on correctness, legality, propriety and regularity of any proceedings of the High Court. The relevant section 4 (3) of AJA provides:

> *4(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to* ***call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order*** *or any*

other decision made thereon and as to the regularity of any proceedings of the High Court. [Emphasis]

We have come to the determination that there are at least three salient procedural matters that require our closer scrutiny in the exercise of our power of revision. **First** is the propriety/regularity or otherwise of the proceedings on 11/11/1999 when the High Court ordered the first and second defendants to be served by way of Substituted Service. **Secondly**, the regularity and legality of the Order of the trial Judge dated 18/2/2009 allowing the plaintiffs to prove their entire claims disclosed in their amended Plaint by way of affidavits. **Thirdly**, is the failure by the trial court, to notify the defendants the date of delivery of the *ex parte* judgment.

We propose to begin with the way the substituted service was ordered by the trial court. Looking back, this was the first procedural step which put the sail against the CBL and Mr. Chande, so to speak. Mr. Nyabiri, who was then their learned Counsel failed to show up on 11/11/1999. The record only implies that he had withdrawn his services. Mr. Nyangarika seized the occasion created by the absence of the two defendants to pray for the trial court to dispense with personal service of

court processes on the first and second defendants. He asked to be allowed to resort to "substituted service". The excerpt on what happened that day shows:

11/11/1999:—

"Coram: L.A.A. Kyando, J.

For plaintiff: Nyangarika: Present

Order: *Leave granted to Mr. Nyabiri to withdraw from the conduct of the suit".*

(L.A.A. KYANDO)

JUDGE

Mr. Nyangarika: *We ask to serve the 1st and 2nd defendants by publication in "Majira" newspaper, Your Lordship.*

Order: *Leave to serve the 1st and 2nd defendants by publication in "Majira" newspaper granted. Mention on 7/12/99.*

(L.A.A. KYANDO)

JUDGE

In the record of the trial court there is a letter; Ref. RCA/CIV.C.5/98 dated 10th November, 1999. But this letter was addressed to the District Registrar, High Court at Dodoma. The firm of Advocates, RK RWEYONGEZA AND COMPANY, was by that letter withdrawing their representation in Civil Case No. 5 of 1998. The letter stated:

> *"...We were representing the 1st and 2nd Defendants in the suit above captioned.*
>
> *For a long time now* ***we have lost contact with the 1st and 2nd Defendants.*** *We even prepared a Written Statement of Defence on Amended Plaint and sent it to our Dar es Salaam Office for onward transmission to the 1st and 2nd defendants for signing but our Mr. Rweyongeza, failed to trace them.*
>
> *We therefore pray to be allowed to withdraw from the conduct of this suit as we have presently no instructions to proceed with it.* ***We further pray that the 1st and 2nd defendants be served personally through the Receiver Manager i.e. the 3rd Defendant.*** *"*[Emphasis added].

It is our duty here to determine whether the circumstances in the trial court were appropriate for the trial Judge to order substituted

service instead of personal service on CBL and Mr. Chande. Trial courts have the power under Order V Rule 20 of the Civil Procedure Code, Cap. 33 **(the CPC)** to direct Substituted Service be mode of service instead of personal service of the court processes. Although this substituted service is as effectual as if it had been made upon the defendant personally, there are pre-conditions to be met under Order V Rule 20:

> *R. 20.-(1)* ***Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service*** *or that, for any other reason, the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court thinks fit.*
>
> *(2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.*

(3) Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require. [Emphasis added].

It seems to us, there must be facts resented before the trial court from which the trial court to satisfy itself that there is reason to believe either that the defendant is keeping out of the way for the purpose of avoiding service, or that there is any other reason summons cannot be served in the ordinary way.

In the revision proceeding before us, the record of the trial court shows that before the date when the Judge ordered substituted service, the first and second defendants were represented by a learned Counsel Mr. Nyabiri. The trial Judge did not record his reasons for ordering substituted services. It is not clear what role, if any, the letter from RK RWEYONGEZA AND COMPANY played in the decision of the trial Judge to order substituted service, instead of personal service through the Receiver Manager i.e. the 3rd defendant as suggested by the letter.

The appropriate law under Order V Rule 20 of the CPC prescribes conditions that the trial Judge should have met to his satisfaction before granting an order of substituted service. It must be shown either that

the defendant is keeping himself away to avoid or evade service of summons; or there is any reason shown on the record that the summons could not be effected on the first and second defendants in the ordinary way. We do not think it was appropriate for the trial Judge to take at face value the contents of the letter which was barely mentioned in his record of proceedings. We do not know what RK RWEYONGEZA meant by saying that *"we have lost contact with the 1st and 2nd defendants"*. It could mean instruction fees had not been paid or it could mean the physical absence of the first and second defendants. It is not clear to us why, if the trial Judge was aware of the letter, he did not heed the suggestion that the two defendants should have been served with court processes through the Receiver Manager, who was already a party to the suit.

The failure by the trial Judge to comply with either of the two conditions under Order V Rule 20 before ordering substituted service amounted to a material irregularity which denied the first and second defendants their rights to be heard before an *ex parte* judgment was entered against them and the subsequent execution proceedings. Order V Rule 20 espouses the right to be heard which is an integral part of

Mohamed Salim Said, The Administrator General and Mabunda Auction Mart, Civil Application for Revision No. 68 of 2011 (unreported) the Court had the occasion to discuss the consequences which should follow a failure to afford a hearing before any decision affecting the rights of any person is given:

> *"...its breach or violation, unless expressly or impliedly authorised by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard..."*

The second salient turn of procedural tide which adversely affected the CBL and Mr. Chande occurred on 18/2/2000 when the trial Judge ordered the plaintiffs to proceed with proof by way of affidavits. The excerpt of the record that day shows:

> *"Coram: L.A.A. Kyando, J.*
> *For Plaintiffs: Nyangarika: Present*
> *1st Defendant: Absent*
> *2nd Defendant: Absent*
> *For 3rd Defendant: Mrs. Makani: Present*

cc: Malima

Mr. Nyangarika: *We sent summons for publication in "Majira" and it was published to "Majira" of 24/11/1999 (copy/cutting filed). There has been no response from 1st and 2nd defendants we pray to proceed against them ex parte by affidavits.*

Order: *Application granted. Mr. Nyangarika* ***to prove suit against 1st and 2nd defendants ex parte by affidavits to be filed by 7/3/2000.*** *Mention on 8/3/2000 for entering judgment.*

(L.A.A. KYANDO)

JUDGE." [Emphasis added].

It is not clear which provisions of the law the trial Judge invoked to readily allow the plaintiffs to prove their entire claims in the suit by affidavits. There are indeed scattered pockets of provisions in the CPC which permit use of affidavits, but we must hasten to point out under Orders XI, XII and XIX of the CPC where affidavits are mentioned, their use are restricted to specified situations. For instance, Order XI is devoted to discovery and inspection during pre-trial stage. Use of affidavits here is restricted to answering interrogatories (rule 7), in specifying which documents a party objects to produce (rule 11) and on inspection of documents referred in the pleadings (rule 13). Even under Order XIX which is wholly devoted to affidavits, use is restricted to proof of a particular fact

and upon showing sufficient reason. Further, the court is left with the power to dispense with affidavits and direct attendance of witnesses.

The issue whether the entire claims by plaintiffs in a suit can be proved solely by affidavit is not novel to this Court. It was answered by a **"NO"** in **Faizen Enterprises Limited vs. Afri-carriers Limited,** Civil Appeal No. 38 of 1997 (unreported) where this Court had the occasion to discuss the regularity of the trial Judge to order *ex parte* proof by way of affidavits. Facts in that case are eerily relevant to the instant revision proceedings before us. On the day when the DSM HC Civil Case No. 307 of 1988 was called for hearing before Mwaikasu J., Counsel for the plaintiff was present, but no representative of the defendant company was present. The learned Counsel for the plaintiff seized his moment to pray for leave to proceed *ex-parte* by affidavit as the defendant was absent. The trial Judge duly obliged the prayer and issued the following order:

*"**Mwajasho:** I pray for leave to proceed ex parte by affidavit as the defendant is absent.*

***Order:** Application granted. Affidavit by 27/4/1993. Mention on 28/4/93."*

As fate would have it, the plaintiff still lost, and appealed to this Court.

The Court observed that while it was fair for the plaintiff's Counsel to proceed *ex parte* as he was entitled under Order IX Rule 6 (1) (a) (i) of the CPC, the Court was not prepared to condone the subsequent Order of the High Court on proof by affidavit:

> *"...But what is beyond our comprehension is the plaintiff's Counsel's other prayer or application that he be allowed to prove his case ex-parte and by affidavit. How can anyone prove his entire case by affidavit and whose affidavits anyway? And most important, under what provision can this be done?"*
>
> *"...We are satisfied that the court was not correct in proceeding the way it did, this non-compliance with the provisions of the Civil Procedure Code resulted not only in very confused proceedings but worse in an unwanted seven years delay before the case could be completed..."*
>
> *"... We think the fair thing to do in such circumstances is to quash the proceedings in the High Court, set aside the judgment and other ancillary orders with an order that the case be retried before another judge who we trust will adhere strictly to the provisions of the Civil Procedure Code."*

We also in the instant revision proceeding, find that the proof by way of affidavit vitiated the resulting *ex parte* judgment and resulting decree of the High Court in Civil Case No. 5 of 1998.

Although the CBL and Mr. Chande were supposedly served with court processes by way of substituted service in the MAJIRA newspaper opening the way for the subsequent *ex parte* judgment against them; in the eyes of the law, it seems, that substituted service did not dispense with the duty the trial Judge (Kyando, J.) had, to cause the two defendants to be notified of the date when the *ex parte* judgment against them was scheduled to be delivered. No affidavit of service was duly filed by the process server to show attempts to notify the defendants were made but they could not be found or were avoiding service. As we pointed out earlier, personal service of the court processes is the preferred mode. Other modes of services are resorted to only when it is shown by affidavit of service that personal service is not feasible in the circumstances of the case concerned. In his letter of complaint to the Chief Justice, Mr. Girish T. Chande cited several instances where he, as a defendant in the suit, was totally by-passed by the court processes:

*... For some odd reason, **the Plaint was served only on the Receiver Manager and not on the Company [i.e. CBL] or myself.** The Receiver Manager did not pass on any of the served papers to the company or myself in spite of knowing where to locate us. The result was that the case proceeded ex parte as the plaintiffs claimed that they could not locate us.... **the first time I became aware of the case was when I was approached by a court broker with a court warrant dated 25th March, 2001 for my arrest and imprisonment**..... It is interesting to note that **whilst I could not be found for the purpose of service of any of the court papers, the plaintiffs and/or the court broker were able to locate me at my office in Samora Avenue for the execution of the arrest warrant**."* [Emphasis added].

With regard to the apparent irregularity of the failure by the trial court, to notify the defendants about the date of delivery of the *ex parte* judgment, we fully embrace the pertinent observations made by Kaijage, J. (as then was) when delivering his Ruling on 2/12/2003 during the course of proceedings in Civil Case No. 5 of 1998. He underscored the right of all parties to impending *ex parte* judgments to be notified of the date of

delivery. He referred to our decision in **Cosmas Construction Co. Ltd vs. Arrow Garments Ltd** [1992] T.L.R. 127 where the Court said:

> *"...A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte, but that is the furthest extent he suffers. Although the matter is therefore considered without any input by him, he is entitled to know the final outcome. He 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..."*

In view of the above irregularities, incorrectness, and impropriety in the proceedings of the Civil Case No. 5 of 1998 which have occasioned injustice to the Capital Breweries Limited and Mr. Girish T. Chande; we are minded to invoke the Court's revisional jurisdiction under section 4 (3) of AJA to quash and set aside all the proceedings in the Civil Case No. 5 of 1998 beginning from the Order of L.A.A. Kyando dated 11/11/1999 granting leave for the plaintiffs to serve the first and second defendants by publication in "MAJIRA" newspaper. We also quash and set aside the Order dated 18/2/2000 wherein Kyando, J. allowed the plaintiffs to prove their suit *ex parte* by affidavits. This means that the *ex parte* Judgment entered

by Kyando, J. on 18/10/2000 and all the subsequent proceedings, orders and warrants are similarly quashed and set aside.

It is hereby ordered that the Civil Case No. 5 of 1998 shall expeditiously continue before another Judge in the High Court at Dodoma and the trial Judge assigned the matter shall begin by prescribing the time within which the first and second defendants shall file their Written Statements of Defence to the Amended Plaint. Each side shall bear its own costs.

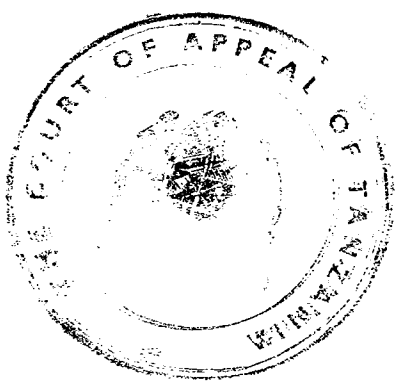
DATED at **DODOMA** this 25th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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