IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., GALEBA, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 161 OF 2019

MARY MCHOME MBWAMBO and AMOS MBWAMBO
(As joint Administrators of the estate of the late
Gilliad Mbwambo) ..... **APPELLANT**

VERSUS

MBEYA CEMENT COMPANY LTD. ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania
(Commercial Division) at Dar Es Salaam)
(Kimaro, J.)

dated the 27th day of March, 2006
in
Commercial Case No. 126 of 2005

JUDGMENT OF THE COURT

22nd March & 4th April, 2022

FIKIRINI, J.A.:

Mary Mchome Mbwambo and Amos Mbwambo (joint administrators of the estate of the late Gilliad Mbwambo, the deceased), appointed on 6th October, 2008 in the High Court Probate and Administration Cause No. 63 of 2007 hereinafter referred to as the appellant, appeal against the default judgment and orders of the High Court in Commercial Case No. 126 of 2005.

The appeal sprouted from a dispute involving an outstanding payment of Tanzania Shillings Three Hundred Seventy-Two Million (TZS. 372,000,000.00) only regarded as payment due by the appellant from the purchase of cement from the respondent company, Mbeya Cement Company Ltd, as well as the payment of general damages, interest and costs to the respondent, as decided in the Commercial Case No. 126 of 2005. The appellant is now challenging the said default judgment entered on 27th March, 2006.

Gathered from the record of appeal, is that Ambwene Mwamakula and Mr. Gilliad Mbwambo were partners in Kirinjiko Investment, a partnership registered under the Business Names Registration Act, Cap. 213 R.E. 2002. Their business dealt with the purchase and distribution of cement delivered from the respondent, which they sold to various clients. While the business was going on, the deceased and his wife were involved in a car accident. Mr. Gilliad Mbwambo lost his life. Initially, Ambwene Mwamakula, the remaining partner, was appointed an administrator of the estate of the late Gilliad Mbwambo in the Probate and Administration Cause No. 123 of 2004 by the Kinondoni Primary court, the appointment was, however, challenged in Civil Appeal No. 20 of 2006 before the

Kinondoni District Court. The appointed administrator was on 7th September, 2006 discharged from the appointment, with no replacement at the time. The estate remained unattended until when the present administrators were jointly appointed on 6th October, 2008, in the High Court Probate and Administration Cause No. 63 of 2007.

By the time the current administrators were appointed to administer the deceased estate, the respondent had already sued Ambwene Mwamakula, the administrator cum partner, and Mary John as 1st and 2nd respondents respectively in Commercial Case No. 126 of 2005. This what transpired on 27th March, 2006 resulting into a default judgment. On the that day which the matter was essentially coming for mention, Mr. Kitururu, plaintiff's advocate informed the court that all the defendants had been served and ordered to file written statement of defence by 13th March, 2006. He thus inquired from the court if there was compliance to the order, the answer was no defence has been filed by any of the defendants. Mr. Kitururu proceeded to pray for default judgment, Mr. Ngudungi advocate for the 2nd defendant's presence and address to the court, notwithstanding, the court satisfied that the defendants were served on 20th February, 2006 as indicated on the summons, went ahead had

pronounced a default judgment on 27th March, 2006, for failure to file a written statement of defence.

Aggrieved and after several applications, the appellant has finally knocked on the door of this Court, armed with two grounds of appeal:

1. That the trial court erred in law and facts when it entered the default judgment against the appellant in total violation of the right to be heard, leading the appellant to be condemned unheard on the ground that:

   a) No summons was issued by the court commanding the appellant to file his written statement of defence within twenty-one (21) days and to appear in court on 21st February, 2006.

   b) The purported summons was not duly served to the appellant and no proof of service was filed in court at all.

2. That the trial court erred in law and facts by entering the default judgment against the appellant in the case on account of;

   a) No summons for appearance was issued, served to the appellant and no proof of service of the same was given to the

court while summons issued was a summons for filing a written statement of defence.

b) The amount claimed in the plaint is colossal and over the amount allowed by law for entering default judgment without wanting the plaintiff to prove the claim.

Mr. Daniel Haule Ngudungi and Mr. Ndanu Emmanuel both learned advocates appeared for the appellant and the respondent, respectively. At the hearing the advocates adopted their written submissions filed in Court in terms of the appeal rules 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules) filed on 3rd September, 2019 and 4th October, 2019 by the respective advocates.

Get the ball rolling, Mr. Ngudungi contended that no summons was ever issued to the appellant as shown at pages 50-51 of the record of appeal, assigning the reason that the date indicated of 17th January, 2005 on the purported summons was crossed out, and was not stated who crossed out the date and inserted another date. He wondered who did that, was it the court, parties, or any other person? Expounding his submissions, he contended that the proper procedure of serving the court

summons, was for the court process server to present the court summons and thereafter to swear an affidavit as proof of the service effected. The summons reflected at pages 50-51 of the record of appeal, he argued had the following questionable remarks at the bottom: (i) "*Mdaiwa amepokea summons, plaint na karatasi zote, lakini amegoma kusaini akidai akili yake slo nzuri (simply translated to mean "the defendant has received summons, plaint and all the papers but refused to sign claiming she is not of sound mind")*. No one knows who inserted those remarks, (ii) the summons at page 51 of the record of appeal, likewise has the following remarks "*Nimeshindwa kumpata mdaiwa lakini summons zimepokelewa na Joshua Mwamakula ambaye ni mtoto wake* (*simply translated to mean "the person effecting service has failed to get hold of the defendant but summons has been received by Joshua Mwamakula his son*)." Again no information was availed as to who inserted the remarks as there was no date or name of the person, remarked the counsel.

Mr. Ngudungi further submitted and referred us to page 53 of the record of appeal, that on the day that the default judgment was entered, the matter was scheduled for mention. On that day the court ordered another date of mention and that parties be notified. Fresh summons was

thus expected but none was issued and there was no proof to that effect. He, on the strength of his submission, prayed for the appeal to be allowed by the Court, nullifying the proceedings as from 21st February, 2006 onwards to allow the appellant opportunity to be heard. He prayed for the appeal to be allowed with costs.

Reacting to Mr. Ngudungi's submission, Mr. Emmanuel contested the grounds of appeal listed to have no relevance alluding to the following reasons: that the appellant's counsel's assertion that there was no summons issued, was not correct, stating that the copy of the summons shown at page 50 of the record of appeal, clearly indicated the case number, names of the parties and had the stamp and the District Registrar's signature. Therefore, the alterations made crossing out the date cannot be the reason for the said summons to be regarded as invalid. Stressing that the appellant was duly served, he submitted that was why his counsel entered appearance and addressed the court on the date fixed as indicated at page 54 of the record of appeal; that the appellant intended to bring an application on account of her ill-health. Mr. Emmanuel, therefore, doubted the assertion that no service was effected, and yet the

appellant's counsel was able to enter an appearance and to even make a submission to the court as the record of appeal shows.

On the issue that there was no proof of service of the summons, he argued that there was no place on the summons for the process server to endorse that service has been effected since there was nothing on the backside of the summons issued allowing the process server's endorsement. Otherwise, the records are clear that on 20th December, 2005, the court ordered for issuance of summons to file a written statement of defence to the appellant and the matter to come for mention on 17th January, 2006. Mr. Emmanuel challenged the appellant's counsel's appearance on the mention date, yet failed to file a written statement of defence as ordered. The Judge was thus correct in entering a default judgment under Order VIII rule 14 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019) (the CPC), maintained Mr. Emmanuel. Controverting Mr. Ngudungi's submission that the proper order would have been for the Judge to order an *ex parte* hearing and not enter default judgment right away, he contended that by then the current amendment through GN. No. 381 of 2019 was not yet operational.

Probed by us, on the importance of proof of service by the process server, even if there was no place for endorsement, Mr. Emmanuel admitted that proof of service was required, however, he was quick to remark under the circumstances of the present case there was no need for proof of service as there was no controversy. Prodded further by us on who entered the comments at the bottom of the summons issued, the explanation from Mr. Emmanuel was that he was informed that the process server was the one who made the endorsement, even though there was no name reflected.

Briefly rejoining, Mr. Ngudungi besides reiterating his earlier submission in chief, responded to Mr. Emmanuel's assertion that the summons issued was valid. On this, he contended that whereas Mr. Emmanuel admitted the summons to have been served by the process server, but has failed to inform the court of the name of the said process server, who he claimed altered the dates, served the summons, and endorsed at the bottom of the two summonses indicated at pages 50-51 of the record of appeal. He further submitted that the questionable summonses as reflected at page 52 of the record of appeal, were issued on 21st December, 2005 after the court order made on 20th December, 2005.

This was followed by a mention date on 17th January, 2006. On that day, none of the parties appeared. Another date for mention was ordered and that parties were to be notified. The order was not complied with as no fresh summonses were issued to parties notifying them of the mention date. Instead, alterations were made which could read as a forgery. Dismissing Mr. Emmanuel's submission that the documents were valid so long as there was a court stamp and District Registrar's signature, Mr. Ngudungi argued that those documents cannot be valid as their correctness and truthfulness were questionable.

Additionally, he contended that despite being present in court as indicated at page 52 of the record of appeal, there was no information given on when the purported service was effected. Responding to the submission regarding the default judgment, he contended that the sum involved was colossal for the court to simply enter a default judgment, hence beckoning for us to find the appeal is meritorious.

We have considerably weighed the rival contentions of the advocates. Thus, in determining the first ground of appeal before us, we find it apposite to first examine the provisions of the law governing

issuance and service of summons to file a written statement of defence and appearance, that being the bone of contention. While Mr. Ngudungi asserts that no service of summons was effected regarding the filing of a written statement of defence or appearance, Mr. Emmanuel adamantly affirms service of summons was effected resulting in counsel for the appellant entering an appearance on 27th March, 2006.

Issuance and service of summons are regulated under Order V rules 1-8 which deals with the issue of summons and rules 9-33 of the CPC. Order V rule 1 provides as follows on summons:

> *"When a suit has been duly instituted a summons may be issued to the defendant at the time when the suit is assigned to a specific judge or magistrate pursuant to the provisions of rule 3 of Order IV-*
>
> *(a) To appear and answer the claim on a day to be specified (herein referred as a summons to appear); or*
>
> *(b) If the suit is instituted in a court other than the High Court and the court so determines, to file, in accordance with subrule (2) of rule 1 of Order VIII, a written statement of defence to the claim (hereinafter referred to as a summons to file a defence)."*

The issue for our determination is thus whether there were summonses issued and duly served upon the defendants then to put them on notice that they were required to file a written statement of defence as ordered by the court and consequently enter appearance on the date fixed for mention.

The controverted summonses in the appeal before us are the summonses issued as indicated at pages 50-51. These summonses are the resultant of the court order dated 20th December, 2005. After the plaint had been filed, the court ordered summonses for filing a written statement of defence to be issued to the defendants. The court duly signed and sealed summonses were issued by the Registrar on 21st December, 2005, that the defendants then were to file their written statement of defence and appear for mention on 17th January, 2006. On that day, neither the respondent nor the appellant entered appearance. This was followed with an order for mention on 21st February, 2006, and that parties be notified. It seems no fresh summonses were issued, instead the already issued summonses on 21st December, 2005 were altered by crossing out the date 17th January, 2006, and the date of 21st February, 2006 was entered. There was no date of when the alterations were made, by who, and why.

Moreover, there was no proof that even those altered summonses were duly served.

We have closely examined the two summonses shown at pages 50-51 of the record of appeal: one issued to Mary John and the other one to Ambwene Mwamakula. On the summons issued and purported served on Mary John, had handwritten remarks at the bottom;

> *"Mdaiwa amepokea summons na plaint na karatasi zote lakini amegoma kusaini akidai kuwa akili yake si nzuri"*

In the second summons issued to Ambwene Mwamakula again, remarks read as follows:

> *"Nimeshindwa kumpata mdaiwa lakini plaint na summons zimepokelewa na Joshua Mwamakula ambaye ni mtoto."*

There is a signature appended at the bottom right end of the summonses, without a name or date as to who and when the service was effected.

According to Mr. Emmanuel, service was duly effected and the remarks at the bottom of the summonses were those of a process server, whom he, nonetheless did not name or even the name of the person who informed him. Mr. Emmanuel's assertion under the circumstances cannot

be given any credence, in the absence of an affidavit of proof of service as required under rule 18 of Order V of the CPC which states:

> *"The serving officer shall, within fourteen days of service in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original; summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons."*

Moreover, guided by rule 16 of Order V of the CPC, service was not duly effected, as the endorsement made in those summonses is questionable. And the return of service is not supported by the proof of service as there was no affidavit or document showing compliance to the dictates of rules 16 and 18 of the Order V of the CPC. We say so as the summonses do not reflect clearly and the Court has not been told with certainty as who endorsed at the bottom of the summons or the date when the endorsements were made indicated. This shortfall could have been salvaged had the process server filed an affidavit proving that was duly effected.

We are thus in agreement with Mr. Ngudungi, that the purported summonses to file a written statement of defence were lacking in authenticity as they did not reflect who made the alterations on the dates and making it hard for us to believe if the said alterations were made or blessed by the court. More to that there was no proof that those summonses were served upon Ambwene Mwamakula and Mary John as alleged. This is so as there was no proof of service in that regard.

Even if we were to assume, which is highly unlikely that the alterations were with the court's blessing, our next question would be were the defendants notified on the next scheduled date of mention, which in this instance was to be on 21st February, 2006? The answer is no, as there is no proof of that. We say so because no fresh summonses were issued and the altered ones lost their authenticity to pass as properly issued and served summonses.

This brings us to the provision of Order V rule 6 of the CPC, which directs on appearance on the date fixed. The provision of rule 6 Order V provides as follows:

"The day of appearance of the defendant shall be fixed with reference to the current business of the court, the place of residence of the defendant and the time necessary for service of the summons; and the day shall be so affixed as to allow the defendant sufficient time to enable him to appear and answer on such day."

Looking at the summonses at pages 50-51, as argued by Mr. Ngudungi the alterations have made it unclear as to when was to be the date of the intended business of the court. We have considered positively, Mr. Ngudungi's submission by considering that the initial summonses that were issued on 21st December, 2005 had passed their date and what was on the record of appeal are the copies of the summonses we declared not authentic as were marred with altered dates, and without explanation as to why and who made the said alterations.

On Mr. Emmanuel's contention that since the appellant's counsel entered appearance on 21st February, 2006 and even made prayers, meant that service was duly effected, we can reason with Mr. Emmanuel's submission that once a party is supposed to appear in court on a particular date and the same appears it connotes that the party knew about the matter and requirement to enter appearance, the issue of service of

summons is thus no longer relevant. Despite that position, we find the scenario in the present situation different. It has not been divulged to the court how the 2nd defendant's (Mary John) counsel made it to court. Our position is based on what transpired on the 27th March, 2006. On that day, Mr. Ngudungi appeared on behalf of the 2nd defendant (Mary John), rose to address the court questioning on the service of the defendants. For ease of reference let the record speak for itself:

> *"**Mr. Ngudungi Advocate**: I was not informed when the defendants were served and whether there is place for service to the defendants. .....*
>
> ***Court:** The summons shows that the defendants were served on 20/2/2006."*

Since there was no proof in that regard it is unsafe to conclude that service was effected on 20th February, 2006. What we can say without hesitation is that there were altered summonses with the insertion of the date reading 21st February, 2006 as the date fixed for a mention, but nothing has been placed before us to support the court's conclusion. The copies of the summonses found at pages 50-51 of the record of appeal do not indicate any service allegedly made on 20th February, 2006. Furthermore, on the

said date Mr. Ngudungi only appeared on behalf of the 2nd defendant, meaning the 1st defendant was not represented even if we were to go by Mr. Emmanuels' argument. The 1st defendant, we can safely say, was not at all aware of what was going on, to warrant the court's order that followed.

We are therefore in agreement with Mr. Ngudungi that there were no authentic summonses issued and served on the appellant nor was there proof of service in that regard. The copies of summonses found at pages 50 -51 are lacking in authenticity as they have alterations on the dates without stating who effected them, when, and why. Likewise, there was no proof of service to that effect. The complaint that the appellant has been denied the right to be heard cannot, in the circumstances, be underrated. In the famous case of **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported), the right to be heard before adverse action is taken is well elucidated when the Court said:

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised by courts in numerous*

decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."

The violation of the right to be heard is a breach of the cardinal principle of natural justice and an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. See: **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma** [2003] T.L.R. 251.

Given the settled position of the law, we are satisfied that the appellants were condemned unheard, and this vitiated the proceedings before the High Court from 20th December, 2005 when the court ordered for issuance and service of summonses and that the defendants file a written statement of defence and appear in court on 17th January, 2006 for mention. Those proceedings are thus nullified.

We find the first ground of appeal sufficient to dispose of the appeal, in which we find no need to dwell on the second ground of appeal on non-compliance to the dictates of Order VIII rule 14 (1) and (2) of the CPC.

From the above discussion, we thus allow the appeal and order the record to be remitted back to the High Court and hearing proceeds from 20th December, 2005 when the court ordered the defendants to file a written statement of defence. In the circumstances of this appeal, we order no costs.

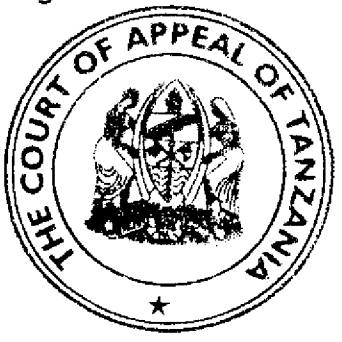
DATED at **DAR ES SALAAM** this 31st day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 4th day of April, 2022 in the presence of Ms. Jackline Kulwa, learned advocate for the appellant and Ms. Julita Surumbu, learned advocate for the respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL