IN THE HIGH COURT OF TANZANIA

AT IRINGA

MISC. CIVIL APPLICATION NO. 6 OF 2013

(Originating from Civil Case No. 2 of 2009 of the High Court of Iringa)

BAHATI M. NGOWI .... APPLICANT

VERSUS

PAUL AIDAN ULUNGI .... RESPONDENT

3/4/2014 & 30/5/2014

RULING

MADAM SHANGALI, J.

The respondent PAUL AIDAN ULUNGI has filed a suit before this court against the applicant BAHATI M. NGOWI. That suit is Civil Case No. 2 of 2009 in which the respondent claimed a total sum of T.Shs.300,000,000/= general damages based on the tort of defamation committed by the applicant.

On 30th April, 2009 when the matter was called for mention before my learned sister (*Hon. Mkuye, J.*) the advocate for the applicant/defendant at that time Mr. Kingwe applied for leave to file a written statement of defence out of time on

ground that his client, the applicant was not served with summons which were kept and left at Tumaini University. The counsel for the respondent/plaintiff vehemently objected the move and contended that the applicant was properly served through the Dean of Faculty of Law, Tumaini University who had received the summons on behalf of the applicant/defendant.

After hearing and considering the submission from both sides on that specific issue of service the court ruled in favour of the respondent/plaintiff, refused leave to file written statement of defence out of time and ordered the suit to be heard exparte.

The suit was heard exparte before my learned brother Mr. Kihio, J. and exparte judgement pronounced in favour of the respondent/plaintiff on 2.4.2013.

Dissatisfied with that decision the applicant has filed this application requesting this court to set aside the exparte judgement and grant both parties with an opportunity to argue their case interparties.

The application has been filed under Order IX Rule 13 (1) and (2), Order XXXIX Rules 5 (2), (3) and (4) and Sections 68 (e) and 95 of the Civil Procedure Code and duly supported by the affidavit deponed by the applicant in person.

The applicant was represented by Mr. Ndelwa and Mr. Nyalusi, learned advocates while the respondent was represented by Mr. Mwamgiga, learned advocate.

In his strong submission Mr. Ndelwa, reiterated the provisions of the law which give this court power and jurisdiction to set aside an exparte decision having considered the circumstances and reasons which led to that decision. He asked this court to apply and rely on the test innunciated in the case of **Mbogo and another Vs. Shah** (1968) EA 893.

In support of his client's affidavit Mr. Ndelwa stated that the main cause for the case to be heard and determined exparte was because there was no proper service of summons effected to the applicant. He argued that Order V Rule 12 of the Civil Procedure Code, Cap. 33 provides clearly that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

The learned counsel submitted that there is no dispute that the court process server, Ms. Court Broker, Cosmas Msigwa having been informed that the applicant was not present at the University at the time he reached there to effect service, he opted to serve one Thomas Mwanayongo the Dean of Faculty of Law, Tumaini University where the applicant was

an employee. Mr. Ndelwa submitted further that in such circumstances there is no dispute that the applicant was not served in person and also the person who was served on her behalf, Mr. Thomas Mwanayongo was not the applicant's authorized agent or summons server. However, Mr. Ndelwa conceded that the applicant was an employee at the Faculty of Law, Tumaini University and therefore Mr. Thomas Mwanayongo was her boss. He further contended that at the time when the alleged service was effected to Mr. Thomas Mwanayongo, the applicant was on leave at Dar-es-Salaam. The learned counsel submitted that having been served with the summons Mr. Thomas Mwanayongo reserved it in his office until when the applicant arrived from Dar-es-Salaam apparently late to appear before the court and file her written statement of defence. In such circumstances, Mr. Ndelwa argued, one cannot seriously say that the applicant was properly served to the extent of allowing the case against her to proceed exparte. He asked this court to refer and adopt the mandatory procedural requirements on the service of summons as stated in the case of **Erukana Kavuma Vs. Mehta** (1960) EA – Volume I pg. 305.

Mr. Ndelwa insisted that the only time to serve summons through another person under Order V Rule 16 to warrant effective service is when the defendant has either refused to sign it or where the court process server has used all due and reasonable diligence efforts to find the defendant and where

there is no authorized agent to sign the summons. He contended that there was no point in time when the defendant/applicant dodged the service or refused to acknowledge the summons. That, the only available evidence is that the service was effected to Mr. Thomas Mwanayongo, who later handed the same to the applicant on unknown date.

The learned counsel further submitted that the belated summons handed to the applicant by the said Thomas Mwanayongo was not accompanied with a copy of plaint and that was in contravention of Order V Rule 3 of the Civil Procedure Code. Meaning that even if the applicant was duly served at that time she could not have been able to file her written statement of defence.

Mr. Ndelwa insisted that the incomplete service was effected to a wrong person who opted to accept it and stay with it in his office, only to handle it to the applicant already out of time. He referred to the case of **Mohammed Nassoro Vs. Ally Mohamed** (1991) TLR 133 where the court set aside exparte judgement.

In his further submission Mr. Ndelwa contended that in an application to set aside an exparte judgement the court is entitled to go further and revisit the merits of the case on the triable issues. He cited Order IX Rule 13 (2) of the Civil Procedure Code and the decision in the case of **Paul S. Albet**

Vs. Theresia Andrea and another, Civil Case No. 9 of 1978, Mwanza registry (*unreported*). In the present case, Mr. Ndelwa argued, the evidence produced by the plaintiff/Respondent did not prove on the balance of probability the tort of defamation because there was no publication to warrant defamation. He asserted that what was available was self publication by the respondent/plaintiff.

Mr. Ndelwa also raised the issue of jurisdiction when he submitted to the effect that this court had no pecuniary jurisdiction to entertain the civil Case No. 2 of 2009 because the amount claimed is general damages to the tune of T.Shs.300,000,000/=. That, there is no specific damages or substantive claim pleaded to determine the pecuniary jurisdiction of the court. He cited the case of **Tanzania – China Friendship Textile Co. Ltd. Vs. Our Lady of Usambara Sisters** (2006) TLR, 400 where it was held that it is the substantive claim and not general damages which determines the pecuniary jurisdiction of the court.

Therefore, Mr. Ndelwa concluded, the court ought to have dismissed the Civil Case No. 2 of 2009 because it lacked jurisdiction to entertain it. He advised that the proper courts within Section 13 of the Civil Procedure Code would have been the Resident Magistrate Court or District Court which are the courts of lowest grade competent to try the matter.

In response Mr. Mwamgiga, learned counsel for the respondent submitted to the effect that the applicant's application for extension of time to file her written statement of Defence out of time was refused on 15/12/2009 (*Hon. Mkuye, J.*) when the respondent was allowed to prove his case exparte. Therefore, the move to file this application and repeat the same issues which were raised and canvassed in that application is meaningless and the application is devoid of any merit. Mr. Mwamgiga submitted to the effect that the proper procedure to have been employed by the applicant was to appeal against the exparte judgement. He cited the case of **Cosmas Construction Company Ltd. Vs. Arrow Garments Ltd.** (1992) TLR.

Mr. Mwamgiga submitted at length on matters irrelevant to the application and eventually pleaded with this court to consider the principles stated in the case of the **Manager NBC Tarime Vs. Enock M. Chacha** (1993) TLR 228 before granting the sought reliefs. He submitted that the applicant have a duty to prove that the respondent having been allowed to prove his case exparte failed to prove it on the balance of probability. Mr. Mwamgiga argued that the exparte judgment pronounced by this court is perfect and well considered decision with no defects. He claimed that the issue of general damages was well attended and supported with several authorities. On the issue of jurisdiction he contended that such an issue cannot be raised at this late stage because at

best the applicant was supposed to raise it earlier as a preliminary objection. Mr. Mwamgiga further submitted that this court have no mandate to challenge its own decision and the only available avenue for the applicant is to appeal against that decision of this court. He prayed the application to be dismissed with costs for lack of merits.

In rejoinder the counsel for the applicants emphasized on their earlier submission while asking this court to refer to the cases of **Maudi s/o Mtaturu Vs. Ntinangi** (1972) HCD 150 and **Ntondoo Vs. Jah Mohamed** (1970) HCD 336.

At this juncture let it be clear that what is before this court for consideration and determination is an application by the applicant seeking to set aside the exparte judgement pronounced against her by this court on 2/4/2013.

The position of the law on this request is found under Order IX rule 13 (1) of the Civil Procedure Code, Cap. 33 which provides;

> *"In any case in which a decree is passed exparte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that summons was not duly served or that he was prevented by any sufficient course from appearing*

when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit ..."

That position of the law has been reiterated in the cases of **Mbogo and another** (*supra*), **Maudi s/o Mtaturu** (*supra*) and **Ntondoo** (*supra*) all cited by the counsel for the applicant.

With that position of the law in mind and having heard the submission from both sides the crucial question is whether the applicant/defendant was duly served with the summons.

Let me state here that I was not comfortable with a good part of submission made by the learned counsel for the respondent because it was tainted with misconceptions. It must be noted that this application is neither an appeal against exparte decision nor appeal against refusal of the application to set aside exparte judgement. As I have pointed above it is an application to set aside a decision pronounced exparte and the duty of the applicant is to give sufficient reason for her failure to appear or to file his written statement of defence. On the other side the duty of the respondent is to counter and challenge the reasons advanced by the applicant. It is interesting that even the case authorities cited by the

respondent's counsel were irrelevant to the application and at most favoured the application.

Coming to the crucial question whether the applicant/defendant was duly and properly served with summons, my straight answer is in the negative.

The available evidence and the whole circumstances of this matter conclude that the applicant was not duly served in accordance to the law. There is no scintilla of evidence to establish that the applicant was served with summons at her home, place of work or at any other place. Order V rule 12 of the Civil Procedure Code provides that wherever it is possible, service shall be made on the defendant in person unless he has an agent empowered to accept the service summons, in which case service on such an agent shall be sufficient.

The available evidence reveal that it was Thomas Mwanayongo, Dean of faculty of law, Tumaini University who was duly served by Ms. Court Broker Cosmas Msigwa on 19th March, 2009 on ground that the applicant was a lecturer at his faculty. It must be noted and admitted that Thomas Mwanayongo was neither an authorized agent nor a court process server. He was simply misled and tricked by the court process server to accept the summons on behalf of the applicant contrary to the law. In other words Thomas Mwanayongo elected to assume and effect duties out of his

domain. As a result he has caused unnecessary confusion and complaints.

There is no evidence to establish that the court process server had employed any due diligence efforts to trace and serve the applicant or evidence to show that the applicant had ever refused, neglected or dodged to accept the service of summons as alleged by the respondent and the court broker. There is evidence to show that at the time of the alleged service to Thomas Mwanayongo the applicant was away at Dar-es-Salaam where she was pursuing her studies at Kampala International University branch. As a result the summons was served to a wrong person who elected to keep it in his office while waiting for the arrival of the applicant.

In addition to that there is no evidence to prove that the alleged summons was attached with a copy of the plaint as required by the law. Therefore, I entirely agree with the counsel for the applicant that even if the applicant was served as alleged she could not have been able to prepare her written statement of defence. The alleged service was in contravention of Order V Rule 3 of the Civil Procedure Code.

In short, I entirely agree with the ample submission made by Mr. Ndelwa on this major ground together with the sound case authorities cited to support his legal proposition. I am convinced that there was no proper service of summons upon

the applicant as mandated by the law.

That finding is enough to dispose off this application as stated in the case of **Mohamed Nassoro** (*supra*). Indeed I see no reason to deliberate on the issue of merits of the case or whether the claims were proved on the balance of probability. Even the serious issue of pecuniary jurisdiction of this court is so obvious that the respondent should carefully ponder on it before taking any further action.

Suffice it to say that the applicant was not properly served with the summons. The application is hereby granted and the exparte judgement of this court dated 2nd April, 2013 is hereby set aside. The applicant is entitled to her costs.

M. S. SHANGALI
JUDGE
30.5.2014

Ruling delivered todate 30th May, 2014 in the presence of Mr. Nyalusi, learned advocate for the applicant and Mr. Mwamgiga learned advocate for the respondent. Respondent present in person.

M. S. SHANGALI
JUDGE
30.5.2014