IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO 57 OF 2016

Originating from Misc. Civil Application No. 74 of 2016 in the Resident Magistrate Court of Arusha at Arusha, Arising from taxation cause No.7 of 2015

NATIONAL MICROFINANCE BANK PLC .....APPELLANT

VERSUS

MIBARWE LOITEYEYO MOLLEL..... RESPONDENT

JUDGMENT

DR. OPIYO, J.

This is an appeal against the decision of Resident Magistrate's Court of Arusha in Application No 74 of 2016, in which the appellant was praying for the orders to set aside the ex-parte ruling in respect of Taxation cause No 07/2015.

Brief facts leading to the present appeal can be summarized as follows, respondent Mibarwe Loiteyeyo Mollel through his counsel Magdalena Sylister filed a taxation cause in the Resident Magistrate's Court of Arusha

in Arusha(RMS) claiming for the costs in respect of Civil case No 2 of 2014. The matter was scheduled for mention on 29th June, 2015 before Rwizire, RM and on that same date Ms. Sylister prayed for the stay of bill of costs as they had an appeal before High Court which was yet to be determined. The court adjourned the matter sine die. On 14thJune, 2016 Ms. Sylister wrote a letter to the RM's court requesting to proceed with the hearing of taxation cause no 07 of 2015. Following her letters, the court issued summons to the appellant that the matter was scheduled for mention on 4th July, 2016. On 4th July 2016 in the absence of the appellant counsel respondent appeared and prayed for the exparte hearing of the bill of costs, the same was granted and she was ordered to file written submission and on 12th August, 2016 the court delivered ex-parte ruling. On 09th September, 2016 appellant filed an application (Misc. app 74 of 2016) to set aside the ex-parte ruling, the application was heard inter parties and the same was dismissed with no order as to costs. Aggrieved by the said decision, the appellant has preferred the present appeal. Their Memorandum of appeal contains Five (5) grounds of appeals as hereunder reproduced:-

1. That, the Honorable Trial Magistrate erred both in law in fact by relying on improperly endorsed summons.

2. That, the Honorable Trial Magistrate erred both in law and in fact by assuming that the confusion of the dates appearing on the summons is not fatal.

3. That, the Honorable Trial Magistrate erred both in law and in fact in ruling that the appellant was dully served with the summons to appear for mention.

4. That, the Honorable Trial Magistrate erred both in law and in fact by allowing the matter to proceed ex-parte without referring to any proof.

5. That, Honorable Magistrate erred both in law and in fact by pronouncing ruling that is based on assumed and guessing facts.

Before this court the appellant was represented by Mr. Philip Mushi, learned counsel while respondent was represented by Ms. Sylister, learned counsel. The appeal was disposed of by the way of written submissions.

Submitting jointly on ground one to four, it was Mr. Mushi's submission that, the trial magistrate erred both in law and in fact by allowing the respondent herein to proceed with ex-parte hearing in Taxation Cause No. 7 of 2017, without any proof of a valid summons, and denying the appellant the application to have the said unlawful procured ex-parte ruling set aside.

It was his further submission that, the trial Magistrate in his ruling at page 2 paragraph 3 and at page 5 paragraph 2 has agreed that the purported

summons which is claimed to have been served to the Appellant has confusion on dates, the fact which was also admitted by the respondent who also took a defence that the said confusion has been created by the court and should not be used to punish them (respondent). It is his contention that, surprisingly despite the fact that the court had already discovered the said defect on summons, it went further relying on it as if it was a proper summons and join hands with the respondent that the mistakes of the court cannot prejudice them.

He submitted further that, the summons at issue, was endorsed by the court on the **24th July 2016** instructing the appellant to appear on court on the **4th July 2016** and it is purported to be served on **the 30th June 2016,** apart from the said piece of paper termed as summons by the respondent, there was no any other evidence tendered by the respondent to prove that it was actually the court who made the confusion on dates and what steps were employed by them to remedy the scenario. He contended that, if the mistakes of the court cannot punish the respondent, why then it can be used to punish the appellant? If this is not corrected the danger of opening Pandora's box is paramount and lower courts will find unfair safe shelter in it, as the decision of this honorable court binds them.

It was his further submission that, during the hearing they notified the trial court that, the said summons has never been served to the appellant, and even if the court will consider that the said summons has been served to the appellant it should consider that there is no proper endorsement. On

the face of the purported summons one cannot know who actually received it and there is no affidavit of the person who served the said purported summons stating who received the summon and up to date the name of the person who served the said summons is a mystery. The said summons only bares stamp of the branch office of the appellant and a signature, at the trial Court they referred the case of **Tito Shumo & 849Others Vs Kiteto District Council Civil Application No 140 of 2012 (Unreported)** whereas on page 4 of the said ruling Justice of Appeal Luanda has clearly explained procedure for effecting proper service of summons, where it was held that:-

> *"Where the service officer of the summons delivers/tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf he shall require him to sign an acknowledgement"*

The quoted authority is *pari materia* to **Order V Rule 16 Civil Procedure Code [CAP 33 R.E 2002]**, which provides, we quote;

> *"Where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf, he shall require the person to whom the copy is so delivered or tendered to sign an acknowledgement of service endorsed on the original summons"*(Emphasis supplied)

It was his further submission that, the key words to extract from the cited authorities are that the defendant personally, or agent or other person, shall berequired to sign an acknowledgement. This means the person who receives summons on behalf of the defendant must be known and sign acknowledgement of the receipt of the summons. Looking at the disputed summons, the same is purported to have been served to office branch of the appellant, that means the same has been served to an agent, hence, the identity of the person who received the summons was important to be disclosed, as the said branch of the bank has a lot of employees each with specific duties and not all can receive summons, that is the reason emphasis is given in requiring identity and signature of the one receiving an acknowledgement. It is only through disclosure of the person who receive summons, the proof of service can be evidenced. It was therefore his submission that their appeal be allowed with costs.

In response to the appellants grounds 1 to 4 Ms. Magdalena Sylister, submitted that, The appellant's submissions under those grounds revolve around two key issues namely error of dates and proof of service of the disputed summons. On error of dates, it was her contention that, there was only one error which was on the date when the summons was issued by the court. All other dates including the date when the appellant was required to appear in court for mention were perfect. It was her further contention that, the question of error of dates in the summons was not stated by the applicant in her application. She did not state that she failed

to appear because the summons had an error on the date when it was issued. Her main contention is that, she was not served with the summons at all, meaning that, she never saw the summons and so she was not aware of any error of dates on the summons. It was her further submission that, question of a wrong date of when the summons was issued was brought up by the appellant for the first time during the hearing of the trial application, as an afterthought.

On proof of service of the disputed summons, the learned counsel submitted that, the disputed summons was duly served to the appellant and proof of that service is the endorsement of the appellant's officer on the said summons. The endorsement contains a stamp of the appellant's customer care services department of the Ngarenaro branch, a signature of the appellant's officer who received the summons and the date of service namely the 30th day of June, 2016. Service was done to the said branch because the respondent's bank account which was involved in the dispute in the main case disclosed above was kept at that branch, and that all matters relating to the main case were handled through that branch.

I have gone through the appellants grounds of appeal one to four, his in respect of the same as well as that of the respondent. I have also gone through the lower courts records in respect of Taxation cause No 07 of 2015. I have gone through the summons in which the appellant is alleged to have been saved. I have observed two things; **one** is in respect of the

confusion as to the dates and **second** is on whether the parties were summoned to appear for mention or hearing.

As for the confusion of dates the said summons speak for itself that the summons was issued on the 24th July, 2016 for the parties to appear on the 4th July, 2016 by this it means that the summons was issued three weeks later, after the date the parties were supposed to appear in court. Summons being a notice/an order requiring a party to appear before a judge or magistrate it must be free from confusion. And since it was the court which made the confusion on the dates I am of the view that either of the parties should not be penalized by failing to understand when and where they were required to appear before the court.

On the issue as to whether the parties were required to appear for mention or hearing, the issue is straight forward, the summons clearly shows that the taxation cause no 07/2015 was fixed/ scheduled for mention on the 4th July, 2016, it is on record that on that date, the appellant's counsel did not appear but respondents counsel appeared and she prayed for the hearing of the matter to proceed ex-parte, the prayer which was granted by the court and she was ordered to file the written submission (ex parte). This constituted misdirection on the part of the court, order to proceed ex parte, is only granted when the defendant/respondent fails to appear when the suit or matter is fixed for hearing, not when the matter is fixed for mention.

Moreover, from the chain of events in this matter, it was wrong for the trial court to order the hearing of matter to proceed ex parte. The facts are that previously the matter was adjourned *sine die* and later the counsel for the appellant wrote a letter for the matter to proceed with the hearing. The court ordered the summons to be issued for the parties to appear. The said summons clearly shows that that, the matter was coming for mention and not hearing. It is on that mention date when the counsel for the respondent, the then applicant requested to proceed ex parte, the prayer that was readily granted. The trial court would have proceeded with the hearing only if both parties were present on 4th July, 2016 and agreed that the matter should be heard on that same date instead of mention.

Therefore since the summons clearly showed that, the matter was scheduled for mention, in the absence of appellant's counsel, it was very wrong for the court to order the matter to proceed ex-parte. It should be borne in mind that the ex-parte hearing should be allowed only in circumstances where there is proof of service and the party defaulted to appear on the date fixed for hearing of the matter. Thus, provided, summon was not for hearing entitling proceeding ex parte, it is not worth discussing whether the appellant was properly served. This is because, even if the appellant was properly served, still her non-appearance would not have the effect of allowing the respondent to proceed *ex parte* as the matter was not fixed for hearing on that date as noted above.

In the circumstances, and for the interest of justice, quash and set aside the decision of the Resident Magistrate's court of Arusha in Misc application No 74/2016. I proceed to nullify the *ex parte* proceedings and order in respect of Taxation cause No 07/2015. I consequently order the matter, Taxation Cause 07/2015be remitted back to the Resident Magistrate's court of Arusha for hearing inter parties. No order as to costs.

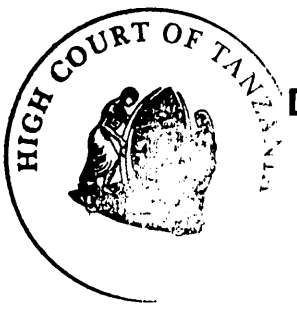
(SGD)

DR. M.OPIYO,

JUDGE

10/08/2018

I hereby certify this to be a true copy of the original.



S.M. KULITA

DEPUTY REGISTRAR

ARUSHA

23/8/2018