**IN THE UNITED REPUBLIC OF TANZANIA**
**IN THE HIGH COURT OF TANZANIA**
**(DAR ES SALAAM DISTRICT REGISTRY)**
**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 72 OF 2015**

*(Originating from the Ruling and Order of the Kisutu Resident Magistrate's Court in Misc. Application No. 219 of 2014 arising from Civil Case No. 182 of 2013).*

**MURO INVESTMENTS CO. LTD.....APPELLANT**

**VERSUS**

**ALICE ANDREW MLELA.....RESPONDENT**

**JUDGEMENT**

*Date of the last Order 11th December 2017*
*Date of Judgement 16th February 2018*

**SAMEJI, R. K, J**

The appellant in this appeal is appealing against the Ruling and Order issued by Hon. N. R. Mwaseba, (SRM) in respect of *Misc. Application No. 219 of 2014.* In its decision the said trial court determined the matter in favour of the respondent. The appellant was aggrieved and filed this appeal with five grounds of appeal as follows:-

*(a) That, the trial Magistrate erred in law and facts in holding that, the appellant was aware of the case namely Civil Case No. 182 of 2013;*

(b) *That, the trial Magistrate erred in law and fact in relying on the Affidavit of Alhaji Idd Almas, the alleged court process server, thus dismissing the application without sufficiently considering other verifying factors, such as a verification from Mtaa Executive Officer substantiating the alleged service and or refusal of summons;*

(c) *That, the trial Magistrate erred in law and facts in holding that, the appellant did not establish sufficient grounds to warrant granting of the Application;*

(d) *That, the trial Magistrate erred in law in misconstruing the provisions of Order VIII Rule 14 (2)(b) of the Civil Procedure Code Cap. 33 [R.E 2002], thus reaching an erroneous decision; and*

(e) *That, the trial Magistrate erred in law in misconstruing Order V Rule 16 of the Civil Procedure Code Cap. 33 [R.E.2002], thus reaching an erroneous decision.*

On the other side the respondent has filed a reply to the Memorandum of Appeal vehemently disputed all the above grounds of Appeal and prayed the Court to dismiss the same with costs for lack of merit.

At the hearing of this matter the appellant was under the services of Mr. Leornard T. Manyama and Mr. Eugenia Valerian Minja both from the Smile Stars Attorneys, while Mr. David A. Ntonge, the learned Counsel, from Ntonge and Co. Advocates represented the respondent. By consent of the parties the Appeal was argued by way of written submissions. This was adequately done and I am grateful to all Counsel for the parties for the energy and industrious research involved in canvassing issues herein.

Submitting in support of 1st, 2nd and 5th grounds of Appeal, the Counsel for the appellant stated that, the trial Magistrate relied on the Affidavit of the Court Process Server one Alhaji Idd Almas and ruled out that, the appellant was aware of the *Civil Case No. 182 of 2013* since August 2013, while in actual fact she was not aware. The Counsel contended that, the appellant was not served with any summons on the said case and as such she was not aware with the same till 22nd September 2014 when she was served with the summons for the execution of an *Exparte Decree*. The Counsel argued further that, in his Affidavit the Court Process Server deponed that,

he served the appellant through his office located along Mandela Road, but the appellant, as a Company undertaking transportation business does not have an office along Mandela Road. The appellant's offices are located at Ubungo Bus Terminal and Ubungo Oilcom Petrol Station. The Counsel submitted further that, in Dar es Salaam there is no street, ward or suburb known as Mandela Road, but the said Mandela Road is passing through and across various vicinity such as, Tazara, Temeke, Tabata, External, Riverside, etc, therefore according to him it was wrong for the trial court to accept that the service was done to the appellant while the Affidavit of the Court Process Server does not mention the specific location and street where the alleged service was undertaken. The Counsel disputed further the alleged service as there was no any Mtaa Executive Officer who was consulted to witness and verifies the actual location of the appellant's office.

The Counsel for the appellant argued that, the Court Process Server claimed to have effected the service on 1st August 2013 at 2pm, but the Affidavit was affirmed on 14th August 2013 almost two weeks later from the date of the alleged service and there was no any explanation of that variation. It was therefore the view of the Counsel for the appellant that

the said act had since raised doubts as to the authenticity and correctness of the said Affidavit and the entire exercise. He said, the trial Magistrate did not analyze the said Affidavit and ended up giving erroneous Ruling that the appellant was aware with the case. He as such prayed the Court to uphold the 1st, 2nd and 5th grounds of Appeal.

As for the 3rd and 4th grounds of Appeal, the Counsel for the appellant stated that in his application before the trial court, the appellant had applied for three prayers, *stay of execution, extension of time and set aside the exparte Judgement,* whereby sufficient reasons for each of the said prayers were well and clearly articulated and itemized in the Affidavit of one Majid Abdallah Kimaro, the appellant's Managing Director to warrant the grant of the said prayers. As for the first prayer he referred to paragraph 5 of the Affidavit and also referred to Section 14(1) of the Law of Limitation Act, Cap. 89 [R.E. 2002] and the case of **Hamida Ramadhani Manara Vs Ramadhani Mohamed and Another**, Misc. Civil Application No. 50 of 2009. On the second prayer, the Counsel argued that paragraph 11 of the Affidavit clearly indicated that, the decision of the trial Magistrate is tainted with illegality which was also a ground for the extension of time. He said the trial Magistrate contravened

Order VIII Rule 14 (2)(b) of the Civil Procedure Code, (supra) for granting exparte Judgement without requiring the respondent to prove her claims, as the amount of money claimed by the respondent was above the stated amount by the law. He cited the case of **V.I.P Engineering and Marketing LTD and Others Vs Citibank (T) Ltd,** Consolidated Civil References No. 6, 7 and 8 of 2006 (Unreported), where the Court of Appeal of Tanzania held that, "...***it is therefore settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time***". The Counsel then prayed the Court to quash the Ruling and the Order of the trial court and order the appellant to be allowed to file written statement of defence in respect of the *Civil Case No. 182 of 2013* and allow the said case to be determined on merit and accord the appellant the right of being heard. He referred to the case of **Sadiki Athuman Vs the Republic** (1986) TLR 235 where it was held that:- "...*the requirement that* ***a party to the proceedings must be given the opportunity to lay his views is a fundamental principle of natural justice***", [Emphasis added].

In response, Mr. Ntoge contended that what was submitted by the Counsel for the appellant has no merit. He said, there is no dispute that before

instituting the *Civil Case No. 182 of 2013*, the respondent was communicating with the appellant physically and even the demand letter and the summons for execution of a decree were dispatched to the same office situated along Mandela Road. He thus noted that, it is not proper for the appellant to deny the said office today and claim that service was not done. Mr. Ntonge argued further that, it is a common ground that court process server does not have personal knowledge of every place needed to serve the summons they are always directed and guided by the litigants, such as the respondent. Therefore, Ntonge was wondering why the appellant claimed that the Court Process Server was misguided by the respondent, he lamented that the submission by the Counsel of the appellant on this matter is misconceived.

Mr. Ntonge spiritedly argued further that, they have failed to understand the submission of the Counsel for the appellant when submitted that there is no place called Mandela Road, because there are several offices being identified to be situated along that Road. He as well disputed the way the Counsel for the appellant challenged the Affidavit of the Court Process Server, because according to him, if there is anything wrong in the said Affidavit the proper procedure was for the appellant to call the process

server for cross examination. He also disputed the claim of the Counsel for the appellant that the Mtaa Executive Officer was supposed to be consulted to witness the service. In his view since the respondent knew the appellant and his office, there was no need to involve the said Officer.

Mr. Ntonge distinguished **Hamida Ramadhani's** case cited by the Counsel for the appellant that it is irrelevant and cannot be applied in this case, because the summons served to the appellant herein was done under Order VIII Rule 14 (1) of the Civil Procedure Code and since the appellant has decided to sit on her right, she cannot come again and ask the Court to extend time for her to set aside the exparte Judgement. Mr. Ntonge disputed the claim that, the Affidavit was signed after two weeks from the date of service that there is no limitation on the affirmation of the Affidavits.

On the 3rd and 4th grounds of Appeal, Mr. Ntonge disputed the application of the appellant before the trial court that it was an omnibus. He said the said application submitted three different prayers which cannot be combined in one application. He cited the **Hamida Ramadhani's** case cited by the Counsel for the appellant at page 3 and also referred to the case of **State Motors Corporation & Others Vs Method Bakuza,**

(Unreported). However, the Court is disabled to appreciate the said authority on this matter, as Mr. Ntonge did not give proper and full citation of the said case and has not even attached a copy of the same to his submission to enable this Court to verify the same.

On the issue of illegality, Mr. Ntonge argued that the appellant wrongly perceived the Ruling of the trial court. Ntonge said, the appellant's summons was issued under Order VIII Rule 14 (1) of the Civil Procedure Code which provides that:-

> *"Where any party has been required to present a Written Statement of Defence under sub-rule (1) of rule 1 or a reply under rule 11 of this order and fail to present the same within the time fixed by the court, the court shall pronounce judgement against him or make such orders in relation to the suit or counterclaim, as the case may be, as it thinks fit".*

He then argued that, the trial court's default Judgement was entered under Order VIII Rule 14 (1) of the Civil Procedure Code and not under Order VIII Rule 14 (2) of the same law, as claimed by the appellant. To buttress his position he referred to the case of **1st Adili Bancorp Limited Vs**

**Matema Beach Traders Co. Ltd**, Civil Appeal No. 40 of 2000, (unreported). However, though this time Mr. Ntonge has given the full citation of the case and indicated that a copy is attached, but in actual fact there is no any copy attached and availed to this Court. The said act of Mr. Ntonge of not attaching the said (unreported) case had again denied the Court and the appellant the opportunity of applying and appreciating the said authority and verifying the same. Mr. Ntonge prayed the Court to dismiss the appeal with costs for lack of merit.

In rejoinder submission, the Counsel for the appellant insisted that the appellant was not served and he as well noted that the submission of Mr. Ntonge is vague, because it does not specify the actual location of or the vicinity where the appellant's office is located and where specifically the service was done.

On the issue of omnibus application, the Counsel for the appellant insisted that the same is acceptable and legally valid as it avoids multiplicity of applications and it serves time and money to both the court and parties. He referred to the case of **Tanzania Knitwear Ltd Vs Shamshu Esmail** (1989) TLR 48 where the High Court of Dar es Salaam, Hon. Mapigano J, as he then was, held that:-

"***The combination of two applications in one is not bad in law since courts of law abhor multiplicity of pleadings***". [Emphasis added].

The Counsel for the appellant further referred to the case of **MIC Tanzania Ltd Vs Minister for Labour and Youth Development and Attorney General**, Civil Appeal No. 103 of 2004 (unreported), where the Court of Appeal of Tanzania, Hon. Rutakangwa, J.A held at page 9 second paragraph that:-

"*...if the position he took is sustained on only those grounds, it would lead to undesirable consequences.* ***There will be a multiplicity of unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications, which would have been conveniently combined.*** *Therefore, unless there is a specific law barring the combination of more than one prayer in one Chamber Summons, the* ***Courts should encourage this procedure rather than wart it for fanciful reasons****".* [Emphasis supplied].

The Counsel for the appellant, then argued that, based on the above authorities, the appellant's application before the trial court was valid and legal.

On the issue that the exparte Judgement was issued under Order VIII Rule 14 (1) of the Civil Procedure Code and not Order VIII Rule 14 (2) of the same law, the Counsel for the appellant argued that, Order VIII Rule 14 (1) cannot be acted upon without referring to Order VIII Rule 14 (2). He insisted that Order VIII Rule 14 (2) require the Courts before entering the default Judgement to receive evidence from the plaintiff who claims for a sum of money which is more than Tshs. 1,000/=. It was therefore the view of the Counsel for the appellant that, since in this case the respondent was claiming more than Tshs, 1,000/= was supposed to lay evidence before the trial court. As such, the Counsel for the appellant insisted that the default judgement is tainted with illegality and prayed the appeal to be upheld as prayed.

I have given careful consideration to the submissions and arguments advanced by both parties and the record of the entire case. I have noted that, the prime issue for determination at this juncture is *whether the Appeal is meritorious.*

I have noted that, the 1st and 2nd grounds of the Appeal are on the issue of service of the summons claimed to have been served to the appellant in respect of *Civil Case No. 182 of 2013* for her to appear and defend her case, '*the right to be heard*'. The Counsel for the appellant is faulting the Ruling of the trial court to rely on the Affidavit of the Court Process Server and ruled that the service was properly done, while in his view the same was not done and the appellant was not aware with the said case. The Counsel for the appellant argued spiritedly that, in his affidavit, which was relied by the trial court, the said Process Server only indicated that the service was done to the appellant along Mandela Road, while the appellant has no office located along that Road. He further disputed that, the said Court Process Server despite of mentioning Mandela Road he never indicated a specific location where the said service was effected.

I have thus perused the said Affidavit of the Court Process Server to verify if the said service was properly done. For the sake of clarity I have endeavored to reproduce the two contentious paragraphs obtained in the said Affidavit by the Court Process Server, which are couched in this manner:-

*"I am the process server of this Court. On the 1st* ***day of August 2013, I received a summons issued by the Kisutu RM's Court in Suit No. 182 of 2013*** *in the said court* ***date the 14th day of August 2013 for service on Muro Investment Company LTD,*** *that the said Defendant *at the time personally known to me, was.....and* ***I served the summons on him on Muro Investment Co. LTD Mandela Road identified to me by Plaintiff on the 1st day of August 2013 at about 14:00 O'clock*** *in the afternoon at tendering a copy thereof to him and requiring his signature to the original summons. The said Defendant signed this Summons* ***in the presence of*** *.....Summons imepelekwa lakini wadaiwa wamekataa kupokea bila sababu yeyote." [Emphasis added].*

It is clear from the above extracted paragraphs from the Process Server's Affidavit that, the same does not indicate the specific location of the appellant's office, but only stating that it was along Mandela Road. There are also two dates which are not very clear.

Furthermore, it is a common ground that the appellant herein is not a natural person, but rather a legal entity (company), where the name and

other particulars of the person who was served and refused the service is very important. It is also clear from the above paragraphs that, the process of signing the summons was supposed to be witnessed by an independent witness. Likewise, the refusal was as well supposed to be witnessed by the very same witness as envisaged in the content of the process server's affidavit. Since, the appellant was disputing that his office was not allocated along Mandela Road and the Affidavit is not giving the specific location where the service was effected, the said trial Magistrate could have as well probed further to ascertain the specific location where the service was effected and the particulars of the person who was served and refused the service thereat. Order V Rule 16 of the Civil Procedure Code provides that:-

"*Where the serving officer delivers or tenders a copy of summons to the defendant personally or to an agent or other person on his behalf he shall require that person ...to sign an acknowledgement of service...if* ***refuses to sign the acknowledgement the serving officer shall leave a copy thereof with him*** *and return the original together with an affidavit stating that the person refused to sign the acknowledgement, that* ***he left a copy of the summons with such***

***person and the name and address of the person*** *(if any), by whom* ***the person on whom the summons was served was identified'***

As indicated above, all these specifications are not indicated in the process server's affidavit and the trial court never bothered to establish and ascertain if the service was properly done to the appellant to accord her the right to be heard.

I am alive to the fact that, Mr. Ntonge had since submitted that, before instituting the suit, (*Civil Case No. 182 of 2013*) the respondent was communicating with the appellant physically and even the demand letter and the summons for execution of a decree were dispatched to the same office situated along Mandela Road.

I must emphasize that being aware with the demand notices and other processes prior to the summons does not water down the legal requirement of service to a party to the case. The right for a party to be heard and defend her or his case is a constitutional right and the same cannot be lightly denied. That is why, before issuing an order of the matter to proceed exparte the trial Magistrate was required to scrutinize the Affidavit by the said Court Process Server and confirm that it meets all the

legal requirement. In **Mbeya Rukwa Autoparts and Transport LTD Vs Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000, the Court of Appeal held that:-

> "***In this country natural justice is not merely a principle of common law.*** *It* ***has become a fundamental constitutional right.*** *Article 13 (6) (a) include the right to be heard amongst the attributes of* ***equality before the law***...". [Emphasis added].

In addition, in **Abbas Sheally and Another Vs Abdul Fazalboy,** Civil Application No. 33 of 2002 the same Court emphasized that:-

> "***The right of a party to be heard before adverse action or decision is taken against such party*** *has been stated and emphasized by the 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", [Emphasis added].*

Following the above authority and settled law, it is my considered view that, the decision of the trial court giving rise to this appeal cannot be

allowed to stand on account of being arrived at in violation of the constitutional right to be heard.

In my considered view, since the appellant has complained that she was not aware with the case and the summons was not served to her and on the other side, the respondent has failed to confirm with concrete evidence on where specifically the said service was effected and the name of the person refused to receive the same, I therefore join hands with the Counsel for the appellant that the entire process of service to the appellant had since created doubts on the authenticity of the said service.

It is therefore my respectful view that, there is considerable merit in the submission by the Counsel for the appellant, that the trial court was wrong to rely on the affidavit of the Court Process Server and ruled out that the service was properly done and that the appellant was aware with the case. In my view, this point alone suffices to dispose of the matter and I feel that it is not necessary to dwell on discussing the remaining grounds of the Appeal.

In the circumstance and based on the above findings, this Appeal is granted. Consequently, the proceedings, orders and decision entered by

the trial court in respect of *Misc. Application No. 219 of 2014* are hereby declared nullity. For the interest of justice, I hereby order the Civil Case No. 182 of 2013 to proceed with the hearing before another Magistrate after the appellant has been accorded right and allowed to file Written Statement of Defence. For avoidance of doubt, the appeal is allowed with costs.

Order accordingly.

DATED at Dar es Salaam this 2nd Day of February 2018

**R.K.Sameji**
**JUDGE**
**02/02/2018**

**COURT-** The Ruling to be delivered by the Deputy Registrar on 16th February 2018.

**R.K.Sameji**
**JUDGE**
**02/02/2018**