

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

CIVIL REVISION NO. 27 OF 2019
(Originating from Land Case No.5 of 2013)

LEKAM INVESTMENT CO. LTD..... APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

AL-JUMA MOSQUE.....1ST RESPONDENT

THE ADMINISTRATOR GENERAL.....2ND RESPONDENT

CLEMENT KAHABUKA.....3RD RESPONDENT

ABDALLAH ILAMULIRA.....4TH RESPONDENT

MAMBA AUCTION MART

AND COURT BROKER.....5THRESPONDENT

RULING

30th September 2020 & 30th October 2010

MASABO, J.

The application before me is made under Order IX Rule 13 of the Civil Procedure Code [Cap 33 RE 2019]. LEKAM Investment Co. Ltd, the applicant herein, is praying for an order for setting aside the *ex parte* judgment of this court in Land Case No. 5 of 2013. Supporting the application is an affidavit deposed by the Applicant's General Manager one Beda Michael Kileo. The affidavit provides a length narration as to the background of the application. In brief, the relevant points decipherable from this narration is that the applicant was the first defendant in Land Case No. 5 of 2013 which was dismissed for non- appearance of the parties. Attempts to restore the suit turned futile after the application for setting aside the dismissal order was

was struck out for incompetence. Later, the first respondents instituted a fresh suit which proceeded *ex parte* after the Defendants, who was served through substituted service, defaulted appearance.

The applicant avers that the 1st and 2nd Respondents misled the court to issue a substituted service. They fraudulently made the court to believe that service could not be affected to applicant or that the applicant has declined service whereas there was no proof from the process server in authentication of the averment. Further, it was averred that, the proceedings of the leading to the *ex parte* judgement were a nullity as the plaint was not verified. Lastly, it was averred that the applicant was never notified of the judgment date. The applicant was contested by the 1st and 2nd Respondent. The third Respondent, supported the application. The 4th and 5th Respondent having being served through substituted service defaulted appearance. Consequently, the hearing proceeded *ex parte* these two respondents.

During the hearing which proceeded in writing, Mr. Samwel Sosmas Mutabazi, learned State Attorney represented the 2nd Respondent. The applicant enjoyed the service of Mr. Edward Peter Chuwa, learned counsel; the first respondent was represented by Mr. Daimu Halfani, learned counsel whereas the 3rd Respondent was represented by Ms. Leah Kamanga, learned counsel.

I have carefully read and considered the submissions for and against the application. While I will not reproduce the submissions made by each part, I

will thoroughly refer to them in the course of determination of the application.

The application being for setting side an *ex parte* judgment, is made under Order IX Rule 13(1) of the Civil Procedure Code (Cap 33 RE 2002) which provides as follows:

13.-(1) In any case in which a decree is passed ex parte 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 the summons was not duly served or that he was prevented by any sufficient cause 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.

As correctly submitted by the learned State Attorney and Mr. Halfani, for an exparte judgment to be set aside, the applicant must satisfy the court that the summons was not dully served, or in the alternative, he was prevented by a sufficient cause from appearance. Therefore, the issue for determination is whether the applicant was not served or was prevented by a sufficient court from entering appearance.

All the parties agree that, service in respect of the proceedings leading to the judgment being challenged, was affected through substituted services. The summons was published in *Majira* Newspaper dated 2nd August 2013 and

Habari Leo newspaper of 12th October 2013. Extracts from the two newspapers were produced in this court as evidence. In his affidavit and submission in support thereto, the applicant acknowledges to have seen the two newspapers in the case file after a perusal conducted by his counsel after the suit had been concluded.

Since there is no dispute as to the publication, the question to be asked is whether the publication sufficed as service. The answer to this question is provided for under Order V Rule 20 (2) which provides the following with regards to substituted services:

"Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally"

This position is in tandem with the decision of the Supreme Court of India in the case of **Sunil Poddar And Others V. Union Bank of India**, AIR 2008 SC 1006: (2008) 2 SCC 326 which I have found to be highly persuasive. In this case which was cited by Mr. Halfani, it was held that, it is a well settled position that once a summons is published in a newspaper having wide circulation, the respondent cannot be heard to complain that he was not aware of such publication and it is immaterial whether the respondent does subscribe or read the newspaper or otherwise. Likewise, in the instant case the two newspapers in which the summons was published have wide circulation. Therefore, pursuant to the position above, they provide a sufficient proof that the applicant herein was served.

Having resolved the issue of summon, the next issue for determination is whether the applicant was prevented by a sufficient cause from entering appearance. With respect, I was unable to discern a ground let alone a sufficient ground in the affidavit and the submission thereto. Instead of demonstrating the grounds which prevented him from entering appearance the applicant has invited me to find and hold that the court erred in issuing an order for substituted service. In support of his point he cited the provision of Order V Rule 20(1) of the Civil Procedure Code [Cap 33 RE 2002] which stated that:

-(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.

Basing on this provision he invited me to find that the application is tenable as the order for substituted service was erroneously granted.

With respect, the provision and all the supporting authorities were cited out of context. The application before this court is for setting aside the ex parte judgment and as stated above, there are only two conditions to be satisfied for the order to issue. It would appear to me that the applicant is inviting me to overrule the order pronounced by this court pursuant Order V Rule 20(1).

This invitation is, with all due respect, misguided and totally inconsistent with the law and practice pertaining to the hierarchy and jurisdiction of courts. As correctly argued for the respondents, this court has no jurisdiction to overrule its own decisions (See **Scholastica Benedict V Martin Benedict** [1993] TLR 1 and **Mohamed Enterprises (T) Ltd v Masoud Mohamed Nasser** [2013] EA 249. Therefore, bending to the invitation fronted by the applicant will more likely land me into the error by making a pronouncement on matters conclusively determined by the trial judge and for which I am *functus officio*.

Let me add that, the case of **Caritas Kigoma v K.G. Dewsi Ltd**, Civil Appeal No. 47 of 2004, Court of Appeal of Tanzania ta Mwanza (unreported) which was cited by the Applicant's counsel in support of the prayer on this point is totally distinguishable. Unlike in the instant case where service was effected through substituted service and the proof of service was rendered to the court, in the said case, there was no proof of service. Thus, the main issue for determination in that case was whether the appellant was duly served with notice to hearing of the suit, which is not at issue in the instant case.

All having been said, I find no merit in the application and I proceed to dismiss it with costs.

DATED at DAR ES SALAAM this 30th day of October 2020.



A handwritten signature in black ink, appearing to read "J.L. MASABO".

J.L.MASABO
JUDGE