

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION NO. 26 OF 2021

(Arising from decision in Land Appeal No. 79 of 2018 dated 04/09/2019, Hon. M. M. Siyani, J.)

NDOLE BUPILIPILI APPLICANT

VERSUS

SHIJA JAMES IHUYA (Suing as Administrator of
the Estate of the late Jacob Ihuya) **RESPONDENT**

RULING

27th & 30th April, 2021

RUMANYIKA, J.:

With respect to exparte judgment and decree of this court (Siyani, J) dated 04/09/2019, the application for setting it aside is brought under Order XXXIX Rule 21 and Section 95 of the Civil Procedure Code Cap 33 R.E. 2019 (the Code). It is supported by affidavit of Ndole Bupilipili whose contents, by way audio teleconferencing Mr. Ng'wanzalima learned counsel adopted during hearing on 27/04/2021.

Whereas Mr. Ng'wanzalima learned counsel appeared for Ndole Bupilipili (the applicant), Shija James Ihuya appeared in person. Using the said digital platform, I heard them through mobile numbers 0765299508 and 0766857545 respectively.

Mr. Ng'wanzalima submitted that irrespective of the Judges' findings subject of the instant application, in fact contrary to the criteria of, and mode of service enshrined under Order V Rule 16 of the Code, there was neither proof of service on the applicant nor one to show, for instance a copy of returned summons that the applicant had refused service much as it wasn't established, who, if at all was the process server? Who else witnessed the applicant's refusal etc. (case of **Muro Investment Company Ltd V. Ally Andrew Mwela**, Civil Appeal No. 72 of 2015 HC, Dar es Salaam (unreported). We humbly submit and pray with costs. The learned counsel further contended.

The respondent just submitted that there was nothing upon which to fault the judge much as there was proof of service on the applicant. That is it.

The bottom line is whether there was proof of service on the applicant so as to warrant the impugned exparte judgment.

Laying down basis for an order of exparte proof at page 3 paragraph 1 of the typed judgment, the words, therefore legal effects of the judge's findings were as not farfetched as hereunder in part quoted: -

".....the court was informed that while the 1st respondent refused service of the summons Upon producing the process server affidavit to that effect, an order to have summons published in the newspaper dated 5th June 2019. Still there was no appearance of the respondents when the appeal came for hearing on 9th July 2019. As such I granted counsel Lubango's prayer to have the matter proceed exparte against the respondent".

From the above quotation therefore, one would wish to see that with respect to the applicant, use of two distinct modes of service was attempted but the latter remained hostile i.e. as sworn by the process server, through the latter the applicant having had refused service, yet through Mwananchi Local Newspaper of 05/06/019 he was served but defaulted.

Whether or not the applicant was duly served, it was all about the evidence available more so the respective process server's affidavit notwithstanding if any, an endorsement on copy of the returned summons. I think it needs one not to swear affidavit that as opposed to oral evidence,

as far as facts therein deposed are concerned more reliable it was evidence by affidavit. Unless in this case the applicant had proved that the processes server's evidence was tainted with open lies, which is not the case here, this kind of evidence cannot just casually discounted.

Moreover, with regard to service by publication, Mr. Ng'wanzalima learned counsel did not in any way whatsoever dispute the fact that following the court's order, the applicant was, through Mwananchi Local Newspaper of 05/06/2019 served just like also, counsel did not even attempt to tell the court that service by publication was no longer good or recognized by the law.

As I am now about to conclude my ruling, I would increasingly hold but also remind the learned counsel of the trite law that unless it was sufficiently established that it falsified or fraudulently procured, court proceedings are serious documents that tell what actually had transpired in court. The records therefore cannot be just like that impeached.

The devoid of merits application is dismissed with costs. It so ordered.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

30/04/2021

The ruling delivered under my hand and seal of the court in chambers this 30/04/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

30/04/2021