

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISCELLANEOUS CIVIL APPEAL NO. 38 OF 2020

*(Arising from Miscellaneous Civil Application No. 61 of 2020, Originating from
Civil Case No. 96 of 2019)*

SAYONA DRINKS LIMITEDAPPELLANT

VERSUS

ELIAWON ELINAMU MACHANGE..... RESPONDENT

JUDGMENT

Date of the last order: 19/5/2021

Date of judgment: 24/6/2021

F. K. MANYANDA, J

This is an appeal against a ruling of the Court of the Resident Magistrate which dismissed an application for setting aside an ex-parte judgment that was entered against the Applicant Sayona Drinks Ltd in Misc. Civil Application No. 61 of 2020. The said ruling was delivered on 19/6/2020 by Hon. Jagadi, Resident Magistrate.

The Applicant is challenging the ruling in nine (9) grounds of appeal which can be reduced into four issues namely:-

Failure by the trial Magistrate to find that there was established sufficient reasons for setting aside the ex-parte ruling. The second issue is that the trial Magistrate failed to find that there were triable issues warranting setting aside the **ex-parte** judgment. The third issue is that the trial Magistrate based his decision on extraneous matters, and the fourth issue is that the trial Magistrate failed to appreciate the basic right to be heard to the Applicant.

Submitting in support of the first issue, Mr. Msalaba learned Advocate argued that the Appellant established sufficient reasons for setting aside of the **ex-part** judgment. The trial Magistrate failed to find that there was no service of summons. It was argued that the Plaint in Civil Case No. 96 of 2019 bears the address of service of the Applicant that it was through her Advocate.

He challenged the contention that the Appellant was served on 23/11/2019 because there is no endorsement at the place of acknowledgement receipt in the summons. Also it had no stamp. He also challenged the affidavit of service by the process server on grounds that the

gender of the recipient being a female the 'her' deleted leaving a pronoun for masculine "him"

Further it was argued that there were other summonses allegedly served to the Applicant but the same were not received. The process server's affidavit indicates that it was sworn on the some date of judgment delivery. He cited the cases of **Mohamed Nassoro vs Ally Mohamed** [1991] TLR 133 and that of **Petrades Godwin vs Marlene Samiath**, Civil Appeal No. 17 of 2017 (unreported) where the Court said where there is no proof of summons, service **ex parte** proceedings and decision is fatal.

On this issue the Respondent's Counsel Mr. MAINDE learned Advocate, submitted in respect of this issue that there was proof of service of summonses per order V. Rule 1 of the CPC. The Defendant was required to file a written statement of defence.

The Counsel submitted further that Order V Rule 12 of the Civil Procedure Code [Cap. 33 R. E. 2019] (CPC) require endorsement to be made on the copy of a summons served by the recipient but does not specify at which part of the summons is endorsed.



The Counsel further argued that the Applicant was served, that is why Mr. Maide held brief of Rita Mellan at one time. He argued also that he sometimes served the Applicant personally without using the address provided in the Plaintiff, such a practice is permissible in law and in some incidences informed him orally.

As regard to the timing of the process server to swear the affidavit, Mr. Mainde argued that Order rule 2 of the CPC do not provide the time for process servers to swear affidavits of proof of service, he can do so between the date of service and the hearing date.

He argued supporting the change of the words 'her' to him that our law recognizes feminine nouns and pronouns to mean masculine noun and pronouns, therefore, the word 'him', has nothing wrong.

Regarding the absence of stamp impression on the received summons by the Applicant, Mr. Mainde argued that the same is not a requirement of the law as proof of authenticity of receipt of the summons. To him service of the summons to an agent of the Applicant sufficed.

Let me determine this issue first. It has been argued by the Applicant that there was no proof of service of summonses by the Respondent to the Applicant in the main case that gave rise to the ex-parte judgment. The Respondent vehemently argued that there was proof of service of summons.

The procedures on issuance and service of summons is governed by order V of the CPC, where Order V Rule 1 provides that once a suit is instituted and a trial judge or magistrate assigned, summonses to the defendant may be issued and served requiring him to file a written statement of defence, if he or she so wishes to do so under Order VIII Rule 1(i) of the CPC.

The Court may strike out the plaint where service of the summons to the defendant is not issued due to failure by the plaintiff to pay service fees or effect the service himself.

Rules 5(1) and (8) of Order V provides on the modes of delivery of summons, that the same shall be delivered physically to the defendant or his agent in suits filed within the jurisdiction of the concerned Court.

Rule 12 of order V provides that a person to whom a summons has been served is required to sign an acknowledgement, of service. Where the defendant refuses to sign acknowledgement, the process server is required to sign acknowledgment and leave a copy and return the original together with an affidavit stating that the person whom service was made refused to sign mentioning his or her name, if identified.

A sample of summons under Order V Rule 1 of the CPC is provided in the Civil Procedure Code (Approved Forms) Notice GN No. 388 of 2017 in Form No. A/1.

My visit of the said form, the same does not provided a requirement of fixing a stamp but provides a special place at the bottom of the summons where the person served is required to acknowledge service in the following words.

"I HEREBY acknowledge the receipt of the duplicate of this summons this-day of.....20....."

.....

DEFENDANT



It follows therefore that fixing a stamp impression is an additional and optional practice to the persons served for assurance of authenticity.

The issue here is therefore whether the summons were issued and served to the Applicant (Defendant) by the Respondent (Plaintiff)

It has been the argument of the Respondent that they delivered the summons to the Applicant's agent. That such agent signed on the summons to acknowledge receipt of the summons.

The trial Court in its ruling stated that the Applicant was dully served on 18/11/2019 where a summons was signed by one Lita Millan and it was accompanied with an affidavit of the process server's acknowledgement receipt. It stated: -

"Rightly argued by the Respondent's Counsel that the service was dully affected (sic) to the applicant to defend the case by him."

This Court has also taken pain to go through the proceedings and the summonses issued in Civil Case No. 96 of 2019 and found that there is a

copy of a summons dated 18/11/2019 which was addressed to Sayona Drinks Ltd as defendant. The said summons was signed by one Ritta Millan Shanghui on 23/11/2019 acknowledging receipt.

The endorsement was, however, made adjacent to address of the the person to whom the summons was addressed to be served. At the said endorsement there is no stamp impression.

As pointed out above, Form 1A of the Civil Procedure Code (Approved Forms) Notice, GN. No. 388 of 2017, has a special place where a served person is required to endorse. That place is provided immediately after the signature of the Judge, Registrar or Magistrate.

In this matter the endorsement was made adjacent to the name and address of the defendant; and not stamped. This Court has asked itself if such an anomaly is fatal. The answer to this question is, in my firm opinion, in the negative. I say so because the purpose of a summons is to inform the defendant that there is a suit filed in Court against him or her and that he or she must file a written statement of Defence within 21 days if he or she so wishes.

This purpose, by looking at the summons dated 18/11/2019 was achieved because a person in the name of Ritha Millan Shanghui signed acknowledgement of service. A mere fact that the said Ritha Millan Shanghui signed at a different place does not invalidate the summons. So is lack of a stamp impression because the law does not require a stamp duty impression, where a stamp impression is fixed then such a practice is an option of the receipt.

Presence of the said summons coupled with the affidavit sworn by the process server, Silas Lucas Isangi, that he served the summons which was received and signed by Ritha Millan Shanghui, makes this Court be of increasingly view that the service to the defendant was dully effected in accordance with the relevant law explained above. The cases cited by Mr. Msalaba namely: - **Mohamed Nassoro's case (supra)** and **Petrades Godwins case (supra)** are inapplicable in the circumstances of this case. The complaint in the first issue has no merit.

The complaint in the second issue is that there are triable issues in the decision given **ex-parte** because the Respondent was awarded specific damage without proof. He cited the case of **Zuberi Augustino vs Aniseth**

Mugabe [1992] TLR 137 where it was stated that specific damages must be specifically pleaded and proved.

Further it was argued that the trial magistrate based his judgment on extraneous matters and relied the authority in the case of **Febronia William vs Israel Robert**, PC Civil Appeal No. 25 of 2017 (unreported).

The Counsel for the Respondent counter argued the complaint above by stating that issues of illegality and irregularities as triable issues in the decision are supposed to be raised in the case itself. The complaint that there was no proof of the specific damages has no concern with their none appearance to file the written statement of defence and defend against the case.

The trial Court in its ruling did not address this issue of existence of triable issues in respect of the ex-parte decision in Civil Case No. 95 of 2019. The reason is that the same was not raised before it. The authorities cited by the Applicant provide a correct position of the law in our land, however they are distinguishable as I shall show below.

This Court agrees with the Counsel for the Respondent that whether or not there exists in the main suit triable issues have nothing to do with failure of the Applicant (who was defendant in that case) to file their written statement of Defence and defend against the suit. There is ample of evidence, as demonstrated above, that they were dully served.

The complaint that the trial Magistrate took into account extraneous matters when deciding the application for setting aside the **ex-parte** judgment is misconceived. I say so because, the decision of the trial Court to grant or not to grant order(s) setting aside the **ex-parte** judgment was based on proof of service of summons to the Respondent (Defendants). After finding that there was proof of service, the trial Magistrate rightly ruled that there was no good cause to warrant setting aside the **ex-parte** judgment.

The complaint that he took extraneous matters into consideration when he said that: -

*".....it is my view that it has become a tendency by many defendants/or either part, not to appear before Court whenever needed, meanwhile when is at the execution stage is where they come to Court to apply for setting aside the **ex-***

pate decision which is to my opinion that any litigation must come to an end."

Was but orbita as rightly argued by the Counsel for the Respondent. The said remarks were made after the finding and decision on whether or not to grant the order for setting aside basing on proof of service was already made. The complaint in this second issue is also baseless.

As to the third and last issue but not least, the Counsel for the Applicant argued that the trial Magistrate failed to appreciate the right to be heard. The Counsel for the Respondent argued that by the Applicant's failure to file the written statement of defence and defend against the suit after been dully served, is evidence that they waived their right to be heard.

The trial Court did not address this issue because, like the previous, it was not raised before it. This Court agrees with the Counsel for Applicant that the right to be heard is among the fundamental rights which are protected by our constitution. However, rights of a party are enjoyable in tandem with responsibility. In this matter, the Applicant was quite aware of his duty to defend against the suit after been dully served with the summons

on 18/11/2019. But, for no apparent reason, didn't file written statement of defence. In the circumstances the trial Magistrate was justified to continue hearing the case *ex-parte* and deliver the judgment in the Applicants) absence because she also defaulted appearance on the judgment date after been served.

This Court is at par with the trial Court findings that the Applicant relinquished her right to be heard. The trial Court was justified to proceed *ex-parte*. The complaint in this issue also has no merit.

In the upshot, and for reasons stated above, this Court finds that the appeal is none meritorious.

Consequently, I do hereby dismiss the same with costs. Order accordingly.




F. K. MANYANDA
JUDGE
24/6/2020