

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 17 OF 2021

*(Arising from the decision of the Civil Case No 05 of 2020 at
Ukerewe District Court)*

MAFURU MWESAAPPELLANT

VERSUS

WANDAGA KEYA1ST RESPONDENT

BUKOMBE MASHAURI2ND RESPONDENT

RULING

Last order date: 18.08.2021

Ruling date: 31.08.2021

M. MNYUKWA, J.

This is a Ruling in respect of the preliminary point of objection raised by the respondent through his learned advocate objecting the appeal on the reason that the trial court erred in law to entertain Civil Case No. 5 of 2020 ex-parte without affording the respondents with the right to be heard hence condemning them unheard.

In brief, the facts of the case are as hereunder: The appellant sued the respondents in the District Court of Ukerewe at Nansio in the Civil Case No. 05 of 2020. He prayed before the District Court of Ukerewe to order the defendants to pay him the sum of Tsh 6,030,000/= as a specific damage for malicious prosecution and loss of business profits, payment of Tsh 276,000/= as a value of the lost fishing equipment, payment of general damages to the tune of Tsh 3,000,000/=, interest at the court's rate and costs of the suit. The matter was heard ex parte because the defendants did not enter appearance. After ex parte hearing, the matter was decided in his favour but he was not fully granted what he prayed before the court. Aggrieved by the decision, the appellant filed the present appeal.

Before hearing the merit of the appeal, the respondent raised a preliminary point of law objecting the appeal on the reason that the trial court erred in law to entertain Civil Case No. 5 of 2020 ex-parte without affording the respondents with the right to be heard.

With leave of the court, the preliminary point of law was argued orally through audio teleconference where parties were remotely present on 18/08/2021. The appellant appeared in person, unrepresented, the first respondent was represented by the learned advocate, Mr. Steven

Makwega while the second respondent did not enter appearance even though the services was done by way of substituted service through Uhuru local newspaper.

Submitting in support of the preliminary point of objection, Mr. Makwega told this court that the ex parte judgement in which this appeal lies was delivered by Ukerewe District Court without affording the defendants opportunity to be heard. He averred that, when the case at the trial court was called on for the first time on 22/10/2020 the court ordered the defendants to be served and file the written statement of defence before 13/10/2021. Again on 19/01/2021 the court ordered the first respondent to file written statement of defence within seven days and ordered the plaintiff to find whereabouts of the second respondent and the case was adjourned until 25/01/2021. When the case was called up on that day, the plaintiff did not inform the court if he managed to serve the first and second respondents, as a result the court ordered the respondents to file their written statement of defence.

He went on to submit that, when the matter was called up on 03/02/2021 the court ordered the matter to proceed through ex parte hearing without being satisfied whether there was proof of service to the respondents or not.

The learned counsel for the first respondent contended that the trial court contravened the requirement of Order V Rule 1(1) of the Civil Procedure Code, Cap 33 R.E 2019 which requires the plaintiff to effect the service to the other party in order to file the written statement of defence. He also referred this court to Order V Rule 15(1) of Cap 33 R.E 2019 which explains the circumstances if the defendant's whereabouts are not known, the substituted way of effecting service can be used to prove service of the summons.

He insisted that, the trial court proceedings do not show that service of the summons was done either to the first or second respondent even by way of substituted services if their whereabouts were not known. He added that, it was not proper for the trial court to order the case to proceed ex parte as it denied the respondents' right to be heard. He concluded his submission by praying to the court to uphold his preliminary objection, the case to be tried de-novo and the appellant be ordered to pay costs.

In responding, the appellant submitted that, if the defendants claimed that they were not afforded with the right to be heard, they should claim their right at Ukerewe District Court. He went on to state that, the first respondent was served with the summons through the Chairman of the village but he denied to accept it. He was later on, served

with the second summons through village executive officer and he acknowledged receipt by endorsing his signature. He insisted that, despite being served, he did not enter appearance an act which shows that he disobey the lawful order of the court. He therefore prayed the court to overrule the preliminary point of law raised by the first respondent and proceed with the hearing of the present appeal.

Rejoining, the first respondent reiterates his submission in chief and added that the trial court's proceeding do not show if the respondents were served with the summons. To substantiate his argument, he averred that if the summons were served to the respondents, the trial court could have not been ordered the respondents to be served with the summons and to file written statement of defence. He therefore prayed the appeal to be struck out and the appellant be ordered to pay costs.

After going through the parties' submission and giving careful consideration to the arguments raised by the respondent as well as the appellant on the preliminary point of law so raised, I find the central issue for consideration is whether the preliminary objection is meritorious

It is an established principle that records of the court is presumed to be accurate and therefore trusted in determining issues that are before the court. As it was observed by the Court of Appeal in the case of **Alex**

Ndendya v R, Criminal Appeal No 207 of 2018 CAT at Iringa (unreported), the court held that;

"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."

In the case at hand, I had the time to go through the trial court's record to so as to ascertain whether the trial court's records are silent as to whether the respondents were served with the summons or not. As it was rightly submitted by the advocate of the first respondent that the record does not show that the summons was duly served to the respondents and yet the trial court magistrate ordered the case to proceed through ex parte hearing.

Order V Rule 12 of the Civil Procedure Code, Cap 33 [R:E 2019] 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 the person to whom the copy is so delivered or tendered to sign an acknowledgement of service endorsed on the original summons:

Provided that, where the defendant, his agent or such other person refuses to sign the acknowledgement the serving officer shall have a copy thereof with him and return the original to the court

together with an affidavit stating that the person upon whom he served the summons refused to sign the acknowledgement, that he left a copy of the summons with such person and the name of the person (if any) by whom the person on whom the summons was served was identified."

Going through the available record, I have seen that the first two summons issued to the first respondent do not show if there is endorsement to acknowledge receipt of the service. The other two summons that were issued and served to the village chairman and village executive officer, there is no affidavit sworn in by the two named officers stating that the first respondent refused to sign acknowledgement. In the absence of that proof, the law presupposes that no service of summons was affected to the first respondent.

The Court of Appeal of Tanzania when struck out the appeal on the reason that the Notice of Appeal was not served on the first respondent stated that:

"There is no indication by signature, rubber stamp or whatever, to prove that the first respondent ever received the Notice of Appeal. We are of the firm view that if the first respondent had been duly served with the Notice of Appeal in person, or through his advocate, whoever received the Notice of Appeal would have signed and such signature would be apparent to

prove service just was the case with the Attorney General.”

The above was stated in the case of **Wilfred Muganyizi Rwakatare v Hamis Sued Kagasheki and the Attorney General**, Civil Appeal No. 107 of 2008 at Dar es Salaam.

The procedure and practice under the provisions of the Civil Procedure Code, Cap 33 [R:E 2019] which is also applicable in the District Court is the service of the summons is complete when it is endorsed by putting a signature by a person who receive it. See the case of **Tito Sumo & 49 others v Kiteto District Council**, Civil Application No 140 of 2012, CAT at Dar es Salaam (Unreported).

If it happen that a person to whom the service was made refused to sign acknowledgement, the serving officer should swear an affidavit stating that a person refused to sign acknowledgement and that he left a copy with such person or any person identified by him. By not doing so, in law no service was effected.

In our case at hand, the record of the trial court’s proceedings as well as the court file do not show that service was effected to the first respondent by endorsing the signature or an affidavit has been filed in the court to show that the first respondent refused to accept service of the summons. Therefore, the order of the trial court to proceed with hearing of the case ex parte, denied the first respondent his right to be

heard as it is guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap 2 [R.E 2019].

In the final analysis, I find the appeal is incompetent, I uphold the preliminary objection raised by the first respondent and ordered the trial de novo of the Civil Case No. 5 of 2020 which was before Ukerewe District Court. To avoid bias, the case should be heard by another Magistrate. In the result I struck out the incompetent appeal with no order as to costs. Each party to bear his own costs. It is so ordered.



M. MNYUKWA
JUDGE
31/8/2021

Ruling delivered on 31/08/2021 via audio teleconference whereby all parties were remotely present.



M. MNYUKWA
JUDGE
31/8/2021