

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL APPEAL NO. 7 OF 2022

(Arising from Civil Application No. 20 of 2021)

KAIZA KATAMBA MWALUGAJAAPPELLANT

Vs

OBBY SIKUANGUKA MWAMPAJA.....1ST RESPONDENT

YONO AUCTION MART LTD2ND RESPONDENT

JUDGEMENT

Ebrahim, J.:

This appeal emanates from Civil Case No. 34 of 2020 in the Resident Magistrate Court of Mbeya at Mbeya which proceeded exparte against the Appellant. Gathering from the records of the proceedings, it was said that the Appellant refused to accept summons by court process server which necessitated the court to order substituted service of summons through

Mwananchi Newspaper of 18th February 2021 and 25th March, 2021. The Appellant however, neither entered appearance nor filed Written Statement of Defence. The court then ordered the case to proceed ex parte. The first Respondent successfully proceeded to prove his case ex parte. Following the ex parte judgement, the Appellant herein unsuccessfully filed Miscellaneous Civil Application No. 20 of 2021 praying for the court to set aside the ex-parte judgement and decree delivered on 12th May 2021 and make an order that the matter be heard inter partes.

It is the ruling of the Resident Magistrates Court of Mbeya of refusing to set aside the ex parte judgement that the Appellant is appealing against in this court raising eight grounds of appeal. The grounds of appeal can be condensed mainly into three complaints. That, there was no summons issued to the Appellant to file Written Statement of Defence or hearing of the case and that the Summons for substituted service were defective as they were for hearing instead of requiring the Appellant to file Written Statement of Defence. The grounds of appeal also raise a complaint that the Magistrate failed to analyse and evaluate the facts presented by the Appellants and he erred in holding that there was contradiction in the Appellant's affidavit which contains falsehood.

The appeal was argued by way of written submission as per the schedule set by the court. Advocate Mwambukusi appeared for the Appellant and the 1st Respondent was represented by advocate Kamru Habibu Msonde. Both parties filed their respective submissions as scheduled, save for the 2nd Respondent who did not file her submission at all.

Counsel for the Appellant based his argument on the fact that the summons published in Mwananchi Newspaper was for hearing and did not specify or require the Appellant to file his Written Statement of Defence within specified time. To buttress his argument, he cited the case of **Petrades Godwin Vs Maelene Samiathi**, Civil Appeal No. 17 of 2017 (HC Bukoba). He also challenged the fact that the trial court did not examine the proof of service filed to notice the apparent error.

Counsel for the Appellant further urged the court to see that there was no compliance of the law, court order and proper service of summons to the appellant to notify him on the date of judgement and that the substituted service preferred by the 1st Respondent was not by the order of the court. Counsel for the Appellant amplified his contention by citing the case of **Chausiku Athumani Vs Atuganile Mwaitege**, Civil Appeal No. 122 of

2007 (HC-DSM) which quoted with approval the Court of Appeal case of **Cosmas Construction Co. Ltd Vs Arrow Garments Ltd** [1992] TLR 127. I was also invited to see that there was no order of the court to employ substituted service to inform the Appellant on the judgement date.

It was further submitted that the affidavit purporting to show that the Appellant rejected the service of summons was not duly tendered and admitted during the trial. Submitting on the contradictions in the affidavit, Counsel for the Appellant cited the case of **Maramo Slaa Hofu and 3 Others Vs Republic**, Criminal Appeal No. 246 of 2008 and argued that the case will only flop where the gist of evidence is contradictory but not on minor discrepancy. Lastly, it was argued by the Appellant's side that the trial Magistrate did not consider the particular material pleaded by the Appellant that the Appellant was available at the precinct of the same court attending Criminal Case No. 251 of 2020, Republic Vs Kaiza Katamba Mwalugaja and Another where the 1st Respondent did not inform the Appellant of the pending suit. He referred to the commentary by learned jurist **Mulla, Code of Civil Procedure**, pg 1665 that there should be material on record to show that efforts were made to find the defendant to justify the resort to substituted service.

Counsel for the Respondent had it that the Appellant was duly serviced via substituted service after the applicant had refused service in ordinary way and that copies of the same were attached to the counter affidavit as annexure OSM-2. They invited me to the persuasive case of **Lekam Investment Co. Ltd VS The Registered Trustees of Al- Jumaa Mosque \$ Others**, Civil Revision No. 27 of 2019(HC- DSM- Unreported) where it was held that substituted service by order of the court is effectual as if the defendant has been personally served. He distinguished the circumstances in the cited case of **Petrades Godwin VS Maelene Samiath (Supra)** on the basis that in the cited case the summons was returned without requiring the defendants to file their WSD contrary to the matter at hand. Also that in the cited case the service was done by a Kitongoji Chairman while in this case by a court process server, namely Paul C. Mtove. As for the complaint that the Appellant was not notified of the date of judgement, counsel for the Respondent maintained that the service was effected by way of publication via Mwananchi Newspaper.

Responding on the need for the court process server to swear an affidavit as a third person mentioned in the counter affidavit, he maintained that the court process server had filed affidavit to show that the Appellant

refused service, hence there was not need to swear another affidavit. As for the complaint on failure to tender summonses for hearing and date of judgement, while citing **Order V Rule 12 of the Civil Procedure Code, Cap 33 RE 2019 read together with Rule 8 of the Subordinates Courts (Civil Procedure Summons and Pleadings) Rules, 1955,** Counsel for the Respondent contended that after the Appellant refused service, the process server returned the original summonses together with the affidavits of service in court. Thus, there was no requirement for the summons to be admitted in evidence and endorsed, he said.

Responding on the issue that the affidavit of the Appellant contains falsehood on giving different versions of the story, he stressed that the affidavit cannot be acted upon as it is bad in law as per the principle set in the case of **Ignazio Messina Vs Willow Investment SPRL**, Civil Application No. 21 of 2001 (CAT-DSM – Unreported).

Counsel for the Respondent maintained also that the presence of criminal case is different from the civil case and that the affidavit sworn by the court process server that the Appellant refused service was enough for the trial court to proceed exparte.

In rejoinder, Counsel for the Appellant mainly reiterated what he averred in his submission in chief.

I have considered the rival submissions of the Appellant and at the 1st Respondent's counsel. In essence, the bone of contentions that I am to determine are pegged on a question as to whether the Appellant was sufficiently served with summons to justify *ex parte* proof; and whether there was material proof relayed to the trial court to justify the order of substituted service before proceeding to *ex parte* proof.

It is the position of the law i.e., **Order IX Rule 13(1) of the Civil Procedure Code, Cap 33 RE 2019**, that the court may upon application, set aside *ex parte* decree against the defendant if it is satisfied that the summons was either not duly served or the defendant was prevented from any sufficient cause from entering appearance when the suit was called on for hearing. The law states as follows:

*"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” {emphasis is mine}

In view of the position maintained by the Appellant that he was not **duly** served with the summons as per the law ad procedure on one hand; and the 1st Respondent that the Appellant was **duly** served but the Appellant refused the service hence the order of substituted service; I dispassionately went through the records so as to scrutinize as to whether such summons was served as per the ambit set by the law.

The law has expressly state that the summons has to be duly served to the defendant. Therefore, the word "**duly**" is not merely an embellishment but it has been used to mean "*in the manner that is correct or expected according to the law or rules*" as defined in **Cambridge Business English Dictionary – Cambridge University Press (online)**.

It follows therefore that; the service of summons must be effected in strictly adherence to the set rules by the law. This calls for no other explanation than the sanctity of right to be heard in the process of adjudicating one's right. Thus, before a person's right of entering

appearance to defend his/her right is curtailed by the law, the same law sternly requires that the party that seeks an order that would otherwise affect another party's right of appearance to satisfy the court and the court to satisfy itself that an ex parte order is imperative in preservation of some else's right to timely justice. In saying so, I find myself obligated to carefully scrutinize as to whether the requirement of the law provided under **Order V Rule 20 of the Civil Procedure Code Cap 33 RE 2019** was **adhered to**. For ease of reference, **Order 5 Rule 20 (1) of Cap 33** provides as follows:

*"(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**.*

(2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally."[emphasis added].

From my contextual reading of the above law together with the meaning assigned under **Order IX Rule 13(1)** of the same law in ensuring that the defendant was **duly served with summons**, I am of the firm position that before a judge or a magistrate issues an order for a substituted service, he/she must satisfy himself/herself that there is reason to believe that the defendant is avoiding the service. I am therefore increasingly convinced to hold the position that the trial judge or magistrate would only be in a position to be satisfied *"that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service..."* if there is material proof or explanation before him/her to make such findings. In essence, the trial court must be addressed on all the attempts made to serve the defendant and must be made aware of the record of attempted personal service by the process server including but not limited to the proof of such service and the court's acknowledgement of seeing such proof. Thus, the plaintiff's material proof and explanation that the defendant avoided or refused to accept the service and the courts findings must well feature in the record of proceedings. Otherwise, it would clearly mean that the court acted without satisfying itself as to whether the plaintiff was **duly** served but rejected to accept the service. Consequence

of which would at times lead the court to act on false representation to the detriment of the right of the defendant to defend his/her case.

I seek inspiration from the learned jurist **Mulla, the Code of Civil Procedure 17th Edition Volume 2 page 1733** who had this to say when discussing substituted service:

"For ordering substituted service of summons, mere assertion of the plaintiff that the opposite party avoid service is not enough, the court must be satisfied of that fact. Where the plaintiff knew the Defendant and in spite of that fact obtained by false representation, an order of substituted service by giving the court to understand that the Defendant has been deliberately avoiding service, it was held that the defendant had not been properly served."

Tailoring the above commentary with the facts of our instant case, I found it apt to visit the proceedings on record as to what transpired on the date that the learned trial Magistrate ordered for a substituted service.

On 08.02.2021, it was recorded that Mr. Kamru, counsel for the plaintiff (Respondent) told the court that the defendant refused to receive summons and prayed for a substituted service in the Newspaper. Without further information on what efforts the plaintiff made to enable them reach to a conclusion that they could not serve the defendant; the trial

Magistrate went on to issue an order for substituted service without first making a finding that there are reasons to believe that the defendant was avoiding service. Actually, she acted on mere words by the counsel for the Plaintiff and the records does not even reveal that she was shown an affidavit of the court process server to confirm that indeed the defendant was duly served and she was not acting on misrepresentation.

Upon my further perusal of the documents in the file, I noticed an affidavit of service of summons purported to have been served to the Defendant having scribbles on the date of service which one cannot tell if it was on 13th or 14th January. As it is the said affidavit leaves a lot to be desired if at all it was genuine or it was filled in to fit the purpose and conveniently found in the court records. Surely, the trial Magistrate would have been certain if she had allowed herself to be availed material proof and further explanation before making the order.

Again, I came across a copy of the summons produced in Mwananchi Newspaper of 18.02.2021 which on the face of it does not indicate if the defendant was only required to enter appearance and all the same did not

accord him 21 days to file his Written Statement of Defence before the first hearing as clearly provided under **Order 8 Rule 1 (1) of Cap 33** that:

"1(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.

(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence:"

The purported substituted service did not indicate either of the above to justify ex parte hearing. It merely called for a hearing date on 01.03.2021.

The law again, i.e., **Order V Rule 16 of Cap 33 RE 2019** provides for a procedure to be followed where the defendant refuses to sign the acknowledgement that the court process server is supposed to leave 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, or that 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. All these crucial steps put by the law were not met.

From my findings above, I am highly persuaded by the findings of my brother Judge Hon. Masoud in the cited case of **Petrades Godwin Vs Marlene Samiath (supra)** when he observed thus:

"...Although it is stated in the affidavit that the appellant refused to sign on the summons, there is nothing showing as to whether a copy was left with the appellant as is required by Order V Rule 16 of the Civil Procedure Code (supra). From the proceedings, it is clear that the trial court did not examine the proof of service filed. Had it done so, it would have seen the apparent errors on the face of the proof of service of the summons to the appellant. It would not have entered default judgement under such circumstances"

Equally the same, had the trial Magistrate directed herself into examining as to whether the defendant was duly served and the purported affidavit of the court process server was duly filled, she would not even have gotten to the stage of issuing the order for substituted service.

With the above findings and reasoning, I cannot hold that the Appellant in this appeal who was a defendant in Civil Case No. 34 of 2020 was "**duly served**" with summons to appear and file his Written Statement of Defence to defend the case against him but refused before the trial court could proceed ex parte against him. I am fortified by the principle held by

the Court of Appeal in the case of **Caritas Kigoma Vs K.G. Dewsi Ltd, Civil Appeal No. 47 of 2004 (CAT-Mwanza Unreported)** that in an application for setting aside ex-parte judgement, the plaintiff alleging that the defendant was duly served before the court proceeded ex parte should produce proof of such service showing that the defendant was indeed duly served. The same would assist in showing that the plaintiff exerted efforts to serve the defendant personally before running to substituted service.

I am equally persuaded by the decision in the case of **The Editor, Nipashe Newspaper and Another Vs Martin Nishikongwa and Another**, Misc. Civil Application No.23 of 2014 by my brother Judge Kihwelo J (as he then was) citing with approval a persuasive case of **Gahire David Vs Uwayezi Immaculate**, Civil Appeal No 0034 (HC Uganda) which held that:

*"Clearly, a court handling an application for setting aside a decree obtained **ex parte is duty bound to investigate and make a finding as to whether summons was or was not duly served. It is not enough that there is an affidavit of service on record because such an affidavit could be false**". [emphasis added].*

As such, despite the persistent averments by the Appellant that he was attending a Criminal Case in the same vicinity with the Respondent hence

would not have refused to accept the service in respect of the civil case; Counsel for the Respondent apart from saying that the Criminal Case is different from a Civil Case, did not deny that both parties met in attending a criminal case hence failed to inform him of the pending civil case.

In their submission, counsel for the Respondent in putting reliance to the persuasive case of **Lekam Investment Co Ltd Vs The Registered Trustees of Al Jumaa Mosque and Others (Supra)** that since there is no dispute as to the publication, substituted service by order of the court shall be effectual as if made to the defendant personally. I subscribe to such principle of the law as the same shall only apply in cases where there is no dispute as to publication. Nevertheless, the cited case is distinguishable with the circumstances of this case as here the dispute is on the substituted service by publication because the same did not adhere to the set rules and procedure set by the law. As a result, the service was not proper.

On the strength of my findings above and the cited principles of the law on the ex-parte proof, I find that there is no summons "duly served" to the defendant to warrant the order of ex-parte proof against him.

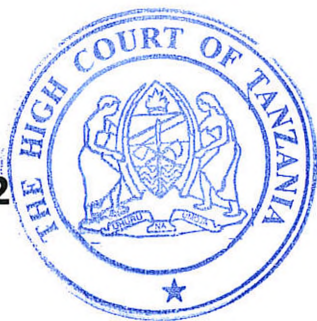
Consequently, the order of 08.02.2021 on the substituted service is hereby quashed and set aside. Similarly, the exparte - judgement delivered on 12.05.2021 by hon. Chuwa in Civil Case No. 34 of 2020 and its decree and all proceedings are nullified and set aside. Further the ruling and all the resultant orders in respect of Miscellaneous Civil Application No. 20 of 2021 are hereby quashed and set aside with costs.

The above decision construed from the 1st, 2nd and 3rd grounds of appeal disposes of the matter hence I shall not belabour on the remaining grounds of appeal.

In the upshot, I order that the main suit in Civil Case No. 34 of 2020 in the Resident Magistrate Court of Mbeya at Mbeya be tried de novo inter-parties before another competent magistrate.

Accordingly Ordered.

Mbeya
06.09.2022



A handwritten signature in blue ink, appearing to read 'R.A. Ebrahim', is written over a horizontal line.

R.A. Ebrahim
Judge