IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MISCELLANEOUS LAND APPLICATION NO. 05 OF 2022

(Arising from Land Case No. 06 of 2022 High Court of Tanzania at Songea Before Hon S. C. Moshi, J.)

STEPHEN NGALAMBE ..... APPLICANT

VERSUS

ONESMO EZEKIA CHAULA ..... 1ST RESPONDENT

SONGEA MUNICIPAL COUNCIL..... 2ND RESPONDENT

RULING

Date of last Order: *01/09/2022*
Date of Ruling: *18/10/2022*

MLYAMBINA, J.

This ruling will lay a dictum that lessens the effect on failure of a party to file written submissions in applications which are made by way of chamber summons supported with an affidavit and replied by counter affidavit. It takes considerations that affidavits are substitute of oral evidence as stated in the case of **East African Cables (T) Limited v. Spenncon Services Limited**.[1] The ruling re-states a principle that; it is improper to dismiss an application whose evidence forms part of the Court records. The goal is not to create much controversy or shirk the

[1] Misc. Application No. 61 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).

existing procedural rules or make Court orders not respected by the parties but to make a better civil justice system not only to the litigants but also indirectly to the entire society.

At the outset, the architecture I endure to strengthen or perfect the imperfect is based on the principles re-stated in the case of **Atuwoneke Mwenda v. Hezron Mangula**.[2] I don't intend to pose myself liberal but I take cognizance that this Court is not automata as there is nothing permanent in this World. The Court has a sacred duty to develop jurisprudence for the betterment of our society. I get inspiration from one of the Judge of the Supreme Court of Nigeria Hon. Pats-Acholonu in the case of **Patrick Magit v. University of Agriculture, Markudi and 3 Others** who said:[3]

> *...It must be admitted that **Judges are not robots (or zombies)** who have no mind of their own except to follow precedents...*As the society is eternally dynamic and with fast changing nature of things in the ever changing world and their attendant complexities, the Courts should, empirically speaking, situate its decisions on realistic premise regard being had the society's construct and

---

[2] Miscellaneous Land Application No. 5 of 2020, High Court of Tanzania at Iringa (unreported).

[3] [2006] All FWLR (pt.298) 1313, 1345 D-F.

understanding of issues that affect the development of jurisprudence. [Emphasis applied].

I take more cognizance that an affidavit is a statement in writing sworn before someone who has authority to administer an oath; it is a solemn assurance of the fact known to the person who states it, sworn before a Commissioner for oath. As such, an affidavit is an evidence. Any statement given at a hearing by a party or his Advocate is a mere amplification of an affidavit evidence.

I further take cognizance that it is a well-established principle of law through the *inter alia* case of **Copper v. Smith**[4] as cited in **Ottu on behalf of P.L. Asenga and 106 Others, Super Auction Mart and Court Brokers, the Royale Orchand inn Ltd and Amikan Ventures Ltd v. Ami (Tannzania) Ltd;**[5] that the core function of the Court is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.

I take additional cognizance that Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.[6] At the

---

[4] (1883) 23 Ch.D 700.

[5] Civil Application No. 20 of 2014 Court of Appeal of Tanzania (unreported).

[6] *Ibid.*

same time, rules of procedure strictly requires that failure to lodge written submission after being so ordered by the Court is tantamount to failure to prosecute or defend one's case. Such position is reflected in *inter alia* cases of **Godfrey Kimbe v. Peter Ngonyani;**[7] **Abisai Damson Kidumba v. Anna N. Chamungu and 3 Others;**[8] **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another;**[9] **NIC of Tanzania and Consolidated Holding Corporation v. Shengana Limited.**[10] **Mariam Suleiman v. Suleiman Mohamed;**[11] **Mechmair Corporation (Malaysia) Berhard v. V.I.P Engineering;**[12] and **Fredrick A. Mutafurwa v. CRDB 1996 Limited and Others.**[13]

---

[7] Civil Appeal No. 41 of 2014, Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 3.

[8] Miscellaneous Land Application No. 43 of 2020 District Registry of Mbeya at Mbeya (unreported).

[9] Civil Application No. 90 of 2011, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[10] Civil Application No. 20 of 2007, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[11] Civil Case No. 27 of 2010, High Court of Tanzania at Dar es Salaam (unreported).

[12] Civil Appeal No. 9 of 2011, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[13] Land Case No. 146 of 2004, High Court of Tanzania, Land Division (unreported).

I equally take cognizance on the principle that failure to file written submission on appeal depend on whether the other party has been prejudiced. The position is captured in the case of **Khalid Misongo v. Unitrans Co. Limited.**[14]

With the above principles in mind, I will first highlight the brief facts of the case that has necessitated the dicta in this case. The Applicant moved this Court by way of Chamber summons made under *section 51 (2) of the Land Disputes Courts Act*[15] *and Order IX Rule 9 of the Civil Procedure Code.*[16] The application was supported with the affidavits of Stephen Ngalambe, the Applicant, Upendo Bonamali-the young sister of the Applicant and of Respicious R.S. Mukandala, an Advocate working in the firm known as Kitare and Company Advocate, a firm dully instructed to represent the Applicant.

In response, the 1st Respondent filed a Counter affidavit. Equally, the 2nd Respondent filed its Counter affidavit sworn by Alto Andrew Lowolelu. On 28th July, 2022, by consent of the parties, the Court ordered the application be disposed by way of written submissions.

---

[14] Civil Appeal No. 20 of 2011, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[15] [Cap 216 R.E. 2019].

[16] [Cap 33 R.E. 2019].

According to the schedule, the Applicant was ordered to file his submissions in chief by 11th August, 2022, the Respondents reply written submissions were to be filed by 25th August, 2022 and rejoinder written submission (if any) was to be filed by 1st September, 2022. All the parties complied with the order except the 1st Respondent. Under the current procedural rule, the Court is mandated to treat the 1st Respondent's act of failure to file reply written submission as one's failure to defend the application. In departing to such established principle, I will revisit the position in UK and Nigeria.

In Tanzania, under *Order XLIII (2) of the Civil Procedure Code*[17] every application to the Court made under *the Civil Procedure Code*[18] must, unless otherwise provided, be made by a chamber summons supported by affidavit. In such context, a chamber summons refers to the legal document which is primarily used to initiate civil applications. This is like an Application Notice in the United Kingdom.

To start with the position in the United Kingdom, under *the Civil Procedure Rules (henceforth the CPR)* proceedings are commenced by a claim form, whilst pre-action/applications to Court are initiated by

---

[17] [Cap 33 R.E. 2019].

[18] *Ibid.*

Application Notice in form N244.[19] An application notice may be made on notice to the other party, or without notice as the CPR permits.

The Applicant may request the application notice to be dealt with without a hearing, this is however dependent on the view taken by the Court in dealing with the application.[20]

Part 23 of the CPR sets out the General Rules about Applications for Court Orders.[21] *Rule 23 sub rule 8 of the CPR* applies to Applications that may be dealt with without a hearing.[22] It provides as follows:

> *The Court may deal with an application without a hearing if;*
> *(a) the parties agree as to the terms of the order sought;*
> *(b) the parties agree that the Court should dispose of the application without a hearing, or*
> *(c) the Court does not consider that a hearing would be appropriate.*[23]

---

[19] justice.gov.uk [lastly accessed on 18th October, 2022 at 8:25am]

[20] N244 - Application Notice (publishing.service.gov.uk) [Lastly accessed on 18th October, 2022 at 8:30 am].

[21] justice.gov.uk [lastly accessed on 18th October, 2022 at 8:25am].

[22] *Ibid.*

[23] *Ibid.*

The power of the Court to proceed with dealing with an application notice in the absence of a party is provided for under *Rule 23 sub rule 11* as follows:

> (1) Where the Applicant or any Respondent fails to attend the hearing of an application, the Court may proceed in his absence.
> *(2) Where –*
> *(a) the Applicant or any Respondent fails to attend the hearing of an application; and*
> *(b) the Court makes an order at the hearing, the Court may, on application or of its own initiative, re-list the application.*

In essence, *Rule 23 sub rule 11 of the CPR* applies to the power of the Court to proceed with the hearing of an application notice in the absence of a party in Court.[24]

Apart from *the CPR*, there is *The Practice Direction (PD) 23A, as amended following the death of Her Majesty Queen Elizabeth II and the accession of His Majesty King Charles III, in particular, all references to "Elizabeth The Second" being replaced with "Charles The Third"; all references to "Queen" be replaced with "King"; all references to*

---

[24] *Ibid.*

"Queen's Bench Division" be replaced with "King's Bench Division"; and all references to "QB" be replaced by "KB".

Under The Practice Direction (PD) 23A, as amended, Applications at paragraph 2.1(5) contains extensive directions on how a party could make a request to the Court for an application to be dealt with without a hearing at the point filing the application. Under *paragraphs 2.2 – 2.10 of the PD 23A,* the Court will consider the circumstances of the application notice on whether it is suitable for without hearing.[25] *Rule 23.9 and 23.10* allows a Party to apply for an order made without a hearing to be set aside or varied.[26]

Further, *Practice Direction 4.1* requires, unless the Court otherwise directs or *paragraph 3 or paragraph 4.1A* of the Practice Direction applies the application notice must be served as soon as practicable after it has been issued and, if there is to be a hearing, at least 3 days before the hearing date *(Rule 23.7 (1) (b).*[27]

In Nigeria, the first assumption to be made is that a chamber summons approximates to what in Nigeria is called an originating

---

[25] Practice Direction 23a – Applications - Civil Procedure Rules available at justice.gov.uk [lastly accessed on 18th October, 2022 at 8:25am].

[26] *Ibid.*

[27] *Ibid.*

summons or originating motion. In Nigeria, a matter commenced by way of an originating summons is usually tried on the basis of affidavit evidence. The originating summons/motion is filed, supported by an affidavit and a written address.[28]

Once both parties have joined issues, that is filed their affidavits as the case may be and written addresses, as well as a reply on points of law as the case, maybe, the matter is then set for hearing/adoption of written addresses.

On the day of the hearing/adoption of written address, either of the parties may be absent. What is open to the Court to do in the circumstance? *Order 22 Rules 8 & 9 of Federal High Court (Civil Procedure Rules) 2019,* provides for the applicable procedure to be followed.[29] *Order 22 Rule 8* provides:[30]

> Where a last written address or written address in respect of any application under these rules has been filed, and it comes up for adoption. Either of the parties is absent; the

---

[28] (Order 3 Rule 9(2)) of the Federal High Court (Civil Procedure Rules) 2019 available at https://olumidebabalolalp.com [Lastly accessed on 18th October, 2022 at 8:45am].

[29] *Ibid.*

[30] *Ibid.*

> Court shall either of its motions or, upon oral application by the Counsel for the party present, order that the address is deemed adopted if it is satisfied that the parties absent had notice of the date of adoption.

Rule 9 provides:[31]

> The Court shall be satisfied that the party absent had notice of the date for adoption if on the previous date last given the party, or his Counsel was present in Court.[32]

The above rules imply that except in circumstances where the Court is satisfied that the party absent in Court had no notice of the date of adoption/hearing, the affidavit and written addresses will be deemed adopted and based on the same affidavit evidence, judgement will be delivered.

With the afore lessons drawn from the United Kingdom and Nigeria along with the reasons restated by this Court in the case of **Atuwoneke Mwenda,**[33] the Court shall in its own motion consider the affidavit evidence of both parties and the available written submissions and determine the application on merits.

---

[31] *Ibid.*

[32] *Ibid.*

[33] Miscellaneous Land Application No. 5 of 2020, High Court of Tanzania at Iringa (unreported).

The records indicate that Stephen Ngalambe (henceforth the Applicant) was the 2nd Defendant in *Land Case No. 06 of 2022*.[34] The Plaintiff was **Onesmo Ezekia Chaula** while **Songea Municipal Council** was the 1st Defendant. The matter was heard ex-parte against the Applicant leading to ex-parte Judgement been delivered on 30th October, 2018 by my learned Sister Hon. S. C. Moshi, J. The Applicant been aggrieved, filed this application seeking for an order to set aside the ex-parte Judgement.

By consent of the parties, the application was argued by way of written submission. All parties were represented except for the 1st Respondent who did not lodge written submission to elaborate his counter affidavit. The Applicant was represented by Mr. Symphorian Revelian Kitare Senior learned Advocate while the second Respondent was enjoying the service of Ms. Theresia Mbawala learned State Attorney.

It must be noted that the impugned *Land case No. 06 of 2018;*[35] was instituted by the 1st Respondent herein. He prayed to be declared as a legal owner of the disputed land. In alternative to be paid a total of TZs 190,200,000.00/= (One Hundred Ninety Million and Two Hundred

---

[34] High Court of Tanzania at Songea (unreported).

[35] *Ibid.*

Thousand Tanzania Shillings Only) as a compensation of the costs he incurred to erect fencing wall of the Land in dispute.

Upon trial of the matter, in absence of the Applicant, the 1st Respondent was declared the lawful owner of the land in dispute while the Applicant and the 2nd Respondent were ordered to pay cost of the suit. On 14th December, 2018 the Applicant become aware of the said *ex parte* judgement via his relative one Upendo Pondamali whom he sent to Songea Municipal Council to pay for Land rent. Upon Upendo Pondamali being informed about the *ex parte* judgement, she notified the Applicant immediately. The same version of facts is reflected in the supporting affidavit of Upendo Pondamali.

It was the submission of the Applicant that; by the time he got the information, the time to file the application to set aside the *ex parte* judgement had lapsed. He lodged the application for the extension of time but it was dismissed. He successfully appealed to the Court of Appeal of Tanzania. The Applicant was allowed to file application for extension of time to set aside the ex-parte judgement within 30 days from 21st March, 2022.

Moreso, the Applicant submitted that; the reason for his non appearance is due to the reason that he was not informed about the case against him. He discovered through his Advocate that the record of

the Court shows that he was served through substituted service (publication) after the first summons was returned without being signed. His Advocate told him that the substituted service is used when the party is avoiding service. For that reason, it was the Applicant's contention that there was no any proper service. The Applicant insisted that; he was not served with a summons for either to file his written Statement of Defence nor a summons to appear. The same facts were supported through the affidavit of the Applicant's Advocate.

On other hand, the 1st Respondent in his counter affidavit contested the Applicant allegation of discovering the ex-parte judgement when the time had lapsed. He however conceded on the following facts: *One*, there existed of a suit and its ex-parte judgement *Two*, the Applicant filed the application for extension of time which was dismissed by this Court. *Three*, the Applicant appealed to the Court of Appeal where he was granted the leave to file this application.

The 1st Respondent averred further that; the substituted service by way of publication is as good as other service. Thus, the Court arrived to opt on the substituted service after satisfied itself that the whereabout of the Applicant was unknown. The substituted service meant to inform the Applicant about the existence of the case, but he never appeared.

The 2nd Respondent on its part disputed the fact that the Applicant discovered the existence of the ex-parte judgement when the time had lapsed. It was further submitted by the 2nd Respondent that the substituted service by way of publication was due to the reason that the 1st Respondent was unaware of the Applicant's domicile.

In the premises of the above, the significant issue to be determined in this case is; *whether the Applicant adduced sufficient reason to warrant this Court to set aside its ex-parte judgement entered against the Applicant. Order IX Rule 9 of the Civil Procedure Code* provides *inter alia* that:[36]

> In any case in which a decree is passed ex parte against a Defendant, he may apply to the Court to set it aside; and *if he satisfy the Court 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 cost, payment into Court or otherwise as it think fit, and shall appoint a day for proceeding with the suit:
>
> Provided that where a decree is of such a nature that it can not be set aside as against such Defendant only it may be set aside as against all or any of the other Defendant also. [Emphasis mine]

[36] [Cap 33 R.E. 2019].

Being guided by *Order IX of the Civil Procedure Code*,[37] it is well settled that the Court may set aside the *ex parte* judgement upon being moved by the Applicant with sufficient reason.[38] At paragraph 8 of the Applicant supporting affidavit, it is stated that, the Applicant was not informed about the existence of the case against him until on 14th December, 2018.

Moreso, the Applicant became aware of the summons issued by the Court which was served through a substituted service by way of publication when his Advocate perused the Court file on 21st December, 2014 (sic).

In his written submission the Counsel for the Applicant reminded this Court that issuance of the summons and serving in all stage of the proceedings is imperative as per *Order V Rule 5, Order IX Rule 1, Order XX Rule 1 of the Civil Procedure Code*.[39] He buttressed his argument with the case of **Ramadhani Amiri v. Yusuphu Rajabu**;[40] **Egin M.**

---

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] [1995] TLR 26.

Mijwahuzi v. Praygod K. Petro;[41] and **Cosmas Construction Co. Ltd v. Arrow Garments Ltd.**[42]

Order V Rule 20 (1) of the Civil Procedure Code provides for substituted service as follows:[43]

> 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 can not 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 upon some conspicuous party 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.*

Having gone through the arguments from the parties, the Court is of the findings that there is no any statement or proof that before issuing the substituted service by way of publication, there was sufficient effort taken to get satisfied that the Applicant was keeping away to avoid the service. The first summons was returned to Court on the

---

[41] Misc. Land Case No. 653 of 2015, High Court of Tanzania, Land Division at Dar es Salaam (unreported).

[42] [1992] TLR 127.

[43] [Cap 33] *Loc cit.*

assertion that the Applicant is nowhere to be found and his place of abode was unknown to the 1st Respondent. It is the further finding of this Court that prior publication, the Court should have been moved to issue another substituted summons by way of affixation. As a result, the Applicant could be accorded fully his right to be heard.

There is no dispute on the effectiveness of the summons served by substituted service through publication as provided under the provision of *Order V Rule 20 (2) of the Civil Procedure Code*.[44] See also the case of **Lekam Investment Co. Limited v. The Registered Trustees of Al-Juma Mosque and 4 others.**[45] But the prime issue to be considered before ordering the service by way of substituted service is whether the Court got satisfied itself if the Applicant in one way or another was trying to keep out of the way for the purpose of avoiding the service. In the case at hand, no any evidence was adduced to prove if the Applicant intentionally kept out of the way to avoid the service.

The 2nd Respondent in his submission averred that, *Order V Rule 16 (1) of the Civil Procedure Code,* allows the service of summons by

---

[44] *Ibid.*

[45] Civil Revision No. 27 of 2019, High Court of Tanzania at Dar es Salaam (unreported).

substituted service.[46] He added that the Applicant is living at Dar es Salaam where the circulation of newspaper is high. He supported his argument with the case of **Werema Marwa Wankogere v. Mseti Marwa Wankogere,**[47] which is distinguishable to the circumstance of the case at hand. In **Werema's case** the Court was dealing with the issues of circulation and availability of newspaper between urban and rural area.[48]

The Counsel for the 2nd Respondent averred further that, the number of summonses issued will serve no purposes as the service was by way of substituted service through publication. In his reply the 2nd Respondent at paragraph 8 of her counter affidavit contested the Applicant statement on substituted service. He submitted that substituted service by way of publication is the proper service and the Court arrived to such order after it was satisfied that the whereabout of the Applicant was unknown.

Furthermore, *Order V Rule 5, Order VIII Rule 1(2)* and *Order IX Rule 1* provides for summons to appear.[49] *Order XX Rule 1 of the Civil*

---

[46] Cap 33 *Op cit.*

[47] Miscellaneous Land Appeal No. 124 of 2020, High Court of Tanzania at Musoma (unreported).

[48] *Ibid.*

[49] [Cap 33] *Op cit.*

Procedure Code provides for the summons/notice for judgement pronouncement.[50] It is not a mere ceremonial procedure but legal procedure which has to be adhered to.

In this case, it is evident that on 19th October, 2018 when the Court set a date of exparte judgement against the Applicant herein, the 1st Respondent and his Advocate and the Advocate for the 2nd Respondent were present. They were notified that the ex-parte judgement date was 30th October, 2018. There was no any kind of summons issued to the Applicant to notify him on the date of delivering the exparte judgement. Such act contravened the principles established in the *inter alia* case of **Cosmas Construction Co. Ltd.**[51] It was also contrary to *Order XX Rule 1 of the Civil Procedure Code*.[52] The Applicant though did not attend the hearing, had the right to be informed on the date of judgement as certain consequences could follow against him. The assertion that he was nowhere to be seen was not a valid justification of not summoning him to attend the judgement pronouncement.

---

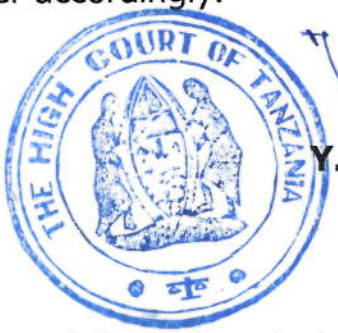
[50] *Ibid.*

[51] [1992] TLR 127.

[52] Cap 33 *Op cit.*

In the end, it is the finding of this Court that the Applicant has succeeded to adduce sufficient cause that warranted his failure to appear before the Court when *Land Case No. 6 of 2017* was litigated. At this juncture the *ex parte* judgement dated 30th October, 2018 entered against the Applicant is hereby set aside. The matter to proceed on merits interparties. No order as to costs.

Order accordingly.



Y. J. MLYAMBINA

JUDGE

18/10/2022

Ruling delivered and dated 18th day of October, 2022 in the presence of learned Counsel Neema Nyagawa holding brief of Respicious R. Mkandala for the Applicant and learned State Attorney Theresia Mbawala for the 2nd Respondent and in the absence of the 1st Respondent.

Y. J. MLYAMBINA

JUDGE

18/10/2022