

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 132 OF 2022

TANCOAL ENERGY LIMITED APPLICANT

VERSUS

**THE BOARD OF TRUSTEES OF
THE NATIONAL SOCIAL SECURITY FUND RESPONDENT**

(Arising from Civil Case No. 136 of 2021

RULING

27th September and 21st October, 2022

KISANYA, J.:

This is an application for setting aside summary judgment and decree of this Court dated 3rd March, 2022 in Civil Case No. 136 of 2021 which were entered in favour of the respondent herein. It is made under Order XXXV, Rule 8 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) and supported by an affidavit sworn by the applicant's counsel one, Tumaini Sekwa Shija.

The tale behind this application runs thus: The respondent instituted a suit against the applicant by presentation of a summary plaint at this Court On 8th October, 2021, the applicant was served with a summons to file application for leave to defend the said summary suit. Twenty days

later, on 28th October, 2021, the applicant filed an application for leave to defend in the summary suit lodged against her by the respondent. The said application was registered as Miscellaneous Civil Application No. 548 of 2021 and was fixed for hearing on 13th December, 2021.

It turned out that the respondent was not served with the application filed by the applicant. In the result, when summary suit came up for orders on 1st November, 2021, the respondent's counsel moved this Court to enter a summary judgment against the applicant. The respondent's prayer was granted and the matter was scheduled for judgment on 3rd December, 2021. However, the judgment was not delivered as scheduled. It was until 3rd March, 2022 when this Court delivered the summary judgment and decree in favour of the respondent. That decision prompted the applicant to file the present application praying for the above stated relief. The ground deposed in the affidavit in support of the application is to the effect that the applicant was not notified of the date of the summary judgment.

Opposing the application, the respondent lodged an affidavit sworn by her legal officer, Mr. Geoffrey Paul Ngwembe.

With leave of the Court, this matter was disposed of by way of written submissions. Mr. Erick Kamala, learned advocate filed written submissions on behalf of the applicant whilst Mr. Godfrey Ngwembe,

learned State Attorney filed written submissions on behalf of the respondent.

Submitting in support of the application, Mr. Kamala started by adopting the affidavit in support of the application to form part of the application. Referring to paragraphs 12 and 13 of the supporting affidavit, he submitted that the applicant was not notified of the date of the judgment. He was of the view that the omission contravened section 28 and Order XX Rule 1 of the CPC which requires parties to be notified of the date of judgment. To bolster his argument, the learned counsel cited the case of **Cosmass Construction Co. Limited vs Arrow Garments Limited** [1992] TLR 127 and **Maxcom Africa Plc vs Multichoice Tanzania Limited**, Misc, Commercial Application No. 136 (unreported). The said case underlined the importance of the presence of the adverse party on the date of judgment. He therefore prayed that the judgment and decree be set aside.

In response, Mr. Ngwembe conceded that the applicant was not issued with summons for appearing on the date of delivery of the judgment. However, he argued that summary suit and procedure governing summary suit are different from that of ordinary suits. Apart from the provision of Order XXXV, Rule 11 of the CPC, the learned counsel

relied on the cases of **Diamond Trust Bank Tanzania Limited vs Mtenda Distributors Company Limited and 6 Others**, Commercial Case No. 79 of 2016, HCT Commercial Division, **Quality Corporation Ltd and Others vs National Bank of Commerce Ltd**, Misc. Commercial Application No. 47 of 2019 (both unreported) and **CRDB Bank Limited vs John Kagimbo Lwambagaza** [2002] TLR 117. Referring further to Order XXXV Rule 2(1), he submitted that the applicant was required to obtain leave to appear and defend the matter in order to have audience. It was his contention that the applicant lost the right in respect of the summary suit because he failed to obtain leave to appear and defend the suit. In essence, the learned State Attorney was of the firm view that the requirement of serving summons of the date of summary judgment is not necessary. He went on moving this Court to dismiss the application with costs.

Having carefully considered the parties' rival arguments, the point that needs this Court's attention is whether or not the application has merit.

This being application to set aside summary judgment and decree, it is governed by Order XXXV, Rule 8 of the CPC. In essence that provision empowers the trial court to set aside the summary decree upon being

satisfied that are exceptional circumstances. For clarity, I extract the said provision:-

"After decree the court may, in exceptional circumstances set aside the decree and if necessary, stay or set aside the decree and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."
(Emphasize supplied).

It is also settled law that, apart from proving the exceptional circumstances, the applicant against whom summary judgment was entered must demonstrate that he has a good defence in the summary suit. I am fortified by the case of **Integrated Property Investment (T) Ltd and Another vs the Company for Habitat and Housing in Africa**, Civil Appeal No. 187 of 2015 (unreported) in which the Court of Appeal held as follows:-

"It is instructive to state further that, unlike in an ex-parte judgment entered in default of the defendant's appearance, a defendant against whom a summary judgment has been entered has to show firstly, that there were exceptional circumstances which prevented him from appearing in court and secondly, that he has a good defence in the suit."

In that case, the Court of Appeal went on citing with approval the comment by **Sarkars in The Code of Civil Procedure, 11th Ed., at pages 2248 – 9**, on Order 37, Rule 4 of the Indian Code of Civil Procedure, which is in *pari materia* with Order XXXV, Rule 8 of the CPC.

The comment reads:-

"Under Rule 4 the defendant is obliged to explain the special circumstances which prevented him from appearing in the Court and seek leave to defend the suit within time. In addition he has further to show that he has good, substantial and/or meritorious defence in the suit."

As hinted earlier, this application is predicated on want of service of summons to appear when the summary suit was called on for judgment. Reading from the provision of Order XX Rule 1 of the CPC, it is vivid that where a judgment is not pronounced at once after the case has been heard, notice shall be given to the parties or their advocate. There is a plethora of authorities to the effect that parties to the suit must be notified of the date of judgment. See the cases of **Cosmass Construction Co. Limited** [supra] TLR 127 and **Maxcom Africa Plc vs Multichoice Tanzania Limited**, (supra) referred to this Court by Mr. Kamala. In another the case of **Awadhi Idd Kajass vs Mayfair Investment**

Limited, Civil Application No. 281/17 of 2017 (unreported) the Court of Appeal held as follows on the issue under consideration:

"... no operative, valid and effective judgment was delivered in the absence of the parties which had no notice of its delivery."

The record of the Court bears it out that the applicant was not served with notice of delivery of *ex-parte* judgment. That fact was also not disputed by Mr. Ngwembe. He contends that the requirement to serve notice of delivery of judgment does not apply to the defendant in summary suit who has not obtained leave to appear and file the defence. I respectfully disagree with him. The position is now settled that, a summary suit entered due to the defendant's failure to file defence is similar to an *ex-parte* judgment. [See the case of **Integrated Property Investment (T) Ltd** (*supra*)]. That being the position of law, the applicant was required to be notified of the date of judgment as in case of *ex-parte* judgment. Considering further that the summary suit was fixed for judgment at the time when the applicant had filed an application for leave to defend the same, I am convinced that one of the conditions for setting aside the summary judgment and decree exist.

However, as shown earlier, the position stated in **Integrated Property Investment (T) Ltd** (*supra*) suggest that exceptional

circumstances is not the sole factor for setting aside the summary judgment and decree. Since the applicant has no automatic right of defending the summary suit, she was expected to demonstrate or show that there is good defence in the suit filed against her.

In our case, the applicant did not discharge that duty. It was not deposed in the supporting affidavit whether the applicant has good or substantial defence in the suit and how. As if that was not enough, the applicant's counsel did not address that issue in his written submissions. In that regard, I am constrained to hold that the application does not meet that threshold to warrant setting aside the summary judgment.

For the above given reasons, the application is found not meritorious. It is hereby dismissed with costs.

DATED at DAR ES SALAAM this 21st day of October, 2022.



S.E. KISANYA
JUDGE
21/10/2022