

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 320 OF 2021

(Appeal from the decision of the Resident Magistrates Court of Dar Es Salaam at Kisutu in Misc. Civil Application No. 24 of 2021)

BETWEEN

DAVE IMPEX LIMITEDAPPELLANT

VERSUS

HELLMAN WORLDWIDE LOGISTICS (T).....RESPONDENT

JUDGMENT

MRUMA, J.

On 6th April 2020 the trial court pronounced an ex-parte Judgment in favour of the Respondent Hellman World Wide Logistics Limited and against the Appellant Dave Impex Limited. Aggrieved by that decision the Appellant successfully filed an application for extension of time within which to file an application to set aside the said ex-parte judgment. The application to set aside ex-parte judgement was refused on 5th August 2021 hence this appeal which is premised on the following grounds:-

1. That the learned trial Magistrate erred in law and fact by holding that there the Respondent serviced summons to the Appellant in a manner the law dictates while service was not properly served to the Appellant;

2. That the trial Magistrate erred in law and facts by not taking into consideration the intensive written submission made by the Appellant during hearing of the application;
3. That the trial Magistrate erred in law by failure to evaluate evidence over how he contents mode of service affected by the Appellant instead he relied on weak submission of the Respondent;
4. That the trial Magistrate erred in law and facts by not assessing the whole evidence of the appellant specifically on issue of service of summon and nature of their relationship which exist between the Appellant and the Respondent;
5. That the trial Magistrate's ruling lacks legal reasoning;
6. That the trial Magistrate erred in law and ion fact by holding that the Appellant had not adduced sufficient cause for non-appearance in Civil Case No. 73 of 2019.

On these grounds the Appellant prays his appeal be allowed with cost.

The appeal was argued by way of written submissions whereby the At the hearing the Appellant was represented by Mr Gabriel Masinga the

learned counsel, and the Respondent was represented by Mr Brian Mambosho Mamb Mambosho learned counsel.

Mr. Masinga began by dropping 5th ground of appeal and then gave a brief background of this suit that on 17th September, 2021 that he lodged an appeal against the ruling and order of the Resident Magistrate Court of Dar es Salaam, that on the said ruling the trial court refused to set aside the ex-parte judgment and decree of the civil case No. 73 of 2019 vide Misc. Civil Application No 24 of 2021. The said civil case was entertained ex-parte after the Appellant failed to enter appearance.

Regarding to 1st ground of appeal Mr. Masinga submitted that service of summons by the Respondent were not duly done in accordance with the law. He argues that the trial court was duty bound to read the plaint between the lines, make diligent to make sure that the respondent uses all alternatives to serve the Appellant before ordering substituted service by way of publication. To him the trial court was wrong to order substituted service by way of publication as the Appellant and Respondent know each other, that they are in business relationship for a long time, that they use to send emails and letters and therefore the Respondent was duty bound to find the Appellant and give him the legal documents pertaining his case. He further argues that the Respondent plait described particulars of the Appellant and it was

sufficed for the court to order substituted service by way of affixing summons in the office of the Appellant or by Post Office as required by the rules.

Submitting in regard to the 2nd ground of appeal Mr. Masinga submitted that the trial court was duty bound to go through the written submissions by the Appellant while contained strong arguments to convince the trial court and set aside the ex-parte judgment and decree. He cited the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company LTD vs. Mbeya Cement Ltd and National Insurance Corporation (T) Ltd TLR (2005) at page 41.**

Regarding to the 3rd ground of appeal Mr. Masinga submitted that the trial court erred to evaluate the contents of the affidavit accompanied the application for setting aside ex-parte judgment. That since an affidavit is a statement reduced in writing and sworn or affirmed before commissioner for oath containing statements of facts which are regarded as the true position then disregarding the Appellant's affidavit in support on the very application to set aside ex-parte judgment and decree was not proper.

Submitting regarding to the 4th ground of appeal Mr. Masinga submitted that according to the documents presented at the ex-parte

proof in civil case No. 73 of 2019 and the ruling in Misc. Civil Application No. 24 of 2021 the trial court erred in law and fact by failure to see and warn the evil intention of the Respondent in trying to mislead the court that the Appellant was untraceable and unreachable while the parties are best friends and partners in business.

Regarding to the 6th ground of appeal Mr. Masinga submitted the trial Magistrate failed to evaluate the evidence properly and see that the Appellant adduced sufficient reasons for non-appearance in Civil case No. 73 of 2019.

In his reply Mr. Mambosho combined 1st, 3rd and 4th ground of appeal, he submitted that Respondent acted accordingly within the parameters of the law which include publication of the summons in the local news papers pursuant to orders of the trial court. That it is on the record that the Respondent published the summons to file a defence issued to the Applicant in Nipashe and the Guardian Newspapers on 4th July 2019. He further argues that the Appellant's failure to file pleadings and attend the proceedings of Civil case No.73 of 2019 leading to ex-parte judgment was intentional and calculated to delay the fruits of the decree obtained by the Respondent.

Replying to the 2nd ground of appeal, Mr. Mambosho submitted that the ground misplaced as it does not challenge the legality of the

court's decision on a point of law nor challenge the court's decision on the application of the law of evidence to admit a fact.

Replying to the 6th ground of appeal Mr. Mambosho submitted the Appellant neglected to attend the proceedings of Civil Case No.73 of 2019 and cannot resort to service of summons as a reason for non-attendance in the said proceedings. He cited the case of **Benezeth Rweyemamu v. Cyprian Alexander Mlay and Others, Civil Appeal No. 109 High Court of Tanzania at Dar es Salaam (Unreported)**, and the case of **Abdallah Zarafi v. Mohamed Omari (1969) HCD**.

In his brief rejoinder Mr. Masinga reiterated his submission in chief, he submitted that substituted service means a lot its more than by way of publication and its our humble submission that since the Appellant and the Respondent knew each other and that the Appellant is an investor who is not conversant with the legal system in Tanzania and or local newspaper then the prayer to move the court to order for substituted service by way of publication means to prevent the Appellant from appearing and defending the suit in Civil case No. 73 of 2019. That had the Respondent be in good will and acting in good faith she ought to pray for substituted service by way of affixation or by email or by post office as it is well narrated in the case of Benezeth Rweyemamu.

Having examined the grounds and records of this appeal plus the submission advanced by the counsel for the parties for and against the appeal, the main issue for determination at this point, is whether this appeal has merits.

In my analysis I will discuss ground no.1st, 3rd and 4th which to me I found they are related, Appellant counsel contended that service was not properly served. While Respondents counsel submitted that summons was duly served through substituted service by way of publication in local newspaper Nipashe and Guardians that being a local news papers which are widely circulated in Tanzania, also he contended that the Appellant was negligent to prosecute his case.

Originally this case arising on application to set aside the ex-parte judgement. The Appellant were required to provide reasons why he was absent until the matter ordered to be heard ex-parte, therefore the Appellant has the option to give sufficient reasons before the court. This is provided under Order IX Rule 9.

"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 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“;

The law requires the Appellant to give sufficient reason as to why he did not enter appearance. The Appellant alleged that he did not enter appearance because he was not served with the summons. This entails that he was not aware of the proceedings on the trial court. The Respondent contended that the Appellant was properly served, but fail to enter appearance, he then prayed for substituted service which was granted. I note that civil case No. 73 Of 2019 was presented for filing on 17th May 2019 and it was called for mention before the trial magistrate on 22. 5. 2019 and was adjourned for mention on 26th June 2019. On that later date Mr. Jerry Msomange counsel for the Plaintiff informed court that an attempt to serve the Defendant by ordinary service has proved futile he therefore prayed to serve them by substituted service by publication the prayer which was dully granted. Summons was published in the Guardian Newspaper. On 26th August 2019 case was ordered to proceed ex-parte against the Defendant (the Appellant herein).

Issuance and service of summons are governed by Order V of the Civil Procedure Code. Rule 8 of that Order requires personal service. Rule 13 requires process server to do all due and reasonable diligence to get the Defendant and if he is unable to find him affix a copy of summons on the outer door of his office or residence. Under Rule 16(1) substituted

service can be issued where court is satisfied that the Defendant is avoiding service. In the present case there is nothing to show that court was satisfied that the Defendant was avoiding service.

This fact has attracted. My attention my attention is on granting of service by publication. I have asked myself why did the trial magistrate allowed service by publication at this juncture. Through my perusal I have seen the affidavit of process server. The affidavit generally shows that the process server wanted to serve the defendant through his office he didn't find him. The affidavit also shows that he tried to find him though his phone number also the Defendant was not found. Looking at the phone number alleged to be phoned is different from the one written in a plaint. Why don't they tried to call the Appellant through the number written in plaint. If Plaintiff intended to find the Defendant why provides a contrary number to the summons.

If the Appellant was nowhere to be found as indicated in the process server's affidavit, why didn't they call the Appellant through his number to know where he is and serve him the summons. If they had called him, they would know where he is and serve him the summons. If the Respondent know where the Appellant is residing, he would have prayed service by way of affixation. Again, why would the trial magistrate after once issued summons jumped to order service by Publication? It Should be known that service by publication should be

last resort where the Appellant is nowhere to be found. The fact that there is an Appellant phone number at the plaint there is no need to serve him by publication. Due to the manner of the service of summons issued to the Appellant, the court sees it was not proper thus it is defect in the procedure and hence affect competence of the proceedings.

I have noted that the Respondent counsel alleged that the Appellant was negligent for failure to attend to the court even when he was aware of the judgment date. With due respect to the counsel this argument was to be brought in application for extension of time and the fact that the appellant was granted extension of time to file his application shows that his reason for delay were sufficient, for grant of extension of time to file the application.

Having found this ground to have merit I see no reason to determine the remaining grounds, therefore the appeal is allowed the judgment and decree of the trial court are hereby quashed and set aside. I remit the file to the trial court and the case be heard interparty.

Order accordingly



A.R. Mruma

Judge

11.10.2022