

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 2 OF 2022

MANAGING DIRECTOR MZEE

YUSUPH ENTERPRISES APPELLANT

VERSUS

MOHAMED JUMA MNYIKA RESPONDENT

**[Appeal from the decision of the District Court of Ilala at
Kinyerezi in Misc. Civil Application No. 100 of 2021]**

JUDGMENT

6th & 17th May 2022

KISANYA, J.:

The appellant herein filed an application in which he moved the District Court of Ilala to set aside its ex-parte judgment in Civil Case No.37 of 2018. After hearing the parties, the trial court was satisfied that the appellant was duly served and that he had not advanced a good cause for his non-appearance when Civil Case No. 37 of 2018 was called on for hearing. Thus, it went on to dismiss the application for want of merit.

Feeling that justice was not served, the appellant filed this appeal which is predicated on the following grounds, in verbatim:-

- 1. That the trial magistrate erred in law and fact to dismiss the application without touching the points of controversy of application and decides (sic) different issues which are not in base of the case.*
- 2. That the trial magistrate erred in law and fact by contradict (sic) himself in his decision while the ground of condemning unheard (sic) was having legs to stand.*
- 3. That the trial magistrate erred in law and fact by failed (sic) to analyze the testimony and evidence during the hearing that reaches in bad judgment on the side of the appellant.*

This appeal matter was disposed of by way of written submissions filed by Mr. Emmanuel Hyera and Ms. Coletha Galus Millinga, learned advocates for the appellant and respondent, respectively.

In arguing the first ground of appeal, Mr. Hyera submitted that the point of controversy before the trial court was to the effect that the appellant was denied of his right to be heard. The learned counsel contended that the appellant was not duly served with summons in respect of Civil Case No. 37 of 2018. He also faulted the trial court for finding that the appellant was served with the summons but refused to receive the same as endorsed by the local government officer (*Mjumbe*). It was his argument that *mjumbe* is not a proper officer authorized to serve summons under Order V, Rule 5(1) and (2) of the CPC read together with Court Brokers and Process Server

(Appointment, Remuneration and Disciplinary (Amendments) Rules, 2017 (as amended).

Submitting on the second ground, Mr. Hyera argued that the appellant being a business organization and not a natural person was required to be served under Order V Rule 9(1) of the CPC. He went on to contend that, Mzee Yusuph Mwinyi who is the managing director of Mzee Yusuph Enterprises was not served at his residence in Mbagala. The learned counsel was of the view that, the circumstances of this case shows that the appellant ought to have been served through substituted service by publication. He reiterated that the appellant was not accorded the right to be heard because he was not served with summons.

Submitting on the third ground of appeal, Mr. Hyera argued that the appellant was not notified of the date of *ex-parte* judgment as required under Order XX, Rule 1 of the CPC. Referring me to the cases of **Khalida Rehire Said vs Mohamed Abdallah Said**, Civil Application No. 39 of 2014 and **Mbeya Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251, the learned counsel argued that the appellant was condemned unheard.

In reply, Ms. Millinga contended that the appellant's counsel had raised facts which were not raised during trial. She submitted that the appellant cannot claim that he was not heard because he refused to receive summons served to his attention with aid his *mjumbe*. Citing the case of **Amina Rashida vs Mohinder Singh and Another** [1986] TLR 196, Ms. Millinga went on to argue that the appellant absented himself from the hearing of the case. It was also her argument that the *mjumbe* is a proper person to serve the summons under Order V, Rule 9(2) of the CPC. She submitted further the appellant had not demonstrated how his evidence was not considered by the trial court. As to the complaint that the appellant was not served with notice of the date of ex-parte judgment, Ms. Millinga contended that the appellant was recorded absent on the date of *ex-parte* judgment.

Having examined the record of this appeal and considered the submissions advanced by the learned counsel for both parties, I am called upon to determine whether this appeal has merit or otherwise.

It is common ground that an *ex-parte* judgment was entered by the trial court in favour of the respondent and against the appellant. That being the case, it is the trial court which was enjoined to set aside the ex-parte

judgment. In order to exercise its discretionary power of setting aside or refusing to set aside the *ex-parte* judgment, the appellant (the then defendant) was charged with a duty of satisfying the trial court that he or she was prevented by a sufficient cause from appearing when the suit was called on for hearing. This requirement is provided for under Order IX, Rule 9 of the CPC, which is reproduced hereunder: -

" 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:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

Considering that the mandate to set aside the *ex-parte* judgment is vested in the trial court, an appellate court can interfere with the decision

made by the trial court if it satisfied that the trial court failed to exercise its discretionary powers judiciously. In so doing, the consideration by the appellate court is whether the defendant established a sufficient cause for his or her non-appearance.

From the foregoing discussion, the grounds of appeal and submissions by both parties require this Court to determine whether the appellant was prevented by a sufficient cause when Civil Case No. 37 of 2018 was called on for hearing before the District Court of Ilala.

I was then inclined to go through the pleadings filed before the trial court. The appellant deposed in the supporting affidavit deposed by Mzee Yusuph Mwinyi that he was not served with summons. This ground is reflected in paragraph 5 and 6 of the supporting affidavit in which the said Mzee Yusuph Mwinyi stated:

"5. That I, was not aware that the Suit (Civil Case No. 37 of 2018) was instituted against me, I was neither served nor summoned by the Court to enter appearance.

6. That, on 10th day of September, 2020, I was surprised to be issued with a Notice/Summons to show cause and why I am neglected (sic) to Court Orders..."

Contesting the application, the respondent (the then plaintiff) stated on oath that the appellant was served through *mjumbe* but refused to receive summons. This is gathered from paragraph 3 of the counter-affidavit in which the respondent deposed, among others, that:-

"...The applicant was aware of Civil Case No. 37 of 2018 which was instituted by the Respondent because he was served with summons, some of the summons were signed by the local government (mjumbe) of Tulian C on 22/07/2017 but ignored to acknowledge them when served.

In view of the pleadings, it is apparent the issue which the trial court was moved to determine is whether the appellant was duly served. The law is certain under section 110 of the Evidence Act [Cap. 6, R.E. 2019) that a person who asserts on existence of certain facts bears the burden of proving the same. In that regard, the respondent was duty bound to prove that the appellant was duly served. In a bid to prove that fact, the respondent appended the summons which were endorsed by his *mjumbe* to the effect that the appellant had refused to receive summons. Basing on the respondent's affidavit and summons appended thereon, the trial court was

satisfied that the appellant was duly served. The relevant excerpt of the trial court's ruling reads: -

"The applicant's reason was that he never knew that there was a case against him and so he was not served with summons. But is clearly proved that the applicant was served with summons as it is evidenced as Annex A."

Was the trial court right in holding that the appellant was duly served? Since it was deposed by the respondent that the appellant refused to receive summons, the applicable provision is Order V, Rule 16 of the CPC which provides: -

*"...Provided that where the defendant, his agent or such other person refuses to sign the acknowledgement the **serving officer shall 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, 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.**"*
(Empasize supplied).

In the light of above provisions, a person refusing to receive the summons is deemed to have been served if the servicing officer: one, returns the original summons to the court; two, leaves a copy of summons with the defendant; and signs an affidavit to the effect that the defendant was served and refused to sign the acknowledgement, a copy of summons was left with the said person, and the name and address of the person served.

As indicated earlier, the respondent contended that the appellant refused to receive summons served to him with aid of *mjumbe*. In the first place, I agree with Mr. Hyera, that *mjumbe* is not a servicing officer under the CPC. Even if I was to consider Ms. Millinga's argument that the trial court did authorize *mjumbe* to serve the defendant, nothing suggesting that the said *mjumbe* signed an affidavit stating the manner in which the appellant was served. Annex A appended to the counter-affidavit cannot be termed as an affidavit of the servicing officer. In the absence of the affidavit of service, I am of the considered view that the appellant was not duly served. This is also when it is considered the person who served the appellant did not file an affidavit to support the respondent claim.

It is also my humble view that, failure to serve the defendant is a sufficient ground for setting aside the ex-parte judgment. This is so because unless he is served with summons, the defendant cannot appear when the case is called on for hearing. Had the trial court considered the law governing service of summons, it would have noted that the appellant was not served in accordance with the law.

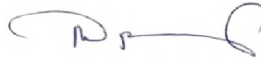
On the above stated reasons, I find merit in the first and second grounds of appeal. Since the appellant was not duly served, the complaint that he was condemned unheard cannot be ignored. The law is settled that a decision premised on the proceedings in which the right to be heard was infringed cannot be allowed to stand.

Ultimately, I allow the appeal and proceed to order as follows:-

1. The ruling of the District Court of Ilala at Ilala in Misc. Application No. 100 of 2021 is hereby quashed and its drawn order set aside.
2. The proceedings of the District Court of Ilala in Civil Case No. 37 of 2018 are hereby nullified from the stage where the matter proceeded *ex-parte* and the *ex-parte* judgment and *ex-parte* decree passed thereon are quashed and set aside.

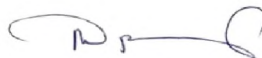
3. Civil Case No. 37 of 2018 of the District Court of Ilala should proceed where it ended before issuance of the order to proceed *ex-parte*. In the interest of justice, it is ordered that the said suit be heard before another magistrate of competent jurisdiction.
4. Given the circumstances of this case, each party shall bear its own costs.

DATED at DAR ES SALAAM this 17th day May, 2022.



S.E. Kisanya
JUDGE
17/05/2022

Court: Judgment delivered this 17th day of May, 2022 in the presence of respondent and in the absence of the appellant. B/C Zawadi present.



S.E. Kisanya
JUDGE
17/05/2022