

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 403 OF 2022

(Originating from Civil Case No.30 of 2019)

JOFLO COMPANY LIMITED.....1st APPLICANT

JOHN BONIFACE2nd APPLICANT

FIDELEIS AUGUSTINE MGASHA.....3rd APPLICANT

FLORA E. MALYEKA.....4th APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITEDRESPONDENT

RULING

1st Dec 2022 & 24th Feb 2023

MKWIZU, J:

This is a ruling in respect to an application for setting aside an ex-parte judgment issued by this court in Civil Case No. 30 of 2019 . The application is made under Order VIII Rule 15 (1) of the CPC,(Cap 33 RE 2019) and it is supported by a joint affidavit of all the applicants in this application sworn on 16 September 2022.

The application through stands opposed through a counter affidavit of by the respondent's advocate Karoli Valerian Tarimo who states that the applicant's application lacks merit. He avers that the exparte judgment was arrived at after the expunging of the applicant's defence from the case file for being filed out of the prescribed time.

The application was canvassed by way of written submissions which I have considered. Order VIII rule 15(1) of the CPC relied upon by the applicants reads:

"15. -(1) Where a judgment has been entered pursuant to rule 14 the court may, upon application made by the aggrieved party, within sixty days from the date of the judgment, set aside or vary the default judgment upon such terms as may be considered by the court to be just."

A simple reading of the above provisions shows that a court has the discretion to set aside a default judgment but this is only done upon good /sufficient cause by the applicants.

The applicant's affidavit in support of the application as well as their written submissions filed in court asserts the improper service in civil case No. 30/2019 as the reasons for *ex-parte* judgment issued by the court. Applicants counsel contends that applicants were not properly served with both the summons and the plaint for them to exercise their statutory rights to defend the case. His contention was that since the defendants (now Applicant) in the impugned decision were more than one, then the respondent (original plaintiff) was compulsorily required under Order V Rule 7 of the CPC to serve summons on each of the defendants listed in the suit in person. He added that the defendants (now applicants) were not served.

Countering the applicants' submissions, respondent counsel said, the applicant's assertion of improper service is a misleading submission. He contended that applicants were in civil case No .30 of 2019 properly served and in response to the service, a joint written statement of defence

was filled with a counterclaim on 24th September 2019. On what instigated the *ex-parte* hearing and judgment, respondent counsel said, the joint written statement of defence was filed outside the time prescribed by the law leading to the expunging of both, their defence and the counterclaim from the records. Ms. Happiness Karoli insisted that the argument as to improper service advanced by the applicant is an afterthought that cannot justify the granting of the prayers sought in this application.

I have revisited the records in civil case No 30 of 2019, it is evident that applicants (original defendants) were served with the plaint and the summons resulted in them filing their joint written statement of defence and the Counterclaim on 24/9/2019, the fact which is not disputed by the applicants themselves. And that after filing their defence and counterclaim, a preliminary objection was raised that the WSD is hopelessly time barred coupled with a prayer to have the WSD be expunged from the records. The objection was argued by both parties. There is nothing like improper service or lack of service advanced by the applicants in that hearing. Their only argument was that the late filing of defence was permitted by Hon Masam Deputy Registrar(as she then was) the fact which was proved by the court to be not true. Sustaining the objection, this court (Ibrahim J) in its ruling dated 26/06/2020 expunged the Defence and the counterclaim from the court records and ordered an *ex-parte* proof of the plaint by the plaintiff in terms of order VIII Rule 14(1) of the Civil Procedure Code (Amendment of the 1st Schedule) Rules, 2019.

That is the exposition from the records available. Had it been true that applicants were not served, then they could have raised the issue

immediately after having knowledge of the matter or even in their submissions against the preliminary objection that was posed against their own defence. This did not happen and therefore applicants cannot be heard complaining about improper service of the plaint at this later stage. The applicant's reason is wanting in merit. Consequently, the application is dismissed with costs.

Dated at Dar es salaam, this **24th** Day of **February 2023**

E. Y Mkwizu
Judge
24/2/2023

Court: Right of Appeal explained



E. Y Mkwizu
Judge
24/2/2023

