

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CIVIL APPEAL NO. 42 OF 2022

(Originating from Misc. Civil Application no. 17 of 2022, District Court Morogoro)

PATHEC LIMITED APPELLANT

VERSUS

JUMA LUKINDA MAJEGELO RESPONDENT

JUDGEMENT

Date of last order: 21/02/2023

Date of judgement: 03/03/2023

MALATA, J

This appeal emanates from Civil Case no. 22 of 2021 whereby the respondent herein has successfully sued the appellant for breach of contract for importation of motor vehicle. The respondent claimed that he concluded agreement with the appellant to import a motor vehicle from Japan, however upon full payment the appellant failed to honour the promise hence the respondent's Civil Case No 22 of 2021.

As it can be gathered from proceedings and records, the case proceeded Ex-parte and the judgement was delivered on 23rd February 2022. The appellant being aggrieved by the exparte judgement he filed Misc. Civil application no. 17 of 2022 in order to set aside Ex-parte judgement in civil case no. 22 of 2021. The application was dismissed by the District Court for lack of sufficient cause. Aggrieved thereof, appealed to this court armed with three grounds of appeal as follows;

1. That, the Honourable trial Magistrate erred in law in finding and determining that the appellant was served with the plaint without bring proof of service according to the law.
2. That the trial magistrate misdirected itself on facts to deny the appellant right to be heard.
3. That the trial magistrate erred on law to disregard the requirement of the law and procedure on service of summons.

In view thereof, prayed to this court to set aside the decision of the District Court and set aside the judgement entered exparte. He pressed for cost as well.

When this appeal came for hearing, the appellant was represented by Ms. Salma Jafari, Advocate and the respondent enjoyed the service of Mr. Byarugaba, Advocate.

Submitting in support of the appeal Ms. Salma stated that the trial magistrate erred in law by rejecting the appellant's prayer. She submitted that, Order XXVIII Rule 2 of the Civil Procedure Code, Cap 33 R. E 2019 (here in to be referred as C.P.C) provides as to how corporation can be served with summons, that summons is to be served to the secretary or any director or other principal officer of the corporation. The learned counsel stated that in this case the appellant is not a natural person but a company thence the service of summons needed to be effected in compliance with Order XXVIII Rule 2 of the CPC.

Ms. Salma further stated that in civil case no. 22/2021 between the same parties the summons was served to one Issa Bakar who is not known by the appellant. Issa Bakar is not an employee or agent of the appellant herein still the trial court maintained that the summons was served to the appellant and continue to issue substituted service through Nipashe newspaper dated 29/12/2021.

Since the law requires service to be affected in accordance with Order XXVIII Rule 2(a) of the C.P.C and the same was not complied with then subsequent summons was validly served to the appellant until complied with Order XXVIII Rule 2(a) of the C.P.C, thus the substituted service was invalid as the later was not effected.

Ms. Salma the learned advocate, however agreed that substituted service do legally exist but for it to be effective the normal service must have failed. In the present case, service was not effected under Order XXVIII Rule 2 of the CPC, the substituted service cannot withstand though it was issued.

On the second ground, Ms. Salma, learned advocate submitted that the appellant was denied the right to be heard. The appellant gave reasons for his non-appearance in court, that he was not duly served as such he had no information of the exparte judgement until 22/01/2022. The reasons given was not taken into consideration, and thus the trial Magistrate denied the appellant right of being heard which is contrary to section 13(6) of the Constitution of United Republic of Tanzania.

Submitting on the third ground, the learned advocated stated that the appellant was not duly served with summons and the court did not dig on the reasons of non-service. The trial court issued an order for substituted service before ascertaining on the compliance of the normal service of summons. As such it went beyond the requirement of the law. She thus prayed the court to allow the appeal and set aside the exparte Order.

Replying on the grounds of appeal as submitted by the appellant, Mr. Byarugaba first prayed to conjoin the first and third ground of appeal, and

submitted that this appeal is challenging the ruling of the District Court where the exparte Order was not set aside. The court records is clear that effort to effect service to the appellant was discharged by the respondent, it is on record that on 18/11/2021 the summons was served to the appellant and the same was stamped with company seal and signed by the company agent and the matter was set for mention. The court did not proceed for hearing it ordered the respondent to serve the summons to the appellant, the respondent being aware of one of the directors Thekla Karage, tried to look for her but his effort was in vain. Mr Bakari signed the summons for Thekla, the director of the appellant, however the appellant never appeared. Since the effort to comply with Order XXVIII Rule 2 of the C.P.C. remain in futile for the interest of justice the court ordered for substituted services.

Mr. Byarugaba, the learned Advocate stated that the substituted service was effected through newspaper in compliance with courts order, the respondent made publication in Nipashe newspaper of 29/11/2021.

He further submitted that; it is a legal position that, once a summons is published in a newspaper having a wide circulation the appellant can't be heard to complain that he was not served. It is immaterial whether the respondent does subscribe to the newspaper or otherwise. To cement this

position, he cited Civil Revision no. 27 of 2019 between **Leekam Investment Co. Ltd vs. The Registered Trustees of al Juma Mosque and four others.**

It is our submission that the same position applies to the company as well. we submit that there was no affidavit proving that the summons was not served to the appellant, he prayed the court to be guided by Order V Rule 16(2) of CPC, he prayed for this ground to be dismissed.

Submitting on the second ground, the learned advocate stated that the right to be heard is enjoyed when one complies with prescribed procedure, failure to honour the procedure one cannot claim to have been denied right to be heard.

He stated that, this appeal is from application no 17/ 2022 instituted by the appellant herein. The court record is clear to the effect that, the appellant was given right to be heard and that they advanced reasons as to why they failed to appear, the reasons given were not tenable therefore their failure to advance tenable reasons cannot be cured by the right to be heard. He invited the court to be guided by the court decision in **Paulina R. Mollel vs. Victory Support Service**, Revision no. 119 of 2021 at page 6.

He prayed for appeal to be dismissed with costs as it lacks merit.

By way of rejoinder Ms. Salma had these to say, as to Order V Rule 16(2) of the C.P.C substituted service was effective that is the position, however the court requires to satisfy itself that the normal service of summons was effective. As to Leekam case is distinguished from this case, as in this case service of summons was issued to a stranger person.

I have considered the rival submissions of both parties, essentially, the issues for determination are;

1. Whether, appellant was properly served with summons with Order XXVIII Rule of the Civil Procedure Code Cap.33 R.E.2019
2. whether service of summons through substituted service was effective and replaced normal service of summons thus valid in law.

Under Order IX Rule 13(1) of the C.P.C, the court may upon application, set aside ex parte decree against the defendant, if it is satisfied that the summons was either not duly served or the defendant was prevented from any sufficient cause from entering appearance when the suit was called on for hearing. The law states as follows:

"In any case in which a decree is passed exparte 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 the **summons was not duly served** or **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”.*

In view of the position maintained by the Appellant that he was not duly served with the summons and the court went ahead to order substituted service; this court has gone through the court's record to ascertain if the applicant was really served with summons in accordance with the law.

It follows therefore that; the service of summons must be effected in strictly adherence to the rules set by the law. This is important in order to protect parties from being denied right to be heard which is one of the inherent rights in dispensation of justice. Before a person's right of entering appearance to defend his/her right is curtailed by the law, the same law strictly requires that the party that seeks an order that would otherwise affect another party's right of appearance to satisfy the court, and the court to satisfy itself that an ex-parte order is crucial and inevitable for the preservation of attendee right.

The appellant's complaint is that, he was not duly served in accordance with Order XXVIII rule 2 of the C.P.C which for easy reference is hereby reproduced;

2. Subject to any written law regulating service of process, where the suit is against a corporation, the summons may be served-

*(a) on the **secretary**, or on any **director**, or other **principal officer** of the corporation; or*

(b) by leaving it or sending it by post addressed to the corporation at the registered office or, if there is no registered office, then at the place where the corporation carries on business.

The law is very clear that where the suit is against corporation, the summons may be served on the secretary or any director or principal officer of the Corporation; or by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. The reason being that a corporation is an artificial person, that being the case there are people authorised to take care of the daily activities of the company and that authority is restricted to those people. That position was reflected

in the case **Cocacola Kwanza Limited vs. Harid Mbonela and 8 others**, Misc. Civil Application no. 173 of 2014, High Court, Dar es salaam.

*As one can see, there is logic in the law, because a corporation has only to act through either its **directors, secretary** or any other **person who is authorized** by it to act on its behalf. A corporation, though has the capacity to sue or be sued, yet it can be sued or sue through those people who are brain, mouth hands and legs. Not every person in a corporation can be said to be the corporation's 'brain' to think for or mouth to talk through. Thus, a person who was said to have received the summons and stamped it with the date, in the absence of evidence that he was a director or secretary or principal officer of the corporation, service could not be legally said to have been effected just to any person working in the corporation.*

The Civil Procedure Code did not leave any loop hole as to the evidence in regard to service. It said firmly that the serving officer who delivers or tenders a copy of the summons to the defendant personally; or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to for acknowledgement of service endorsed on the original summons.

The purpose of requiring the signature of the person to whom service is effected could be of two folds, **one**, is to ascertain that the person who received the summons, in the case of a corporation, is a director, secretary or a principal officer of the corporation whose acts are binding on the corporation, and **second**, the identity of the defendant, who is to be held liable in the event the suit is proved against.

Upon perusal of the subordinate court's records, the summons served to the appellant was signed by one Issa Bakari on 27/12/2021, according to the courts records there is no proof of service of summons signed by the appellant or appellant's agent on 18/12/2021. The allegation by the respondent that, the summons was served on 18/11/2021 to the appellant agent who signed and stamped the same is unfounded. It is the respondent who alleged existence of this fact then he bears a duty to prove the same. In this position I am guided by section 110,112 and 115 of the Evidence Act, Cap. 6 R.E.2022.

Section 110 (1) and (2) elucidate that,

"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 112 depict that,

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

Section 115 provides that,

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

It is alleged by the respondent that, the summons was signed by one Issa Bakar, servant of appellant's director. This court with all eyes did not see any evidence proving that, **one**, who was Issa Bakar, **two**, Issa Bakar did not swear an affidavit proving to be among the person mentioned under Order XXVIII Rule 2 of the CPC, **three**, there is no confirmation from the company that, Issa Bakar was their agent and **four**, there is no evidence confirming that, he received the document and signed on it. In the absence of evidence that he was a director, secretary or principal officer of the corporation service couldn't be legally said to be effected to any other person. As such, I am motivated to agree with Ms Salma learned counsel that, there was no service of summons under Order XXVIII Rule

2 of the CPC. In other words, the appellant had never been issued with summons to appear in court or file written statement of defence, thus there was no service to the appellant. **The first issue therefore is answered in affirmative.**

On the second issue I am guided by Order V Rule 16(1) of the CPC which provides that;

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 cannot 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 also upon some conspicuous part 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.

According to Order V Rule 16(1), for substituted service to be effective there are pre conditions to be met, the court **must be satisfied** itself that, **one**, the defendant is keeping out of the way for the purpose of avoiding service and **two**, for any other reason, the summons cannot be

served in the ordinary way. Upon that satisfaction the court may order direct service of summons to be issued by substituted services including **first**, be affixed in some conspicuous place in the court-house, **second**, be affixed at some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain **third**, in such other manner as the court thinks fit, this may include publication as it happened in the case at hand. Going by the court's record there is nowhere either impliedly or expressly shown that, the court was satisfied as to the existence of any other above conduct by the defendant thence ordering for substituted services. Since there is no such confirmation from the court itself, it goes without saying therefore that, that conditions precedent for issuance of substituted services to the defendant was not complied with. As such, the substituted service was ineffective for the assigned reasons.

Further, I am aware of Order V Rule 16(2) of the CPC which provides that;

(2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require.

It is undisputed fact that, there was a substituted service of summons by publication, certain as per the above provisions cited the appellant became bound by it. My decision is that, Order V Rule 16 (2) and (3) of the CPC cannot be invoked unless and until Order V Rule 16(1) of the CPC has fully been satisfied by the Court otherwise one cannot revert to substituted service.

The court of appeal had once discussed on the pre conditions for invocation of substituted services though in different way but gist is the same. In the case of **Abutwalib Musa Msuya and two others vs. Capital Breweries Ltd and two others**, Civil Revision no. 02 of 2012, (Unreported), Court of Appeal, Dodoma. The court had this to say

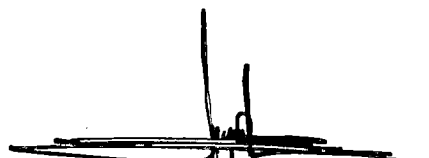
"The failure by the trial Judge to comply with either of the two conditions under Order V Rule 20 before ordering substituted service amounted to a material irregularity which denied the first and second defendants their rights to be heard before an ex-parte judgment was entered against them and the subsequent execution proceedings."

Having re-evaluated and reconsidered on what transpired in the subordinated court, I am satisfied that, this is a fit case to interfere with the trial court's decision as I hereby do.

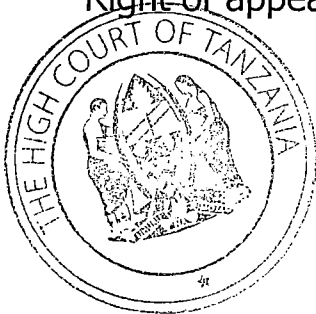
All said and done, I am satisfied and inclined to agree with the submissions by Ms. Salma learned counsel thus allow the appeal. Consequently, I hereby nullify the impugned trial court's decision, set aside the Ex parte Judgement and order for inter parte hearing before another Magistrate. Cost to follow the event.


It is so ordered

DATED at MOROGORO this 17th of March, 2023


G. P. MALATA
JUDGE
17/3/2023

Right of appeal explained to the parties.




G. P. MALATA
JUDGE
17/3/2023