

**IN THE HIGH COURT OF THE REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF TABORA
AT TABORA.**

DC CIVIL APPEAL NO. 15 OF 2021

(Arising from Misc. Civil Application no. 7 of 2019 and originally Civil Case No.10 of 2017 of the District Court of Tabora)

**CHINA CHONGQING INTERNATIONAL
CONSTRUCTION LTD TABORA BRANCH**

(CICO) AND 3 OTHERS APPELLANTS

VERSUS

JOSEPH JASPER MACHUMU

AND 2 OTHERS RESPONDENTS

JUDGMENT

24th & 24th May, 2023

MATUMA, J

The respondents herein; Joseph Jasper Machumu, Yasini Swalche and Azizi Maulidi sued the Appellants; China Chongqing International Construction LTD Tabora Branch (CICO), Wang Gao Yi, Ramadhani Songoro and Athumani Maulidi in the District Court of Tabora at Tabora for a claim of Tshs. 240,000,000/= as compensation for wrongful prosecutions, Tshs. 150,000,000/= as general damages, interests and costs.

It is alleged that the appellants defaulted appearance during trial despite of having been served which prompted an ex-parte hearing against them. They were finally condemned on an ex-parte judgment to pay the respondents the claimed reliefs supra.

The appellants found themselves in trouble at the execution stage of the ex-parte decree. They tried several times on various applications and litigations to find a relief against the ex-parte judgment in vain. They thus filed an application for extension of time within which to apply for setting aside the ex-parte judgment. They also, subject to the grant of extension of time applied for an order setting aside the ex-parte judgment. The Trial Court having heard the parties for and against the application dismissed it for having found that there were no good reasons to warrant the application;

“The applicant has failed to demonstrate sufficient causes for extension of time to apply to set aside the ex-parte decision vide Civil Case No.10 of 2017. The application is denied for being devoid of merits. Hence, the same is hereby dismissed with costs”

The Appellants became aggrieved by such decision hence this appeal with one ground contending that they were not served with the summons in the main suit and thus unaware of the suit against them. That, the lack of proof that they were dully served sufficed to be a good ground for extension of time and subsequently thereof a grant for an order setting aside the ex-parte judgment. They thus argued that their application was wrongly dismissed.

At the hearing of this appeal, Mr. Kelvin Kayaga learned advocate represented the appellants while Mr. Musyani Emmanuel learned advocate represented the respondents.

Mr. Kelvin Kayaga learned advocate for the appellants submitting on the ground of appeal stated that the learned trial

magistrate was duty bound to determine whether there was sufficient evidence to prove that the appellants were dully served prior to the order for the ex-parte proof but unfortunately that duty was abrogated when the magistrate took refuge into the doctrine of functus officio which was not applicable in the circumstances of this case.

The learned advocate further argued that the appellants were not served with the summons to file a defence and or the summons to appear and therefore were denied the right to be heard. He was of the view that the lack of proof of service and the fact that the appellants were denied the right to be heard ought to have been given weight by the learned magistrate and therefore allow their application for both orders.

Mr. Musyani learned advocate opposed the appeal contending that the learned magistrate was satisfied that the appellants were dully served but they deliberately neglected to enter appearance. In that respect the learned advocate contended that the ex-parte hearing was proper and there is no any illegality to fault the decision of the District Court which denied them the two prayers.

Having heard the parties for and against this appeal and after my perusal of the court records, I have seen that the grounds raised to seek extension of time were the same relied by the appellants in their second prayer for an order to set aside the ex-parte judgment. All the grounds revolved on the argument that the appellants were not served with the requisite summons either to file a defence or to enter appearance and thus they were condemned unheard.

In that respect I asked both parties to address me on who effected the disputed service. Mr. Musyani submitted that it was

one Joseph Madega who was a judicial staff and whom they used to effect services in various cases. That upon service in the instant matter the said Joseph Madega sworn an affidavit and dully filed it in court.

Mr. Kelvin on his part, argued that in first premise the said Joseph Madega did not effect any service to the appellants as purported in his affidavit. But again, that the said Joseph was not a court process server authorized to execute services in terms of the law and thus it was a private arrangement between him and the respondents.

Under the circumstances, the question for determination is whether the appellants were dully served in the main suit but neglected to appear and enter their respective defences. This issue once determined, it will help to determine whether the appellants were aware of the suit against them and therefore could not be extended time to file any other application for redress against the ex-parte decision.

No doubts it was Joseph Madege who filed an affidavit to the effect that the appellants refused to receive summons on the ground that they had no pending case in court because their previous case was dully determined on 29/06/2017.

When I inquired from the Registry as to who was Joseph Madega, I was told that he was a judicial staff as an office assistance (Msaidizi wa ofisi) who is currently transferred to Morogoro.

Since the contentious issue between the parties is whether or not the appellants were served, I find it better to determine whether the said Joseph Madega was in law capable of effecting service to

avoid possible prejudices to either party. This is because we have a governing law for service of summons. It is not for one to decide how and when to effect service.

In accordance to the **Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, G.N. 363 of 2017**, only Court Processes Servers appointed and recruited under the law are eligible for effecting services. When it is not practically possible to procure the court process server for whatever reason, the party bound to effect service may apply to the Deputy Registrar or the Resident Magistrate incharge for an order appointing any public officer to effect such service. That is in accordance to rule 30 and 31 of GN no. 363 of 2017 supra. Court process servers are appointed under rule 5 (2) of G.N No. 363 supra and are subject to disciplinary measures under the G.N and they have their own code of conduct made under the same G.N.

Service of summons is therefore not a duty to be executed by anybody but by very selected and recruited persons under the G.N supra. It is the duty that should not be taken lightly or for leisure.

In the case of ***Pascal Leonard versus Iddi Kavuruzi, DC Civil Appeal No.9 of 2020***, this Court at Kigoma held that service of summons is a dignified duty which entails integrity, honesty, competence, quality service and confidentiality.

The essence of the law in putting in place Court process servers to effect services was well stated in the case of Pascal Leonard supra to the effect that a party to the suit should not be allowed to make his own private arrangements for effecting service to avoid misleading the Court on the true status of service which might put

justice in danger. The Court in rejecting private arrangements for effecting service held at page 6; -

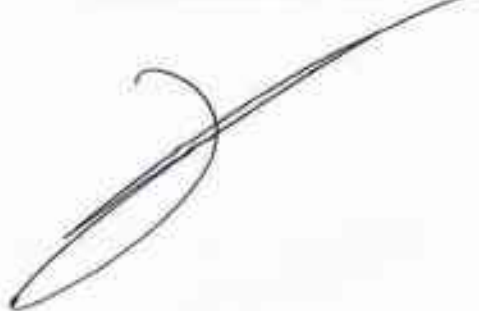
“That is very dangerous as I have said herein above as it may mislead the Court and cause the right of the parties to be heard be infringed by mere affidavits sworn by unrecognized persons like what happened in this case.

The person to effect service should not be under control of either party to the suit so that he would state the true status of service for the better end of justice.

To ensure as such, the process server must be only those who are legally recognized as herein above stated, and who are subject to Disciplinary Committee and Code of Conduct for process servers, or who are under special appointment by the order of the Registrar of Magistrate for special cases as stated herein”.

I fully subscribe to the herein above finding and take it as part of the decision in this appeal. If the respondents made their private arrangement to procure Mr. Joseph Madega to assist them in effecting service and he returned feedback to them that the service was rejected, the next step was not for them to procure an affidavit from him but to find out another summons and use the process server to effect such service. Only the affidavit of the process server is worthy to be considered as a true status of service.

Since in this case Joseph Madega was neither a process server nor a public officer appointed under Rule 31 of G.N. No.363 supra to effect service in lieu of process servers, and since he was privately engaged by the respondents, his integrity and freedom to



swear the real facts pertaining to the service in question is questionable.

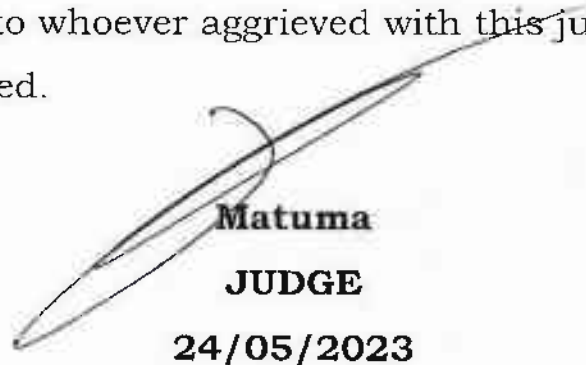
It is thus very dangerous to act on his affidavit to the detriment of the appellants who are standing as by now condemned to pay the respondents a total amount of **Tshs. 390,000,000/=** with an increasing interests of 25% from the date the suit was filed to the date of judgment and 12% from the date of judgment till final payments.

With the herein analysis, I find that the appellants had a justifiable ground to have their application before the District court granted. The extension of time should have been granted as sought.

On the strength of the arguments by both parties to the effect that once extension of time is granted on the ground that the appellants were not dully served, it would have an automatic effect of allowing the prayer for setting aside the ex-parte judgment, I do hereby quash the proceedings in Civil Case no. 10 of 2017. The ex-parte judgment thereof, decree and all other consequential orders are hereby set aside.

The parties should go back to the trial court to have their suit determined inter-parties. No orders as to costs. Right of appeal is hereby explained to whoever aggrieved with this judgment.

It is so ordered.



Matuma
JUDGE
24/05/2023

ORDER

Judgment delivered in presence of Mr. Akram Magoti, advocate, holding brief of Mr. Kelvin Kayaga and Mr. Musyani Emmanuel, advocates for the appellants and respondents respectively.



Matuma
JUDGE
24/05/2023