IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 183 OF 2024

(Arising from the Judgement and Decree of the District Court of Temeke dated 23rd November 2023 in Civil Appeal No. 22 of 2023; Original Civil Case No. 166 of 2020 dated 15th December 2020 in the Primary Court of Temeke)

ROAD FORCE LIMITED..APPELLANT

VERSUS

MUHAMMAD ADAM KHATRI.....................................RESPONDENT

JUDGEMENT

Date of last order: 16th January 2024
Date of Ruling: 28th March 2024

MTEMBWA, J.:

In the Primary Court of Temeke in Dar es Salaam Region, the Appellant commenced a civil claim against the Respondent for the claim of payment of **Tanzanian Shillings 27,036,800/=.** According to the facts, on 22nd May 2013, the Respondent hired from the Appellant a steel dry cargo container for the agreed period of time. It could appear, the hire contract was renewed several times and some of the agreed payments were made by the Respondent to the

Appellant. In the end, the Respondent failed to pay a total sum of **Tanzania shillings 13,731,000/=.**

The facts reveal further that, the Respondent, on 14th August 2013, further hired three motor vehicles with trailers from the Appellant for the agreed period of time and paid some advance amounts. That, the Respondent promised to pay the remaining balance after delivery of the cargo in Zambia. That, the cargo was safely delivered to Zambia but the Respondent did not pay as promised. As such, the total unpaid balance for the hired vehicles stretched to **Tanzanian Shillings 12,263,680/=.**

Having tiredly failed to secure the attendance of the Respondent, on 23rd September 2020, the trial Court ordered service of the summons by publication in the Gazette. The matter then was adjourned to 19th October 2020. On the scheduled date, the Respondent was, as usual, recorded absent. It was then adjourned to 9th November 2020 where hearing proceeded exparte against the Respondent. Having evaluated the evidenced available, the trial Court delivered a Judgement in favour of the Appellant, the claimant.

The Respondent was not pleased at all. At first, he unsuccessfully applied for an order to set aside the exparte

Judgement. Still undaunted to demonstrate his rights, the Respondent successfully appealed to the District Court of Temeke in Civil Appeal No. 22 of 2023 where the decision of the trial Court was set aside. The appellate Court further ordered *trial denovo* before another Magistrate. This time, it is the Appellant who is dissatisfied by the said decision. He has preferred this Appeal with the following grounds of appeal and I quote in verbatim;

1. *That the 1st Appellate Court fell into error in holding that the Respondent was denied right to be heard after disregarding service of summons by publication done by the Appellant.*
2. *That the 1st Appellate Court erred in law in holding that affidavit of process server is a mandatory document while disregarding Appellant's efforts and statements recorded in the trial Court proceedings as well as other proofs of service.*
3. *The 1st Appellate Court fell into error in holding that service of summons by affixation is mandatory before service by publication while disregarding that both are substituted services.*

When this matter was called up for orders on 16th January 2024, Mr. Benedict Muta, the learned counsel appeared for the Appellant while the Respondent appeared in person. By consent,

parties agreed to argue this appeal by way of written submissions of which, upon perusing the records, the agreed schedule was accordingly adhered to. I recommend to that.

The appellant opted to argue the grounds of appeal jointly. Taking the podium, the Appellant faulted the decision of the first appellate Court by setting aside the decision of the trial Court. He added further that, the procedures under ***rules 18 and 19 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, G.N NO 310 of 1964*** were strictly followed by the Appellant. That, when the Appellant failed tiredly to secure the attendance of the Respondent through served of the summons by a normal way, he reported such inability to the trial Court. It was upon such information that the trial Court ordered substituted service by publication in the Gazette in view of ***rule 19 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules (supra)***. He also cited ***rule 8.1.5 of the Guidelines for Court Brokers and Court Process Servers of 2019***.

The Appellant further argued that, the trial Court ordered service of summons by publication and as such, the same was published through Mwananchi Newspapers dated 25th September

2020. To fortify, he cited the case of ***Njeru Vs. Muturi & Others (2007) 2 EA 363*** where the Court observed that;

> *The Court can order substituted service of summons after being satisfied that the person to be served 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 Appellant added that, having publicized the summons as ordered, still, the Respondent did not appear unjustifiably. As such, the Court was right to procced with the hearing exparte. He cited the case of ***Lekem Investment Co. Ltd Vs. the Registered Trustees of Al-Juma Mosque & 4 Others, Civil Revision No. 27 of 2019, High Court of Tanzania at Dar e Salaam*** where it was observed that, service substituted by the order of the court is as effectual as if it had been made on the defendant personally.

That, since service was effectively done, the Respondent is precluded from complaining that he was not afforded an opportunity to be heard. He cited an Indian case of ***Sunil Poddar & Others vs. Union Bank of India, AIR 2008 SC 1006: (2008) 2 Scc 326*** where it was stated that, once a summons is published in a newspaper having wide circulation, the person cannot be heard to

complain that he was not aware of such publication and it is immaterial whether that person does subscribe or read the newspaper or otherwise. He lastly beseeched this Court to uphold the decision of the trial Court. He also placed for costs.

In reply thereof, the Respondent submitted that, the Appeal by the Appellant was totally misconceived as the decision of the trial Court, wholly, based on the constitutional right to be heard. He continued to note that, by ill motive, the Appellant failed to serve the summons to the Respondent.

The Respondent further submitted on the anomalies that he observed at the time of filing his submissions. He pointed out issues related to forgery, locus stand, authorization to sign the pleading and time limitation. For purposes of this Appeal however, I will not determine them because, by doing so, I will traverse outside the memorandum of appeal to which I am not ready. Besides, some of the anomalies revealed are of the criminal nature which require special standards of prove once raised in a civil case.

The Respondent supported the findings of the appellate Court and contended further that, there was no prove of service by an affidavit of the process server in view of ***rule 19 (2) of the***

Magistrates' Courts (Civil Procedure in Primary Courts) Rules (supra). That, equally, there was no evidence therefore that, the Respondent was served and ultimately, in disregard manner, failed to appear.

The Respondent argued also that, there was no notice of Judgement that was issued and or served to the Respondent. To fortify, he cited then case of ***Chausiku Athuman Vs. Atuganile Mwaitege, Civil Appeal No. 122 of 2007, High Court of Tanzania at Dar es Salaam*** where it was observed that, in exparte proceedings, failure to notify the other party as to when the exparte judgement will be delivered denies the party the right to take the necessary steps to protect her or his rights where the said judgement is prejudicial to her or his interest. He also cited the case of ***Cosmas Construction Co. Ltd Vs. Arrow Garments Ltd (1992) TLR 127***.

The Respondent further distinguished the cited cases of ***Njeru (supra), Lekem Investment Co. Ltd (supra)*** and ***Sunil Poddar (supra)*** and added that, in those cases, there was evidence of service. He said, in the present case, there was no evidence that the summons were served to the Respondent. Insisting that the right to be heard is constitutional, the Respondent cited the cases of ***Mbeya***

– Rukwa Auto Parts & Transport Limited Vs. Jestina George Mwakyoma, Civil case No. 45 of 2000 (2003) TLR 251, Abbas Sherally & Another Vs. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (2020) TZHC 308 and ***Muro Investment Co. Limited Vs. Alice Andrew Mlela, Civil Appeal No. 72 of 2015, High Court of Tanzania at Dar es Salaam.***

Lastly, the Respondent beseeched this Court to sustain the decision of the appellate Court and dismiss this appeal with Costs.

Rejoining to what has been argued by the Respondent in reply, the Appellant submitted that, the preliminary objections raised are irrelevant and were not raised in the first appellate Court. That, in such circumstances, this Court can not consider them at this stage. He cited the case of ***Abdul Athuman Vs. Republic (2004) TLR 151*** where it was observed that a second appellate Court can not adjudicate on a matter which was not raised as a ground of appeal in the first appellate Court.

The Appellant further faulted the Respondent's assertion that Mr. Rajesh Kumar Shivji Aggarwal was not dully authorized to sign the pleadings. It was submitted further that, looking at the records of the trial Court, specifically the Board resolution, he was the director dully

authorised to represent the Appellant's Company.

The Appellant in addition also submitted that, the Respondent failed properly to interpret the provisions of ***rule 19 (2) and (3) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules (supra)***. She implored this Court to find that, the submissions thereof were misconceived.

On the issue of failure to issue a notice of the date of exparte Judgement, the Appellant submitted that, the Respondent was the one to blame in the circumstance of this case. He cited the case of ***Yusuph Lyandala Vs. Deogratias Mlawa, Civil Appeal No. 01 of 2019, High Court of Tanzania at Iringa*** where it was held that, the party cannot be heard to complain for failure to be notified of the date of exparte Judgement if his previous conducts of avoiding service was exhibited. The Appellant also distinguished all cases cited by the Respondent. In the end, the Appellant reiterated his submissions in chief.

Having gone through the rival arguments by the parties, I think a crucial point for determination here is whether the Respondent was dully served with summons to appear and blatantly and in disregard manner, failed to appear. While the Respondent maintains that, the

summons was not effectively served to him, the Appellant's story is quiet the opposite.

Before I proceed, I will comment in a very short way here as follows. It is glaring that in support of her written submissions, the Appellant attached Mwananchi Newspaper dated 25th September 2020. I think this is contrary to the laid down principles on what amounts to written submissions. In ***TUICO Versus Mbeya Cement Company Ltd and Another (2005) T.L.T 41*** the Court observed that, in principle all annexure to written submissions, except extract of judicial decisions or textbooks have been regarded as evidence of facts. The reason here is that, the written submissions are summary of arguments and should not be used to introduce evidence. Hon. Massati, J (as he then was) noted further that;

> *Those decisions have held that where there are such annexures, they have to be expunged from the submission and totally disregarded. I will do the same in respect to the annexures attached to Mr. Nyangalika's written submissions. All the documents annexed to his submissions are accordingly expunged; and shall be ignored.*

Having so commented, I can now proceed to determine this appeal. I have carefully scrutinized the trial Court's records and I think, for purposes of this appeal, there are issues to be taken into consideration before I delve into the crux of the matter.

Indeed, according to ***rule 5 (1) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 119 of 1983***, the proceedings in the Primary Court are commenced by filing an application orally or in written form signed by the Applicant. Rule 15 (1) (a) – (d) thereof, provides for the particulars or contents of the application. It provides that;

> *A proceeding shall be instituted by an application specifying;*
>
> (a) *the name of the court in which the proceeding is brought;*
>
> (b) ***the name, occupation and place of residence or place of business of the claimant;***
>
> (c) *the name, occupation and place of residence or place of business of the defendant, so far as they can be ascertained;*
>
> (d) *the facts on wh.ch the claim is based and when and where it arose;*
>
> **(Emphasis mine)**

Following the import of the above cited rule, on **15th July 2020,** an application or a complaint form was filed with the following particulars or contents and I quote;

JAMUHURI WA MUUNGANO WA TANZANIA

MADAI

(MCA/83)

Mahakama ya Mwanzo ya Temeke Wilaya ya Temeke

Madai Nambari .... ya 20.............

Jina la Mdai: Lenyagwa S. Malecela

Taifa: Mtanzania

Kabila: Mgogo

Mahala: Tabata

Jina la Mdaiwa: Muhammad Khatri

Taifa: Mta

Mahala: Kisutu

Andika Madai na Habari fupi ya Ukweli wa Madai na lini yalitokea:

Ilikuwa tarehe 22/5/2013 mdaiwa alikuja kukodisha Contena kwa thamani ya Tshs. 13,731,000/= pia alichukua gari kwetu kwa thamani ya Tshs. 12,263,680/= lakini mdaiwa huyu hajalipa pesa yoyote. Hivyo naiomba mahakama inisaidie niweze kulipwa deni hilo

Kiasi kinachodaiwa: 27,036,800/=

Sahihi ya mdai......................... (signed)

Following the filing of the above Application, the proceedings before the trial Court commenced. On 23rd, September 2020, it could appear, upon a prayer by the claimant, an order of service by publication was issued. Through Mwananchi Newspaper dated 25th

September 2020, the summons was accordingly publicized. I looked at the said newspaper and noted that, the one who publicized the summons was **Senyagwa S. Malecela (Road Force LTD).** Following such publication, the learned trial magistrate was satisfied that the same was effectively served and proceeded to hear the matter exparte.

During hearing, the trial Court was gratified that, the complainant proved the claim to the required standards. I looked at the Judgement of the trial Court only to find that, the same was issued in favour the Applicant or claimant (mdai) by the name of **Damas Julius Mahundi (Road Force Limited)** whose name cannot even be traced from the Application or complaint form. On further scrutiny of the proceedings, I noted that, Damas Julius Mahundi testified as PW1 while Senyagwa Malicela as PW2. An Appeal to the District Court of Temeke in Civil Appeal No. 22 of 2023 was preferred against **Road Force Limited**.

Having so observed, the question is whether the summons was effectively served to the Respondent. As alluded above, according to the records, the Applicant or claimant was **Lenyagwa S. Malecela.** The one who issued the summons by publication (Applicant) was

Senyagwa S. Malecela (Road Force LTD). For records keeping, these are two different persons. In such circumstances, can it be resolved that the summons issued related to the Appellant's claim? The answer will probably be **NO** because in this matter, there is a new claimant known as **Road Force Limited**, a company limited by shares, who cannot be traced from the application filed in the trial Court. It is not far to hold that Road Force Limited never instituted a claim at the trial Court. Equally, she never served any summons to the Respondent since the inception.

But even looking at the Judgement of the trial Court, the Appellant (Road Force limited) has never been a party. As said before, the Judgement was issued in favour of **Damas Julius Mahundi (Road Force Limited)** although the proceedings make reference to Road Force Limited, the Appellant. It is not known why **Lenyagwa S. Malecela** described himself as the claimant at the time of commencement of the claim at the trial Court.

From the totality of cocktail and quagmire of events observed above, it cannot be safely arrived that the summons served related to the claim to which the appellant is concerned. It is even difficult for this Court to determine this appeal because the claimant as per the

application is not the Appellant. But even the summons was publicized by unknown person. The trial Court delivered the Judgement in favour of the person not recognized by the pleadings before it as observed above.

It is not in dispute the Appellant is a registered company limited by shares. In view of ***section 15 (2) of the Companies Act, Cap 212 RE 2002,*** from the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, become a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, with perpetual succession and a common seal. In that respect, it can sue or be sued in its own name (see also ***Salomon Vs. Salomon and Co Ltd (1897) AC 22***). I therefore expected to see the appellant referred to as the claimant in the application or complaint form and not **Lenyagwa S. Malecela.**

It was therefore a glaring error on the part of the trial Court to proceed determining the matter exparte and resolving in favour of the person who never commenced proceedings before it as reveled by pleadings, in this case, the Application. It is safe, considering the

circumstances to hold that, the appellant never served the summons to the Respondent because she never commenced any civil proceedings against the Respondent at the trial Court so to say.

Given that the application is a foundation, heart and blood of a civil trial before the Primary Court (which is now Form No. 2 in view of ***the Magistrates' Court (Approved Forms for Primary Court) Rule, GN No. 943 of 2020)***, the proceedings of the first appellate Court and the trial Court cannot be spared. I will therefore proceed to set them aside. I was about to order retrial but in the circumstance of this case, that will be impossible. The Appellant, if she so wishes, may commence proceedings in the Court of competent jurisdiction in her own name.

To that end, the appeal is disallowed. The proceedings, Judgement and Decree of the **District Court of Temeke in Civil Appeal No. 22 of 2023** and the **Primary Court of Temeke in Civil Case No. 166 of 2020** are hereby quashed and set aside. The Appellant, if she so wishes, may commence proceedings in any Court of competent jurisdiction in her own name. I order accordingly.

Right of appeal explained.

DATED at **DAR ES SALAAM** this 28th March 2024.

H.S. MTEMBWA
JUDGE