

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 38 OF 2006

ALAWI RAJABU KASSIM..... PLAINTIFF

VERSUS

M/S UPAMI GROUP COMPANY LIMITED...1<sup>ST</sup> DEFENDANT  
VITUS JOHN LIPAGILA.....2<sup>ND</sup> DEFENDANT  
ANNA VITUS LIPAGILA.....3<sup>RD</sup> DEFENDANT  
JOHNSON VITUS LIPAGILA.....4<sup>TH</sup> DEFENDANT  
GRACE VITUS LIPAGILA.....5<sup>TH</sup> DEFENDANT

R U L I N G

MJASIRI, J.

This application is brought under Order XXXV Rule 4 of the Civil Procedure Act.

The application arises from the exparte judgment entered against the applicants, M/S Upami Group Company Limited and its directors. The applicants are asking the court for the following orders:

1. *A temporary stay of execution, pending the hearing of the application.*
2. *An order to set aside the judgment and Decree of this court dated September 4, 2006.*
3. *An order of stay of execution of its decree dated September 4, 2006.*
4. *An order to give leave to the Defendants to appear to the summons and defend the suit.*

The court entered judgment against the Applicants following the refusal to accept service twice, by the company supported by the affidavit of the Process Server.

The applicants were represented by Dr. Wambali, Advocate and the Respondent by Nyangarika, Advocate.

Order XXXV Rule 4 provides as under:

*“After the decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the*

*suit, if it seems reasonable to the court to do so, and on such terms as the court thinks fit.”*

Under Rule 4 it is necessary for the Defendant to show that special circumstances exist to set aside the decree.

In **Dwarta Cement Work Limited V Rajnesh Jain**, 2001 AIHC 3309 (Bom-DB) cited in Sarkar on Civil Procedure Code 10<sup>th</sup> Edition (2005 reprint) on page 1985, it was stated as under:

*“Special circumstances ordinarily mean that the Defendant was prevented to appear in the court on account of unavoidable circumstances beyond his control.”*

Looking at the record, it appears that attempts to serve the Defendants was made through the company, and no evidence has come about that the second, third, fourth and fifth defendants refused service. The evidence on record centres only on the Company.

In the case of **Vijaya Home Loans Limited V Ms Crown Traders Ltd** 2001 AIHC 4472 (Del) Sarkar 1986. It was held that where the court entertains reasonable doubt about proper

service of summons on the Defendant, the court may set aside the decree.

The Plaintiff's claim though filed under Order XXXV of the Civil Procedure Act is not solely based on a suit upon bills of exchange including cheques or promissory notes. The Plaintiff asked for the following reliefs as well.

- i) *A declaration order that the plaintiff had not resigned and is still a director and signatory of the Bank Account of the 1<sup>st</sup> Defendant Company.*
- ii) *That meeting purported to be held by the Board of Director of the 1<sup>st</sup> Defendant on 12.10.2005 was unlawfully or null and void ab initio.*
- iii) *That all transactions of the 1<sup>st</sup> defendant company conducted from 12.10.2005 to the date of judgment when the plaintiff is purported to have resigned are unlawful.*
- iv) *That the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants be ordered to refund all the money generated or withdrawn from the company Bank Account as from 12.10.2005 to the date of Judgment.*

- v) The defendants pay the Plaintiff a total of Tshs 33,700,000 as stated in para 4 and 8 herein.*
- vi) The defendants to pay the plaintiff all his dividends, from the proceeds of the 1<sup>st</sup> defendant as from 12.7.2004 to the date of judgment.*

In view of the doubt I have in respect of services to the Defendants, in their individual capacity, and in view of the nature of the plaintiff's claim, I am of the view that in the interest of justice, it is pertinent that the Defendants be given leave to defend the suit.

In view of what is stated hereinabove, it is hereby ordered as under:

- i) The judgment and decree dated September 4, 2006 is hereby set aside.*
- ii) Leave is given to the Defendants to appear to the summons and to defend the suit.*
- iii) The Defendants deposit in court the sum of Shs 33,700,000 two weeks from the date of this order.*

iv) Costs to be costs in the cause.

Sauda Mjasiri,  
Judge  
January 30, 2007

Delivered in Chambers this 30<sup>th</sup> day of January 2007 in the presence of Dr. Wambali, advocate for the applicants and Mr. Nyangarika, Advocate for the Respondent.

Sauda Mjasiri,  
Judge  
January 30, 2007

1060 words

I Certify that this is a true and correct  
of the original and correct  
Sign \_\_\_\_\_  
Registrar, Commercial Court, Dar es Salaam.  
Date 31/1/07