

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

COMMERCIAL CASE NO. 59 OF 2007

**ADAM SAMSON NAMHISA.....APPLICANT/DEFENDANT
VERSUS
KCB (TANZANIA) LIMITED.....RESPONDENT/PLAINTIFF
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R U L I N G

MASSATI, J

This is an application under O. IX rule 13 (1) of the Civil Procedure Code to set aside an exparte judgment entered by this Court on 19/10/2007. It is supported by the Applicant's affidavit, and opposed by that of Mr. Henry Lema, the Respondent's official.

According to the affidavits and counter affidavit the Applicant contends that he was not served, while the Respondent claims that postal service was duly effected through the postal box provided by the Applicant in his loan application form. Mr. Sikira, learned Counsel for the Applicant has submitted that in terms of O. V rule 30 of the Civil Procedure Code 1966 and on the authority of **KULWA DAUDI VS REBECCA STEPHEN** [1985] TLR 19 and **WILLOW INTESTMENT VS MBANDO & 2 OTHERS** [1997] TLR 49, service by post was not properly invoked. The learned Counsel further argued that on the authority of **COSMAS CONSTRUCTION CO.**

LTD VS ARROW GARMENTS LTD [1992] TLR 129, the Applicant ought to have been notified, but was not, of the date of judgment.

He therefore prayed that the exparte judgment be set aside.

On the other hand, Mr. Rwehumbiza, learned Counsel for the Respondent, submitted that after termination of his services with the Respondent, the Applicant was unreachable, so they had to use his postal box, which he himself supplied while filling in the loan application form. This was supported by the certificate of posting. He adopted the contents of the affidavit of HENRY LEMA, that the Respondent's officials had never been to the Applicant's residential premises.

As posed above, and in the wording of O. IX rule 13 (1) of the Civil Procedure Code, 1966; the issue is whether the Applicant was duly served, or prevented by any sufficient reason from appearing when the suit was called on for hearing.

It is true that the Court has power to order service by post, and under O. V rule 30. of the Civil Procedure Code, service is deemed to have been duly effected if; inter alia: -

*"(c) Evidence is produced that a postal packet was received by the Defendant, supported by a certificate of **an officer of the Court that the postal packet contained the summons.**"*

In the present case, I do not accept the Applicant's contention that the parcel was sent to a wrong address, because that address appears in his letter of termination dated 16/7/2007 (Annx. Adam Aff – 1 to his affidavit). So, I have no doubt that the parcel was posted to the correct address. However, there is no *"certificate from an officer of the Court that the postal parcel contained the summons"*. This defect is sufficient to disapply the provisions of O. V rule 30 (c) of the Civil Procedure Code 1966.

That said, it follows that there was no evidence of service by post as envisaged by law. Therefore in terms of O. IX rule 13 (1) of the Civil Procedure Code 1966 the Applicant has shown that he was not duly served with the summons. And that is sufficient to set aside the exparte judgment.

On the premises, I am satisfied that the Applicant is entitled to the reliefs prayed for. Accordingly, the application is allowed. The exparte judgment is set aside. Costs shall be costs in the suit.

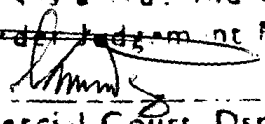
Order accordingly.

S.A. MASSATI

JUDGE

23/11/2007

588 words

I Certify that this is a true and correct
of the original ~~under Judgment~~ Ruling
Ign 

Registrar Commercial Court Dsm

Date 28th Nov 07