IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 292 OF 2015

(Arising from Commercial Case No. 130 of 2013)

NASRA SAID ..... APPLICANT

VERSUS

KCB BANK TANZANIA LIMITED ..... RESPONDENT

13th & 25th July, 2016

RULING

MWAMBEGELE, J.:

It is an old principle of Natural Justice, perhaps the foundation of the very justice this court is constitutionally charged to administer, that no person shall be adjudged without being heard.

Accordingly, in response thereto, the rules of civil procedure and litigation at large require that one must be put to notice of a claim against him and be allowed to present his defence. Elaborate procedure on this is given by the rules of Civil Procedure particularly on Service of summons.

In the application at hand, the applicant seeks the indulgence of this court to do one thing in the main; that is:

"... to set aside the decree passed ex-parte on 16th April, 2014 and set aside entire judgment for ends of justice".

Ancillary thereto is a prayer that costs be provided for and applicant be granted any other relief this court deems fit.

An affidavit in support of the application fronts mainly one reason for the main prayer made. That is, the applicant was never summoned and therefore she was not aware of the claim against her. Impliedly, to put it together, she was adjudged unheard. Expounding, the statements are to the effect that the affidavit of the process server is not true because she had never shifted from her residence at Tegata Block F. No. 699, that in the publication there were misstatement of her residence as Plot no. 42 block "F" Tegeta instead of Plot No. 699 block "F" Tegeta, that the respondent took advantage of her being a lay person and inability to afford to buy newspapers by publishing the summons through newspapers, that if the prayers are not granted she and her family will suffer irreparably.

In the counter-affidavit, sworn by one Samwel Mangesho, all statements by the applicants are controverted. It is mainly put that the applicant was properly served by substituted service in the Mwananchi Newspaper of 07.03.2014 following failure of ordinary service by one Hatibu Omary, a court process server, that allegation against process server implies fraud whose standard of proof the applicant has not managed to discharge, that her illiteracy does not constitute ground for setting aside the default judgment, that no sufficient grounds to do so, and finally that it is the bank that stands to suffer irreparably if the decree is not executed.

Both parties were represented by legal counsel at the hearing of the application. Mr. Samson Russumo learned, counsel represented the applicant whereas Mr. Elisa Abel Msuya represented the respondent.

Mr. Rusumo filed and adopted his skeleton arguments at the oral hearing. The oral submissions are substantially a replica of the affidavit, counter-affidavit and a reply to the Counter-affidavit.

What comes out therefrom is that the judgment was passed against the applicant unheard due to the defects in issuance of summons. She stresses that the applicant became aware of the suit only at the stage of execution.

On the other hand, Mr. Msuya strongly opposes the application relying on orders XXXV rule 4, XXXVII rule 4 and Mulla on **the Code of Civil Procedure** at 3660 – 3661. The learned counsel maintains that the application should have disclosed special circumstances which are beyond sufficient reasons for failure to appear as well as good defence to the claim. According to him, none has been shown in either affidavit or reply to counter-affidavit. Citing ***Othman Kawila Matata Vs Grace Titus Matata*** [1981] TLR 23, at 26, the learned counsel submits that that the allegations by Hatibu Omary's affidavit should have established by higher standards required in Civil Procedure. To him, the summons to file application for leave to defend having been issued in terms of rule 17 of the Rules of O. V. rule 20 (1) of the Civil Procedure Code which is resorted to after the party to a suit is nowhere to be found, the same was done in this case on the strength of Hatib Omary's affidavit. Relying also on ***Thomas Kilumbuyo Omar Vs TTCL***, Civil Application No. 1 of 2005 (unreported) at pp 7 – 8, the applicant's illiteracy is not a defence.

Regarding the misstatement in the summons, as to the address of the applicant, he conceded that in the Newspaper it was stated as plot No. 42 Block F, instead of Plot No. 669 Block F; but this, he argued, is not a defence. According to the learned counsel, that is so because the set of particulars are the same, that since the one who allege must prove, she must have stated how she was affected by mentioning plot No. 42, and no strong defence has been shown anywhere in the affidavit. He summarized that the misstatement of a plot number does not amount to special circumstances.

Rejoining, Mr. Rusumo stressed that the special circumstances are that the applicant was never summonsed and that the applicant had never relocated to Chang'ombe Maduka Mawili. He stressed that the applicant is not illiterate but a lay person and that the counsel for the applicant has relied on technicalities but that the reality on the ground is that the applicant had never been summoned and that she is unable to buy a newspaper.

Having keenly heard the rival contentions of the learned counsels, I think I am called to determine whether the application before me has merit. To do so, the question to be answered, is, I think, predicated on the provisions of the law upon which this application is pegged. These are Order XXXV rule 4, Order IX rule 13 (1), Sections 68 (e) and 95 of the Civil Procedure Code as well as section 14 (1) of the Law of Limitation Act. To me, however, the only relevant provisions in applications of this nature are Order XXXV rule 4 as well as Order IX rule 13 (1) of the CPC.

Among the two sets of provisions, the most apposite in the situation at hand is the former, for it is the one where this court draws power to set aside a

decree entered in a summary suit. For, the latter provision provides such powers to this court where a decree follows an ordinary suit.

One common denominator though, is the prerequisite conditions upon which this court can set aside such a decree. Let the provision spell it out here:

> "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 so to do, and on such terms as the court thinks fit".

The above underlining is for the said condition which is re-echoed under Order IX rule 13 (1). Thus, the court will set aside a decree either following an ordinary suit or a summary suit, only upon special circumstances being disclosed. The question to be answered in this case is, therefore, whether special circumstances exist or have been disclosed by the applicant to warrant setting aside a decree following a summary suit.

I take note of the provisions of the law as well as authorities cited by the learned counsel for the respondent. However, none of them prescribes on express terms as to what can be termed as "special Circumstances" to warrant the action sought.

All I have from the learned counsel for the applicant, is an argument that failure to summon the applicant due to the fact that the plot was misstated and that she never relocated to another place are special circumstances,

while on the other hand, it is strenuously negated by counsel for the respondent.

In my considered opinion, special circumstances are determined on merits of each particular case. Apparently, there can be no hard and fast rule to fix what amounts to "special circumstance" to cover each and every situation. Thus, what appears to be special circumstances in one situation can be found not to be so in another.

As to whether failure to summon the defendant (applicant in this application) amounts to special circumstances, I would answer this question in the affirmative. I am of this position because, the law [Order XXXV rule 4 and IX rule 13 (ii)] recognizes and caters for a situation where a party has failed to defend the suit to the extent that a decree has been entered in his absence. Failure to defend, as envisaged under those provisions, results from none other reasons but failure to appear or failure to obtain leave for audience in case of a summary suit.

The question therefore becomes whether there was no summons to the applicant in respect of the suit under reference. This question calls for examination of the circumstances, as obtained from the proceedings, the pleadings and annextures as found both in the record of the said suit and this application. The applicant, through her affidavit, states that she had been unaware of the suit until after execution process commenced. Regarding the affidavit of the process server, it is her statement that that was not true because she had never relocated to Chang'ombe Maduka Mawili or anywhere. As for the substituted service through publication, she maintains that the

residential address was misstated, and that she cannot afford to buy newspapers.

On the other hand, it is maintained by the respondent that the service was effected but the applicant was nowhere to be found. As for misstatement of the address, it is argued that it does not amount to special circumstances because the contents remained the same and that the applicant has not stated how the misstatement affected her.

To me, the question as to whether the applicant was or was not summoned would have been off limit in this discourse had it not been the circumstances as revealed from the record. I say so because I am aware of this court's note on 02.10.2013, of the process server's affidavit. To grasp well what was noted, let the proceedings speak for itself:

> **"Ms. Fatma:**
> The matter is coming up for orders. We have not been able to trace the defendant. We therefore pray for re-service.
>
> **Court:**
> Affidavit of court process server seen and noted.
>
> **Order:**
> Mention on 22/10/2012 summons to re-issue for service upon the defendant".

That means, the attempt to serve the applicant were made on the first instance but the respondent (then Plaintiff) could not trace the applicant.

This court (Nchimbi, J.) had noted that fact through an affidavit sworn by the process server probably on 30.09.2013 by the said Hatibu Omary.

I say "probably" because upon perusal of the controlling court record, that is of Commercial Case No. 130 of 2013, I have not been able to see any other summons issued in terms of the said above order of the court save for that summons dated and issued on 23.09.2013.

Yet, in the same file, there are two affidavits sworn by the same person namely Hatibu Omary to the effect that the applicant herein (then defendant) was nowhere to be found. I reckon that a copy of one of the said affidavits is the one attached to the counter-affidavit in attempt to negate the fact that the applicant was not summoned.

Strikingly and strangely though, the said two affidavits in the court file were sworn on the same date of 30.09.2013 by the same person. They are different though, in some material particulars. I shall demonstrate.

One, whereas the first is in respect of the affidavit purportedly served by the process server on the 28.09.2013, the other one is purportedly to have been served on 30.09.2013. Further, although the affidavits were sworn on the same day and in respect of the same subject matter; that is, failed service to the defendant (the applicant herein), they appear to have been sworn before different Magistrates due to the apparent difference of the signatures as well as of the rubber stamp impressions.

One might quickly reason that the difference is due to the apparent possibility of the summons having been served on different dates of 28.09.2013 and 30.09.2013. Unfortunately though, none refer to the other and no

explanation is made as to the two attempts to serve the defendant within the interval of only two days. Also strange is the fact that the details as to the failure to serve the defendant are different in the two affidavits. Let the words of the process server in those affidavit paint the picture.

To start with is the one purportedly served on the 30.09.2013 written:

> "... summons hii haikupokelewa na NASRA SAID baada ya kumtafuta kila sehemu niliyoelekezwa na mdai maeneo ya Tegeta na kuambiwa kuwa amehamia Chang'ombe Maduka Mawili ila aliyenielekeza hajui ni sehemu gani hapo maduka wawili ..."

The one purportedly served on the 28.09.2013 is scribbled as follows:

> "... summons hii haikupokelewa na Bi NASRA SAID baad ya kumtafuta seheum iliyoelekezwa na mdai eneo la TEGETA PLOT No. 699 BLOCK "F" Kinondoin Mdaiwa huyo amehama na amehamia chang'ombe maduka mawili ambapo aliyenielekeza hapafahamu mtaa na ni maduka mawili upande gani".

As intimated hereinabove, a photostatic copy of the affidavit attached to the counter-affidavit appears to be the latter; that of 28.09.2013. A slight difference between this copy and its purported original in the court file is in respect of the plot number of the defendant's residential address. Whereas the original shows Plot No. 699 the copy shows Plot No. 69. One can quickly

associate this to a photocopying error due to mechanical defect of the machine employed or poor workmanship of the person who performed the photocopying command. The only question though, is, if that is the case, then why error in respect of that single detail as to plot number, not any other details which are all intact and materially the same. No viable answers come from either the pleadings or the submissions by the learned counsel for the respondent.

I am alive to yet another note by this court which was made on 17.02.2014. This was made following Mr. Mfinanga's prayer in the absence of the defendant for substituted service. The said note reads thus:

> "Court:
> Affidavit of process server of 30/09/2013 tally with counsel prayer".

And the subsequent order goes thus: -

> "Order:
> (1) Mention on 10/3/2014.
> (2) Service upon the defendant by Publication in the local newspaper of Mwananchi".

The above notwithstanding there is no indication of compliance with the court's order of re-services which was made on the 22.09.2013. All that there is in the record is prayer for another mention which was made by Ms. Fatma on 07.11.2013 whereby this court granted the same and made an order for summons to issue upon the defendant (the applicant herein).

The lingering question here is, when exactly was the previous order of re-service made on 22.09.2013 complied with? And, if an order for re-service was made on 22.09.2013, then how was the first attempt to service made? For, as intimated, there is no any other summons issued to the defendant by this court other than that dated 23.09.2013. Further is the question as to why Ms. Fatma learned counsel prayed for another mention date on 07.11.2013 when it was about 10 days after the purported service by the said Hatibu Omary on 28.09.2013? Was it that she had no communication with the said process server as to failure of service? And when was the said affidavit filed in court? Once again, this court is clueless on all these loose knots.

These lapses notwithstanding, it is on record that the respondent then plaintiff was allowed to make alternative service by publication. It being an order of this court, and presumably having proceeded from the face value of the said affidavit of the process server, it cannot be said, as the applicant would wish, that the statements therein were wrong so as to warrant disregard of the said affidavit at this stage. Thus, once proof of service is filed, as it were in this case, this court is precluded from making assumptions as to the veracity of the sworn statements therein unless an alarm to that effect is raised.

That nevertheless, does not tell it all as for further lapses noted in the service to the defendant (the applicant herein). Thus, the record has it that once an order for publication was issued, the same was complied with by the plaintiff (the respondent herein). It is the manner of compliance that forms also the applicant's arguments of non-service. It is contended that instead of Plot No. 669 block "F" Kinondoni, it was stated as plot No. 42 Block F" Kinondoni. For

the respondent, it is argued that that cannot amount to a defence because the details were the same. By this argument, the counsel seems to suggest that the said misstatement could not have impact on the defendant or rather the defendant was supposed to act on the same. With all due respect to the learned counsel, I do not agree. The reasons for my disagreement are simple and straight-forward, that Plot No. 42 Block "F" Tegeta area Kinondoni Municipality is not plot No. 669 block "F" Tegeta area Kinondoni Municipality.

To that, I hasten to add that, since names of individuals are not copyright table to warrant restriction of the name to an individual, one cannot say that wherever one sees a name similar to which that one is known by, one should act in response to what is required of that name or individual. In my considered opinion, the only and best way is to describe a person's address as correctly as possible so as to ensure effective communication. This is for the simple reason that Plot No. 42 is not equal to Plot No. 699 though they may be in the same area or municipality for that matter.

This is more so were the respondent is irrebutably presumed to have been aware of the correct address and location of the applicant and as such describing Plot No. 6999 as No. 42 is highly unwarranted.

Essentially therefore, the material differences in the process server's affidavits as shown herein earlier, plus the unanswered questions, coupled with this latter glaring defect in the said publication, to me constitutes special circumstances to warrant setting aside the decree entered.

Since this court is empowered under said provision of Order XXXV rule 4 to take that action under special circumstances and from the above, having satisfied myself that special circumstances exist, I hereby proceed to set aside

the judgment and the decree thereof. In terms of the said order, I hereby proceed to order that in the interests of justice the defendant should file an application for leave to defend the summary suit; Commercial Case No. 130 of 2013 within a fortnight from the date of this ruling. The circumstances of this case are such that each party should bear its own costs. I therefore order that each party in this application shall bear its own costs.

Order accordingly.

DATED at DAR ES SALAAM this 25th day of July, 2016.

J. C. M. MWAMBEGELE

JUDGE