

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPLICATION NO.83 OF 2022
(Arising from Commercial Case No.80 of 2020)**

NIPO GROUP LTD.....APPLICANT

VERSUS

SAO HILL INDUSTRIES LTD.....RESPONDENT

Date of Last Order: 16/08/2022

Date of Ruling: 23/09/2022

RULING

NANGELA, J.:

This application was brought under Rule 23 (1) of the High Court (Commercial Division) Rules, GN No. 250 of 2012 as amended by GN. No.107 of 2019. It was brought by way of a chamber summons supported by an affidavit of Hodrum Benedict Suleiman, the Applicant's Principal Officer.

The Applicant is seeking for the following orders of this Court:

1. That, this Honourable Court be
pleased to set aside a default
judgment delivered by this Court
(Hon. Dr. Deo John Nangela, J.,)

on the 18th day of June 2021 in
Commercial Case No.80 of 2020.

2. The Respondent be ordered to
pay costs of this application.
3. Any other relief as this
Honourable Court may deem fit
to grant.

The Respondent contested this application by filing a counter affidavit. In terms of representation, the Applicant enjoyed the services of Mr Franco Mahena, learned Advocate while Mr Mvano Mlekano appeared for the Respondent.

When the parties appeared in Court on the 6th July 2022, I directed them to dispose of this application by way of written submission. A schedule of filing which was issued to the parties has been duly adhered to.

With those submissions having been filed as directed, I will proceed to summarize the parties' arguments and render my conclusion/findings in respect of the application.

Submitting in support of the application, the Applicant's counsel sought the indulgence of this Court to set aside the

Summary Judgment it earlier issued on the 18th June 2020 in Commercial Case No.80 of 2020.

Relying on the affidavit in support of the application, it was the submission of Mr Mahena that, the Applicant and the Respondent have been in a long-term business relationship and in 2019 they concluded an agreement whereby the Respondent supplied electric poles to the Applicant's construction sites for an agreed consideration.

He contended that; the terms of the agreement were smoothly honoured. According to Mr Mahena, on the 9th of August 2021 the Applicant was shocked to read an Article in the Daily News paper titled: **"Court orders NIPO Group to Pay 940M/- to Sao Hill."** He submitted further that, having read the article, the Applicant instructed her advocates of Mzizima Law Associates Advocates to follow-up the matter in Court in order to understand what transpired.

He submitted that, upon perusal of the Court's file, the Applicant's Advocate noted that, the Respondent had filed a case, i.e., Commercial Case No.80 of 2020 and, that, a default

judgement was entered and delivered on the 18th June 2020 following the Applicant's failure to file its Defence. Relying on paragraph 17 of the affidavit supporting this application, Mr Mahena submitted that, the Applicant was unaware of the suit and the Default Judgement in Commercial Case No.80 of 2020 until when the perusal of the Court file was done on the 10th of June 2021.

He contended that, at that time, the Applicant was already out of time within which he was to apply to set aside the default judgement as per Rule 23 (1) the **High Court (Commercial Division) Rules of Procedure**, GN.250 of 2012 (as amended). He submitted that, through Misc. Commercial Application No.116 of 2022, the Applicant applied and was granted extended time, hence, the filing of this application.

He submitted that, under Rule 23 of the **High Court (Commercial Division) Rules of Procedure**, an aggrieved party may apply upon there being sufficient reasons to set aside a default judgement. He contended that, the Applicant's

failure to file defence was not due to her own wrong doing but was due to the reason that the Applicant was not aware of the suit, i.e., Commercial Case No.80 of 2020.

He contended further that, the averments in the Respondent's Counter affidavit that service to the Applicant was denied lacks authenticity because, the process server's affidavits of service do not show or state the physical address or location of the Applicant's office where the summons was served. He also contended that, the officer who refused to receive the summons is not stated or whether was a third party or not or whether a copy was left or not.

Relying on the case of **Muro Investments Co. Ltd vs. Alice Andrew Mlela**, Civil Appeal No.72 of 2015, he contended that, the process server's affidavit must be clear of all doubts. He emphasized that, the Applicant was not served. He contended further that, the Respondent's claim that the service was done to one Omega Steven Myeya who signed on the Plaint, is doubtful since the copy of the summons does not show any signature.

Relying on Order V rule 18 (1) and rule 19 of the Civil Procedure Code, Cap.33 R.E 2019, he argued that, the manner through which service is to be effected is well provided for in case the Defendant is within the precincts of the jurisdiction of the Court. As regards the Respondent's claim that substituted service was relied upon, he contended that, the newspaper could not reach the Applicant.

He argued that, since the parties were in business relation, the Respondent ought to have utilised the electronic mode of service as per Rule 17 of the Rules of Procedure of this Court as the Respondent has the Applicant's e-mail address. Relying on the case of **Mbeya-Rukwa Autoparts & Transaport Ltd vs. Jestina George Mwakyoma** [2003] TLR 251 cited in the **Muro Investments Co. Ltd vs. Alice Andrew Mlela** (supra), he urged this Court to grant the application since a party to the case should not be denied right to be heard.

Responding to the submissions made by Mr Mahena, the learned advocate for the Respondent commenced his

submission by adopting the counter affidavit filed in this Court with its annexure as forming part of his submissions.

Mr Mlekano submitted that; it is trite principle of law that submission from the bar is not evidence as such. He pointed out that, the Applicant did not even bother to file a reply to the counter affidavit. He submitted that, if there was any need to challenge the averments of the process server, then a reply to counter affidavit ought to have been filed or would have applied to cross-examine the process server under Order XVIII Rule 19 or Order XIX RULE 2 of the Civil Procedure Code, Cap. 33 R.E 2019.

He contended that, failure to do so; the Applicant is stopped from challenging the authenticity of the averments made in respect of the service by the process server. Reliance was placed on the case of **Rosemary Stella Chambejairo vs. David Kitundu Jairo**, Civil Reference No.6 of 2018.

To shorten his submission, what the Respondent emphasises is that, the Applicant was properly served twice and declined to accept service, first on the 8th of October 2020 and

on the 25th November 2020. Mr Mlekano submitted that, on the 10th of December 2020 one of the Applicant's officer name Omega Steven Myeya acknowledged the receipt of the Plaint and Summons by affixing his signature and date on them as per **Annexure SHI-5** to the counter affidavit.

He contended that; the Applicant has neither admitted nor denied that the said Omega Steven is her employee. As such, it was Mr Mlekano's submission that, in accordance with the provisions of Order V rule 12 of the CPC, the Applicant was duly served. He charged that, reference to the case of **Muro Investments Co. Ltd vs. Alice Andrew Mlela** (supra), is irrelevant and distinguishable to the case at hand.

Mr Mlekano submitted further that, there was as the record shows; as well an attempt to serve the Applicant (Defendant) by way of substituted service and this was done, via **Nipashe** and the **Daily News** newspaper dated on 10th day of December 2020 which was after a Court order was sought and granted. As such, Mr Mlekano urged this Court to dismiss this application as it lacks merits.

I have carefully examined the submissions made by the counsels for the parties herein. The law is clear that, in an application of the like nature, the Applicant is duty bound to give sufficient reasons to the Court regarding why there was failure on his/her part to file a defence. That is specifically the requirement under Rule 23 (1) (b) of the High Court (Commercial Division) Rules, GN No. 250 of 2012 as amended by GN.No.107 of 2019.

In his submissions, the learned counsel for the Applicant has contended that, the Applicant was not made aware of the existence of the suit until the 09th of August 2021 when he read from news papers about what happened in Court and upon further perusal by his advocate. He has relied on the case of **Mbeya-Rukwa Autoparts & Transaport Ltd vs. Jestina George Mwakyoma** [2003] TLR 251 cited in the **Muro Investments Co. Ltd vs. Alice Andrew Mlela** (supra), contending that the Applicant has a right to be heard.

With due respect, I do not find any merit in the submission by the Applicant warranting this Court to take a

step towards granting the prayers sought. I hold so because; the Applicant has not adduced sufficient reasons regarding her failure to file a defence in Court as required by the law.

Basically, as clearly demonstrated by the evidence adduced in the Counter affidavit filed by the Respondent and, as rightly submitted by the learned counsel for the Respondent, it is clear that the Respondent made attempts to serve the Applicant and the documents were duly received by the Applicant employee in the name of Omega Steven but the Applicant did not appear in Court.

As submitted by Mr Mlekano, the Applicant has neither admitted nor denied that the said Omega Steven is her employee. Moreover, the Applicant did not bother to file any reply to the Counter Affidavit, meaning that, she admitted the facts as adduced by the Respondent. In the absence of the reply to the counter affidavit, the Applicant cannot controvert those facts by way of submissions from the bar.

It is also on record that, this Court was informed on the 3rd of December 2020 by the learned counsel for the Plaintiff

(Respondent) by then one Sumaeya Jaffer, that, the Applicant was served with the relevant documents but refused to receive them. A prayer was made for a substituted service and the same was granted. Subsequently a summons to appear and filed defence was then published via **Nipashe** and the **Daily News** newspaper dated on 10th day of December 2020.

In my view, the Applicant's argument that, the summons ought to be sent to the Applicant by way of e-mail is of no assistance since service by way of publication is likewise a recognised and sufficient mode of service under the law. What is of essence is that the relevant part was informed or deemed to have been duly informed.

I am fortified by the decision of the Court of Appeal in the case of **Amos Shani & Peter Kirua vs. Jumanne Juma**, Crim. Appeal No.168 of 2013 where the Court of Appeal of Tanzania had the following to say:

"We have noted that, the order of substituted service by way of publication issued by this Court on 18th September 2013 was complied

with by publishing in the
“Mwananchi” newspaper dated 18th
May 2015 by notice which informed
the parties to enter appearance on
10th June 2015. We are of the opinion
that, such a notice suffices to make
the parties to appear in the
hearing...”

In his submission, and based on paragraph 15 of the Applicant’s supporting affidavit, Mr Mahena argued that, the substituted service never came to the attention of the Applicant. In the affidavit in support, the Applicant avers that most of the time all its officers are in the rural areas where newspapers are difficult to reach.

However, in paragraph 8 of the same affidavit it is averred that, it is ironically stated that, the Applicant knew of the default judgement having read an article in the Daily News Newspaper. One wonders how the Applicant was able to get the article if at all the newspapers are not accessible in rural areas.

From the foregoing I find that the Applicant has not been able to adduce sufficient reasons regarding why she failed to file her defence in Court. For that matter, this Court settles for the following orders:

1. The prayers made by the Applicant are hereby rejected and the current Misc. Commercial Application No.83 of 2022 is hereby dismissed in its entirety.
2. The dismissal is with costs.

It is so ordered

DATED AT DAR-ES-SALAAM THIS 23RD DAY OF SEPTEMBER, 2022.



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DEO JOHN NANGELA
JUDGE