

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. APPLICATION NO. 148 OF 2022
(Originating from Commercial Case No. 15 of 2021)**

**YUSUPH HAMIS KITUMBO APPLICANT
VERSUS
MAENDELEO BANK PLC RESPONDENT
RULING**

Last order: 6/3/2023
Date of Ruling: 5/4/2023

NANGELA, J.

This is an application of setting aside an ex-parte Judgment of this Court (Nangela, J) which was delivered on 17th October 2022. The application was brought by way of a Chamber Summons supported by affidavit of one Yusuph Hamis Kitumbo, and it was brought under Order IX rule 9 and Section 95 of the Civil Procedure Code [CAP 33 R.E 2019] and any other enabling provision.

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

1. This Honorable Court be pleased to
set aside an order of *ex-parte* judgment

which was scheduled for delivering
on 17th Day of September 2021 in
respect of Commercial case No. 15 of
2021 between the Applicant and
Respondent.

2. Costs of this application be provided
for.

3. Any other relief(s) and directions as

this Court may deem necessary to
grant in the interest of justice.

The Respondent contested this application by filed a counter affidavit sworn by George Kihongozi. The said counter affidavit the same was filed in court on 3rd October 2022. The parties appeared before me through their advocates for the hearing of this application. It was agreed that this application should be argued by way of written submissions.

On the one hand, Mr. Augustine Mathern Kusalika Learned Advocate argued the application on behalf of the applicant while on the other hand, the Respondent enjoyed the legal service of Mr. Kennedy Alex Mgongolwa learned Advocate. which was agreed

by both parties to be conducted by way of written submission, hence this ruling.

Submitting in support of the prayers sought, Mr. Kusalika adopted the contents of the Applicant's affidavit and submitted that, the Applicant failed to appear in Court when the matter was previously called on for its hearing because he was unaware of the pendency of the main suit, i.e., Commercial Case No. 15 of 2021. He contended that, the reason of the Applicant's absenteeism when he was required to appear in Court was because he was not served with the summons in respect of the main suit. He contended that; the summons was served by way of substituted method of publication despite the fact that the Respondent was aware of the whereabouts of the business of the Applicant.

While he conceded that the Applicant was issued with a credit facility by the Respondent to a tune of **TZS 521,022,133.50**, Mr. Kusalika contended that, the Applicant has all along been discharging his repayment obligation and the failure on the part of the Respondent to serve the Applicant, has caused him to be condemned unheard. He submitted further, that; the Applicant became aware of the Summary Judgment in respect of Commercial Case No. 15 of 2021 after being served with the

notice to pay the Respondent **TZS 613,418,461.91**. He urged this Court to grant this application as Applicant has managed to show sufficient cause.

Replying to the Applicant's submission, Mr. Kennedy Mgongolwa, the Respondent's counsel, opposed the granting of the prayers sought in this application on the ground that, the Applicant has failed to advance cogent reasons warranting this Court to set aside its Summary Judgment in Commercial Case No.15 of 2021.

He referred to this Court the case of **Integrated Property Investments (T) Limited & others vs The Company for Habitat & Housing in Africa** [2018] T.L.R 204, which established, among others, requirements which need to be met if a Court is to set aside a summary judgment of its own.

In that particular case of **Integrated Property Investments (T)** (supra), the Court held such requirements to be met as being:

- (a) That the applicant has a good defense
in the suit and good defense includes
proof that he has paid the said loan
either in full or partial

(b) That there were exceptional circumstances which prevented him from appearing in court.

From the above authority, Mr. Mgongolwa submitted that, the Applicant has failed to meet such requirements stated therein because the Applicant has nowhere stated or shown the kind of defense available to warrant the setting aside of the said judgment of the Court. He submitted as well that, the Applicant has not been able to prove that the loan was repaid in full or in part as not even a single cent has been paid to that date. He contended that, such non-repayment has continued to cause irreparable losses to the business of the Respondent.

Commenting on the allegation that the Applicant was not served, Mr. Mgongolwa submitted that, the issue of service was irrelevant because the Applicant entered appearance two times after the filing of the Commercial Case No. 15 of 2021 and, that, he even filed an application for leave to defend the suit, vide *Misc. Commercial Application No. 47 of 2021*. He contended, therefore, that, the Applicant was fully aware of the case since he even took some efforts to defend the same but later on lost interest in pursuing the matters he initiated in Court.

He as well contended that; the Applicant failed as well to show an exceptional reason which would warrant this Court to set aside an *ex-parte* judgment. Mr. Mgongolwa contended that; the Applicant's affidavit has just narrated events which are in essence baseless. He maintained, therefore, that, failure on the part of the Applicant to meet the requirements as stated in the earlier cited case here above, renders the application unmerited and has to be dismissed.

In alternative, Mr. Mgongolwa stated that, the provision upon which the Applicant's advocate premised this application and moved this Court, that is to say, *Order IX Rule 9 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019* were improper provisions. He contended that, the proper provision should have been Order XXXV Rule 8 of the Civil Procedure Code, Cap 33 R.E 2019. He relied once again on the earlier cited case of **Integrated Property Investments (T) Ltd** (*supra*). In view of his submission, he urged this Court to dismiss the application with costs.

I have gone through the rival submissions filed by both learned counsels for the parties herein, and the question I need to deal with is whether the Applicant has demonstrated sufficient

reasons so as to warrant this Court to exercise its powers and set aside its *ex-parte* Judgment as prayed by the Applicant.

Order XXXV Rule 8 of the Civil Procedure Code, Cap.33 R.E 2019 provides that:

“After Decree the Court may, in **exceptional 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.”

In his submission the learned counsel for the Applicant has contended that, the reasons for seeking to set aside the *ex-parte* Judgment issued by this Court is that, the suit was not duly served on the Applicant and he never got any summons to appear and file leave to defend the suit, although the Respondent was well aware of his whereabouts. Moreover, he said that, much as the Applicant was issued with credit facility (loan), the fact is that, the Applicant has been servicing the such loan and, hence, he was denied his right to be heard.

With due respect, however, I do not find any merit in the Applicant's submission that would warrant this Court take steps towards granting the prayers sought by the Applicant. I hold it to be so because, the submissions made by the Applicant's learned counsel do not disclose any exceptional circumstance or cogent ground/reasons which would convince this Court to grant the prayers sought by the Applicant in the chamber summons.

In essence, and, as clearly demonstrated in the counter affidavit filed in Court by the Respondent, the Applicant was all along aware of the main suit and, as rightly submitted, did even appear twice in Court and attempted to apply for leave to defend the suit vide **Misc. Commercial Application No.49 of 2021** but, later, this application was, on 12th August 2021, dismissed for want of prosecution. In view of that fact, the Applicant cannot say he was denied his right to be heard.

Besides, and as correctly submitted by the learned counsel for the Respondent, in order to set aside an ex-parte Judgement, the Applicant must show good defense in the suit, which may include *prima facie* proof that, he has paid the claimed loan amount, be it in part or in full.

According to the Respondent's counsel, from the time when the suit was filed in the year 2021 to date, the Applicant has not repaid a single cent. That contradicts the unsupported averments made by the Applicant's counsel that, all along the Applicant has been servicing the loan. Nothing was even attached to the Applicant's affidavit as supporting material to show that the Applicant was servicing the loan as alleged.

In view of all that, I am not satisfied that the Applicant has demonstrated any exceptional circumstance or cogent reasons to warrant this Court to take steps and grant the prayers sought by the Applicant. In the upshot of all that, this Court hereby declines to grant the prayers contained in the chamber summons and settle for the following orders:

1. That this Application is hereby dismissed.
2. That the dismissal order is with costs to the Respondent.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 5th DAY OF APRIL

2023



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DEO JOHN NANGELA
JUDGE