IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 95 OF 2022

(Arising from the Judgment in the Commercial Case No. 14 of 2021 in HCCD at Arusha delivered on 26/05/2022 before Hon. Judge S. M. Magoiga)

BETWEEN

LODRICK IMMANUEL URONU.....APPLICANT

VERSUS

DHARAM SINGH HANSPAUL AND SONS LIMITED.....1ST RESPONDENT

FADHILI ABRAHAM MSOFE ..... 2ND RESPONDENT

RULING

Date of last order: 23/03/2023
Date of ruling: 31/03/2023

AGATHO, J.:

This ruling was prompted by the Applicant's application to set aside a default judgment and decree entered against him on 26/05/2022 in Commercial Case No. 14 of 2021. Along that he is seeking an order for restoration of the Commercial Case No. 14 of 2021. The application was brought under rule 23 (1)(2)(a) of the High Court (Commercial Division) Procedure Rules, 2012 as amended in 2019 G.N. No. 107 of 2019. The application was by way of chamber summons and supported by the affidavit of Lodrick Immanuel Uronu. The 1st respondent contested the application by filing counter affidavit deponed by Rodgers Godfrey

Mlacha. The 2nd respondent neither filed his counter affidavit nor appeared.

Both the applicant and the 1st respondent were represented by advocates. Whereas the applicant was represented by Advocate Iddi Mwinyi, the respondent was represented by Agnes Dominick, learned counsel. The matter was heard orally on 23/03/2023.

The background of the application is that there was accident which occurred on 07/01/2020 Kikatiti within Arusha region involving the applicant's motor vehicle make Nissan Bus with registration No. T877 BDE and the 1st respondent's motor vehicle make Mitsubishi Fuso with registration No. T 118 BCZ. The second respondent was a driver of the applicant's motor vehicle.He faced a traffic charge of reckless and negligent driving in which he pleaded guilty and sentenced to a fine. The applicant claims that the motor vehicle had interim insurance cover at the time of the accident, the fact which was not known to the 1st respondentwhen the commercial case No.14 of 2021 was filed. Nevertheless, in the present application we are concerned with whether there are sufficient reasons to grant an order to set aside the default judgment.

On the submission of learned counsel for the parties, we begin with the submission of advocate Iddi Mwinyi, for the applicant. He submitted that they have complied with Rule 64 of the HCCD Procedure Rules of 2012 as amended in 2019 via GN 107 of 2019 Rule 64 by filing their skeleton arguments in support of application to set aside the default judgment and decree delivered by this Court on 26/05/2022 in Commercial Case No. 14 of 2021 before Hon. Judge S. M. Magoiga. He submitted that on 10/06/2022 they filed an application to set aside the default judgment and decree through electronic case filing system. On 15/06/2022 they presented a copy of the said application for filing before this court. Mr Mwinyi submitted that the application was brought by way of chamber summons supported by an affidavit of the Applicant. The application was made under Rule 23(1) and (2)(a) and (b) of HCCD Procedure Rules of 2012 as amended in 2019. In the chamber summons the applicant prayed for the court to set aside the default judgment and decree entered against the applicant on 26/05/2022. He submitted that since their skeleton arguments are before the Court, he prayed to adopt it as it is. He prayed that the Court to allow this application with costs, quash and set aside the default judgment and decree in Commercial case No. 14 of 2021 and allow the applicant to file his Written Statement of Defence together with any other order this court deems first grant.

In her reply, Ms Agnes Dominick, counsel for the 1st respondent responded by submitting that she prayed to adopt the contents of the counter affidavit filed on 18/07/2022 as well as the contents of the skeleton arguments filed on 16/02/2023 and make them part of her submission. She added that since the parties' skeleton arguments are filed simultaneously, she had a brief reply to some of the contents that are in the applicant's skeleton arguments that have been adopted. Ms. Dominick submitted that the applicant's main reason for wanting to set aside the default judgment is that he was not properly served upon. In her submission she reminded the applicant's counsel that for an order of substituted service of summons to be made by the court, certain conditions must be fulfilled which in the matter at hand they were fulfilled. She also submitted that the court made that order, hence this Court becomes *functus officio*. It cannot reopen the same matter again. If the applicant is challenging that the service was not proper, then he would have other avenues to challenge the same rather than bringing an application to set aside the default judgment. She submitted further that the application to set aside the default judgment is not an appeal in disguise. Ms. Dominick submitted that the Commercial Court Procedure Rules have set conditions that the applicant that wishes to resort to such kind of application to fulfil, and those conditions must be met.To

substantiate that she referred to the Court of Appeal which according to her has added another condition on top of that of the High Court Commercial Division Procedure (HCCD) Rules which is for the applicant to show at least he has an arguable defence to the matter. She was dismayed that the applicant in this matter has stated nothing in relation to his defence over the matter (Commercial Case No. 14 of 2021) that had proceeded against him. The 1st respondent's counselconcluded her submission by praying that the application be dismissed with costs for the applicant's failure to satisfy the conditions that have been set by the law.

Mr Mwinyi, the applicant's counsel in his rejoinder submitted briefly that this Court as per the application made by the applicant has been vested with powers to make an order to set aside its decision. He re-joined further that the Court is not *functus officio* as submitted by the counsel for the 1st Respondent. As for the conditions which has been set by the HCCD Procedure Rules, he submitted these conditions have not been mentioned by the counsel for 1st Respondent. He also questioned the counsel for the respondent's reference to the Court of Appeal position which she said has added another condition to be complied with, but she has not shown this court that decision of the Court of Appeal. He closed his submission by praying that this Court disregard

the 1st respondent's reply and allow the applicant's application with costs.

The bone of this application is whether the court should set aside its default judgment and decree? It is common ground that to do so requires determination of whether there is sufficient cause. In such exercise, the court is obliged to examine the conditions set in the statutory law and case law. Central to that it is of interest to know whether there was an order for publication of summons by substituted services? Whether that was a proper service? Whether the applicant had sufficient cause? And whether he has arguable defence?

According to paragraph 7 of the applicant's affidavit his sole reason for this application is that he was not properly served with summons to file his Written Statement of Defence (WSD) and summons to appear before the court. He claims that he was not aware of the commercial case No. 14 of 2021.

He further avers in paragraph 8 of the same affidavit that his advocate perused the court file in Commercial Case No. 14 of 2021 that is when he found the affidavit of the court process server (affidavit of proof of service), and two newspapers dated 27/01/2022 that published the summons. However, up to this point he has not told the court how he came to know the existence of default judgment and decree. The

latter was published in the newspaper. It is unclear whether he read it or not.

The applicant on paragraph 9 of the affidavit attacked the affidavit of proof of services that it was irregular as it did not explain when and how the court process server effected the service of summons and if he left a copy of plaint to the applicant as required in proving service of summons to file a defence. In my view this averment lacks substance the said affidavit has not been attached to his affidavit. It is understandable though that the said affidavit being in a court file and forming part of record of proceedings may be a matter of judicial notice. The applicant went on in paragraph 10 of his affidavit attacking the affidavit of the process server that it contains false statement as the applicant did not refuse the service of summons and he did not receive any call or any message from the process server.

The applicant went on averring in paragraph 12 of his affidavit that he is a well-known businessman owning LIM Safaris.He lamented that the process server did not go to his office in Moshi or Arusha Bus terminals. He did not visit his office physically to serve upon him, his employees, or agents. On this point I distance myself with the applicant's averments and agree with the 1st respondent averments on

paragraphs 13 and 19 of the counter affidavit that there is no proof given by the applicant that he owns LIM Safaris. Moreover, the bus which caused the accident was not called LIM Safaris. Equally, there is no proof that he owns gold mines in Geita region or he was there during the time the process server was trying to serve upon him with the summons. It is the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove.

Furthermore, the applicant contended (in paragraphs 13-14 of his affidavit) that the substituted service was improper. He insisted in paragraphs 15 -16 of the affidavit that the initial mode of service was not exhausted and the service by publication in the newspaper was improper. In my settled view he is forgetting that the order for substituted services by publication is granted when the court is satisfied that a party is avoiding the summons or service by ordinary means has proved futile. See Order V Rule 20(1) of the Civil Procedure Code [Cap 33 R.E. 2019].

The averment in paragraph 17 of the applicant's affidavit is that he does not read newspapers. If find this to be a lame excuse. It is the law that if the party is avoiding service of summons or refuses to sign the acknowledgement then the service of summons may be effected by substituted means. That is, by publication in the newspapers. It is

understandable and yet not an excuse that the owner of a bus company such as LIM Safaris does not read newspapers. One may also wonder how did he come to know about the default judgment delivered on 26/05/2022, and the decree published in the newspaper on 02/06/2022? This is intriguing because the application at hand was filed on 15/06/2022. I wish to add that he who goes to equity must go with clean hands. The applicant exhibitednot to have clean hands in this application as his explanations seem inconsistent and illogical and without any evidence.

Further, the applicant claimed that his motor vehicle had insurance cover and that the insurance company promised to indemnify him in case he is found liable and if he had brought the insurance company into the case by filing his written statement of defence. As I have stated earlier the 1st respondent was not informed about this prior to the filing of the commercial case No. 14 of 2021. Again, there is no evidence that the insurance company did really promise what the applicant is saying.

Moreover, the court of appeal has held in **Hashi Energy (T) Limited v Khamis Maganga, Civil Appeal No. 181 of 2016 CAT** that the applicant has to show that there is arguable defence. And along that he should have at least annexed his WSD to the affidavit so that we could see the defence. Nonetheless, he contended his bus had insurance

cover, and the insurer was willing to provide indemnity. That is the substance of his defence which is my view is inadequate to convince this court to set aside the default judgment. I am saying so because the order of service of summons by substituted service still stands. There is no concrete evidence presented to convince the court to fault it.

Summons are governed by Rule 17(1), (2) and (3) of the HCCD Procedure Rules, 2012 as amended in 2019, and Order V Rules 9 to 33 of the Civil Procedure Code [Cap 33 R.E. 2019]. The summons can be served upon a party by various means. The ordinary mode of service is by servicing upon him in person. Order V rule 9 of the CPC. There is possibility of serving upon him through his manager or agent as per Order V rule 13 of the CPC. The service may also be by affixation of summons on the party's office or residence. That is provided for under Order V rule 17 of the CPC.And yet summons may be effected by substituted service such as publication in the newspapers circulated in the area, as stated in Order V rule 20 (1) of the CPC. But the latter modehas some conditions.

According to Order V rule 16 of the CPC where a party is avoiding or refusing to sign the acknowledgement, the process server shall leave a copy thereof with him and return the original to the Court together with an affidavit stating that the person upon whom he served the

summons refused to sign the acknowledgement, that he left a copy of the summons with such person and the name and address of the person (if any) by whom the summons was served was identified. This was emphasized n the case of **Mohamed Nassoro v Ali Mohamed [1991] TLR 133**. In the present case the process server attempted to serve upon the applicant with summons. He filed the affidavit of proof of service that the applicant was refusing the service. He also tried to call him and send him SMS.

Whether that was not a proper service? Whether the applicant had arguable defence? In **Hashi Energy (T) Limited v Khamis Maganga, Civil Appeal No. 181 of 2016 CAT**, in dealing with application to set aside default judgment, the Court held inter alia that:

> " *Indeed, the factors to be considered in such an application are not to be treated as rigid rules. For instance, the presence of an arguable defence on the merit may justify the High Court to exercise its discretion to set aside default judgment, even if the other factors are unsatisfactory in the whole or in part.*"

Before concluding I should say a word or two on the counsel for the 1st respondent's argument that the court became *functus officio* after

orderingsubstituted service of summons by publication in the newspaper. I associate myself with views of the applicant that this Court is not *functus officio* because the law allows setting aside of default judgment and decree in a fit situation. For instance, if the order permitting service by substituted means was improperly or prematurely given. In that context the court is not *functus officio*. For detailed discussion as to when the court becomes *functus officio* see the case **Bibi Kisoko Medard v Minister for Lands, Housing and Urban Development and Another [1983] TLR 250**.

Apart from the *functus officio* issue, the applicant in my view and considering the averments in his affidavit he has not shown sufficient cause to persuade this court to exercise its discretion to set aside the default judgment. He gave several averments that are unsubstantiated. Let me reiterate some of them that he owns gold mine at Geita and he was at that mining site when the summons were issued, that he owns LIM Safaris, hence summons could be served at his office, that he does not read newspapers, yet he became aware of the decree published in the newspaper. He thus attacked the process server's affidavit of proof of service without any concrete evidence.

For the foregoing reasons, I have not been convinced that the applicant has shown sufficient causeto set aside the default judgment and decree. Hence, the applicationlacks merit. It is dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 31st day of March, 2023.

U. J. AGATHO
JUDGE
31/03/2023

Date: 31/03/2023

Coram: Hon. U. J. Agatho, J.
For Applicant: Absent
For Respondent: Agnes Dominick, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 31st March, 2023 in the presence of Agnes Dominick, advocate for Respondent, but in the absence of the Applicant.

U. J. AGATHO
JUDGE
31/03/2022