

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
ARUSHA DISTRICT REGISTRY  
AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 98 OF 2022**

*(C/F Misc. Civil Revision No. 22 of 2021 High Court Arusha, Original Civil Case No. 74 of  
2018 Resident Magistrates Court of Arusha)*

**ANNA KEMILEMBE BAHIGANA ..... APPLICANT**

**VERSUS**

**HENRICK WILLEM TIMMER ..... RESPONDENT**

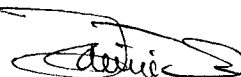
**RULING**

28<sup>th</sup> November, 2022 & 24<sup>th</sup> March, 2023

**TIGANGA, J.**

Under **Section 68 (e), 95 and Order XXIX Rule 19 of the Civil Procedure Code**, Cap 33, R.E 2019, the applicant prays that this Court be pleased to set aside its *ex parte* Ruling and Order of Civil Revision No. 22 of 2022 delivered on 20<sup>th</sup> July, 2022.

To understand what this application is all about, I find it important to narrate a brief history of the matter at hand. The brief history of this application as deciphered from the records is to the effect that; the applicant herein sued the respondent for breach of a contract of a promise to marry before the Resident Magistrates Court (trial court) vide Civil case No. 74 of 2018. She claimed for compensation to the tune of Tshs.



300,000,000/= and general damages to be determined by the court. The matter was decided *ex parte* and in her favour as the respondent herein was ordered to pay her Tshs. 300,000,000/= as compensation and Tshs, 10,000,000/= as general damages. Thereafter, the order for execution of the said decision was also given *ex parte* whereby the respondent herein was blamed for failing to voluntarily honour the decree, consequently, he was detained as a civil prisoner until when he agreed to enter a settlement which adjusted the decree to the tune of Tsh. 200,000,000/= but that was done while he was under police custody.

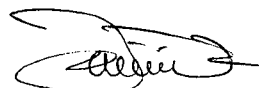
Aggrieved by the *ex parte* decision, the decree and the execution, the respondent filed Civil Revision No. 22 of 2021 before this Court praying that, the whole procedure from how the case was determined to its execution at the trial court be revised and set aside.

His application to this Court was heard *ex parte* and the Court decided in his favour on the ground that, proceedings, judgment, decree and execution were all tainted with irregularities and therefore they were intolerable in the eyes of the law. The Court also ordered the applicant to return the Tshs. 200,000,000/= accrued from illegal execution proceedings.

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The ground of the application deposed by the applicant in her affidavit are that, she was transferred from Arusha to Dodoma and also she conceived and faced pregnancy challenges which led her to be put on bed rest until when she delivered her baby through a cesarian section. She also deponed that, she was notified of the ongoing Revision Application by one Advera Kyaruzi and immediately thereafter she made follow up through her Advocate and consequently filed this application praying that the *ex parte* proceedings and the decision of this Court be set aside so that the matter can be heard and determined inter parties. From her affidavit and that of his learned Advocate the main grounds for the applications;

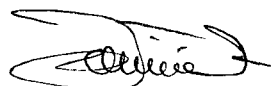
- i. There was no proof that, the summons was dully served to the applicants in person or via publication as alternative substituted summons.
- ii. The affidavit of the process server is irregular and ambiguous to justify Civil Revision No. 22 of 2021 to proceed *ex parte* against the applicant.
- iii. That, the applicant was denied right to be heard.
- iv. That, prior to delivery of the Ruling no order was issued and served to the applicant regarding delivery of the said decision.
- v. That, the process server Mr. Zakaria Meleiya is not dully appointed by the court to serve court summons in private cases.

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The application was heard by way of written submissions the applicant was represented by Mr. Gwakisa Sambo and the respondent was represented by Mr. John Wilbard Masawe all learned Advocates.

Supporting the application, Mr. Sambo submitted that, the applicant was never aware of the Civil Revision of No. 22 of 2021. He averred that, the applicant was in Dodoma and was sick hence the alleged summons were never served to her and that, she does not know a person by the name Juma Omary or Richard Jacopiyo who allegedly signed the summons on her behalf. He referred the court to the case of **Bernard Luttashoba vs. Costancia Kamugisha**, Land Application No. 128 of 2021 where the High Court of Tanzania at Bukoba cited the case of **T.M. Mango vs. Sandrudin G. Alibai & 2 Others** (1997) TLR 51 where it was held that; uncertainty of service of summons is sufficient reason for allowing an application to set aside *ex parte* judgment and decree.

He also argued that, the impugned summons neither discloses the case number, the name of the parties nor the Court which is a clear indication that the same was not addressed to the applicant. More so, the said Omary Juma and Richard Jackopiyo were never called to testify if they were authorized by the applicant to receive the summons on her behalf.

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According to the applicant's learned counsel, the applicant was bed ridden sick due to pregnancy complications which at the end she delivered her baby through cesarian section as seen in her medical report attached to the affidavit as ANNA1. He asserted that, the whole ordeal regarding service of summons denied the applicant her right to be heard as she was never served with summons to appear and defend the application against her. He prayed that, for the interest of justice, the applicant be granted this application so that she can be availed with right to defend herself as the same will not prejudice the respondent in anyhow.

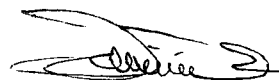
In reply Mr. Massawe started his submission by pointing out that, the current application is incompetent as section 68 (e) of the CPC deals with issuance of interlocutory orders thus, unfit to move the court to determine the application. More so, Order XXIX Rule 19 of the CPC as well as R.E. 2022 are non-existent as it does not feature in the latest revised laws of the G.N. No. 461 of 2022, The Laws Revision (Specific Laws) Notice, 2022. He asserted that, wrong citation of the enabling provision renders the application incompetent as held in the case of **China Henan International Cooperation Group vs. Saivand K.A Rwegasira** [2006] TLR 220.

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Regarding the information by one Advera Kyaruzi to the applicant regarding the revision application that she claimed not to be aware of, Mr. Massawe submitted that, such person never swore an affidavit hence such information remains a hearsay and the same should be disregarded by this court. To buttress this argument, he referred the court to the case of **Sabena Tachnics Dar Limited vs. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 CAT at Dsm (unreported).

As to Juma Omary @ Richard Jackopiyo whom the applicant denies to know him, it was Mr. Massawe's submission that, it was the applicant who shared her contacts hence she is lying not to know them. He argued that, the applicant knew about the application but chose to standby long enough for the proceedings to finalize and purposefully thwart the wheels of justice. He averred that, even after being aware of the application in court, neither the applicant nor her learned Advocate objected the proceedings on the issuance of summons as provided in Order IX (4) of the Civil Procedure Code, (supra) hence filing this application is a mere afterthought.

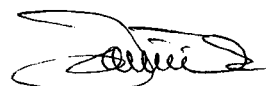
Mr. Massawe also challenged the issue of the applicant's sickness that, the medical chits attached in her affidavit neither showed doctor's recommendation, proof of admission nor medical report to support her

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averment that she was bed ridden sick. More so, the birth certificate attached to the Affidavit only shows the infant name Prisha Kokushubila Kaijage but the same does not indicate that the infant belongs to the applicant. He referred the court to the case of **Elisha Mang'ehe vs. Nyangi Ogigo**, Civil Application No. 45/08 of 2018 CAT at Mwanza (unreported) where the Court of Appeal underscored the importance of elaborating on the medical chits tendered in court.

The same goes to the transfer to Dodoma, the learned counsel argued that, it was not substantiated with any proof hence remains an afterthought. Learned counsel also objected the assertion that, no prejudice will occasion to the Respondent in the event this application is granted. He stated that, the respondent being a man of retirement age with no other means of subsistence, non-payment of his illegally seized funds will definitely prejudice him. He prayed that this application be dismissed with cost.

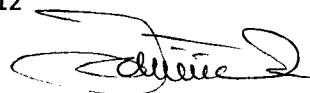
In his rejoinder, Mr. Sambo reiterated his earlier submission and pointed out that citing Civil Procedure Code as [R.E. 2022] instead of [R.E. 2019] was a mere slip of a pen however the remaining section 68 and 95 can still move the court to determine the application. He also argued that, wrong citation of the wrong provision is no longer fatal as long as the

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court has jurisdiction to grant what has been prayed for as held in the case of **The Director General LPF Pension Fund vs. Paschal Ngalo**, Civil Application No. 76/08 of 2018 CAT at Mwanza (unreported). He prayed the anomaly to be pardoned by overriding objective principle which urges courts to do away with technicalities and deal with substantive justice.

He also maintained that, the applicant never sent Richard Jacopiyo to sign summons on her behalf and if he did, he would have signed as such and not as Juma Omari. He insisted that, the said summons was never served to either Richard Jackopiyo or the Applicant herein. He prayed that, the application be allowed.

After hearing both parties the question for determination is whether this application is meritorious. In addressing the issue, I find it important to start with the procedures on issuance and service of summons. This is governed by Order V of the Civil Procedure Code, (supra) particularly rule 12 which provides that, a person to whom a summons has been served is required to sign an acknowledgement of service. Where the respondent refuses to sign acknowledgement, the process server is required to sign acknowledgment and leave a copy and return the original together with an affidavit stating that, the person whom service was directed refused to

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sign mentioning his or her name, if identified. The issue in the matter at hand therefore is whether the summons were issued and served to the applicant by the respondent and if not whether the inaction was fatal.

It has been the respondent's argument that they delivered the summons to the applicant's authorised person one Richard Jackopiyo. That, such person signed on the summons to acknowledge receipt of the summons under his alias name of Omari Juma. On the other hand, the applicant denies in totality to either know the said Richard Jackopiyo @ Omari Juma or authorising him to receive such summons or any court process or records. In its ruling, this Court stated that, the applicant was dully served on 08/06/2022 by a court process server who swore an affidavit to that effect thus proceeded to hear the application *ex parte*.

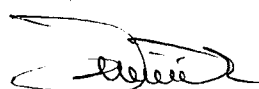
However, looking at the affidavit of the process server the same is flawed. It reads as follows;

*"... THE AFFIDAVIT OF Zakaria Meleiya*

*I Z. Meleiya made oath and say as follows:-*

*I am a process server of this Court.*

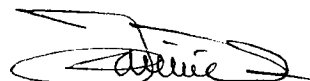
*On 20<sup>th</sup> day of May 2021, I received a summons/notice issued by the **RM's Court of Arusha in Bill of Cost/Civil/Case/Application No. 20 of 2021** in the said court dated the 8<sup>th</sup> day of June 2021 for service.*



*The said Anna Kemilembe Bahigana has at the time personally known to me by ... and served the said notice/summons on him/her on 20<sup>th</sup> day of May 2021 about 11:29 AM at Ngarenero by tendering a copy thereof to him and to his signature on the original summons and left a copy to him.*

*The said Juma Omari signed to receive this summons in the presence of Zakaria Meleiya ...”*

In light of the above affidavit it is clear that the summons served to the applicant was never delivered to her but to one Juma Omary whom according to the respondent is an alias name of Richard Jackopiyo. The question remains why didn't the said Richard Jacopiyo sign his name. On top of that, the process server made an affidavit in respect of the Bill of Cost/Civil Case/Application No. 20 of 2021 which is before at the Resident Magistrates Court and not in this court. In the circumstances, had the applicant received the summons, she would have attended in the wrong court. In the cases of **Mohamed Nassoro vs. Ally Mohamed** [1991] TLR 133 and that of **Petrades Godwin vs. Marlene Samiath**, Civil Appeal No. 17 of 2017 (unreported) the Court held underscored the importance of proof of summons service failure of which makes the *ex parte* proceedings and decision is fatal. In the light of the above, I find that, the applicant has demonstrated the reasons for this court to set aside

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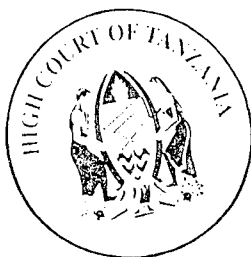
the *ex parte* Ruling which is the subject of this application. Further to that, also moved by the doctrine of the right to be heard, the applicant was curtailed her right to be heard as held in the case of **Abbas Sherally and Another Vs. Abdul Fazalboy**, Civil Application No. 33 of 2002 where the Court held that;

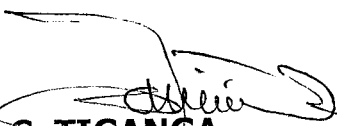
*"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

In the circumstances, this court allows the application and hereby set aside the *ex parte* proceeding and ruling in Civil Revision No. 22 of 2021. The matter is hereby ordered to start afresh interparty. Costs to follow the events.

It is accordingly ordered.

**Dated and delivered at Arusha** this 24<sup>th</sup> day of March, 2023



  
**J.C. TIGANGA**  
**JUDGE**