IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLENOUS COMMERCIAL APPLICATION NO. 136 OF 2019

(Arising from Commercial Case No. 64 of 2019)

MAXCOM AFRICA PLC.....APPLICANT

Versus

MULTICHOICE TANZANIA LTD.....RESPONDENT

Last Order: 09th Mar, 2020

Date of Ruling: 15th Apr, 2020

RULING

FIKIRINI, J.

The applicant has moved this Court by way of chamber summons under Rule 23 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) and any other enabling Provisions of the Law) seeking for, setting aside the default judgment and decree issued on 17th October, 2019, costs and any other relief deemed fit by the Court. The application was supported by an affidavit of one Ahmed Lusasi, applicant's Principle officer, and was argued for by Mr. Phillemon Mrosso counsel for the applicant. Whereas on behalf of the respondent Mr. Jovin Kagirwa counsel for respondent filed a counter-affidavit opposing the application.

The application was argued by way of written submissions, with Mr. Mrosso counsel for the applicant filing written as well as rejoining written submissions

which he prayed be adopted and form part of the submission in support of the application. Mr. Kagirwa filed written submission opposing the application and prayed for the submissions to be adopted to form part of the submission in opposition.

Mr. Mrosso in support of the application raised the following three (3) grounds as reflected under paragraph 9 of the deponed affidavit for Court's consideration.

(i) That, the applicant was not properly served with summons to appear and defend the case.

(ii) That, the applicant was not served with summons to attend date of judgment, and

(iii) That the respondent did not exhaust the dispute resolution mechanisms including initiation of arbitration proceedings as provided for under the Agreement before filing the case in this honourable Court.

Submitting on right to be heard, Mr. Mrosso stated that it was trite law that before any decision affecting the rights of the parties or interested persons is made, those involved must be heard first or else the decision reached would be a nullity. And in which case that would be against the principles of natural justice as advocated in various court decisions, citing the cases of **David Nzaligo v National**

Microfinance Bank Plc, Civil Appeal No. 61 of 2016 (unreported), p. 24 (copy annexed); **Muro Investment Co. Ltd v Alice Andrew Mlela, Civil Appeal No. 72 of 2015, (unreported) p. 17** in which the Court made reference to the case of **Abbas Sheally & Another v Abdul Fazalboy, Civil Application No. 33 of 2002 (unreported).**

It was the applicant's submission that the reason for failing to appear before the Court, or for failing to file their defence as required in law and in particular Rule 15 and 20 of the Rules was because there were not aware of the existence of the Commercial Case No. 64 of 2019, since they were not served with summons to appear. Disputing the summons alleged served by one Hussein Fula by then an employee at Hallmarks, as shown in his sworn affidavit in that regard, , it was Mr. Mrosso's arguments that the summons are doubted as were served by a person other than the Court process server, and that the served summons though have stamp and signature but is without the name of the person who received the summons.

Furthering the submission, it was his contention that not serving the applicant was the cause for the applicant's failure to enter appearance and defend her case. And that warrants this Court to set aside the default judgment, referring this Court to the case of **Muro** (supra) p. 18 in underscoring his submission. Also buttressing his

position, he cited the case of **Ethimex Tanzania Limited & 4 Others v KCB Bank (T) Ltd, Miscellaneous Commercial Application No. 86 of 2014, High Court of Tanzania, Commercial Division (Unreported)** (copy annexed), where the Court stressed on right to be heard, served and hearing inter parties.

Another point argued was that the applicant was not notified of the date of judgment which was contrary to the mandatory requirement of law pursuant to Order XX Rule 3A of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC). Supporting the submission Mr. Mrosso cited the case of **Cosmas Construction Co. Ltd v Arrow Garments Ltd [1992] T. L. R. 127**, where the Court of Appeal underlined the importance of the other party to be present during the delivering of the judgment, even though did not participate in the proceedings.

Winding up his submission it was Mr. Mrosso's contention that it was wrong and a procedural irregularity for a Court to order the case to proceed *ex parte* and pronounce default judgment without proper service or notice of the judgment date as required in law. Fortifying his stance, he cited the case of **Kalunga & Company Advocates v National Bank of Commerce Ltd [2006] T. L. R. 235.**

Mr. Mrosso based on his submission prayed for the default judgment and decree issued against the applicant to be set aside and allow the matter to proceed inter-parties. He prayed for the grant of the application with costs.

Mr. Kagirwa filed submission on behalf of the respondent in which he stated while he was not disputing the right to be heard, but he nonetheless was contesting the application as to have been brought under a wrong provision. The provision of Rule 23 (1) of the Rules which has been used can only be used in a situation where a party who was duly served but failed to file defence and thence the Court entered a default judgment after compliance to Rule 22 (1) by the plaintiff. Submitting more on this point he contended that the Court cannot enter a default judgment without being satisfied that summons was served to the defendant and the defendant failed to file a written statement of defence, And in the present instant the Court satisfied itself that the defendant was duly served basing its observation in an affidavit filed in support of the application for default judgment. It was then his argument that this point on service upon the defendant cannot be considered more by this Court as the Court was now *functus officio*. Supporting his assertion, Mr. Kagirwa referred this Court to the cases of **Godvives Transport Ltd & Another v Commercial Bank of Africa, Miscellaneous Commercial Application No. 135 of 2018** and **Bibi Kisoko Medard v Minister for Lands Housing and Urban Development & Another [1983] T. L. R 250,** where the Court considered itself *functus officio* to decide on the issues already dealt with by this Court. Mr. Kagirwa as well directed this Court to the Black's Dictionary, 6th Ed, which defined the term *functus officio,* as to mean:

"Having fulfilled the function, discharged the office or accomplished the purpose and therefore nor further force or authority"

Mr. Kagirwa reiterated his submission, on the issue of functus officio, by contending that the Court proceeded to enter default judgment after answering two issues in affirmative:

(i) Whether the defendant was served with the summons pursuant to Rule 15 and 20 of the Rules, and

(ii) Whether the plaintiff proved his case on merits by affidavit.

Since the two issues have been determined by the Court, the Court is thus functus officio and bound by its own decision, citing the case of **Khalife Mohamed (As Surviving Administrator of the Estate of the late Said Khalife) v Aziz Khalife & Another, Civil Appeal No. 97 of 2018 (unreported)** (copy annexed).

Specifically addressing the issue of service which the respondent claim was duly effected but disputed by the applicant, Mr. Kagirwa stated that the applicant essentially did not dispute the service effected on 27th June, 2019 which was endorsed with the defendant's company stamp, the fact which was not controverted by the applicant. The only concern raised by the applicant was the manner of

service, that the service was not effected by the Court process server. This assertion was however, not pleaded but raised from the bar by the applicant's attorney. which was improper and contrary to the provision of Order XIX of the CPC. The applicant has not countered the service which was served by the respondent employee and did not for further proof or interrogation of the deponent on that issue.

Mr. Kagirwa hustling with this point asked himself if the argument falls within the ambit of Rule 23 (2) of the Rules. Answering the question, it was his submission that Rule 20 (1) of the Rules has covered well the defendant's right to be heard, but went on to submit that the said right did not extend to be the right to force a party to, any civil proceedings or to utilize the opportunity to be heard. The defendant's right to be heard was well observed by the Court when it issued summons under Rule 15 of the Rules which was effected by the respondent on 27th June, 2019 at the applicant's registered office. The applicant opted not to attend nor file defence, the applicant cannot come now under the cover of natural justice despite being served and opted not to act. Since he has slept on his right to be heard, the applicant though submitted extensively on this point, cannot at this eleventh hour move the Court seeking for setting aside of the decision entered following the applicant's own negligent act.

Furthering his submission on the right to be heard, it was Mr. Kagirwa's submission that the applicant slept on his rights. Stressing on service, he submitted that the applicant was duly served the fact which is not disputed as the applicant acknowledged receipt of summons by signing and endorsing by stamping its Maxcom Africa Plc stamp. The case of **Diamond Trust Bank (T) Ltd v Prime Farms Ltd, Nishat Naushad Muui Alibhai (also known as Nishat Mulji), Praful Mogal and Shahin Kassam, Commercial Case No. 39 of 2019, (unreported) p. 4,** whereby the Court dealt with rescheduled hearing with prior notice to the defendant but none appeared nor filed written statement of defence. Still admitting the applicant had a right to be heard, but argued that the right was not in place to ensure the presence of the defendant even in the circumstances where the defendant was reluctant to take part in the proceedings. Either the Rule introduced *ex parte* procedure and right to apply for default judgment in order to rescue the one part specifically the plaintiff against the unwilling and reluctant part to the proceedings. On the same footing, it was Mr. Kagirwa's submission that there was no dispute on authenticity of the applicant's stamp and signature of the officer who received the summons. And in addition, the applicant did not dispute existence of the claim or debt.

On the submission that the applicant was not served with summons to appear for judgment, it was Mr. Kagirwa's submission that the application for setting aside default judgment was granted on the reason as to why the written statement of defence could not be filed and not extend to challenge the legal procedure of the Court. The defendant though did not attend on the judgment date but the judgment was published on 25th October, 2019 in Mwananchi and Guardian Newspapers to enable the defendant who absented himself from taking part to the proceeding to be aware of the Court judgment to enable him to take any further steps against the judgment. Based on the above, it was thus Mr. Kagirwa's submission that the applicant was employing technical delay tactics to deprive the respondent the right to enjoy the fruits of the decree passed by this Court.

Concluding his submission Mr. Kagirwa urged the Court to decline the application for lacking in merits as no ground was advanced let alone sufficient one. Also, out of three points raised as reflected in paragraph 9 (i) – (iii) of the affidavit only one was addressed. On that note he prayed for the application be dismissed with costs.

Rejoining the submission, Mr. Mrosso argued that the submission that Rule 23 (1) and (2) of the Rules did not befit the application was misconceived and misleading. According to him, the provision has only two conditions, that the application for setting aside the default judgment has to be made within 21 (twenty-one) days and

give sufficient reasons for failure to file defence as well as to enter appearance and prosecute its case. The applicant has complied to the requirement and stating having no knowledge on the existence of the suit as was not served with summons to that effect.

Contesting that this Court was *functus officio,* it was Mr. Mrosso's submission that the Court can only become so, once it is to sit to determine a matter that previously was determined and finally disposed of on merit regarding the same subject matter. To strengthen his position, he referred the Court to the definition of the term as defined in the **Black's Law Dictionary, 9th Ed, at p. 743** and the case of **Kamundi v R, (1973) EA 540.** He further submitted that there was no any former application or suit for setting aside the default judgment made by the applicant which was heard and determined on merit by this Court, hence this Court was not *functus officio* to determine the present application. The respondent's submission was thus misleading as conditions precedent for doctrine of *functus officio* were not met in the present application.

As to being aware of the existing Commercial Case No. 64 of 2019, the applicant refuted that contending he was neither served with the summons to appear and file his defence nor summon for the date of judgment as required by the laws. And that the summons relied by the Court was stamped with the applicant's stamp but the

same did not identify the officer from the applicant's office who received it and stamp it. According to Mr. Mrosso stamping the summons only was not enough to justify that the applicant was properly served.

He thus reiterated his earlier prayer that the application be granted with costs and matter allowed to proceed inter-parties.

Reading from the submissions it is clear that both counsels are in agreement that right to be heard is fundamental and cannot be overstated. All the cited cases to wit **Nzaligo, Muro Investment,** and **Ethimex** (supra), have illustrated expansively on the right to be heard. In **Nzaligo's** case the Court of Appeal had this to say:

> *"The law that no person shall be condemned unheard is legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard."*

Although are in agreement to the above but Mr. Kagirwa does not agree that the applicant had been denied right to be heard, premising his position on the submission that the applicant was duly served on 27th June, 2019, the submission which, was being contested by the applicant. On this point I am at one with Mr.

Kagirwa for the respondent that the applicant was duly served. *First and foremost*, the applicant does not dispute the service effected at his registered office. The summons was received, was signed, and endorsed by stamping of the applicant's office Maxcom Africa Plc. Second, the applicant has not contested authenticity of the stamp used in endorsing on the summons to acknowledge service. The only dispute is there is no name of the officer who received the summons, signed and endorsed by stamping using the official applicant's stamp. The affidavit deponed by one Ahmed Lusasi, denied knowledge of the existence of the Commercial Case No. 64 of 2019, but the affidavit deponed does not state disputing about the summons served and received on 27th June, 2019. Instead the applicant contested receipt of the summons as not proper as it was not served by the Court process server. On this, I am at one with Mr. Kagirwa that the submission was not part of the affidavit deponed, but made from the bar by the applicant's counsel. This is not proper and contrary to the law and in particularly Order XIX of the CPC. **See: Registered Trustees of the Archdiocese of DSM v The Chairman Bunju Village Government & Others, Civil Appeal No. 147 of 2006, CAT-DSM (unreported) p. 7.**

The applicant if at all was disputing the effected service was at liberty to seek for Court's leave to file a reply to the affidavit filed, the option was never implored.

Also in the alternative he would have sought for further proof and/or request for the deponent of the affidavit that service was effected upon the applicant at his registered office be summoned for cross-examination. All these options were not attempted, making this Court give less weight to his assertion, despite the position that parties to the case must be afforded opportunity to be heard before any adverse decision is taken against any of those parties.

So the applicant's complaint that he was not served with summons to appear and file defence and/or prosecute his case is in my view an afterthought as the applicant was duly served on 27th June, 2019 and satisfied that service was duly effected on the applicant this Court proceeded to enter default judgment after the respondent has complied with Rule 22 (1) of the Rules which required filing of Form No. 1 and filing of an affidavit in proof of the claim.

Having said that and moving to the lack of service of the notice of the date of judgment, it my position that even though Mr. Kagirwa contested this assertion in his submission but it is an unwaivered fact that the applicant was not served with the notice as required by Order XX Rule 3A of the CPC. The provision of Order XX Rule 3A of the CPC is clear when it states:

> *"In Commercial Division of the High Court the Court shall, after the case has been heard, sum up the evidence of each*

side and then require each assessor to state his or her opinion orally as to the case generally and to any specific question of fact, and ***thereafter the judge shall pronounce judgment in open court, either at once or on some future day, of which due notice shall been given to the parties or their advocates****"*[Emphasis mine]

Although in the presènt circumstance the hearing was one sided with no assessors but it was important for the defendant to be notified of the judgment date by way of notice, so that the defendant can enter appearance and hear the judgment to be delivered and act accordingly after the pronouncement. It is apparent from the records of proceedings that the defendant was not notified. This is a legal requirement which was omitted. The case of **Cosmas Construction Co.** (supra) has elucidated on the point amply when it stated:

"A party who fails to enter an appearance disables himself from participating when the proceedings are consequently 'ex parte', ***but has to be told when the judgment is delivered so that he may, if he wishes, attend to take it as certain consequences may follow****."*[Emphasis mine]

For not being notified as to when the judgment was to be delivered, regardless it was a default judgment was unprocedural and unjustly to the applicant. On this aspect I, find myself agreeing with Mr. Mrosso, that this application deserves granting in order to cure the irregularity occasioned.

In light of the above, I hereby proceed to set aside the default judgment pronounced on 17th October, 2019. The costs to follow events. It is so ordered.

P. S. FIKIRINI

JUDGE

15th APRIL, 2020

Order:

(i) The applicant within 21 (twenty-one) days from the date of this ruling to file his written statement of defence;

(ii) Serve the plaintiff, who if there is any reply to make do so 7 (seven) days from the date of the service.

(iii) On the date fixed the parties should be coming for 1st Pre-Trial Conference or hearing of the preliminary point of objection if any, and

(iv) Skeleton arguments if desired in case there is preliminary point of objection raised has to be filed 3 (three) clear days before the hearing date.

P. S. FIKIRINI

JUDGE

15th APRIL, 2020