

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CASE NO. 186 OF 2020

FES ENTERPRISES COMPANY APPLICANT

VERSUS

SERENGETI BREWERIES LIMITED RESPONDENT

Date of Last Order: 20/10/2021

Date of Ruling: 19/11/2021

RULING

The applicant, FES ENTERPRISES COMPANY LIMITED instituted the instant application against the above named respondent by way of chamber summons moving this court under the provisions of Rule 23(1) of the High Court (Commercial Division) Procedure Rules, 2012, G.N. 250 of 2012, section 95 of the Civil Procedure Code, [Cap 33 R.E. 2019] and sections 2(1) and 3 of JALA [Cap 358 R.E. 2019] praying that this court be pleased to grant the following orders, namely:

- i. Set aside a default judgement entered by this court on 20th November, 2020;
- ii. Costs of this application be provided for;
- iii. Any other order as the court may deem fit to issue.



The chamber summons as usual was accompanied by affidavits deposed by Mr. Festo Mallya, Principal Officer of the applicant and Mr. Samsonn Mbamba, learned advocate for the applicant respectively all stating the reasons why this application should be granted.

Upon being served with the chamber summons and accompanied affidavit, the respondent filed counter affidavit deposed by Mr. Nuhu Said Mkumbukwa, learned advocate for the respondent stating the reasons why this application should not be granted.

The briefs facts pertaining to this ruling are that, on 20th November, 2020, this court entered a default judgement against the applicant for prayers as contained in Commercial Case No. 76 of 2019. The default judgement was entered after the court was satisfied that, the applicant, according to law, was satisfactorily served but default to file written statement of defence. While the suit was at stage of proof by affidavit, Mr. Mbamba unsuccessfully attempted to stay proceedings and set aside the order by proof by affidavit as required by law. Consequently, the applicant filed an appeal to the Court of Appeal against that refusal which is pending and has preferred this application to set aside the default judgement, hence, this ruling.



When this application was called on for hearing, the applicant was enjoying the legal services of Mr. Samson Edward Mbamba, learned advocate. On the other hand, the respondent was enjoying the legal services of Mr. Erick Denga, learned advocate.

Mr. Mbamba arguing this application reiterated the provisions under which this application was preferred and adopted the contents of the affidavit in support of the application. In the affidavit, the only reason stated why the applicant failed to file a defence was that, he was outside Dar es Salaam the whole of September to 26th October, 2019 as he went to Mbingu area, in Ifakara district for farming where no circulation of Daily News paper.

The learned advocate for the applicant cited the cases of FREDRICK SELANGA AND ANOTHER vs. AGNESS MASELE [1993] TLR 99 and KULWA DAUDI vs. REBECA STEPHEN [1985] TLR 116 of which it was held that wherever possible suit should be determined on the merits and that no reasons was advanced for substituted serviced respectively.

On the foregoing, the learned advocate for the applicant submitted that since the amount involved is big, then, urged this court to grant the applicant the prayers as contained in the chamber summons.



On the other hand, Mr. Denga at the outset prayed to adopt the contents of the counter affidavit opposing this application. Both in the counter affidavit and by oral submissions, the learned advocate for the respondent denied the allegations that Daily News paper and Mwananchi of which the service was done, do not circulate all over the country, Ifakara district inclusive. According to Mr. Denga, no proof that the applicant was actually in Ifakara but just bare allegations and not even substantiated. The learned advocate for the respondent submitted that, the cases cited are distinguishable and that none befit the circumstances we have here. The applicant, submitted Mr. Denga, was avoiding services and there is an affidavit by process server to that effect.

On the foregoing, Mr. Denga urged this court to dismiss this application for want of merits with costs.

In rejoinder, Mr. Mbamba was not moved that the cases cited are distinguishable and in rebuttal submitted that, are persuasive and the ratio decidendi purely befit this application. The learned advocate for the applicant insisted that, the two news papers of Daily News and Mwananchi do not circulate Mbingu area in Ifakara. Eventually, Mr. Mbamba prayed that this application be granted as prayed.



This marked the end of hearing of this application.

The task of this court now is to determine the merit or otherwise of this application. Having heard the parties' rivaling submissions, the issue now for determination, in my view, is whether the applicant has demonstrated sufficient reason(s) for failing to file written statement of defence to allow this court to exercise its discretion as provided for under Rule 23(1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended from time to time. The provision of Rule 23(1) and (2) provides and guide the court what to consider when the aggrieved party has to satisfy two cumulative points before exercising the discretion. These are; **one**, if the application was made within prescribed time of twenty one days from the date of the judgement, and **two**, if the applicant has given sufficient reasons for failure to file a defence. For easy of reference, the said Rule provides as follow:

Rule 23(1) Where a judgement has been entered pursuant to Rule 22 the court may, upon application made by the aggrieved party, within twenty-one-days from the date of the judgement, set aside or vary such a judgement upon such terms as may be considered by the court to be just.



(2) In considering whether to set aside or vary the judgement under this Rule, the court shall consider whether the aggrieved party has:-

(a) applied to the court within the period specified under sub rule (1) and;

(b) given sufficient reasons for failing to file a defence.

Going by the wording of the rule above, there is no dispute that, this application was preferred within the specified period of twenty-one-days. However, what is in serious dispute between parties' learned advocates is whether the applicant has given sufficient reasons for failure to file a defence.

The phrase sufficient reason is not defined but through case law depends on circumstances of each case. See the case of REGIONAL MANAGER, TANROADS KAGERA vs. RUAHA CONCRETE COMPANY LIMITED, CIVIL APPLICATION NO. 96 OF 2007 CAT (UNREPORTED).

Now back to the instant application, the only plausible reason given both in the affidavit and oral submission by Mr. Mbamba is that Daily News do not circulate in Mbingu area in Ifakara district and as such the applicant's



staying there for the months of September and October 2019 could not be able to access the news papers and enable him file a defence. Nothing was said on Mwananchi news paper in which a substituted service was also made therein.

I have dutifully considered the second consideration for aggrieved party on being required to give reasons and I find with respect to Mr. Mbamba that, this application is devoid of any useful reason leave alone reasons why the applicant did not file a defence. The reasons, I am taking this stance are not far-fetched. **One**, one of the reasons that the applicant is urging this court to grant the application is the findings though perusal that was done by Mr. Mbamba which was annexure **FES-2** but in that affidavit nothing was submitted or deposed to negate the finding of the court through the affidavit of the process server that the applicant was avoiding service leading to prayer for substituted service as last resort. Both Mr. Festo Malya and Mr. Samson Mbamba deposed nothing on this very key reason for grant and ordering of substituted services by the court. **Two**, as rightly argued by Mr. Denga, and rightly so, in my view, it is not true that Mwananchi news paper do not circulate allover the country and other townships, the town of Ifakara inclusive.



On the totality of the above reasons, I find the application together with the supportive affidavit and oral arguments far from convincing this court to hold otherwise.

In the foregoing reasons, this application must be and is hereby dismissed for being unmerited with costs.

It is so ordered.

Dated at Dar es Salaam this 19th day of November, 2021.



S. M. MAGOIGA
JUDGE
19/11/2021