

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 127 OF 2023
(Originating from Commercial Case No. 36 of 2023)**

BETWEEN

SALMA MOHAMED MWASA APPLICANT

VERSUS

AZANIA BANK LIMITEDRESPONDENT

Last order: 3/ 10/2023
Date of Ruling: 20/11/ 2023

RULING

NANGELA, J.

This is an application in respect of a prayer to set aside a defaulted Judgment which was delivered by this court on the 04th of August 2023. The application was brought by way of a Chamber Summons supported by an affidavit of one Salma Mohamed Mwasa.

The chamber summons was filed under rule 23 (1) of the High Court (Commercial Division) procedure Rules, 2012 (as amended) and Order XLIII rule 2 of the Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provisions of

the law. In this application the Applicant is seeking for the following orders of the Court:

1. That the Honourable Court may be pleased to make an order setting aside the default Judgment in Commercial case No.36 of 2023 dated 04/08/2023.
2. That the Honourable court may grant costs of this application.
3. That the Honourable court grant any other order it deems fit.

The Respondent contested this application by filing a counter affidavit sworn and deposed by Mr. Charles Mugilaon 21st day of September 2023. The Applicant has as well filed a reply to the said counter affidavit.

In terms of representations, the Applicant was represented by Mr. Julius Manjeka, learned Advocate who also argued the application while the Respondent enjoyed the legal service of Mr. Mbagati Nyarigo, learned Advocate.

In his submission, Mr. Manjeka adopted the contents of the affidavits filed by the Applicant in support of the prayers sought in the application as forming part of his submission. He submitted that, the Applicant is urging this court to be pleased to set aside its default judgement entered on the 04th day of August 2023, the ground being that the Applicant was unaware of the existence of the suit until when she got informed by one Mr. Frank Jumbe, who is an advocate of this court. He attached the WhatsApp conversation between the said advocate and the Applicant to that effect.

Mr. Manjeka submitted further that, the reason for the applicant's absenteeism was also contributed by the fact that, although the service was made by way of substituted services through newspapers, still the Applicant was not aware of the suit.

As regards the lack of an affidavit by Advocate Jumbe to support what had been asserted, Mr. Manjela contended that the Applicant and advocate Jumbe had

misunderstanding, hence the failure to have the Mr. Jumbe's affidavit.

He attached the aforesaid WhatsApp communications exchange messages which he attached to this as annexure to the affidavit filed by the Applicant. He also contended that, the phone number in the loan application form was not the same number which the court process server used when seeking to reach out to the Applicant. He told this court that, the number on the loan application form was 0715860199 while the number used by the court process server was 0653534050 and, this a fact which finds support from the affidavit of the court process server, hence the failure to reach out to the Applicant.

Mr. Manjeka submitted as well that, the Respondent was also negligent in reaching out to the Applicant because, even though the Applicant is a well-known person having been a former Member of Parliament, the Applicant was not properly served or made aware of the suit.

He therefore urged this court to allow this application and set aside the default judgment in Commercial case No. 36 of 2023, thereby affording the Applicant her right to defend the suit. He also prayed for the costs of this application.

Responding to the Applicant counsel's submissions, Mr. Nyarigo, the learned counsel for the Respondent submitted that, the Applicant has failed to demonstrate sufficient reasons to warrant this court to exercise her discretion to set aside a default judgment. He contended that, as the regard the submission that the phone number used was not the one indicated in the application form, the said number on the form was the Applicant's spouse's number.

According to Mr. Nyagiro, they failed to disclose that phone number, because the Respondent as a banking institutional has a duty confidentiality towards her customers, it would not have been possible to use the number without the client's consent. He argued, therefore, that, the Applicant's allegation that the Respondent was supposed to

reach out the Applicant through No. 0715860199 was not tenable.

Mr. Nyarigo submitted further that, the phone No. 0653534050 was the one which the relationship officer of the Respondent used to communicate with the Applicant at all material times and, hence, the Applicant has failed to prove that the same was not reachable.

As regard the issue of misunderstanding between Mr. Jumbe and the Applicant, it was Mr.Nyarigo's submission that, such assertion was a mere submission from the bar as there was not any affidavit proving what was stated. To support his submission, he cited the case of **NBC Ltd vs.Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002, which has been quoted in the case of **Benny JosephatyMdesa and another vs. NMB Bank PLC and 3 others**, Misc. Land Application No. 19 of 2022 (all unreported cases).

Mr. Nyarigo submitted that, in line with those authorities, where an affidavit mentions another person in it,

unless that other person also files an affidavit, what is averred remains to be a mere hearsay. Finally, Mr. Nyarigo submitted that, it was only after the Respondent had advertised the Decree in a widely circulating newspaper that the Applicant contacted by allegedly advocate Elisante Frank Jumbe. He urged this court to dismiss this application with costs as it is devoid of merits.

I have carefully gone through the rival submissions by the parties as well as the affidavits in support file by the parties herein. The question I am called upon to determine is whether the Applicant has demonstrated sufficient reasons warranting this court to exercise its powers to set aside its default judgment.

Rule 23 (2)(b) of the High Court (Commercial Division) procedure Rules, GN No. 250 of 2012 which is the rule upon which this application was predicated provides that:

(2) in considering whether to set aside or vary the judgment under this rule, the Court shall consider whether the aggrieved party has:

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

In his submission, the learned advocate for the Applicant has submitted that, the reasons why the Applicant is seeking to set aside the default judgment issued by this court, was that the Plaintiff was not duly served to her until the 7th day of August 2023 when one, Mr. Elisant Frank Jumbe, an advocate of this court, informed the Applicant about the existence of the suit.

He attached, as evidence to that fact, WhatsApp communication messages between the Applicant and the said Mr. Jume. It has as well be the argument of Mr. Manjeka that, even though the Applicant was a well-known former Member of Parliament, the Respondent negligently failed to reach out the Applicant.

With due respect, I do not find any merit in the Applicant's submission. I hold it to be so because, as it was stated by the Applicant herself, service of this suit was done by way of publication on the widely circulated newspapers, a fact which, suffices to prove that the Applicant was made

aware of the suit. For that reason, I do agree with the Respondent's submission that, the reason advanced by the Applicant is untenable.

I am therefore not satisfied that the Applicant has demonstrated sufficient reason to warrant this court to take steps and grant the prayers sought by the Applicant. In the upshot, this Court hereby declines to grant the prayers sought and settle for the following orders:

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

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 20TH DAY OF
NOVEMBER 2023



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DEO JOHN NANGELA
JUDGE