IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

MISC COMMERCIAL APPLICATION N0.145 OF 2023

(*Arising from the default judgement in Commercial Case No.118 of 2022*)

REGIONAL LOGISTICS LIMITED.....1ST APPLICANT

CATHERINE KETTIE MHANGO.....2ND APPLICANT

PETRO ODONGO KITIWA.....3RD APPLICANT

VERSUS

EQUITY BANK(TANZANIA) LIMITED ..... RESPONDENT

RULING

Date of Last Order: 27.09.2023
Date of Judgement: 24.11. 2023

AGATHO, J.:

Under certificate of urgency, the applicants are moving this court for an order to set aside its default judgement and decree dated 1st September,2023 issued in Commercial Case No.118 of 2022 before his lordship Mbagwa, J and restore the suit for hearing inter parties. The application is brought by way of chamber summons under the provisions

of Rule 23 of the High Court (Commercial Division) Procedure Rules,2012 and any other enabling provisions of the law, seeking for following orders:

1. That this honourable court be pleased to issue an order to set aside the default judgement of 01/09/2023.
2. That this Honourable Court be pleased to make any other order that may appear to be just and convenient in the circumstances.

The chamber summons was taken at the instance of Mr. George Anosisye Timoth, learned advocate for the applicant and is supported by an affidavit deposed by Mr. George Anosisye Timoth learned advocatee, stating the reasons why this application should be granted. Upon being served with the application, the respondent filed a counter affidavit deposed by Ms. Dorothea Rutta, principal officer of the respondent stating the reasons why this application should not be granted.

The brief background of the application is that the respondent instituted commercial Case No 118 of 2022 against the applicants and in the circumstances the applicants were served with summons and plaint to file their written statement of defence within 21 days. Efforts by respondent to serve the applicants by normal means were in vain and the court ordered service by substituted mode. Following that order the respondent on 17th April,2023 served the applicants through Nipashe newspaper. Facts go

further that upon proof of service, on 1st September ,2023 this honourable court delivered the default judgement in commercial case No.118 of 2022 and the same ordered the respondent to advertise the copy of default judgement on local newspaper. The said default judgement and decree on 13th September,2023, were advertised in the Citizen newspaper. Against this background the applicants preferred this application for an order to set aside the default judgement, hence, this ruling.

Before I venture unto the application, it suffices to mention that the applicants were represented by Mr. George Anosisye Timoth learned advocate, while the respondent enjoyed the services of Mr Florian Frances, learned advocate. It was by consensus that the application be disposed by way of written submissions. The schedule was drawn, and appreciatively the parties filed their submissions timely.

Submitting in support of the application, Mr. Anosisye Timoth prayed to adopt the contents of his affidavit to form part of his submissions. The learned counsel for applicant told that the court the provision under which the instant application is pegged and admitted is for an order to set default judgement under Rule 23 of the High Court Commercial Division Procedure Rules. The rules requires the applicant to make an application within 21 days and give sufficient reasons for failure to file defence with prescribed time.

Expounding on the first conditions the learned counsel for respondent told the court that the applicants have complied with the first conditions by failing the instant application within 8 days from the date of default judgement. The applicants counsel submitted that the default judgement was delivered on 1st September,2023 and on 13th September, 2023 the applicants filed the instant application.

Submitting on the second condition, the learned counsel for applicant had it that the applicants failed to file their written statement of defence within prescribed time because they were not aware of Commercial case No 118 of 2022. Mr. Anosisye Timoth told the court that the 1st applicant's directors are now residents of South Africa since 2019. He reasoned that since the summons was published in Nipashe newspaper whose circulation is within the boundaries of the United Republic of Tanzania then it is impossible for 2nd and 3rd applicants to have come across with the publication because they are in South Africa. He added that even the service by way of substituted service could not serve the purpose because the plaint itself was not published. According to Mr. Anosisye Timoth the impugned default judgement was obtained illegally with fraud because no efforts were made by the court process server to locate the 1st applicant through emails or post office or phone numbers which could be used to access the 1st

applicant and directors. It is on the totality of the above reasons, the learned counsel for the applicants invited this court to grant the prayers as contained in the chamber summons so as to pave way for the interest of justice to be done.

In rebuttal, Mr Florian Frances, learned advocate for the respondent strongly opposed the application and prayed that the contents of the counter affidavit sworn by Ms. Dorothea Rutta be adopted as part of his submissions. It was Mr Frances' submission that apart from the two conditions depicted under Rule 23 of the HCCD Rules, the applicants are required also to show that they have arguable defence which requires trial. His reliance was placed on the case of **Hashi Energy (T) Limited v Khamis Maganga Civil Appeal No 18 of 2016,** in which the court stated 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 merits may justify the High court to exercise its discretion to set aside default judgement even if the other factors are unsatisfied in the whole or in part.

According to Mr Frances the applicants have failed to establish or to show that they have arguable defence. He added that one of the reasons for

failure to file written statement of defence by the applicants is that they were not aware of the pendency of Commercial Case No 118 of 2022 because summons served by substituted service in Nipashe newspaper dated 17th April, 2023 did not publish the plaint. According to Mr Frances this argument is misconceived because service of summons by substituted service does not require publication of the plaint as applicants suggests. What the law require is service of summons.

Replying on the allegation of illegality, the learned counsel for the respondent contended that this argument is misconceived because the order of service by substituted mode is issued after *prima facie* proof that a party is avoiding the summons or service by ordinary means has proved futile. He reasoned that the argument that the court process server has not given any fact of effort made to locate the applicants is just a mare excuse with no merit. To cement his argument he relied further in the case of **Hashi Energy (T) Limited (supra)** in which the court held that where the issue of illegality is raised, the court must be satisfied that such a claimed illegality really exists and it is apparent on impugned default judgement. Regard the above authority the learned counsel for respondent concluded that the illegality does not exist, and it is not apparent because the default judgement was obtained in accordance with the law.

Reacting on the allegation on the unawareness of the pendency of the commercial case No 118 of 2022 the learned counsel for respondent told the court that the statement has some contradictions because the learned counsel for applicant told the court that they were unaware of the summons because the applicants are residing in South Africa but later on the 1st director (2nd applicant) came across it in the Citizen Newspaper which is a local newspaper similar to Nipashe. In the views of Mr Frances the applicants have failed to provide an explanation as to how they suddenly get access to local newspaper while they are residing in South Affrica. He added that the applicant's affidavit shows that it's only the 3rd applicant who was outside the country. But this court is yet to be told whereabouts of the 2nd applicant.

As per Mr Frances, there is nothing on record to fault the default judgement which was entered after complying with the law. The learned counsel for applicant concluded his submission by beseeching the court to dismiss the application with costs for want of fulfilment of the conditions established by the law.

It clear on record that neither rejoinder was filed nor explanation was advanced as to why it was not filed, and this marked the end of hearing of the application. Having considered the affidavits and parties' submissions for and against the application, with due respect to the applicants, their

application is bound to fail. I am taking that stance because for an applicant to be granted an order to set aside the default judgement and decree s/he must adduce sufficient cause for failure to file written statement of defence within the prescribed time. One of the reasons raised by the applicants is that there was no proper service of the summons to file written statement of defence because the 1st applicant and its directors were not aware of the pendency of Commercial Case No 118 of 2022 as the 2nd and 3rd applicants (directors) are now residing in South Africa. With due respect to the learned counsel for applicants this argument is misleading because the applicants are not telling the court how they come to know the existence of default judgement and decree published in the Citizen newspaper which is a local newspaper like Nipashe newspaper. The court is asking itself if service by publication in Nipashe could not be read by the applicants because it cannot be circulated outside the boundaries of Tanzania how come the applicants came across with the Citizen newspaper? These questions were not answered by the applicants. The admission by the applicants under paragraph 8 of the affidavit that the applicants became aware with the default judgement and decree after coming across with the Citizen newspaper on 13th September,2023 is nothing other than admission that the applicant was served with the summons to file written statement of defence, but they opted not to file one.

In addition to that it is not disputed that the 1st applicant is a legal entity and being a legal entity, it operates under a management and officers. It is beyond imagination that not a single officer of the 1st applicant came across the impugned publication of summons. And the argument that the court process server has not shown or given the fact that the 1st applicant's office was locked, and the directors were not present is tantamount to admission that some of the directors were present in Tanzania and the 1st applicant was operating her daily business.

The averment under paragraph 7 of the affidavit that the 1st applicant failed to file her defence because the 2nd and 3rd applicants are currently residing in South Africa and the operation of the 1st applicant are now centred in southern region, in my view these explanations are inconsistent, illogical and misleading. Along that the argument that the court process server has not given any fact on efforts made to reach there or to locate the 1st applicant was raised out of ignorance and a lame excuse because 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, we have service by publication in the newspapers. And the order for substituted services by publication is granted only when the court is satisfied that a party is avoiding the summons or

service by ordinary means has proved futile. See the case of **Hashi Energy (T) Limited** (supra).

More so, the applicants have not brought to court any arguable defence. It is the law that apart from two conditions set under Rule 23 of the Commercial Court Procedure Rules, the applicant has to show that there is arguable defence by attaching his written statement of defence but for reasons known best to the applicants they did not bother to attach their defence so that this court could ascertain if there is arguable defence that is worth to be entertained at trial. In absence of the written statement of defence this court cannot assume that there is arguable defence. That said and done this application is hereby dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th Day of November 2023.

U. J. AGATHO

JUDGE

24/11/2023

Date: 24/11/2023

Coram: Hon. U.J. Agatho J.

For Applicants: Charles Ndaki, Advocate, h/b of George Timoth, Advocate.

For Respondent: Mahmoud Mwangia, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today, this 24th November 2023 in the presence of Charles Ndaki, Advocate, h/b of George Timoth, Advocate, counsel for the Applicant, Mahmoud Mwangia, Advocate for the Respondent.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

U. J. AGATHO

JUDGE

24/11/2023