

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 119 OF 2023**

JASSIE AND COMPANY LIMITED.....APPLICANT

VERSUS

GULF AGGREGATES (T) LIMITED RESPONDENT

RULING

Date of last order: 05/10/2023

Date of Ruling: 07/12/2023

NANGELA, J.:

The Applicant has approached this court by way of a chamber application premised on Order IX Rule 9 and Section 95 of the Civil Procedure Code, Cap.33 R.E 2019. It was supported by an affidavit of Kulwa Samson Ndulilwa. In this application, the Applicant seeks for orders:

1. That, this Honourable Court be pleased to set aside the ex-parte judgement dated 06th July 2023 in Commercial Case No.79 of 2022 which proceeded by way of ex-parte proof against the Applicant.

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2. Costs of this Application be provided for.
3. Any other relief(s) this Honourable Court may deem fit and just to grant.

On the 05th of October 2023, a day when this matter was fixed for hearing, Mr. Ondijo Sylvanus, a learned advocate, appeared before this court holding brief for Mr. Leonard Joseph, a learned advocate representing the Applicant. The Respondent enjoyed the services of Mr. Odhiambo Kobas, a learned advocate as well.

Mr. Ondijo informed the court that his colleague Mr. Leonerd who had the conduct of the matter from the beginning could not make it to the court. He prayed for another date of hearing. Mr. Kobas was opposed to prayer preferring that the parties should be ordered to proceed with the hearing of this matter by way of written submissions.

This court granted the prayer, and the parties were given a schedule of filing their respective submissions. They duly filed their submissions and, hence, this ruling.

Submitting in support of the application, Mr. Ondijo's reason for the application was that the Applicant was

uninformed about the date when the *ex-parte* judgement was delivered. He argued that it was in the best interest of the Applicant to have been notified even if the judgement was *ex-parte*. He argued that the Applicant became aware of the *ex-parte* judgement after she made a follow-up in the court's registry, a fact which prompted her to file this application.

Mr. Ondijo has placed reliance on the case of **Omary Shabani Nyambu vs. Dodoma Urban Water Supply and Sewerage Authority (DUWASA)**, Civil Appeal No.303 of 2020 (unreported). He also relied on **Mulla, The Code of Civil Procedure**, Prasad B.M (2007) 7th Edition, Vol.2, Lexis-Nexis, on page 581 to support his position. He urged this court to therefore set aside the *ex-parte* judgement contending that it has infringed Orders 1X Rule 9 and XX Rule 1 of the Civil Procedure Code, Cap.33 R.E 2019.

On the 2nd of November 2023, the Respondent's learned counsel filed his reply to the submissions of Mr. Ondijo. In his submission, Mr. Kobas started by adopting the contents of the counter-affidavit filed in opposition to this application. He submitted that the Respondent instituted the suit, Commercial Case No.79 of 2022 in this court, and following the completion

of the final Pre-trial Conference on the 27th of March 2023 in the presence of both parties, the court ordered the parties to file their witness statements as per the applicable rules of this court.

Mr. Kobas submitted that the case was fixed for hearing on the 15th and 16th of May 2023 but when the case was called on for hearing on the material dates neither the Applicant nor her advocate appeared in court. Besides, no witness statement was filed in court as previously ordered by this court before the presence of both parties on the 27th of March 2023.

He submitted that that was the basis for proceeding *ex-parte* under Order 1X rule 8 of the Civil Procedure Code, Cap.33 R.E 2019, and the hearing took place on the 7th of June 2023 in the presence of the Counsel for the Applicant and the Principal Officer of the Respondent (one **Mr. Atubone Wilson**) who appeared on the material date. He submitted that on the same day and in the presence of both parties, the court fixed the date of delivery of its *ex-parte* judgement to be the 06th day of July 2023.

Mr. Kobas submitted that for a court to exercise its discretion and set aside its *ex-parte* judgment under Order IX

rule 9 and section 95 of the Code, the Applicant must adduce sufficient reasons as to why she/he was prevented from appearing when the suit was called for the hearing. He submitted that the Applicant has not advanced any of such convincing and sufficient cause for her non-appearance.

He submitted that what has been stated in the affidavit supporting the application is the reason why the Applicant did not file his witness statements but no reasons as to why she did not appear on the dates set for the hearing of the suit. He submitted that, the Applicant ought to have appeared on the date of the hearing of the suit and that was the day he should have addressed the court as to why she was unable to file the witness statements as earlier ordered by the court.

Mr. Kobas submitted that the Applicant cannot use her non-appearance as a pretext and ground for setting aside the *ex-parte* judgment. Mr. Kobas was of the view, concerning the reason advanced in paragraph 11 of the supporting affidavit to the effect that the Applicant was not informed of the date on which the *ex-parte* judgement was to be delivered, that, the same is baseless.

He submitted that the Applicant was well aware based on the fact that the Applicant's principal officer, one **Mr. Atubone Wilson** was present in court on the 07th of June 2023, the day when the 06th of July 2023 was fixed as the date for the delivery of the *ex-parte* judgment. He submitted that on the material date, i.e., the 07th of June 2023, the parties, in the presence of Mr. Michael Kabakenga, Advocate who appeared for the Plaintiff/Respondent and Mr. Atubone Wilson (the Defendant/ Applicant's Principal Officer "Operations Manager", were duly informed of the date and time of delivery of the *ex-parte* judgment.

From that context, Mr. Kobas argued that the cases relied upon by the Applicant, including the case of **Omary Shabani Nyambu vs. DUWASA** (supra) are distinguishable. He relied on the case of **Jamal S. Mkumba & Abdallah Issa Namangu & 359Others vs. The Attorney-General**, Civil Application No.240/01 of 2019 (unreported) and implored this court to make a finding that the application has no merits. He urged the court to dismiss the application with costs.

Mr. Ondijo was relentless in his pursuit and filed a lengthy rejoinder trying to convince this court to accede to his

position. Apart from reiterating his earlier submission made in chief, he argued that parties must be notified of the date of judgment regardless of whether the matter proceeded *ex-parte* or not.

He rejoined further that the ground he advanced was by itself sufficient to dispose of the application. He placed due reliance on the cases of **National Industries Credit Bank vs. Mutinda** [2003]1 E.A 194, **Songea District Council vs. Elias Khalifa Mgeni**, Misc. Civil Appeal No.1 of 2020 (unreported), and **Joflo Company Limited & 3 Others vs. Bank of Africa Tanzania Ltd.**, Misc. Civil Application No.562 of 2021 (unreported). He submitted that when a judgment is passed in the absence of the Defendant that amounts to a denial of justice.

He shielded his submissions by relying on the cases of **Omary Shaban Nyambu** (*supra*), **Trust Bank vs. Portway Stores (1993) Ltd., & 4Others** [2001] E.A 296, **Kevorkian vs. Burney** [1937] 4All ER 97, **Jedida Alumasa & Others vs. SS Kositany**, Civil Appl. No.337 of 1996 (CAK) (unreported), and **Mugo & Others vs. Wanjiru & Another** [1970] E.A 481, 483.

From such extended reliance on the above cited authorities, he urged this court to exercise its discretion and grant the application stating that it would constitute a gross misinterpretation to distinguish between the holding of the Court of Appeal in the case of **Omary Shaban Nyambu** (supra) and the reality and circumstances facing the Applicant in this instant application.

I have carefully gone through the reasoning and rival submissions made by each of the learned counsels for the parties herein. The issue for me is whether the Applicant has adduced before this court sufficient reasons regarding why I should exercise the discretion vested in the court to set aside the *ex-parte* judgment delivered on the 06th of July 2023.

As the chamber summons indicates, this application was made under order IX Rule 9 and section 95 of the Civil Procedure Code, Cap. 33 R.E 2019. Order IX Rule 9 of the Civil Procedure Code provides that:

“In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to

set it aside; and **if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing**, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit..." (Emphasis added).

As the above-cited provision of Order IX Rule 9 of the Code provides, the Applicant seeking to move the court to exercise her discretion must do so to the satisfaction of the court that she/he was prevented by sufficient cause from appearing when the matter was called for hearing. On the other hand, section 95 of the Civil Procedure is about the inherent or residuary powers which this court must grant relief to an aggrieved party. Such powers are and indeed must be sparingly used only when it is necessary to protect the "ends of justice" or the process of the court.

In the context of this application, the Applicant seems to have invoked section 95 of the Civil Procedure because she seeks to prevent an injustice that she feels is perpetrated not just against her interests but against the law itself, hence, the citing of Order IX Rule 9 of the Code. In other words, she seeks to protect the “**ends of justice**”.

This court (Nangela, Kisanya & Mwenegoha, JJJ) had the opportunity to look at the phrase “ends of justice” in the case of **Alexander J. Barunguza vs. The Law School of Tanzania & 20Others**, Misc. Cause No. 11 of 2022 (unreported) and noted that:

"Ends of justice" are solemn words and no mere polite expression in juristic methodology and here secreted in the solemn words is the aspiration that justice is the pursuit and end of all law. But the words "ends of justice" wide as they are do not, however, mean vague and indeterminate notions of justice, but justice according to the statutes and laws of the land..."

Justice in its narrower sense, however, may be viewed as fairness, meaning, as **Nicholas Rescher** puts it in his book titled: ***Distributive Justice***. (Washington, D.C.: University Press of America, Inc., 1982, it is an action that pays due regard to the proper interests, property, and safety of one's fellows. In the context of what was considered earlier it will be understood within the framework of adherence to the dictates of fair play as provided for by the laws and the applicable procedures.

In this application, the Applicant has raised a lamentation that she has been denied justice for not being informed of the date when an *ex-parte* judgment in **Commercial Case No.79 of 2022** was going to be delivered. In other words, she has submitted the pronouncement of the said *ex-parte* judgment was declared behind her back, in shrouded secrecy, in the dark. But is it true?

In his response submission, the learned counsel for the Respondent has submitted that the date of pronouncement and delivery of the judgement which the Applicant is seeking to set aside by invoking Order IX Rule 9 and section 95 of the

CPC to protect the ends of justice was made known to the Applicant well in advance.

I do subscribe to Mr. Kobas's submissions being the same judge who presided over the matter. As correctly stated, the Applicant (Defendant) was in court up to the stage when the court convened for a final pre-trial hearing whereby parties were directed to file their respective witnesses' statements in line with the requirements of the applicable rules of procedures of this court. A hearing date was also fixed and declared to all the parties.

The Respondent (Plaintiff) complied with the order of the court, filed her witnesses' statements, and duly entered an appearance on the 15th of June 2023, the date when the suit was fixed for the commencement of the oral hearing of the witnesses. However, the Applicant (Defendant) never appeared on the material date, and neither did she file her witnesses' statements as per the order of the court earlier issued in the presence of his learned counsel on the 27th of March 2023.

It is also on record that on the 15th of June 2023, the date when the matter was called on for hearing, the Applicant's

advocate was absent in court. The court made an order to proceed with the hearing *ex-parte* and the 07th of June 2023 was fixed as the date when the *ex-parte* hearing was to be held.

On the material date, the Respondent/Plaintiff appeared through her learned counsel Mr. Kabekenga while the Applicant entered appearance in court through Mr. Atubone Wilson, appearing as a Principal Officer (Operations Manager) of the Applicant/Defendant. Since the matter was to proceed *ex-parte* he only observed the proceedings on the 7th of June 2023. The court did fix and declare to the parties and in the presence of the said Mr. Atubone Wilson that the judgement was to be delivered on the 06th of July 2023 at 8:30 am.

From the above context, can it be said, as the Applicant seems to convince this court to believe, that the Applicant was unaware of the date of delivery of the *ex-parte* judgment and, hence, an infringement of Order XX Rule 1 of the Civil Procedure Code, Cap. 33 R.E 2019 has been occasioned?

In his submission, Mr. Ondijo has strenuously attempted to convince this court that the Applicant has a

genuine cause in her pursuit of this application. He has heavily invested in the applicability of the authoritative decision of the Court of Appeal in the case of **Omary Shaban Nyambu** (supra) arguing that to distinguish it from the facts and context of this application will be a gross misinterpretation.

With due respect, I beg to differ and hold that the case is utterly distinguishable from the facts as they stand in this case. In **Omary Shaban Nyambu's case** (supra) the court confirmed that the court delivered its judgement in the absence of both parties who were not given due notice. The Court of Appeal noted that on 11/12/2012 when the parties appeared before Hon. Chinguwile J., (as she then was), the court granted orders for the filing of written submissions and reserved her judgment to a date to be notified. The record, however, did not reveal what transpired afterward save that judgement was shown to have been delivered on 11/10/2013.

It was from that context that the Court of Appeal held and stated as follows:

"There is nothing to show that the notice for the judgment was issued to the parties as it was ordered earlier.

In the case of *Awadhi Iddi Kajass vs. Mayfair Investment Ltd*, Civil Application No.28/17 of 2017 (unreported), while discussing the competence of the judgement that was **delivered in the absence of parties who had no notice of the date of its delivery**, like in the case at hand, the Court cited that there was no operative, valid, and effective judgement delivered **in the absence of the parties who had no notice of the date of its delivery.**"

(Emphasis added).

As it may be readily seen from the above excerpt taken *verbatim* from the judgment of the Court of Appeal in the case of **Omary Shabani Nyambu** (*supra*), the concern of the Court of Appeal was on the fact that the parties had no notice of the date of judgment. In the context of this application, however, the circumstances and facts under which the *ex-parte* hearing of Commercial Case No.79 of 2022 took place were quite different from what transpired in **Omary Nyambu's** case (*supra*).

One, while in the Omary Nyambu's case the parties were never informed of the date of judgement, in the Commercial Case No.79 of 2022, which is the subject matter of this application, the parties (including the Defendant (Applicant herein) whose' Principle Officer/ cum 'Operations Manager (Mr. Atubone Wilson)) were duly made aware on the 07th of June 2023, that, the *ex-parte* judgement of the court was to be delivered on the 06th day of July 2023.

Second, on the 6th day of July 2023, this court pronounced judgement in the presence of the Respondent/Plaintiff and in the absence of the Applicant/Defendant (who was duly aware of the date of delivery of the said *ex-parte* judgment). This is unlike what happened in the Omary Shaban Nyambu's case as both parties were uninformed and none was present when the Court was pronouncing her judgment.

In light of the circumstances of the facts as they appear from the record of Commercial Case No.79 of 2023 and considering this application and the submissions made by the Applicant's counsel and the Respondent's counsel, I find that the arguments raised by the Applicant are baseless. Being

mindful as well of the fact that setting aside an *ex-parte* judgment under Order IX Rule 9 of the Civil Procedure Code, Cap.33 R.E 2019 is an act done in exercise of discretion of this court, and since such discretion must be exercised judiciously, such exercise of discretion cannot be exercised where there are no cogent reasons which demonstrate that the course of justice will be perverted.

Even if the Applicant seeks to be treated fairly, fairness does not mean entertaining laxity, especially of a party who was well informed in advance and given a specified date and time, of an eventuality affecting his/her interest, which eventuality was about to take place, i.e., the delivery of the *ex-parte* judgement. It must be pointed out that the procedural "fairness" or "equity in display" that the Applicant seeks when she invokes the provisions of Order IX Rule 9 and Section 95 of the CPC, is itself a mark of equilibrium of relations and a measure of how parties should be treated. Put differently, it implies a concern with proportionality. Proportionality is about balance, a balance between necessity and equity.

In context, it means that if the Applicant expects to be treated fairly and within the confines of the procedural rules in which he seeks refuge then, he should also understand that he is equally expected, and within the scales of proportionality, to show up with clean hands. Her necessity to see the *ex-parte* judgement set aside must be examined by considering not only his interests and rights but also the rights and interests of the Respondent who took heed and complied with the orders of this court, including the order which notified both parties of the date of delivery of the *ex-parte* judgment.

The above stated position is, in my view the true import and spirit of Order IX rule 9 where it requires a demonstration of sufficient cause. That proposition marks not only the tenets of the law but also justice, which if I may borrow a leaf from the Digest fragment of Ulpian, (see Alan Watson, **The Digest of Justinian**, Vol. 1–4 (University of Pennsylvania, 1998):

“is the constant and perpetual will to
give each, his own... The rules are...to
give each other his due.”

Since all that the court did in Commercial Case No.79 of 2023 and even in this present application was to give to each

party his/her dues within the required scales of justice and fairness and, given that the Applicant has not disclosed sufficient grounds to warrant the court exercise its discretion and set aside its *ex-parte* judgement delivered on the 06th of July 2023, this application is devoid of merits. In the upshot, this court settles for the following orders:

1. That, the application being devoid of merits is hereby dismissed in its entirety.
2. That, the dismissal of this application is with costs to the Respondent.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 7TH DAY OF DECEMBER
2023



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DEO JOHN NANGELA
JUDGE

Right of Appeal Explained