

**IN THE HIGH COURT OF TANZANIA**

**[DODOMA DISTRICT REGISTRY]**

**AT DODOMA**

**CIVIL APPEAL NO. 14 OF 2019**

*[Arising from a default Judgment issued by the Resident Magistrate Court of Dodoma at Dodoma in Civil Case No. 1 of 2018]*

**BABA DRILLING CO. LTD ..... APPELLANT**

**VERSUS**

**SHARIFF RAJABU ..... RESPONDENT**

**JUDGMENT**

*24<sup>th</sup> June, 2020 & 7<sup>th</sup> September, 2020*

**M.M SIYANI, J.**

For clarity and easy of understanding, I find it prudent to narrate the fact of the case albeit briefly. On 8<sup>th</sup> January, 2018, Shariff Rajabu who is the respondent herein, instituted a civil suit against Baba Drilling Co. Ltd at the Resident Magistrate Court of Dodoma where he claimed to be paid the sum of Tshs 24, 157,650/=, general damages, interest and costs of the suit, for breach of contract. On 4<sup>th</sup> April 2018, the respondent notified the trial court that he has failed to locate the defendant (appellant herein) and so prayed

for fresh summons and an adjournment of the matter. Subject to such prayers, the trial court without specifying which summons the appellant should be issued with, ordered summons to be issued and the matter was adjourned to 11<sup>th</sup> April 2018.

When the matter was recalled on 11<sup>th</sup> April, 2018, counsel Palangyo who held the briefs of Mr. Kusekwa for the respondent still informed the court that they have failed to serve the appellant and they needed more time. Like it was on 4<sup>th</sup> April, 2018, the court adjourned the matter to 2<sup>nd</sup> May, 2018 and ordered summons to be issued. Counsel Malinga appeared for the plaintiff on 2<sup>nd</sup> May 2018. The record shows he notified the court that the defendant was served but refused to receive the same. He argued that since the defendant has not presented his written statements of defense, the plaintiff was entitled to default judgment under Order VIII Rule 14 (1) of the Civil Procedure Code Cap 33 RE 2002.

In its own wisdom, the court adjourned the matter to 16<sup>th</sup> May 2018 and then to 23<sup>rd</sup> May 2018 where Mr. Malinga was represented by Ms Marmo advocate who once again moved the court to enter a default judgment

against the appellant. This time, the trial court was persuaded and as such the default judgment was entered accordingly. The proceedings are silent as to what transpired at the trial court after that decision.

On 17<sup>th</sup> December, 2018 the appellant approached this court for enlargement of time so as to present his appeal against the trial court's default judgment out of time. The instant appeal was therefore filed after securing the sought extension of time. The memorandum of appeal presented contains two grounds as follows:

- 1. That the Honourable trial Magistrate erred in law and facts for holding that the appellant was properly served.*
- 2. That the Honourable trial Magistrate erred in law to enter a default judgment.*

In this appeal, the appellant was represented by counsels from Gunda and Malimi Advocates and the respondent, enjoyed the services of counsel Godfrey S. J Wasonga. By consent, the learned counsels resolved to argue the appeal by way of filing of written submissions. In his brief submission

in support of the appeal, counsel Malimi Juma argued that, despite the fact that the trial court agreed with respondent that summons were served to the appellant who refused to accept the same, the trial court records contains no such evidence on the alleged proof of services. According to counsel Malimi, although the respondent attached a summons in an application for extension of time which tends to suggest that the appellant herein was served with summons on 12<sup>th</sup> April, 2018 but the same does not feature in the proceedings and so not part of the court's record.

It was further submitted in support of the appeal that there was no compliance to the law under Order V Rule 16 of the Civil Procedure Code, Cap 33 RE 2002 in serving the alleged summons to the appellant. The learned counsel contended that an affidavit sworn by Mipango street chairman to prove that indeed summons were served to the appellant, is defective for offending section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 RE 2002 as amended by section 47 of the Written Laws (Misc Amendments) Act No. 2 of 2016 which requires indication of the name, signature and stamp of the commissioner of oath in the jurat of attestation. The case of **Samwel Kimaro Vs Hidaya Didas**, Civil

Application No. 20 of 2020 and **Director of Public Prosecution Vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008, were cited to support the above assertion.

With regard to the second ground of appeal, it was submitted that although the law under Order VII Rule 14 (1) of the Civil Procedure Code Cap 33 RE 2002, allows courts of law to enter a judgment against a person who having been required to present a written statements of defence, fails to do so within the prescribed time, but the appellant herein was neither served with summons to present his written statement of defence under Order VIII Rule 1 (1) nor summons to appear under Order VIII Rule 1 (2) of the Civil Procedure Code.

Replying the above submissions, counsel Godfrey Wasonga started with what ought to have been a list of preliminary points of objections by contending that the instant appeal lacks clarity on which matter is appealed against hence contravened order XXXIX Rule (1) of the Civil Procedure Code. The learned counsel also faulted the appellant for moving the court to allow the appeal without first praying to nullify the proceedings and set

aside the decision appealed against; for being signed by an advocate who neither endorsed the name nor indicate his enrolment number and for attaching a ruling which enlarged time for filing the instant appeal instead of the decree appealed for.

On the merits of the appeal, it was argued that the appellant was served and the trial court was satisfied beyond doubt that the service was duly effected and that proof of service of summons is a procedural issue for which no appeal can lie to this court. With regard to the alleged defects in the Chairperson's affidavit, counsel Wasonga argued that such an issue was not among the raised ground of appeal and therefore the same was entertained prior to obtaining leave of the court. Counsel Wasonga also believed that the question of defectiveness of the affidavit cannot be dealt with by an appellate court.

On the second ground of appeal, counsel Wasonga submitted that the only remedy available once the court is satisfied that summons were served to the defendant under Order VIII Rule 1 of the Civil Procedure Code is to enter a default judgment. In view of the learned counsel, having been

served with the summons, the appellant refused to sign the same and the court was satisfied that indeed the appellant was served but failed to file his defence. There was no any other remedy available according to counsel Wasonga rather than pronouncing a default judgment as it was done by the trial court in this matter.

I have carefully considered the rival submissions by the learned counsels and I wish to be brief in my response. As indicated above, counsel Wasonga raised through his reply submissions what I found to be points of preliminary objections. The practise that this court has always adopted, is to entertain issues of law raised before resorting to the merits of the matter. However, that practice requires parties to raise such issues at an early stage unless it's the question of jurisdiction of the court which can be raised anytime. That notwithstanding, it's the duty of the court to determine issues placed before it. I have considered all the preliminary issues raised by counsel Wasonga. In my view, the same are basically technical issues which does not go in line with the overriding objective of facilitating just, expeditious, proportionate and affordable resolution of civil disputes for which both, parties and their advocates are tasked with a duty

to assist the court to effect the overriding objective above. As such and for the reason that will be known shortly, I will not respond to them.

In my considered opinion, in order to determine the raised grounds of appeal, the questions whether the appellant was served with either summons to appear or present his written statement of defense and whether the trial court was justified in entering a default judgment in the circumstance of this matter, becomes crucial. Apparently, the matter which is a subject of this appeal is a civil suit which was instituted by the respondent at the Resident Magistrate's Court Dodoma. The law governing procedure for civil suits in that court, is the Civil Procedure Code (supra). In terms of Order VIII Rule 1 (1) and (2) of the Civil Procedure Code, the defendant can only present his written statement of defense once he has been served either with summons to appear or summons to file the said written statement of defense. For reference purposes I have reproduced the contents of Order VIII Rule 1 (1) and (2) and Rule 14 of the Civil Procedure Code as hereunder:

***Order VIII Rule 1: Written statement of defence:***



*(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.*

*(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence.*

*[Underlined emphasis supplied]*

**Order VIII Rule (14)** *Failure to present written statement of defense:*

*(1) Where any party has been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of this order and fails to present the same within the time fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.*

*(2) In any case in which a defendant who is required under sub rule (2) of rule 1 to present his written statement of defense fails to do so within the period specified in the summons or, where such period has been extended in accordance with the*

*proviso to that sub rule, within the period of such extension, the court may:*

*(a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons, enter judgment in favour of the plaintiff without requiring him to prove his claim;*

*(b) in any other case, fix a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.*

*[Underlined Emphasis supplied]*

As said above, it's only when the defendant has been served with either summons to appear or present his written statement of defense that he can present the same. As correctly argued by counsel Malimi, the records of the trial court are silent as to which summons the appellant herein was served with. Counsel Wasonga did not also say which summons was served to the appellant. Filing of a written statement of defense is a court order. In absence of a summons in the trial court's record which shows that the appellant was served with either summons to appear or file his defense, it cannot be taken for granted that he was actually informed of the institution of the case. During the hearing of an application for extension of time in

this court, the respondent produced summons which was indorsed by a chairperson of 'Chuo cha Mipango' street that the appellant refused service. The same as correctly argued by counsel Wasonga is not part of neither the suit nor this appeal. But even if the said summons is taken for granted to have been served to the appellant, such summons would fall short of the requirement of law under Order VIII Rule 1 (1) and (2) above because the said summon was neither summons to appear nor to present written statements of defense. It was rather a mere notice of hearing of the suit.

In the fine, since going by the records, there is no proof that the appellant was served with summons, it was improper for the trial court to invoke its powers under Order VIII Rule 14 (1) of the Civil Procedure Code (supra) because for that provision to apply, a party against whom a default judgment is entered, must have been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of the same code. Indeed in terms of Order VIII Rule 14 (2) (a) a default judgment can only be entered where a claim is for a liquidated sum not exceeding one thousand shillings. In this case the respondent's claim was more than Tshs 24,157,650/=. In any way a default judgment could not have been entered

for such a claim. All what the court ought to have done upon satisfying itself that summons to present written statement of defense has been served, was to resort to Order VIII Rule 14 (2) (b) of the Civil Procedure Code by fixing a day for ex parte proof and therefore pronounce judgment in favour of the plaintiff upon such proof of his claim.

For the reason above, I find merits in all two grounds of appeal which is now allowed with costs. The proceedings of the Resident Magistrate's Court Dodoma in Civil case No. 1 of 2018 and its impugned default judgment are accordingly quashed and set aside. It is further ordered that appellant be given time to present his defense and thereafter the suit be heard afresh in accordance with the law by another magistrate with competent jurisdiction. Order accordingly.

**DATED at DODOMA** this day of 7<sup>th</sup> day of September, 2020



**M.M. SIYANI**  
**JUDGE**