

TANZANIA / JUDGMENT

maureen george mboww jililwa another vs twiga bancorp ltd 5 others 2021 tzhclandd 6867 13 december 2021

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13 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 27 OF 2018 MAUREEN GEORGE MBOWE JILIWA..... 1st
PLAINTIFF MAUREEN GEORGE MBOWE (as guardian of BARICK BECKAM JILIWA and BARACK
GEORGE JILIWA).....2nd PLAINTIFF VERSUS TWIGA BANCORP LTD.....
1st DEFENDANT SAID MUSA MSWAKI..... 2nd DEFENDANT NONDO
KALOMBOLAt/a N.J PETROLEUM S.P.R.L.....
3rdDEFENDANT AMAN ETCHA..... 4thDEFENDANT
A.K. MAMBA t/a MAMBA AUCTION MART CO. LTD.....
5thDEFENDANT SUDI KHASIM SUDI..... 6thDEFENDANT

RULING

Date of Last Order: 02.11.2021 Date of Ruling: 13.12.2021 OPIYO, J. On 2nd of November, 2021, this case was scheduled for hearing of the Preliminary objections, advanced by the 6th defendant, one Sudi Khasim Sudi. However, the counsel for the Plaintiff, Mr. Kephass Mayenje before i the starting of the hearing of the said preliminary prayed for the order to serve the second defendant. His reason was that, since the case was stayed for a long time pending the determination of the Revision before the Court of Appeal. His prayer was met with an objection from Advocates Roman Masumbuko for the 3rd and 4th defendants and Mwitasi counsel for the 6th defendant who insisted that, the counsel for the plaintiff did not act diligently as the order to serve the 2nd defendant was issued two or three months before the case was stayed pending the one at the Court of Appeal. When the matter came back from the Court of Appeal, all parties were served with summons and the same was supposed to reach the 2nd defendant too. He insisted that the plaintiff is time barred to serve the 2nd defendant and the court should invoke the provision of Order I rule 2 and 6 of the Civil Procedure Code, Cap 33 R.E 2019. Mr. Mwitasi was of the view further that, the conducts of the plaintiffs' counsel in this case is an abuse of court process. That they were supposed to serve the 2nd defendant as they did to others, in that case this suit should be struck out. Mr. Masumbuko added that the failure to serve second defendant is a delaying tactic by the plaintiff and the application being at the Court of Appeal does not bar the plaintiff from serving the 2nd defendant. In his brief rejoinder, Mr. Mayanje was

of the view that, the order that was referred by Advocates was not made on the date stated. And on that the order was to file a written statement of defense serving the respondent. Since everything in relation to this suit was stayed, they could not serve the 2nd defendant to appear before the court to which the matter 2 was stayed. Since the matter was for the hearing of the preliminary objection, the same cannot proceed in the absence of the 2nd defendant, therefore it will be just if an order for reservice is issued. To resolve the matter at hand, I decided to painstakingly go through the case file from the date when the notice to appear before Hon. Judge, Hon. Mzuna J, was issued on 8th March, 2018. The parties were supposed to appear before the said Judge on 9/3/2018, but the 1st and the 2nd defendant did not appear and the order to serve both was issued. The case came again on the 17th of April 2018, the 2nd defendant was absent, the court ordered the 2nd defendant to be served. The case came again for mention on the 17th of July, the 2nd defendant was absent, same as on 20th August, 2018, 29th November 2018, 3rd December 2018, 28th September 2021, 28th October 2021 and finally on the 2nd November 2021 when the counsel for the plaintiffs made a prayer for re-service to the 2nd defendant. The records are silent as to whether the 2nd defendant was duly served as per the requirement of the law. In their arguments which are well supported by the records at hand, both counsels, Mayenje and Mwitasi mentioned that there were once issued summons to procure the attendance of the 2nd defendant before this court. If the same were duly served to the said defendant remains a doubtful issue. At least, the plaintiff s' advocate would have provided a proof of service or otherwise the proof that the service was done according to Order V rule 13 of the Civil Procedure Code, Cap 33 R.E 2019. That means he was not served. The issue is whether the order of re-service is attainable in the 3 circumstances. In my view, although there is a serious delay in serving the 2nd defendant as noted by the other defendants' counsels, but I believe the chance to do so is still there. This is because this matter was for sometimes stayed pending determination of the matter that was before the court of appeal, this could in a way derail the service channel, because one can not get order or reserve for all that stay period as argued by plaintiff's counsel. It is on the basis of this background, although with hesitation, I allow plaintiff a last chance to serve the defendant for the interest of justice as far as the case at hand is concerned. M.P. OPIYO
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