

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CIVIL APPEAL NO. 56 OF 2019

(Originating from Misc. Civil Application No. 17 of 2019, Original Civil Case No. 248 of 2016 in the Resident Magistrate's Court of Geita at Geita)

SOLWA MAFURU APPELLANT

VERSUS

TINKA KALEGEA RESPONDENT

JUDGMENT

06 & 14/05/2020

RUMANYIKA, J.:

Appeal is against a ruling and order(s) of 18/11/2019 of Geita Resident Magistrate's Court (the court) which refused Solwa Mafuru (the appellant) with respect to ex parte judgment of 22/08/2017 extension of time within which one to lodge application for setting it aside.

The 3 grounds of appeal revolve around points: **(a)** the court erred in fact and law not holding that the appellant had assigned sufficient reasons for extension of time **(b)** That the court erred in law and fact not holding that there was no proof of service hence the premature ex parte judgment **(c)** that the court erred in law and fact not holding that its

failure to notify the appellant of the date of delivery of the exparte judgment constituted a sufficient ground for extension of time.

Both parties appeared in person.

When the appeal was called on 06/05/2020 for hearing, following the global outbreak of coronavirus pandemic, and pursuant to my order of 25/03/2020, the parties were, by way of Audio Teleconferencing heard through their Mobile numbers (0748317916 and 0765972089) respectively.

The appellant only submitted that he had nothing to add to his memorandum of appeal. The respondent also took the same course as he had nothing additional to his reply to the memorandum of appeal.

Its genesis is traced way back on 05/10/2016 when Tinka Kalegeya (the respondent) sued the appellant claiming shs. 5,000,000/= being general damages for a tort of defamation but according to records when their case was called on 26/10/2016 it appears for initial necessary court orders the applicant entered no appearance. Several and repeated attempts to serve him were made all in vain until on 03/05/2017 when according to records the court was satisfied by a reported proof of service and ordered exparte proof hence the exparte judgment.

The central issue, and it is settled law is whether the appellant had good and sufficient ground for extension of time within which to apply for setting aside the exparte judgment.

With regard to the ex parte judgment and the appellant's complaint of no proof of service, the court's proceedings of 03/05/2017 cut the long story short. It reads:-

"Date: 03/05/2017

Coram: U.S. Swalo, SRM

Plaintiff: Present

Defendant: Absent

C/Clerk: Sosthenesy

Plaintiff: This case is for hearing. The Defendant was served but he has not attended today I pray to proceed with the hearing in his absence.

COURT: The defendant was served by the process server. He has neither filed his written statement of defence nor has he appeared to defend himself. This case will therefore proceed in his absence. The plaintiff should prove his case.

Sgnd:

03/05/2017"

I had ample time and from the court record I saw the Kagu local village chair's declaration of 04/11/2016 that upon service, with insults the appellant refused summons. Leave alone the process server's endorsement

and again that of the chair dated 03/02/2017. I have no ground upon which to ignore the records. This reminds me of the long settled legal principle that records of a court of law are serious documents which can't be casually impeached because the records reflect what actually had transpired in court. Grounds (a) and (b) of the appeal are dismissed much as appellant did not, in his affidavit in any way fault the process server and the local chair.

The appellant may have not been notified of the date on which the ex parte judgment was going to be delivered so much so that if need be one takes some necessary steps yes, but now that there was proof of service but he refused it on 03/02/2017 latest, the appellant had reasons to know the date but for the risks that he chose to take. The appellant knew it all and he foresaw all this happening but for his arrogance. Unless aggrieved party legally challenged it, no court order was issued for cosmetic purposes the orders need to be complied with. Ground (c) of appeal is dismissed.

Now that the issue of no proof of service was not there, if wished and he had good reasons, at least on the common ground say the respondent did not prove his claims on the balance of probabilities, the appellant should have appealed against the impugned ex parte judgment. Otherwise taking the steps say two years and at execution stage the subsequent appellant's steps were but after thought.

Decision of the court is upheld. The devoid of merits appeal is dismissed with costs. It is ordered accordingly.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

11/05/2020

It is delivered under my hand and seal of the court in chambers this 14/05/2020 in absence of the parties with notice (copies to be supplied immediately).



S. M. RUMANYIKA

JUDGE

14/05/2020