

19830127 TZHC Arusha

DECIDED
27 January 1983

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JUDGMENT

The appellant was the respondent in a petition for judicial separation. All her pleadings in the case were filed before the hearing date was fixed. "On the hearing date the petition was filed in the negative. The appellant/respondent in the petition had refused to accept service of the notice of hearing. She also procured a judgment in her favor. It was the same effect. C' the basic principle, the court ordered, that the case proceed ex parte. The appellant filed an application to set aside the judgment immediately he applied. The application was dismissed, hence the order. The record shows that the trial court ordered that the hearing should be on the respondent/appellant by the petitioners. The order was issued by the court. The procedure is civil. The proceedings and witnesses to a case are as follows: 'providing in order 16 of the Rules of Order 6 provides: 'Every summons under this order shall

- . - ; l • -. be served as nearly_ as; ma':f..b~ in. the. . \ t . ' ~ ~ :: ~ .. ~ .
- manner, .as a summons to a d~fendant and. ' _ - ; .. ~. . . , . . . \ . } . ' "the t;:'\le_--
in,,o'fd~f v_ as to· pro~f of i. • , ' ~ _ rJ~3-.,..... . . serviq~ sqallj apply in the· case of .all .-.. :
~·~ ; ... r.;,,~ . . . summonses,,_served under this~ ruleo II .. "l. . . (;>. . . • . . Orqer V Rule
31 __prqvides; ,. ~. ~ - ~· ~;J: "Service by..- the p'iairi~if..f or his age~t.:may be

- •• 1 -t-rF)c., .. - . . • l.. -'deemed .to have ·been· duly served if an affidavit is filed by the person who effected the service ,~./2· (a) that he.,,00000 2 . . { a) that he. personally served ~htt summons on . • .l :.~ , the defendant; and· . ; , _ :.(J:.) :. that the ·cte'fendant wa\$· personally known to him o.twas identified tohim by a·person , I .
- named in the affidavit; and_
- (c) exhibiting the summons or copy thereof '' endorsed by the defendant with an acknowledgement of s·ervice or giving reasons why no such endorsement could be obtained." It is further-provided in order-l6 Rule 10 (1) that: "Where a person to whom: a summons· has been issued either to attend to give evidence or t6~#roduce a document fails to attend or to produc~ the document in compliance with such;:. summons, the . court shall; if the cetificate oif;"the serving .(' ! . . ,~;! !';;-r/""- officer has not been verified by' ~ffidavit, and ,J· . . 'e<::Jnay,'if it has been ·so verified, examine the ;; · · ,Serving officer on· oath; or cause him to be { ' -r examined by anb'ther·cotirt, touching the service or non- . ,J Under Ord~r V Rule 31 1 therefore, no service by a plaintiff is d:3emed to be duly· effected unless an affidavit is filed:by the . • . :. l.:r:;:~·~ , .~.i~ ~ _ : , :~-- · ·~ , :. person who effected the·service. Similary, Under Order 16 RuleO (1) ' · 00 if a person ~o served faais to appear it is mandat.ory for the ' .l \7 "" •, court to cause the serving officer to be examined on oath touching on the service or non-service of the summons if the certificate of :.r . service has not been verified by affidavit. -, .. The record of the trial court· shows . th.at the notice of hearing tendered by the petitioner and endorsed to the 3:'!ffect that ttle -, . defendant/ appellant. had refused- to_ accept service w·as not accompanied by an affidavit of the messenger alleged by the petitioner to have served it on the defendant as required by Order o ~ule 31,nor is then:: anything in the record to show that such personwas examined on oath on the service or non-service of the summons.. That being the case, it could not be said that ·the respondent/appellant; was served with the notice of hearingo ~/3 Th~ tiiai court ••
ooo••• 3 - The trial court thus erred in dismissing the applicant's application to set aside the ex-parte judgment. This appeal 1s accordingly a_llowed. The ex-parte judgment is set aside and it is ordered that the case shou~d proceed in the ~ri_al court according to law. Under section 90 (1) ·o'f the Marriage. Act there shall be no order for I costs. JUDGE 27/1/83 Parties to be notified~ RBM/MJK. . --

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