

TANZANIA / JUDGMENT

endasak village council vs daniel bura

2018 tzhc 2252 13 november 2018

COURT
TZHCDECIDED
13 November 2018

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (ARUSHA DISTRICT REGISTRY)
AT ARUSHA DC CIVIL APPEAL NO.8 OF 2017 (Arising from the decisions of Hanang District
Court in Civil Case No. 2 of 2014 and Miscellaneous Civil Application No.1 of 2016) ENDASAK
VILLAGE COUNCIL..... APPELLANT VERSUS DANIEL
BURA RESPONDENT MAIGE, 3

JUDGEMENT

In this matter, the appellant challenges the correctness of the decision of the District Court of Hanang ("trial court") refusing to set aside its ex parte judgment. The memorandum of appeal contains seven grounds which in essence raise one pertinent issue namely; whether there was sufficient cause for setting aside the ex parte judgment. The appeal was argued by way of written submissions. In his written submissions in rebuttal, the respondent has raised three preliminary legal issues. In the first point, it is contended that; in so far as it was filed 83 days after the date of the ruling, the appeal is time barred. The respondent's contention on this issue is no doubt premised on incorrect understanding of the time limit for pursuing an appeal under the Civil Procedure Code. It is 90 days according to item 1 of part II of the Schedule to the Law of Limitation Act (Cap. 89, R.E. 2002). The preliminary objection is henceforth overruled. There was also a complaint that the document initiating the appeal ought to have been "petition of appeal" and not "memorandum of appeal". Again, the purported point of law is misconceived. This being an appeal under the CPC, the proper initiating instrument is memorandum of appeal. This is in accordance with the express provision of section 75 of the CPC. The third legal point is that the submissions by the appellant has been filed on 10th October 2018 while according to the order of the Court it was supposed to be filed on 9th October 2018. Much as I subscribe to the respondent on this point, for the reason of illegality in the judgment, ruling and proceedings of the trial court as it shall be apparent in due course, I find myself unable to do without invoking my discretion under section 93 of the CPC and condone the late filing of the written submissions. This is in line with the principle in *Principle Secretary. Ministry of Defense and National Service vs. Devran Valambia*, 1992, TLR 185 to the effect that; where the point involved is illegality, the appellate court may extend time for pursuit of the appeal so that the same can be corrected. With the above remarks, it is desirable to consider the appeal. The question which I have to resolve is;

whether the trial magistrate was wrong in holding that sufficient cause for setting aside the ex parte judgment was not established. In the affidavit in support of the application, the applicant claimed that summons was not duly served on the appellant. In his counter affidavit, the respondent claimed that the same was duly served on the chairman of the appellant who in turn filed a written statement of defense. In its written submissions, the appellant contends that the chairman of the village council was not an executive officer capable of receiving a summons for the appellant or representing the appellant in any court proceedings. In his rebuttal submissions, the respondent argues that the defect in service if any would have been raised by way of preliminary objection. In his ruling, the trial magistrate, it seems to me, refused the application for the reason that the appellant was duly served through its chairperson who subsequently appeared in the proceedings and filed written statement of defense. He did not take time to consider whether the service of summons duly complied with the law. The position of law in this aspect is very clear. The burden of proof that summons was duly served on the defendant is on the plaintiff. In terms of order 5 rule 31 of the CPC, service of summons is proved by an affidavit. There is no affidavit to that effect on the record of the trial court. The appellant in this case, is an incorporation. The procedure for effecting service to an incorporation is set out in order 28 rule 2 (a) and (b) of the CPC. It has to be served on the director, secretary or principal officer of the corporation. It was not. On top of that, the appellant being a local government authority established by the Local Government (District Authorities) Act, Cap. 287, order 28 rule 2 (a) and (b) of the CPC has to be read together with section 199 (1) of the Act which requires service of notice to such authorities be addressed to the clerk, the chief executive officer, president, secretary, treasurer or the principal officer. The chairman is not among the persons who is competent to receive such notice. He is not capable of filing a written statement of defense on behalf of the appellant too. The written statement of defense filed at the trial court was executed by a person representing himself as the respondent. His name and title in the appellant's council was not disclosed. The appellant being a juristic person could have not signed into a written statement of defense by itself. Nor could it write a written statement of defense in its own name. Therefore, there is no evidence on the record of the trial court of a written statement of defense being filed by the appellant. In the final result therefore, the appeal is allowed with costs. The ruling of the trial court refusing to set aside the dismissal order is reversed and substituted with an order setting aside the ex parte judgment. Since the person who filed the written statement of defense and represented the appellant at the trial court was not authorized so to do, all the proceedings of the trial court subsequent to the issuance of the initial summons, including the written statement of defense itself, are hereby quashed. The file is hereby remitted to the trial court for retrial before another magistrate. It is so ordered MAIGE JUDGE 13/ 11/2018 Ruling delivered this 13th day of the presence of the respondent in person and in the nt. 01 j 'WMGE o % ' S M a \ JUDGE V 13/ 11/2018

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