

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CIVIL APPEAL NO. 46 OF 2017

(Arising from Civil Appeal No. 14 of 2017 of the District Court of Musoma at Mara)

MSIRU SALUMU APPELLANT

VERSUS

JORAM LASTOM RESPONDENT

JUDGMENT

26/09/2018 & 31/01/2019

RUMANYIKA, J.:

The 2nd appeal is against judgment and decree of 08/05/2017 of the District Court for Musoma at Musoma upholding decision of 03/11/2016 of Kukirango Primary Court (the trial court). Wherein Joram Kastom (the respondent) was, end of the day awarded Shs. 2,889,752/= (the claims) being compensation for various crops in his shamba destroyed by the appellant's heads of cattle.

The 3 grounds of appeal revolve around two (2) points as hereunder:-

1. the 1st appeal court not holding that there was, at the trial court no proof of service on the appellant.
2. claims of Shs. 2,889,752/= were, on the balance of probabilities not proved.

Mr. Mhingo learned counsel appeared for the appellant. The respondent appeared in person.

Mr. Mhingo advocate chose to, and he dropped ground 2 of the appeal. He only submitted that there had been actually no proof of service on the appellant therefore was denied right to be heard.

The respondent just submitted that the appellant was three times duly served but for reasons known to himself defaulted appearance.

Questioned by court for clarification, the respondent submitted that three copies of the returned summons demonstrated that the appellant refused service and the local leader endorsed it as such. That is all.

A brief account of evidence on record (according to the respondent) would show that upon instituting the claims, the appellant was three times duly served but did not appear. That on 20/10/2016 instantly, the trial court ordered exparte proof, heard respondent (the sole prosecution witness), and pronounced judgment as said, on 03/11/2016.

The issue is whether the appellant was duly served. The answer is no.

Looking at the trial court's records, one may see it very clearly that;

- (1) when the case was called on for the 1st time on 18/07/2016, the appellant wasn't in court.
- (2) when matter was called, according to records for necessary orders on 26/07/2016, both parties were not in court. Notices were ordered and probably issued.

- (3) on 09/08/2016, the appellant wasn't in court (perhaps not served).
- (4) on 16/08/2016, the appellant was absent with notice.
- (5) on 24/08/2016, the appellant was absent (no proof of service).
- (6) on 31/08/2016, he wasn't in court. Service was ordered.
- (7) on 15/09/2016, again he wasn't in attendance (23/09/2016 was fixed a hearing date).
- (8) on 03/10/2016, no longer 23/09/2016, he was not in court (but matter didn't take off. As the respondent hadn't with him exhibits).
- (9) on 05/10/2016, both parties were not in court.
- (10) on 20/10/2016, the appellant was not in court. But long at last and, as said, the court ordered exparte proof and instantly heard the respondent.

Indeed twice and thrice I went through the records with a view to assuring myself whether the appellant was even once duly served. If anything, there was two copies of returned summons; one for 05/09/2016 (reportedly away on safari) and the other one for 21/07/2016 (record is silent). He wasn't served literally. It means therefore, it is not clear as for who exactly told the process server that the appellant had been on safari?

Who was the process server? Whether on arrival if at all, he was on safari, and who notified him of the hearing date? It is very unfortunate that the three fundamental questions escaped judicial minds of the two courts below!

The order for ex parte proof and instant hearing was respectfully made but prematurely.

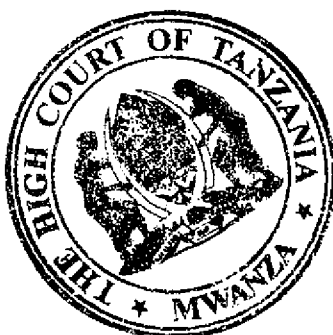
I will increasingly hold that the rationale behind proof of service on parties to case is that no one in courts of law shall be caught by surprise.

Appeal is allowed with costs. Decision and concurrent orders of the two courts below are, for avoidance of doubts quashed and set aside respectively.

Right of appeal explained.


S.M. RUMANYIKA
JUDGE
26/01/2019

Delivered under my hand and seal of the court in chambers this 31st day of January, 2019 in the presence of the appellant in person and in absence of the respondent.




O.H. Kingwele
DEPUTY REGISTRAR
31/01/2019