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CARITAS KIGOMA *v.* KG DEWSI LTD

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COURT OF APPEAL OF TANZANIA AT MWANZA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

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CIVIL APPEAL No. 69 OF 1999

(From the ruling and order of the High Court of Tanzania at Tabora, Masanche, J. dated 17 September 1998 in High Court Civil Case No. 24 of 1997)

F *Civil Practice and Procedure – Ex-parte judgement – Application for extension of time to apply to set aside ex-parte judgment and (b) setting aside – What the Court must consider in the application.*

G The appellant was the defendant in the High Court and did not appear when the suit was called for hearing; and an *ex-parte* judgment was consequently given against it. The appellant then filed an application for two orders: first, for extension of time in which to apply to set aside the *ex-parte* judgment; second, to set aside the *exparte* judgment. Purporting to deal with the application as it related to extension of time, the H judge proceeded to consider whether the applicant had given good reason for its failure to appear on the date of hearing the case. The judge dismissed the application for extension of time, having found that the applicant had no good excuse for his non-appearance. The judge did not deal with the application to set aside the *ex parte* I judgment. The applicant appealed to the Court of Appeal.

Held: (i) While reason for failure to appear on the date of hearing the case is relevant to an application to set aside an *ex-parte* judgment, it is irrelevant to an application for extension of time;

(ii) In an application for extension of time, the question to be considered is whether sufficient cause has been shown by applicant for the delay in applying to set aside the ex-parte judgment.

Appeal allowed

Statutory provision referred to:

(1) Civil Procedure Code Order IX, rule13

Mr Mtaki, for the Appellant

Mr Boaz, for the Respondent

JUDGMENT

(Dated 19 November 2001)

Lubuva, J.A.: In High Court Civil Case Number 290 of 1997, the respondent, KG Dewsi Ltd., a general merchant, import and export undertaking, filed a suit against the appellant, a Christian charity organization based in Kigoma. On 20 March1998, the case came on for mention when it was fixed for hearing on 1 April 1998 and parties were ordered to be served. On 1 April 1998, hearing commenced in the absence of the appellant. Judgment was reserved. On 14 April 1998, in an *ex-parte* judgment, the respondent was awarded payment for TZS. 15 million plus costs and interest at Court rate. Dissatisfied, the appellant sought to have the *ex-parte* judgment set aside. The appellant filed an application for two orders: First, for extension of time in which to apply to set aside the *ex parte* judgment. Second to set aside the *ex parte* judgment. The High Court (Masanche, J.) having dismissed the application for extension of time did not deal with the application to set aside the *ex parte* judgment. This appeal is against that decision.

In this appeal, the appellant was represented by Mr Mtaki, learned counsel, while on the other hand, Mr Boaz, learned counsel, appeared for the respondent. From the grounds of appeal, the essence of Mr Mtaki's criticism against the decision of the learned judge is as follows: That in refusing to extend the time in which to apply to set aside the *ex parte* judgment the learned judge grossly misdirected himself in considering the issue pertaining to the application for setting aside the *ex-parte* judgment when purporting to consider the application for extension of time. That under such a misdirection, the learned judge held that no sufficient cause had been shown for the appellant's failure to appear in Court on 1 April 1998, when the case was called on for hearing. That the learned judge, came to this conclusion because, he was of the view that the appellant was aware of the case. On this premise, Mr Mtaki said the application for extension of time was refused.

With respect, we think there is merit in this submission. A cursory glance through the ruling, reflects the general trend of the learned judge's appreciation of the matter before him. He seems to deal with the application to set aside the *ex parte* judgment instead of the application for extension of time in which to apply to set aside the *ex-parte* judgment a stage which, we think, had not yet been reached. That the learned judge had strayed into dealing with the setting aside of the *ex-parte* judgment is evident from his ruling when among others, he says:

> The applicant's main reason as he puts it, for not coming to Court is that he was not aware of the fact that he had a case in Court. That cannot possibly be true. It cannot possibly be true because the conduct of the applicant after judgment was delivered shows clearly that he knew that he has a case.

This, in our considered opinion, was a misdirection on the part of the learned judge. In considering the application for extension of time, what was relevant and important for consideration was whether *sufficient cause* had been shown by the applicant, the appellant in

this matter, for the delay in applying to set aside the *ex parte* judgment. The reason for failure to appear in Court on the date of hearing the case was pertinent and relevant in considering the application for setting aside the *ex-parte* judgment. Based on such a misdirection we cannot with respect, accept Mr Boaz 's submission that the learned judge's decision was justified on this point. It was, with respect, misconceived.

With regard to the application for extension of time, the only crucial issue is whether sufficient cause for the delay in filing the application for extension of time had been shown. Mr Mtaki strongly contended that had the learned judge properly directed himself in the matter before him, sufficient reason had been shown to warrant granting the application. First, he said when the case was heard *ex parte* on 1 April 1998, the appellant was not aware, he was not served. Second, the appellant became aware of the case on 27 May 1998, when he was informed by telephone that an *ex-parte* judgment had been obtained. The following day, on 28 May 1998, an officer of the appellant boarded a train from Kigoma to Tabora where, he instructed Mr Mtaki on 29 April 1998 to handle the case. On 1 June 1998, the application for extension of time in which to apply to set aside the *ex parte* judgment was filed. While conceding that in the circumstances, the application was filed about 3 days out of time, he ardently urged that, that constituted sufficient cause for the delay.

Responding to this submission, Mr Boaz vehemently argued that no sufficient case had been shown to justify the delay. In his view, from the time the appellant became aware of the case there was sufficient time within which the application to set aside the *ex parte* judgment could be lodged. Referring to the provisions of Order IX, rule 13 of the Civil Procedure Code the time expired on 28 May 1998, while the appellant was made aware of the case on 27 May 1998.

With all respect to Mr Boaz, his submission is not supported by any evidence on record. As deponed by Mr Misigalo, the Executive

Director of CARITAS, and Mr *Boaz* does not challenge this fact, the appellant was made aware of the case on 27 May 1998. In that situation, as urged by Mr Mtaki, we accept that the appellant took the earliest opportunity to take the necessary steps in filing the application. On this, the affidavit of Mr Misigalo loudly speaks for itself. For instance, soon after becoming aware of the case, Mr Misigigalo left Kigoma on 28 May 1998 for Tabora where, on 29 May 1998, Mr Mtaki was instructed to handle the case. It is also not disputed that Mr Mtaki after applying for and obtaining copy of proceedings and judgment, duly filed the application for Extension of Time on 1 June 1998. This, as correctly conceded by Mr Boaz, was a delay of about 3 days after the expiry of the six weeks limitation period provided under Order IX, rule 13 of the Civil Procedure Code 1966 for setting aside an *ex-parte* judgment. In the circumstance, having regard first, to the fact that the appellant was not aware of the case, and secondly, the diligent effort made by the appellant soon after he became aware of the case to file the application, we are satisfied that sufficient cause for the delay had been shown. We think, with respect, that had the learned judge properly directed himself to this aspect, he would more likely than not have held that sufficient cause for the delay had been shown.

In the event, and for the foregoing reasons, we allow the appeal and set aside the order of the High Court of 17 September 1998. In consequence thereof, the appellant's application for extension of time in which to apply to set aside the *ex-parte* judgment is granted. The matter is remitted to the High Court with direction to hear the application for setting aside the *ex-parte* judgment by another judge.

The appellant is granted costs in this appeal.