AT DAR ES SALAAM.

CIVIL APPEAL NO. 76 OF 1993

MICHAEL LESSAN KWEKA .....APPELLANT

VERSUS

JOHN ELIAFYE .....RESPONDENT.

R U L I N G.

BUBESHI, J.

On 3.8.94 my learned brother Chua,J. dismissed the appeal that had been filed by Michael Lessani Kweka (who was the defendant in the lower court) for non - appearance. Following that action the appellant filed a chamber summons seeking for orders that the applicants appeal be re admitted and of couse costs. The application was set for hearing on 18.5.95 wherein I dismissed the application for want of prosecution. Assisting the parties was Mr. Mbuya learned counsel for the applicant and Mr. Mwakasungula for the respondent. In this instance the respondent sought to have the application dismissed as the applicant was missing though aware of the hearing date.

Mr. Mbuya for the applicant has filed an application for the orders that: the order dismissing the appliction on 18.5.95 be set a side;

that the application for re-admission of the appeal be heard and determined on merits. The reasons for this application are to be found in the affidavit filed by Mr. Evarist Mbuya, learned counsel. Essentially Mr. Mbuya is saying that he was aware of their application in this court but was held up at the lower court until 9.15 am when he had that case adjourned and rushed to this court only to find his application dismissed for non appearance at around 9.20. That the applicant's son was present in court but could not make any representation regarding his failure to appear. Also Mr. Mbuya has stated in para 7 of the affidavit that there is a serious triable issue in the matter of the appeal hence it would be in the interest of justice to hear the application and the appeal on merits. One Dismas Kweka, the son of the applicant has deposed in his affidavit that he appeared in court when the application was called but that his advocate was not then around. Mr. Dismas Kweka however does not say whether he said anything to the court concerning the late arrival of his advocate. He is, on the other hand, of the view tha

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the dismissal of the case will cause a big loss to his father. This loss has not been explained to this court.

The respondent was quick to react. He called upon the court to dismiss the application which in his view had no merit. The respondent felt disturbed by what he called delayed tactics on the part of the applicant and that since the case started, it is running in to the fourth year now. He prayed for this court to dismiss the application as the applicants have not been vigilant enough to pursue their case.

After a careful study of the application, I am, with due respect to learned counsel Mbuya, inclired to disallow the same. I am not convinced that he has been diligent to pursue this case. This is the second time that he has failed to appear in respect of the same case. I am sure counsel Mbuya would agree with me that this court takes precedence over the district court and it would have been prudent on his part to start with this court whilst sending a massage of adjournment to the lower court I must add that when the son of the applicant came into court during the hearing of his father's application, he did not intimate to this court that their lowyer was on his way and therefore ask the court maybe to start with other cases. He stayed mum in the court room, apart from saying that he was listening in on behalf of his father.

I have also considered the contention made by Mr. Mbuya that there is a serious triable issue in the matter of this appeal. In order to discern this issue I had to grant myself the privilodge of looking at the grounds of appeal as presented in the memorandum of appeal. One clear complaint that emerges is that the trial magistrate did not take evidence on the issue of revocation. But a study of the proceoddngs and judgment gives a different picture - the defendant failed to produce their witness despite several adjournments. I cannot at this juncture agree with the applicant then defendant that the issue of revocation was not looked into by the trial magistrate. In my view, he did address his mind to the matter.

In the event the application by the applicant is disallowed with costs.

A.G. Buboshi

For the applicant Mr. Mbuya — A.G. Buboshi

Respondent present in porson — JUDGE

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Mr. Mbuya - My hard I want to appeal against this ruling. I therefore pray for leave - this is under S. 5 (1).

ORDER: - leave granted to appeal to court of Appeal.

A.G. Buboshi

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JUDGE

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