IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 94/96

TANZANIA HABOURS AUTHORITY ..... APPLICANT

Versus

KADER F. MOHAMED ..... RESPONDENT

R U L I N G

IHEMA. J.

Tanzania Habours Authority the applicant filed a Chamber Summons under S.68 (2). Order XXI Rule 24 and Section 95 of the Civil Procedure Code 1966 and any other enebling provisions of the law praying for this court to order stay of execution of the Decree of the Resident Magistrate Court of Dar-es Salaam at Kisutu dated 7th May 1996. The reason for stay of execution is that the applicant be heard on his application for extension of time to file a Notice and Memorendum of Appeal against the judgment of this court dismissing the appeal filed against the decision of the Resident Magistrate Court at Kisutu dated 14/7/95.

This Court (Mackanja J) dismissed the application for stay of execution on 13/4/99 upon the non-appearance of the applicant at 08.45, the day when the matter was set for mention. It may also be in teresting to note that the respondent was also absent on the material day. The applicant contends that the court was not justified to dismiss the application on 13/4/99 the day the application was set for mention and not for hearing and cited the case of the National Bank of Commerce Vs Grace Sengela (1982) TLR 248 in which Bahati J. held that " a suit can only be dismissed on grounds of default of appearance when the case is fixed for hearing and not merely for mention." The respondent through his advocate Mr. Muccadam controverts applicant's contention due to the fact, among others, that the word " mention " does not appear any where in the Civil Procedure Code 1966 and that the real issue is whether the applicant was present in Court when the case was called up.

On the facts of this application I am inclined to grant the prayer to set aside the dismissal order and order that matter proceed to hearing on merit in terms of Order IX Rule 4 of the Civil Procedure Code. It is common ground that on the material day both parties were prevented by sufficient cause not to appear before the Court by 08.45hrs where the Court ordered the dismissal of the application. Furthermore adopting the reasoning of Bahati J. in the case of the National Bank of Commerce Vs

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Grave Sengela (1982) TLR 248 as well as the Court of Appeal (Nyalali C J as he then was) in the case of GEORGE SHAMBWE V ATTORNEY GENERAL AND ANOTHER(1997) TLR 176, I agree that the logical step the Court (Mackanja J) should have taken is to order for a hearing date instead of dismissing the application. At page 180 the Court of Appeal in the case cited above observed,inter alia:

> " The appellant contends that since the case was fixed for mention on that day, Then in law or practice, the case was meant to come up only for orders and the court had no powers to dismiss the petition for non appearance or non prosecution. Counsel for the first and second respondents argue to the contrary to the effect that the court had powers to dismiss the petition on those grounds on the basis that the appellant knew that the case was fixed for continous hearing over a period of time, including 29th October 1966, and on the basis that the appellant decided to cut off communication with the court after his third police message. Furthermore,counsel contend that since the trial court on 24 October 96 adjourned the case for "any issuance of dismissal order" if the appellant failed to appear on 29th October 1996, the only order or orders that could be made when the case come up that day in default of appearance by the appellant, was the dismissal order. We agree with counsel for the first and second respondents that the Court was acting within the scope of its previous order when it dismissed the petition and that it was justified in so doing because the appellant must have been aware of the hearing date but failed to appear." (underline supplied).

In the present case it is apparent the Court did not act within the scope of its previous order of mention when it proceeded to dismiss the application. An order for hearing was the most appropriate order in the circumstances.

In the premise, I sustain the application ... to set aside the dismissal order and order that the application be heard on merit as filed. Costs to abide in the cause.

S.Ihema

JUDGE

19/01/2001