

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. CIVIL APPEAL NUMBER 30 OF 2001  
(From the decision of the District Court  
of Kyela District at Kyela in Misc. Civil  
Application No.2 of 2000)

CHRISTOPHER MWAKALOMBA.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF ELCT  
- KONDE DIOCESE.....RESPONDENT

JUDGMENT

MACKINJA, J.

Having lost in an employment cause the registered trustees of the ELCT - Konde Diocese did not appeal until they ran out of time. And, instead of appealing they applied for extension of time within which to apply for a review of the trial court's judgment and decree for the review itself. Both reliefs were granted. The application for review was founded on the contention that the trial court's decision was delivered per incuriam because the suit was instituted against the wrong party. There was, it was said, a misjoinder of the defendant. In the end the application for review was determined in favour of the applicants, who feature as the respondents in these proceedings.

The appellant was aggrieved by the outcome of the application for review. He has therefore appealed complaining that --

1. the learned magistrate erred in law and in fact to reverse his judgment as he was already functus officio; and
2. that the case being an employment cause the learned magistrate erred in law and in fact in condemning the appellant to pay costs.

After several adjournments the appeal was set down for hearing on 1st August, 2002. On that date the appellant is recorded to have said this:-

"Appellant

I pray to file written submissions within one month from today."

So upon his own request the appellant was directed to do so on or before 31st August, 2002. Mr. Mbise, learned counsel for the respondents, was directed to file his by 30th September, 2002. For reasons not disclosed to the Court the appellant did not file his written submissions at all in compliance with the Court order that was made at his own intimation. Mr. Mbise now argues that the respondent's failure to comply with the Court order should be construed to mean that the appellant has failed to prosecute his appeal and, therefore, that it should be dismissed with costs. He has cited the decision of this Court in Harold Maleko v. Harry Mwasanjala, (DC) Civil Appeal NO. 18 of 1998. After reviewing a number of decisions on the same issue this Court observed in Harold Maleko's case that a Court order with directions that written submissions are part of the hearing of the appeal:

"... and that if a party fails to act within the prescribed time he will be guilty of indiligence in like manner as if he defaulted to appear..."

I am, upon the foregoing authority in total agreement with Mr. Mbise that the omission amounts to failure to prosecute the appeal. In the result the appeal would fail. Mr. Mbise has also prayed for costs. The practice in employment cause, specially

as provided by section 143 of the Employment Ordinance, Cap. 366, is against awarding costs to a successful party save in particular cases where it is legally justified to make such an order. I can find no justification to condemn the appellant to pay the costs of this appeal and the court below.

In the result the appeal is dismissed. There shall be no order as to costs here and in the trial court.

sgd: J.M. MACKANJA

JUDGE

11.10.2002

22/10/2002

Coram: S.A. Lila, DR

For Appellant: Absent

For Respondent: Mr. Mbise Advocate

C/C: S. Kasubiri

Order: Judgment delivered today in the presence of learned Mr. Mbise advocate for the Respondent and in the absence of the appellant.

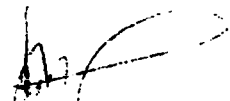
sgd: S.A. Lila

DISTRICT REGISTRAR

22/10/2002

Certified true copy of the original.



  
DISTRICT REGISTRAR

MBEYA