

**IN THE HIGH COURT OF
TANZANIA
(DAR ES SALAAM DISTRICT
REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 90 OF 2004**

**ILALA MUNICIPAL COUNCIL.....APPLICANT
VERSUS
KWEYAMBAH QUAKER.....RESPONDENT**

RULING

SHANGWA, J:

This is an application for leave to appeal out of time. The intended appeal is against the judgment and the garnishee order of the Court of the Resident Magistrate at Kisutu in Civil case No.67 of 2001 in which the applicant **ILALA MUNICIPAL COUNCIL** was the third defendant and the respondent **KWEYAMBAH QUAKER** was the plaintiff. Other defendants in that case were Roberts and Associates and Robert Kashamba who were recorded as the first and second defendants respectively.

I have gathered from the judgment of the lower Court that both the 1st and 2nd defendants had been awarded a tender by the 3rd defendant for renovation of

eight rooms at Ilala Primary School which are used as class and staff rooms. This tender was for Shs.11,416,562/=. This amount had to be paid by instalments. As the 1st and 2nd defendants had no sufficient money to start work, the 2nd defendant secured a loan from the Plaintiff in form of cash and building materials which amounted to Shs.3,000,000/=. He undertook to repay it after being paid by the 3rd defendant. However, he was not able to repay the whole debt to the plaintiff even after the 3rd defendant had paid him together with the 1st defendant some two instalments. The plaintiff then decided to sue them together with the 3rd defendant who is now the applicant for recovery of his money. The learned trial Principal Resident Magistrate Mr. S. Kama who heard the suit entered judgment in his favour and ordered that the plaintiff should be paid by the 3rd defendant the total loan of shs.3,000,000 from the instalment amount which had to be paid to them for renovation works at Ilala Primary School. In so doing, he expressed the following view and I quote:

"In my considered view the plaintiff was

entitled to ask the 3rd defendant to transmit such funds to him and upon the 3rd defendant's refusal to do so to ask for the court's assistance."

In executing this judgment the Senior Resident Magistrate Mr.F.S.K. Mutungi issued a garnishee order requiring the Branch Manager NMB Morogoro Branch to pay to the plaintiffs learned Counsel Taslima Law Chambers the Sum of Shs.11,416,562 from the 3rd defendant's account.

Learned Counsel for the applicant (3rd defendant) intends to submit on appeal once this application for leave to appeal out of time is granted that the trial court erred both in law and fact in ordering the 3rd defendant to pay the plaintiff the sum of Shs.3,000,000/= owed to him by the 1st and 2nd defendants in form of a loan and in issuing a garnishee order to the tune of Shs 11416,562/= in favour of the plaintiff from the 3rd defendant's account which sum was not the sum that

had been decreed and which sum had already been paid by the 3rd defendant to the 2nd defendant for renovation work that had already been done at Ilala Primary School.

In arguing this application, learned Counsel for the applicant submitted that in view of the trial Court's errors, the intended appeal has overwhelming chances of success. In reply, learned Counsel for the respondent submitted that there is no evidence that the applicant's intended appeal has such chances.

On my part, I will not dwell on whether or not the intended appeal has overwhelming chances of success.. The success or failure of an appeal always depends on facts. I will only consider whether or not the applicant has reasonable cause for the failure to lodge the appeal in time. According to learned Counsel for the applicant, judgment was delivered in his absence and without notice. Learned Counsel for the respondent does not

dispute the fact that when the trial court delivered its judgment, Counsel for the applicant was not present but he submits that his failure to appear on the date of judgment was due to sheer laxity and arrogance as he did not care to attend the court on the dates when the case was adjourned for judgment.

Normally, it is a duty of the court to issue notice to the party who fails to appear on a date fixed for mention, hearing or judgment. In this case, it appears that the applicant was not notified of the date when judgment was delivered. Even the copy of judgment itself does not show the date when it was delivered. This being the case, I think the applicant's failure to lodge its appeal within the statutory period of thirty days was occasioned by reasonable cause. Therefore, I allow this application and order that the intended appeal should be filed