

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL CASE NO.15 OF 2005

MBARAKA K. IGWEPLAINTIFF

VERSUS

GAPCO (T) LTD.....DEFENDANT

**EXPARTE J U D G M E N T O N
C O U N T E R C L A I M**

A.Shangwa,J.

On 1st July, 2005, the Defendant GAPCO (T) Ltd filed a chamber summons for the following orders:

- 1. A default judgment as per the counter claim against the plaintiff MBARAKA K. IGWE for failure to file written replies to the counter claim.*

2. *In the alternative, exparte proof of its counter claim against the plaintiff in the total sum of Tshs 139,783,010/=.*

On 21st July, 2005, I granted the second order which was asked in the alternative by ordering that the counter claim should be proved exparte by affidavit to be filed by 19th August, 2005. The affidavit to prove the counter claim was accordingly presented for filing on the said date. It is the affidavit of KHALID MABRUKI who is the employee of the defendant company.

In his affidavit, KHALID MABRUKI avers that he conducted a physical audit of the stock of the petroleum products at Musoma where the plaintiff was working as a depot manager and found that the sale proceeds of those products amounting to Tshs 139,783,010 had not been accounted for by the plaintiff . Furthermore, he avers that

the sale proceeds of those products were stolen by the plaintiff.

From this affidavit, I find that the defendant company is trying to recover from the plaintiff the proceeds of sale of petroleum products at Musoma depot branch which were not accounted for during the period when he was the depot manager there. This company is trying to recover them by way of civil action. At paragraph 32 of the affidavit in proof of the counter claim, it is averred that the defendant's management reported the matter to the police for action but the plaintiff absconded and is still at large.

As it can be seen, the case against the plaintiff is of a criminal nature. The plaintiff is labelled by the defendant company as a thief. Theft is a criminal offence which attracts criminal action.

In my view, the counter claim filed by the defendant company against the plaintiff has the effect of turning a criminal case into a civil one. I advise the defendant company to proceed against him by way of a criminal action instead of a civil action. A private prosecution might be found desirable in this case. If the plaintiff will be found guilty and convicted, the Court will order him to pay the total amount in the counter claim.

In general, it is not advisable for the Court to allow a Civil action to take precedence over a criminal action. For this reason, I cannot determine the counter claim on its merit. It is hereby struck out.


A. Shangwa, J.

6/12/2005

Delivered in Court this 6th day of December , 2005 .


A.Shangwa

JUDGE

6/12/2005