

**IN THE HIGH COURT OF
TANZANIA
(DAR ES SALAAM DISTRICT
REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION NO. 8 OF 2004**

**COWI CONSULT (T) LTD.....APPLICANT
VERSUS
PIUS KUHANGAIKA & 2 OTHERSRESPONDENTS**

RULING

SHANGWA. J:

This is an application for revision of several orders made by the court of the Resident Magistrate at Kisutu on various dates in Employment cause No.371 of 2000 between COWI CONSULT (T) LTD and PIUS KUHANGAIKA & 2 OTHERS. First is the order of Makwandi, RM made on 14.3.2002 in which ex-parte judgment was entered in favour of the Respondents. Second, is the order of Makwandi, RM made on 1.10.2003 in which the Applicant's application for setting aside the ex-parte judgment was dismissed. Third, is the garnishee order of MTOTELA PRM (RTD) made on 6.10.2003 in which the decretal sum was increased from TShs.59,976,316.20 cts to TShs 96 200 025 00 Fourth, is the order of MTOTELA

PRM

(RTD) made on 8.1.2004 dismissing the Applicant's application for review of the Court's orders and allowing execution of the decree forthwith.

M/S Ishengoma, Masha, Mujulizi and Magai (Advocates) represented the Applicant COWI CONSULT (T) LTD and Mr. H. S. Ndolezi, Advocate represented the Respondents PIUS KUHANGAIKA & 2 OTHERS.

The order which was made by Makwandi, RM on the 14.3.2002 entering exparte judgment in favour of the Respondents is a mother of all orders complained of which were subsequently made by the court of the Resident Magistrate at Kisutu between 14th March, 2002 and 8th January, 2004.

In order to save this court's time, I will only examine the correctness, legality and propriety of that order for the

purposes of disposing of this case. The major complaint against that order is that no notice was issued to the applicants when the ex-parte judgment was entered in favour of the Respondents.

The trial court's record shows that on 28.2.2002, the defendant who is now the Applicant was absent. The case was before Makwandi, RM who fixed it for hearing on 14.3.2002 and ordered for the summons to be issued to the defendant/Applicant.

On the 14.3.2002, the defendant/Applicant did not appear and the court entered judgment in favour of the plaintiffs/Respondents for non appearance of the defendant. The following is what Makwandi, RM ordered on that day and I quote:

"Court: I have considered what Mr. Mlugaluga Senior Labour Officer has said on behalf of the

plaintiffs. Since the suit was for hearing and the defendant is absent without any reasonable ground, I hereby enter judgment for the plaintiff as per O.IX r.6 (1) (a) (i) (B) of the Civil Procedure Code, 1966."

O.IX r.6 (1) (a) (i) of the Civil Procedure Code, 1966 provides as follows:

*"r.6-(1) where the plaintiff appears and the defendant does not appear when the suit is called for hearing then -
(a)-(i) if the suit is before the High Court and it is proved that the summons was duly served, the court may proceed ex parte."*

Taking into consideration the fact that the suit was not before the High Court, it was not correct for Makwandi, RM to act on the provisions of O.IX r.6 (1) (a) (i) of the Civil Procedure Code, 1966. It would have been correct for him had he acted on the provisions of O.IX r.6-(1) (a) (ii) (B) of the said Code

which

provides as follows:

"r.6-(l) where the plaintiff appears and the defendant does not appear when the suit is called for hearing then -

(a) *- (ii) if the suit is before any court other than*

the High Court -(B) the summons issued was a summons to appear

and it is proved that the summons was duly served, the court may enter judgment for the plaintiff."

It appears to me from the order of Makwandi, RM dated 14.3.2002 that judgment was entered in favour of the plaintiffs/Respondents on the basis that the defendant/Applicant did not appear on that date when the suit was fixed for hearing without any reasonable ground, and not on the basis of any proof that the summons which was previously ordered by him to be issued to the defendant/Applicant was duly served on the defendant.

In my considered opinion, the basis on which

judgment was entered in favour of the plaintiffs/Respondents was not proper. Before entering the ex-parte judgment in favour of the plaintiffs, the court had to satisfy itself as to whether or not the summons was issued and duly served on the defendant/Applicant instead of doing so on mere assumption that the defendant had absented himself without any reasonable ground.

Apart from the said impropriety, if one looks at the trial court's proceedings which were recorded by Makwandi, RM immediately before 14.3.2002 when the ex-parte judgment was entered in favour of the plaintiffs/Respondents, it will be found that there is something fishy.

The following is what took place: On 6.12.2001, the case was fixed for mention on 22.2.2002 after learned Counsel for the defendant/Applicant Mr. Ishengoma had prayed for a copy of ruling on the preliminary objection which had been raised by the defendant as he intended to appeal against that ruling. On that date, neither party

appeared before the trial court and there was no Coram recorded. Sometimes later on 28.2.2002, the case file was called by Makwandi, RM who fixed the date of hearing the suit on 14.3.2002. Surprisingly enough, on 28.2.2002 when the suit was fixed for hearing on 14.3.2002, the plaintiffs/Respondents appeared but the defendant/Applicant did not appear.

The question which arises from those proceedings is how did the plaintiffs become aware that the case had been fixed on 28.2.2002 without an order having been issued to summon both parties to appear on that date. This means that the order made on 14.3.2002 entering ex-parte judgment in favour of the plaintiffs/Respondents for non appearance of the defendant/Applicant was simply designed by Makwandi, RM in order to bury justice in this case. I find therefore that the court's order made on 14.3.2002 in favour of the Respondents is totally illegal.

For those reasons, I hereby quash that order of 14.3.2002 together with other orders which were made by the trial court subsequent to it and I order that the case should be remitted to the same court at Kisumu for being tried inter partes by another Resident Magistrate with competent jurisdiction.

A. Shangwa

JUDGE

14.4.2005

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Delivered in open Court at Dar es Salaam on **14.4.2005** in the absence of the applicant and in the presence of the respondents.

Shangwa

A.

JUDGE

14.4.2005