

**IN THE HIGH COURT OF TANZANIA****AT DAR ES SALAAM****CIVIL REVISION NO. 67 OF 2004**

**NJAKE INTERPRISES AND  
Oil Transport Ltd..... 1<sup>ST</sup> APPLICANT  
ORES KUMBURU..... 2<sup>ND</sup> APPLICANT**

**VERSUS****ELIAS KUMBURU..... RESPONDENT**

**Date of last order: 17/3/2007  
Date of Ruling: 29/5/07**

**RULING****MANENTO, JK:**

The Respondent Elias Kumburu had instituted a civil suit at Kisutu Resident Magistrate's Court for payment of damages, both specific and general totaling at shs.8,950,000/=. The cause of action was that he was involved into a road accident whereby he was knocked by the motor vehicle of the first applicant. That motor vehicle TZM 7855 was being driven by the 2<sup>nd</sup> Applicant. That was on 18<sup>th</sup> December, 2000. The civil suit was filed in the court on 13<sup>th</sup> February, 2003. The respondents engaged the services of Mr. Kilule,

learned counsel who filed the written statement of defence disclaiming liability on that the Respondent contributed in the negligence. The cases did not end after the hearing of the parties, but judgment was entered *ex parte*, a fact which led to the application before this Court, which is the subject of this ruling.

The chamber summons is filed under section 44(1) of the Magistrate's Courts Act, 1984, section 79(1) of the Civil Procedure Code, 1966 and any other laws.

The orders prayed for are two:

- (1) To call for and examine the record in Resident Magistrate's Court, hon. Seme, PRM in Civil Case No.34/2003 for purpose of satisfying itself as to the correctness, legality or propriety of a finding and holding that the Applicant's Application filed on 26<sup>th</sup> February, 2004 is dismissed because the Resident Magistrate's Court was *functus officio* revise and revise the same.
- (2) That the Court be pleased to revise the proceedings in Civil Case No.34/2003, hon. Seme PRM and set the same aside as there has been an error material

to the merits of the case involving injustice on the part of the Applicants and

(3) Costs of the Application.

That chamber summons is supported by the affidavit of the learned counsel, Mr. Kilule. The Respondent replied by filing a counter affidavit which, in substance did not refute what had been deponed by Mr. Kilule, learned counsel, except that he either generally denied the allegations in the affidavit or he wanted strict proof. This being an application on points of law, it will be the duty of this court, if it will be of the opinion that an injustice had been occasioned, revise the decision or order of the subordinate court or confirm it. That decision will be made on the basis of the affidavit of Mr. Kilule, counter affidavit of the Respondent and the submissions by both parties.

Mr. Kilule had deponed in his affidavit that he had prayed to file a 3<sup>rd</sup> party notice, to include the Alliance Insurance Company's in the suit and was allowed so to do. After filing the notice and before it was signed by the magistrate for service to insurer the proceedings were re assigned to the late hon. Seme, PRM. The case file was then before hon. Seme, PRM on 8/10/2003 in the absence of all the parties with notice. On 28/11/03 Mr. Kilule, learned counsel was also absent,

and the Respondent prayed for an *ex parte* judgment which prayer was granted, purportedly under Ord. 9 r 6 (a) (ii) B of the Civil Procedure Code, 196. Mr. Kilule, having learnt of the *ex parte* judgment, he filed a chamber summons to set aside the *ex parte* judgment. The court did set a mention day as 25/2/2004. Unfortunately again, Mr. Kilule, learned counsel was not present on that day. But the case was not fixed for hearing. It was for mention.

As usual, Mr. Kilule learned counsel was aggrieved by the dismissal order. He filed an application to set aside the dismissal. On being served, the Respondent raised a preliminary objection which he could not prosecute on the date set for its hearing on 7/5/2004. The trial Principal Resident Magistrate then on her own, ruled that she had discharged her duty so that whoever was aggrieved should appeal. She said in the following words:

“To the best of my understanding, as far as the record show, this court is **functus officio**. All parties, whether by the second application or preliminary objection, this court cannot determine such requests at this stage.

Whoever is aggrieved, he is advised, that he is at liberty to pursue his matters by way of an appeal.”

It is from that conclusion that the learned counsel for the Applicants have petitioned for revision of those proceedings because of their being illegal and not correct. Though the late PRM Seme did not say anywhere in the proceedings, I think that she was fed up with the endless applications. I shall comment on that before I pen off in this ruling.

As the records show, the learned counsel for the Applicants had a habit of absenting himself from the court's proceedings and later on filing applications, to set aside the dismissal orders or *ex parte* judgments. Again, the record shows that, perhaps, due to the change of trial magistrates for one reason or another, there was no proper follow up of the court's proceedings. I say so because after the Applicant had been granted leave for the inclusion of the 3<sup>rd</sup> party to the proceedings, and before the 3<sup>rd</sup> party was served and enter appearance or otherwise, judgment *ex parte* was entered.

When the case was fixed for mention on 5/11/2003 the learned counsel had requested by a letter that the case be fixed for hearing on 28/11/2003. His prayer was granted. On that day, he could not make it as he was in Zanzibar and he came on the 1/12/2003,. The Respondent then prayed for the court to proceed *ex parte* and enter a judgment in his favour for the reason that the hearing date was fixed at the request of the counsel for the Applicant. The court found substance in the prayer and it proceeded to

enter *ex parte* judgment under Order 9 r.6 (a) (ii) B of the Civil Procedure Code, 1966 which, for ease of reference is hereunder supplied:

Ord. 9 r 6 – 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.

In the case before the subordinate court, there were no summonses issued. The hearing date has been fixed at the instance of the counsel for the Applicant, so he was well aware of the hearing date. The learned counsel does not dispute knowledge of the hearing date, but what he deponed in his affidavit is that he was at Zanzibar High Court in Civil Case No.49/2003 Zainab Sewji v. Ahamed Sewji and six others. He came to Dare s Salaam well after the case had been dismissed. He came back on 1<sup>st</sup> December, 2003. So the reason for his failure to turn up in court was that he was at Zanzibar, attending to another case. He never communicated that information to the trial court. On his failure to communicate to the court of his failure to turn

up to court, the trial court rightly entered *ex parte* judgment. Being in another court is not an excuse or good cause for the court not to proceed with the hearing. That is under Ord. XVII r. 2(c) which provides as hereunder:

Rule 2: Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fails to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Ord. IX make such orders as it thinks fit.

(c) the fact that the advocate of the party is engaged in another court shall not be a ground for adjournment. See G.N. 508/1991.

Taking from above Order 9 and rule, even being in another court is not an excuse for attending into a court where the hearing date of a case had been already fixed. The learned PRM decided to proceed under Ord. 96(ii)(B) of the Civil Procedure Code, 1966. As I have said earlier, the trial magistrate was right to enter *ex parte* judgment. The complaint here is that the learned counsel was not heard on his application after the trial magistrate had ruled that she was *functus officio*. Having heard now the learned counsel for the Applicant, and the reason that he was in another Court at Zanzibar on the day the case was scheduled for hearing, and worse

still, that could not be an excuse for the dismissal of the magistrates order dated 28/11/2003.

From what I have said, I don't see any illegality on the orders of the trial magistrate, only that she was not functus officio. I can not therefore, on the strength of what I have said, revise the proceedings of the trial court. The exparte judgment remains as it was entered.

I had commented briefly about the behaviour of the learned counsel towards the hearing of the cases. The record in the Civil Case No.34/2003 shows that he is fond of absenting himself from the courts when either cases are fixed for mention or hearing. On hearing dates, cases had been dismissed for want of prosecution or exparte judgments entered. Then he files relevant applications to either set aside dismissal orders or exparte judgments. He has always convincing reasons which could be true or not true. The same had applied before this court as if he is engaged to delay the proceedings. He is advised to be serious on his cases otherwise, he may lose clients.

Having so commented, the application to revise the trial courts order is dismissed with costs.

Let the case file No.34/2003 be forwarded to Kisumu Resident Magistrate's Court for the execution of the decree. It is so ordered.

  
**A.R. Mamoto**

**JAJI KIONGOZI.**

29-5-2007

Coram – Bampikya DR-HC

For the 1<sup>st</sup> Applicant

For the 2<sup>nd</sup> Applicant

For the Respondent

Cc: Livanga

**Court:** The ruling has been delivered to day 29<sup>th</sup> day of May, 2002 for the absence of applicant but in the presence of Respondent.

**P.W. Bampikya**

**DEPUTY REGISTRAR-HIGH COURT**

**29/5/2007**