IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

CIVIL APPEAL NO. 168 OF 2005

FEM CONSTRUCTION CO. LTD.....APPELLANT
VERSUS
NKULULEKO KARANJA.....RESPONDENT

JUDGMENT

ORIYO, J:

In Civil Case No. 18 of 2004 in the Resident Magistrates Court of Morogoro, the respondent sued the appellant for moneys due on a contract of service. On 28/12/2002, an exparte judgment was entered for the respondent after the appellant failed to filed Written Statement of Defence. The appellant's efforts to have the exparte judgment set aside were unsuccessful after the supporting affidavit was found to be defective. The appellant was aggrieved by the Ruling dated 6/6/2005 which struck out the application to set aside the exparte judgment.

The parties had no legal representation. The appellant was represented by Frank Sekibojo; a Principal Officer. The respondent appeared in person.

The Memorandum of Appeal contained 10 grounds of complaints. Grounds 1 to 5, however, were against the default judgment of 28/12/2002. I hasten to state here that those 5 grounds are not relevant in the instant appeal because the subject decision complained of is the Ruling of 6/6/2005

only. The judgment is therefore limited to the complaints contained in grounds 6 to 10 of appeal which raise dissatisfaction with the said ruling.

In terms of the ruling of 6/6/05, the appellant's application to set aside the exparte judgment was struck out because the accompanying affidavit was defective in two aspects. The first defect was that it contained opinions and submissions contrary to Order XIX rule 3 (1) of the Civil Procedure Act [Cap 33, R.E 2002]. The second defect was that it contained derogatory language against the trial court. Examples of the defects were best set out in paragraphs 4, 5 and 6 of the joint affidavit of Frank Sekibojo and Melletius A. Sasagu dated 11/1/2005. To appreciate the situation; I have taken the liberty to reproduce the said paragraphs hereunder:

> *"4. That, the exparte judgment was entered under order VIII Rule 14(1) of rule 1 of the C.P.C. 1966, which states part of it*
> .....
>
> *"Where a summons to appear has been issued, the defendant may if so required by the court shall, at or before the first hearing or within such time as the Court may permit present to the Court a written statement of his defence"*
>
> *The law is clear that the defendants or applicants were summoned to appear and present to the Court their written statement of defence since the time (21) days had not elapsed, section 14(1) of the C.P.C. was not applicable here. The Court entered the judgment by mistake."*

Paragraph 5 stated:-

"1. That, even if we were at fault as the law says, the respondent (plaintiff) or his Advocate was supposed to give the facts of the case, and there after the Court studies them, and thereafter deliver a judgment. In this case there is no judgment as no facts were given or delivered by the Advocate in Court. What appears on record is....." Court enters the default judgment against the defendant under order 8 Rule 14(1) of C.P.C. of 1966, with costs and General Damages on (sic) the tune of 500,000/=."

Lastly, paragraph 6 was couched in the following language:-

"That, one cannot understand the locus standi of the general damages of 500,000/= here the judgment, the Advocate did not pray for the damages neither (sic) such damages are not included in the plaint, lastly the court has no powers to impose such damages which have not been proved in Court. ***We can only say that, this was probably a happy new year award to the plaintiff."*** (Underlining supplied)

In my view the two preliminary points of objection raised against the affidavit are similar in that the affidavit did not meet the statutory requirements. Order XIX rule 3 (1) of the Civil Procedure Act provides:-

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted:

Provided that the grounds thereof are stated."

On the legal status of affidavits which do not confine to the facts and contain extraneous matters; the then East African Court of Appeal, when faced with a similar situation in the case of UGANDA VS COMMISSIONER OF PRISONS Exparte Matovu (1966) EA 514 stated as follows:-

> *"The affidavit sworn by Counsel is also defective. It is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of facts and circumstances to which the witness deposes either of his own know ledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument. The affidavit by Counsel in this matter contravenes Order 17 rule 3 and should have been struck out."*

Paragraphs 4, 5 and 6 of the joint affidavit as reproduced above, clearly contravene the law. The contents of the affidavit were therefore not confined to facts within the deponents' own knowledge only; but it contained arguments, submissions and opinions as well. Under such circumstances, the trial court had no option but to strike out the affidavit for the defects; hence rendered the application incompetent. The decision of the trial court is upheld.

In the result the appeal has no merit. Accordingly it is dismissed with costs.

K. K. Oriyo

JUDGE

29/6/2007