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

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**CIVIL APPEAL NO. 134 OF 2002**

**VICTOR SUNGURA TOKE ..... APPLICANT**

**VERSUS**

**P.S.R.C &**

**BOARD OF INTERNAL TRADE ..... RESPONDENT**

*Date of last Order:*

*Date of Ruling : 09/04/2008*

**RULING**

**MLAY, J.**

The PSRC and the BOARD OF INTERNAL TRADE through their counsel Mr. H. P. BETHUEL have filed an application by Chamber Summons, "***under Order XLVIII r.2, section 68 (e) and 95 of the Civil Procedure Code 1966 together with any enabling Provision of the law***". According to the Chamber summons, the application seeks the following orders:-

- i) That this Honourable Court be pleased to **vacate and ultimately set aside its own proceedings conducted** on 16<sup>th</sup> March, 2004.
- ii) The costs of this application be provided for
- iii) Any other order or reliefs this honourable court may deem just to grant.

The application is supported by the affidavit of HEAVENUGHE PETER BETHEREL, the applicants advocate in which he has deponed in poor, as follows:

2. That in my capacity as the advocate, I have been engaged by the Defendants/ applicants herein above mentioned to represent them in this case at hand and therefore I am conversant with the facts I am about to deponed.
3. That I understand that this case was scheduled for hearing before Hon. Justice Mwaikugile on 16<sup>th</sup> March, 2004 at 9.00 o'clock in the forenoon.
4. That unfortunately in the night of 14<sup>th</sup> March 2004, I received sad news about the death of my cousin in Moshi who was to be laid to rest on the 16<sup>th</sup> March 2004, afternoon.
5. That before I left to Moshi on the 6<sup>th</sup> March 2004 morning, I wrote a letter to the court to inform it

about the incident and requested for an adjournment of the case for I could not get in touch with my client in the very morning. Attached here to and marked Annexure A1 is a copy of the letter to form part of this affidavit.

6. That to that end, I sent my clerk namely ABAS MTENGA to file the letter to the Court and serve its copy to Mr. Maira, who is representing the plaintiff/ Respondent.
7. That I further insisted to my clerk to look for an alternative advocate who could hold by (sic) brief to ask for adjournment in case Mr. Maira was not around.
8. That thereafter I left for Moshi in the same morning using my own motor vehicle and arrived back on the 18<sup>th</sup> March, 2004.
9. That on 19<sup>th</sup> Morning while in the office I was told by any clerk that Mr. Maira was granted orders to proceed exparte following his neglect to hold my brief while in the Judges Chambers though he had earlier accepted the letter issued to him by my clerk outside the judges chambers.
10. That ever since I was engaged by the defendants/ applicants I have never missed any appearance and have equally been pursuing my client's case with the diligence.

11. That I defaulted appearance for the Defendants/applicants not out of neglect or irresponsibility but, due to the above circumstances which were beyond my control.
12. That it is in there interest of justice to order the suit to proceed inter parties instead of proceeding to admitting the plaintiffs exparte affidavit of proof filed by Mr. Maira on 16<sup>th</sup> March 2004 because the law of practice is strongly against proof of the case exparte by an affidavit.
13. That under the circumstances it is reasonable and justifiable if the applicant's prayers in the chamber summons are granted.

There is also the affidavit of the advocates clerk ABAS MTENTA to support the contensions in the counsels affidavit and the affidavit of HASHIM KOSHUMA the court clerk to Justice Mwaikugile, J to support the contention that ABAS MTENGA did give the counsels letter to Mr. Maira and Mr. Maira read its contents before he ***“proceeded so apply for the orders intended to him without speaking any thing about the content of the letter from it P. Bethael, advocate.....”***

Mr. Maira counsel for the Respondent filed a counter affidavit in which inter alia, he admitted to have received the

letter from HP Bethunel's Chamber dated 16<sup>th</sup> March, 2004 but deponed that the letter was not copied to him and (as) "**no court fees had been paid before the court. I could not bring the courts attention to it on the same was not properly before the court**".

Both counsels, with leave of the court filed written submissions on the application. In the written submissions filed on behalf of the applicants by K. M. Fungamtama advocate, it is submitted that the affidavits in support of the application "**set out sufficient reasons for non- appearance of the previous counsel for the defendants/ applicants**".

Secondly, in a submitted that Mr. Maira "**non-disclosure to the Court of Mr. Bethwel's letter and his views on its validity denied the court to reach a first judicial decisions**".

Thirdly its submitted "than non- appearance of the previous counsel for the Defendants/ Applicants was not out of neglect or irresponsibility but due to sufficient cause disclosed in his affidavit. Lastly Mr. Fungamtama invite this court to consider whether **this exparte order was correct**. He submitted that "**from established precedent it is discerned that the trial judge was not correct to issue an order to prove the case by affidavit. Thence forth, the**

**said order and all that was done there under suffered from illegality**". He cited CIVIL APPEAL NO.38 of 1997 between FAIZEN ENTERPRISES LIMITED and AFRICARRIERS to support his view.

Mr. Maira in reply quoted Order IX Rule 6 (1) of the Cifl Procedure Code to show that if the suit is before the High Court and it is proved that the summons was duly served, the Court may proceed exparte. He submitted that the record shows that the case in question had been set by the District Registrar, for hearing on 16<sup>th</sup> August 2004. As for Defendants counsel's letter Mr. Maira submitted that it was impolite and lacking in courtesy for counsel to conduct litigation through correspondence. As for his failure to hold the Defendants Counsel's brief, Mr. Maira submitted that the letter addussed to the District Registrar, "**was not ever marked to be copied to Messers Maira and Company**". He further submitted that the Judge had the discreation wherein or not to grant an adjournment. He referred to the proviso to Order XVII Rule 2 of the Civil Procedure Code 1966 as emended by <sup>GN</sup> 6W508/91 and contended that at the material time Mr. Bethewel was working for the Tanzania Legal Cooperation which had service lawyers but no explanation was given why another advocate was ~~let~~<sup>not</sup> instructed. He submitted that "**the defendants have themselves to blame for not obeying an order of the court**

***which mandated their presence in court on 16/03/2004, with or without counsel”.***

Lastly Mr. Maira quoted the provisions of sections 68 (e) and 95 of the Civil Procedure Code, 1966 under which the application has been made. He submitted that case law has enunciated that no order should be made under section 95 unless there are no specific provisions to meet the necessity of the case and it is necessary for the ends of justice or to prevent the abuse of the process of the court. He quoted .... and **JAFFER V BHABRA [1967] EA328.**

He submitted that the powers the provisions of section 95 of the Civil Procedure Code are “exercisable where the law <sup>a</sup> h/s made no provision governing the particular under at hand. He cited the case of DERO HELICOPTER (T) LTD V F.N JANSEN [1990] TLR 142. He further submitted that since the matter had been adjourned for hearing ex parte, Rule 7 or 13 of Order IX of the Civil Procedure Code are the provisions which the applicants could have resorted to. Mr. Maira refered to the Chamber summons in which Order XL VIII Rule 2 of the Civil Procedure Code, Act, 1966 has been cited. He submitted that the Civil Procedure Code Act, 1966 does not have Order XL VIII.

He submitted that failure to cite the provisions under which the court is moved is fatal and render the application of

no value. He cited to case of CITIBANK (TANZANIA LTD) VS TTCL AND 3 OTHERS (CA) (Unreported) Civil Appeal No. 64/2003 and **NATIONAL BAWA<sup>MC</sup> OF COMMERCE VS SADNIDOM MEGJI (CA) CIVIL APPLICATION NO. 20/97 (Unreported) and MRS NGEME MBITA VS MBEYA RUKWA AUTO PARTS AND TRANSPORT LTD (CA) CIVIL APPLCIATION NO. 45 OF 2004.**

On the order for exparte proof by affidavit Mr. Maira submitted that another judged cannot sit an appeal on the decision by Justice Mwaikugile and also that the FAIZENS case did not prohibit proof of a matter by affidavit.

The facts leading to the present application are simple and straight forward. The Plaintiff filed a plaint in this court seeking judgment and decree against the defendants/ applicants as fallows:-

- (a) Demanding Tshs.31,450,514.00 in compounded gratuity at 25% of contract of salary per annum payable in year 2001. Subsequesly Tshs.62,180,000.00 for subsistence up keeps allowance from 1<sup>st</sup> June 2000 to 31<sup>st</sup> December 2001.
- (b) General damages to be assessed for breach of contract and interest thereon at the court rate

from the day of judgment till full and final payment

- (c) Costs.
- (d) Any other on further relief (s) on the court deems meet just and equitable.

The claim arises for termination of contract of employment. The suit came up for mediation before Ihema, J on 8/7/2003 when an order was made that mediation had failed. The suit was then assigned to Mwaikugile J for trial. The suit came up several times before his lordships and was set for trial first on 7/10/2003 which did not take place and that on 18/11/2003 when it came up before the District Registrar in the presence of Mr. Maira for the Plaintiff and Mr. Bethwel for the Defendants. The District Registrar set the suit for hearing on 16/3/2006.

On 16/03/2004 the date for the hearing this suit came up before Mwaikugile, J the Defendant and their counsel being absent, Mr. Maira counsel for the Plaintiff applied to proceed *ex parte* by way of filing a supporting affidavit, which application was granted, and hence the present application.

As I have shown at the beginning of this ruling, the application is for an order “***that this court to vacate and***

***ultimately set aside its own proceedings conducted a 16th March 2004”.***

The application has been made under Order XLVIII r2, section 68 (e) and 95 of the Civil Procedure Code 1966 together enter unspecified other enabling provisions of the law. Clearly, and as Mr. Maira has pointed the in his submissions, the Civil Procedure Code does not contain Order XLVIII as the last provision in the Civil Procedure Code, is Order XLIII. The applicant therefore appears on the face of the chamber summons, to have cited and relied upon a non existing provision of the law, to move the court.

However, it appears that citing of Order XLVIII rule (2) may have been a ~~slip~~<sup>slip</sup> of the pen, when the applicants counsel may have intended to cite Order XLIII rule 2, which provides that an application under the Civil Procedure code shall be made by chamber summons. As the application has indeed been made by way of a chamber summons. As the application has indeed been made by way of a chamber summons the slip of the pen is not fatal.

The applicant has however, also relied on sections 68 9e) and 95 of the Civil Procedure Code. Mr. Maira has in essence submitted that these provisions cannot be invoked where there are specific provisons in the Civil Procedure Code,

which deal with the subject matter of the application. This is undeniably, the correct statement of the law. Section 68 (e) is a supplemental provision, while gives the court discretionary power to make orders to prevent the ends of justice from being defeated while section 95 preserves the inherent powers of the court to make orders necessary for the ends of justice to prevent the abuse of the process of the court.

In the present case, the applicant who was the defendant in the suit filed by the respondent, was absent from the cannot on the date of hearing of the suit.

The Respondents advocate prayed to proceed exparte under Order IX Rule. Rule 6 (1) (a) which provides:

*“6- (1) where the plaintiff appears and the defendant does not appear when the suit is called for hearing then-*

*(a)- 9i) if the suit is before the High Court and it is proved that the summons was duly served, the court may proceed exparte”.*

The court, (Mwaikugile J) granted the application and ordered that “proof of the case is to proceed exparte by way of

filing a supporting affidavit, the same to be filed before the end of the day.....

It follows for the above order that the case was adjourned for exparte proof by affidavit, to be filed both on that day. The record shows that the affidavit was duly filed on 16/3/2004 but when and matter came up before Mwaikugile J on 31/3/2004 the present application to set aside the order for expart proof, had already been filed. Its Lordship their made an order to **“reaper the case so as to hear, the parties on the application filed.....”**

Since the suit had been adjourned for exparte proof, the proper provision applicable to the matter is Order IX Rule 7 of the Civil Procedure Code, which provides that:

*“7 where the court has adjourned the hearing of the suit exparte and the defendant at or before such hearing appears and assigns good cause for his previous non appearance, he may, upon such terms as the court may direct as to costs or otherwise, be heard an answer to the suit as of he had appeared on the day fixed for his appearance”.*

Although the case was adjourned for exparte proof by affidavit, it was still adjourned for hearing exparte, within the meaning of Order IX Rule 7 and the application filed before the matter had come up again before the judge, was in my view, an appearance by the defendant. The issue is whether the defendant has assigned a good cause for his non appearance on 16/3/2004, the date of the hearing. In his affidavit, the applicants advocate has stated that he was bereaved and had to travel to Moshi an on day prior to the hearing date.

The advocate also stated that he wrote a letter to the Court informing the court (through the District Registrar) of his inability to attend.

It is in evidence that the letter was brought to the attention of Mr. Maira, counsel for the Respondent and Mr. Maira has conceded the fact but argued that it was not copied to him and also that counsels fees were not paid for him to hold brief for two applicants counsel. With due respect to Mr. Maira, having been aware of the letter written by the Applicants counsel explaining his ability to attend the meaning of the suit, even if he did not wish to hold brief for Mr. Msafiri advocate for the applicant, as an officer of the court, he was obliged to inform the judge of the existence of the letter. This would as have prejudiced his right to make an application for exparte proof, on the grounds which he has tried

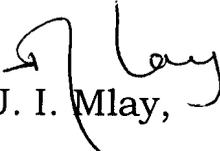
to advance for ignoring the letter which was handed over to him by Mr. Msafiri's clerk, who had no right of audience to address the judge on the matter.

The judge was by Mr. Maira's conduct, denied the opportunity to consider Mr. Msafiri's letter while deciding on Mr. Maira's application for *ex parte* proof. For the propose of this application, the absence of Mr. Msafiri on the date of hearing due to attending a funeral in Moshi after he had written a letter to inform the court and Mr. Maira of the fact, is in my view a good cause for Mr. Msafiri's previous non appearance. For this reasons the applicant is entitled to be heard in answer to the suit, in terms of Order IX Rule 7 of the Civil Procedure Code.

Accordingly the order for *ex parte* proof by affidavit is vacated and the affidavit of proof is expunged from the record. As the Respondents advocate withheld the information contained in Mr. Msafiri's letter informing the Court of his inability to attend the proceedings on 16/3/2004, each party to bear its own costs in this application.

J. I. Mlay,  
**JUDGE.**

Delivered in the presence of the Respondent in person  
and in the absence of the Applicant, this 9<sup>th</sup> day of April, 2008.



J. I. Mlay,  
**JUDGE.**

**09/04/2008.**