IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 160 OF 2004

SAID SALUM MOHAMED ..... APPELLANT

VERSUS

BAKARI SELEMANI YOMBE ..... RESPONDENT

Date of last Order : *24/6/09*

Date of Ruling : *26/6/2009*

RULING

MLAY, J.

The applicant SAID SALUM MOHAMED through MS M. A. ISMAIL AND CO. ADVOCATES filed a memorandum of appeal in this court on 28/6/2004 against the judgment and decree of the Court of the Resident Magistrate of Dar es Salaam at Kisutu, in Civil Case No. 27/2002. The appeal was dismissed for failure to

trial written submissions, on 25/7/2005. On 10/3/06 the applicant filed an application under Section 68, 95 and Orders 43 rule 2 and 39 rule 19 of the Civil Procedure Code, Cap 33 R.E. 2002 and Section 14 of the Law of Limitation Act, Cap 89 R.E 2002, seeking the following orders:-

" 1. ..... *to extend time within which to file an application to set a side the order dated 15th July 2005 dismissing Civil Appeal No. 160 of 2004 for want of prosecution.*

2. *That this Honourable court may be pleased to set aside the order dated 15th July 2005 dismissing Civil Appeal No. 160 of 2004 for want of prosecution.*

3. *Costs.*

4. *Any other reliefs."*

Together with this application, the applicant also filed under a certificate of urgency, an application by chamber summons seeking the following orders:-

1. *That this Honourable court may be pleased to stay the execution of its order dated 15th July, 2005 dismissing the applicant's Appeal for want of prosecution in Civil Appeal No. 160 of 2004 between the parties herein pending*

hearing and determination of an application for restoring of the appeal.

2. *Costs to be provided for.*
3. *Any other relief.....*"

The application for stay of execution is brought under Section 68 (e), 95 and orders 43 2 and 39 of Cap 33 R.E 2002. The respondent through Mpoki Associates Advocates raised preliminary objections to the application. In relation to the application for stay of executions, the respondents counsel raised the following preliminary objections:

1. *The dismissal Order dated 15th July 2005 is not Capable of execution.*
2. *The application is incompetent as there is nothing to be executed.*
3. *The application is incompetent for non citation of enabling provisions.*

In relation to the application for extension of time and for setting aside the dismissal of the appeal, the respondents counsel raised the following preliminary objections:-

1. *The application is incompetent for being not maintainable in Law.*
2. *The application is incompetent for non citation of enabling provisions.*
3. *The affidavit of Dr. Fauz. Twaib is bad in law as it contravenes the provisions of Order XIX rule 3 of the Civil Procedure Code Act,1966.*

Counsels were granted leave to file written submissions on the preliminary objections and as submissions have been duly filed on the objections to both applications, for the sake of convenience they are consolidated and will he considered together in this ruling.

I will start with the application for stay of execution as it is logically intended to precede the second application. In the chamber summons it is clearly and in unambiguous terms, stated that the order being sought is " t**o stay the execution of its order dated 15th July dismissing the applicants Appeal for want prosecution in Civil Appeal No. 160 of 2004 ..... Pending the determination of an** application for the restoration of the appeal."

The respondents counsel has argued that the dismissal order dated 15th July 2005 is not capable of execution and therefore that the application is incompetent as there is nothing to be executed. In

the written submission by the applicants counsel this matter has been conceded. The applicants counsel has however argued that this was a slip of the per and that, what was intended was stay of prosecution of the decree of the trial court. I do not see how the clear wording of the application can be stretched to mean what the applicants counsel has argued. This application cannot by any stretch of imagination be taken to be for stay of execution of the decree of the trial court. It is clearly stated that the order sought is the stay of the order of this court dismissing the appeal for want of prosecution. As correctly conceded by the applicants counsel, that order is not capable of being executed. This finding would be sufficient to dispose of the application for stay of execution by dismissing it. However, even it is assumed that the order sought was for the stay of execution of the decree of the trial court, the issue would arise whether in terms of Order 39 Rule 5 (3), stay of execution should be ordered. The relevant provisions state:

(3) *No order for stay of execution shall be made under sub rule (1) or sub rule (2) [of rule 5] unless the High Court or the court making it is satisfied:-*

(a) That substantial loss ~~may~~ results to the party applying for stay of execution unless the order as made;

(b) That the application has been made without unreasonable delay; and

(c) That security has been given by the applicant for the due performance of such decree or orders as may ultimately be binding upon him."

The record shows that the applicant filed his appeal against the decree of the trial court on 28/6/2004 but there was no application for stay of execution of that decree which was made by the applicant, until 10/3/2006 when the present application was filed. Rule 5 (1) of Order 39 clearly states that " An appeal **shall not operate as a stay of proceedings under a decree** or order appealed..... "

In the present case the applicant having filed his appeal did not take any steps to seek the stay of execution of the decree until after the appeal had been dismissed for want of prosecution, a period of nearly three years. The application for stay of execution cannot be said to have been made " **without unreasonable delay",** within the meaning of Order 39 rule 5 (3) (b) of Cap 33 R.E 2005. In the circumstances, even if the application was for stay of execution of the decree or order of the trial court, which it is not, the unreasonable delay to bring the application would have been sufficient grounds not to grant stay of execution. The respondents

counsel has also argued that the application is incompetent for not citing the enabling provision of the law. In the light of the fact finding that the application for stay of the execution of the order dated 15th July 2005 is incompetent, as it cannot be executed, I do not see any reason to consider the additional grounds, although I would be inclined to find the inclusion of Order 39 in the provisions cited to be sufficient reasons for not sustaining this particular ground.

For the above reasons, the objection that the application for stay of execution of the order dated 15th July 2005 is incompetent, is upheld and the application is accordingly dismissed.

We now, proceed to consider the objections to the second application for extension of time in which to file an application to set aside the dismissal order dated 15th July, 2005. The objections raised are that:-

1. *The application is incompetent for not being maintainable in law.*
2. *The application is incompetent for non citation of enabling provisions.*

3. *The affidavit of Dr. Fauz Twaib is bad in law as it contravenes the provision of Order XIX rule 3 of the Civil Procedure Code Act, 1966.*

In the written submissions filed by the respondents advocate each objection has been dealt with separately. As regards the first point that " **the application is incompetent for not being maintainable in law,"** the learned counsel pointed out that the chamber summons seeks the following orders:

1. *Extension of time within which to file application to set aside the order dated 15th July, 2005 dismissing Civil Appeal No. 160 of 2004 for want of prosecution.*
2. *Setting aside the order dated 15th July, 2005 dismissing Civil Appeal No. 160 of 2004 for want of prosecution the respondents counsel argued that the two applications cannot be competently humped together into one. He that it is only when the court has granted an extension that the application for setting aside the dismissal order can be made. He submitted that both application are incompetently and in properly before the court. He cited the case of IDDI MPEMBA Vs JOSPHINE CHALE, Civil Revision No. 13 of 1995 (Dsm Registry (unreported) which was an similar applications and in which this court (Kalegeya J) held that " Lumping them*

together as is the case here is an incurable irregularity which can only earn the relevant application a dismissal..... "

The applicants advocate submitted that there is nothing offensive in merging two applications in one chamber summons as the court will simply consider prayer one and if it is rejected then the next prayer/ application collapses. He contended that the move is geared not to the abuse of the legal process but to save expense and time especially as this court hates multiplicity of suits. He cited the case of TANZANIA KNITWEAR LTD VS SHAMSITU ESMAIL (1989) TWR 48 in which Mapigano J held:

" *the combination of two applications in one is not bad in law since courts of law abhor a multiplicity of suits."*

He also quoted the reasoning of the defunct Court of Appeal of East Africa Law J. A. in BROKEBAND LIEBING (T) LTD Vs. MALLYA [1997? EA 266) staling:

" *Even if procedure by separate suit is proper procedure, and I am not convinced as to this, a court is not precluded from giving effect to its decisions under its inherent powers especially where time and expense can be served."*

In addition, the applicants counsel submitted in essence that the irregularity is curable pursuant to Article 107 (e) of the Constitution of the United Republic of Tanzania which enjoins this court from paying undue regard to technicalities of procedure.

On the second point of objection which is that " **the application in incompetent for non - citation and wrong citation of enabling provisions of law**", the respondents advocate referred to Section 68, 95 and Orders 43 rule 2 and Order 39 Rule 19 all of the Civil Procedure Act, Cap 33 R.E. 2002 and Section 14 of the Law of Limitation Act, 1971 which have been cited in the chamber summons as the enabling provisions for the application. The learned Advocate submitted that all these provisions do not enable the court to grant the orders sought in the chamber summons. He argued that Section 68 and 95 of the Civil Procedure Act, cannot be invoked where there are specific provisions of the law on the subject matter. As for Order 43 rule 2, the Advocate argued that it is a procedural provision directing that all applications to the court be made by chamber summons supported by an affidavit. As for Order 39 rule 19 of the Civil Procedure Act, the respondents advocate argued that it is an enabling provision for readmission of appeal and not for setting aside a dismissal order. In relation to the citing of Section 14 of the Law of Limitation Act1971, the respondents advocate argued that as the order for setting aside the dismissal order has already been prayed for in this application,

there is no provision of the law cited by the applicant, upon which this court can grant orders of extension of time to file an application which itself has a heady been filed. He cited the case of CITIBANK TANZANIA LIMITED VS. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED AND OTHERS, CIVIL APPLICATION NO. 64 OF 2003 (CA) (unreported) where it was stated:

> " *It hardly reeds to be overemphasized that in a notice of motion an applicant must state specific provision of the law under which the applicant wants to move the court to exercise its jurisdiction."*

He further cited the case of THE NATIONAL BANK OF COMMERCE VS. SADRUDIN MEGHJI, CIVIL APPLICATION NO. 20 OF 1997 (unreported) in which the Court of Appeal stated:

> " *It follows therefore that the application has been filed by Notice of Motion under an inapplicable law. Consequently as the court was not properly moved, the application is likewise incompetent."*

On the same point relating to citation of a wrong provision or non-citation of the provision of law, the respondent's advocate referred

to ANTONY J. TESHA VS ANITA TESHA, CIVIL APPEAL NO. 10 OF 2003 (unreported) where the Court of Appeal said:

> " *This court has said number of times that a wrong citation of the enabling provision of law or non – citation renders an application incompetent. Here the mere citation of section 5 without indicating the subsection and paragraph is tantamount to non – citation and Munuo J. should have struck out the application. We do just that."*

He invited this court to take the position above to dismiss the application as the court has not been properly lmoved.

In reply, the applicants advocate contended that the respondents submissions that the respondent failed to cite enabling provision properly is misconceived. He submitted that there is no specific provision (remedy) catering for an application for setting aside a dismissal order, and the decision appealed against and therefore, reference to Section 95, 68 (e) and Order 39 generally is in order and legal. Alternatively he submitted that even of there was a specific remedy, the non citation or wrong citation of such provision in chamber summons is not fatal. It is a defect that can be cured as the applicant is not prejudiced in any way. He relied

upon the decision of this court (Nchalla J.) in A. M. MLENDA V.JUMA MFAUME 1989 TLR 145 OR P. 147 above it is stated:

> " *But as I have already found, the omission by Mr. Rahim to indicate Section 47 (1) © in his chamber application is not fatal, as the substance of the application remains the some, and in no way has the respondent been embarrassed by the omission."*

He further relied on C. MHISO VS. G. NJAU AND ANOTHER 1997 TLR in which Msumi J. stated:

> " *It was true that a chamber summons without a court seal was of no legal effect but it was not good law that such defect should be ground for dismissal of a suit."*

Other cases cited to support the advocate position are Express and Another V Mr. George and others, Land Case No. 43/1998 which dealt with a chamber summons which was " confusedly drawn up omitting names of same of the applicants." BROKE BOND LIEBIG (T) LTD Vs. MALLYA (earlier cited) in which the Notice of Motion did ask for " review", but cited the wrong order; and lastly, MAWJI V AMOLA GENERAL STORES [1970] EA 137, a case originating from Tanzania where Newbold P. is quoted to have stated:

" *We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the court in such a way that no possible injustice is caused to either, then a mere irregularities in relation to the rules of procedure would not result in vitiation of proceedings. I should like it quite clear that this does not mean that the rules of procedure should not be complied with. Indeed they should be, but non-compliance with the rules of procedure of the court, which are* ***directory and not mandatory rules*** *would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties."*

The learned advocate for the applicant invited his court to confine the decisions of the Court of Appeal cited by the respondents advocate, to validity of Notice of motion and no more.

Lastly, the learned advocate cited a number of cases originating from Kenya and Uganda to buttress the proposition that irregularities or compliance never rule of procedure or the citing of wrong provision of the law can be ignored or cured in keeping with the provisions of Article 107 (e) of the Constitution of the United Republic of Tanzania.

The third ground of objection relates to defects in the affidavit of the applicants advocate Dr. Fauz Twaib in that it contravenes the provisions of Order XIX Rule 3 of the Civil Procedure Code. The said provisions which have been quoted state:

> "3 - (1) *Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that the grounds thereof are stated.*
>
> *(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matters or copies of or extracts from documents shall (unless the Court otherwise directs) be paid by the party filing the same."*

The Respondent submitted that the law prohibits affidavits deponed upon hearsay or upon matters which are within the knowledge of another person. He contended that paragraph 4 of Dr. the affidavit of Dr. Fauz Twaib is wholly dependent upon the clerk to whom he allegedly presented his submission for filing and that paragraph 5 thereof is deponed upon informed on in contravention of the law and to aggravate matters, the person from whom the information was obtained, was not mentioned. The Respondent further

submitted that, the verification clause which states; " **All what is stated in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 is true to my own knowledge**", cannot be true to the deponents own knowledge, presumably, in the light of what was diponed in paras 4 and 5. A number of decided cases have been cited and quoted in support of the proposition that affidavit suffering from defects of this nature, cannot be acted upon by the courts of law. Those are AUGUSTINO LYATONGA MREMA AND OTHER VERSUS ATTONREY GENERAL AND OTHERS [1996] TLR 273, KUBACH &SAYBOOK LTD VS. HASHIM KASSAM & SONS LTD [1992] HCD No. 228 (Brauble J), SALIMA VUAI FOUM VERSUS REGISTRAR OF COOPERATIVE SOCIETIES AND OTHERS [1995] TLR 76 and KIMWAGA VS PRINCIPAL SECRETARY MINISTRY OF FINANCE, CIVIL APPLICATION NO. 31/2000 (CA) (Unreported). The Respondent submitted that the affidavits of the persons mentioned in paragraphs 4 and 5 of the impugned affidavit were required to be filed in court otherwise the matters deposed to are all hearsay and an affidavit sworn on the basis of hearsay is incurably defective. The Respondent further refered to and quoted from SARKAR ON EVIDENCE 13TH EDITION, VOL. 2 at page 2186 the following:

> " *The verification must state which particular paragraphs are true to the deponent's knowledge and those which are true to his information. If the deponents fail to distinguish and express clearly how much is a statement of their*

knowledge and how much is a statement of their. knowledge and how much is a statement of their belief, and to state the ground of belief, it would mean that they are swearing to facts within their own knowledge which will entail all its necessary consequences."

For the above reasons the Respondent prayed that the affidavit of Dr. Fauz Twaib be rejected.

The Applicant in response to the attack on Dr. TWAIBS affidavit submitted that, "**the applicants objection is frivolous and misguided as the impugned paragraph and or the affidavit as a whole substantially onform (s) to the law and clearly set out the grounds upon which this court may upon in the determination of this application."** In the alternative, the Applicant submitted that **" the alleged defects, if any, are severable and cannot vitiate the entire affidavit ..... The alleged defects are not paid. They can be ignored without occasioning injustice to the applicant".** He invited this court to adopt the statement of MKWAWA J. in NYONI Vs MS HAULE & COMPANY (1996) TRL 71 at page 73 that:

" *I have further noted other irregularities in the deponent's affidavit taking into account the most celebrated case of STANDARD GOODS CORPORATION LTD V. HARAK*

CHAND NATBAN & CO. (1950) 17 EA 99 where the defunct Court of Appeal of Eastern Africa held that when an affidavit is made on information it should not be acted upon by any court unless the sources of information are specified. While dwelling on this matter understand that procedural rules are intended to serve as handmaiden of justice and not to defeat or to frustrate it, and it can not be denied that the strict application of the rule in question in certain cases amount to legal formalization. In the light of the aforegoing I am of a settled view that this court like any other court worthy of the name has a duty to look into the matter sympathetically with a broad mind and with realistic approach."

The Applicant further quoted the learned judge to have stated, **" In my view the irregularities in the affidavit are curable by the provision of Order 95 of the Civil Procedure Code."**

I propose to start with the objection relative to the affidavit of Dr. Fauz Twaib. Paragraphs 4 and 5 of the said affidavit which have been impugned depose as follows:

" 4. *That on 28/6/2005, pursuant to, and in compliance with the said order, I filed, the said submissions in support of the appeal. And the respondent was duly*

served and has acknowledged such service. Copies of the said submissions and a receipt thereof are herewith annexed and marked "A" Apparently, however, we note that the said submissions have been timeously but ***mistakenly, filed in Civil Appeal No. 60 of 2004*** *lasted of 160 of 2004, which fact may have caused the current impase. I further state that my attempt to peruse the former's case file could not succeed as* ***Court Official told us the said file was already closed and could not be found in the Registry****. Copies of the relevant perusal fees are herewith annexed and marked "B".*

5 *That on the said mention date i.e 20/7/2005, I duly attended court* ***where upon I was told that Hon. Judge Ihema had retired and that all cases that were in his calendar would be reassigned*** *and parties would be notified by the some.*

It is the Respondents contention that the matter deposed to in the two paragraphs, and I think, the Respondent meant those portions I have underlined, could not be matters which were within the knowledge of Dr. Fauz Twaib, as it has been stated in the verification clause. Secondly, it is the Respondents contention that the said information is hearsay evidence and thirdly, that the

source of that information has not been disclosed. I do not think that the Applicant was serious when he stated in the written submissions that, " **the applicants objection is frivolous and misguided as the impugned paragraph ..... as a whole substantially conform to the law".** Order XIX Rule 3 (1) requires that **" Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove .....** " The facts deponed to by Dr. Fauz Twaib in paragraph 4 that the submission had been " **mistakenly filed in Civil Appeal No. 60 of 2004 instead of 160 of 2004**" and what he was told by an undisclosed Court Official that, " **the said file was already closed and could not be found in the Registry",** cannot by any stretch of imagination be facts which Dr. TWAIB knew of his own knowledge. Clearly, Dr. Twaib did not disclose the source of that information or state that he believed that information to be true, and the grounds for believing so. The said paragraph does not therefore conform to the provisions of the law. Equally, what Dr. Fauz Twaib deposed to in paragraph 5 that he " **was told that Hon. Judge Ihema had retired"** etc, cannot be a fact within his own knowledge and clearly, the source of that information is not disclosed. Dr. Fauz Twaibs affidavit is undeniably defective and the defect renders the affidavit unreliable to be acted upon by this court. It should be remembered that an affidavit is a substitute to oral evidence and it is subject to the rules of evidence like any other piece of evidence. What then is the effect of the detective affidavit on the application as a whole? The application would normally be liable to be struck out for not

being supported by an affidavit. However, in the present application there is a second supporting affidavit of the Applicant himself, SAID SALUM MOHAMED, what has not been impugned. Since the application is still supported by the affidavit of the Applicant himself, the defect in Dr. Twaib affidavit which renders it unreliable as evidence, does not vitiate the application.

Let us now come back to the remaining points of objection. The first is that it is incompetent for not being maintainable in law. For the Respondent it has been submitted that two applications cannot be competently lumped together into one. The case of IDDI MPENDA VS JOSEPHINE CHALE CIVIL REVISION NO. 131 OF 1995, per Kalegeya J, as he was, has been cited in support of this submission but the Applicant came up with the case of TANZANIA KNITWEAL LTD BS SHAMISU ESMAIL 1989 TLR 48, in which Mapigano J held that such a combination **" is not bad in law since courts of law abhor a multiplicity of suits**." In IDDI MBEMBA VS JOSEPHINE CHALE Kalegeya J was dealing with an application lumping together an application for extension of time in which to file an application and the application itself . His Lordship was of the view that:

" *Where a party is late in filing an application he should first file a chamber summons supported by an affidavit praying*

for extension of time, and only if allowed, would he proceed to file another chamber summons supported by another affidavit from the main application ..... It is unprocedural as was the case have, to lump them together ..... Lumping them together as is the case here is an incurable irregularity which can may earn the relevant application a dismissal as the one I hereby award in respect of the one at hand."

The two decision appear to be in conflict. Unfortunately the decision in the TANZANIA KNITWEAR LTD VS SHAMBU ESMAIL was not cited to his lordship. The extension and logic of the decision in the IDDI MBEMBU VS JOSEPHINE cannot be faulted in that, where an applicant is seeking an extension of time, to bring main application which was otherwise caught by the Law of Limitation, such application can only be brought after the application for extension of time has been granted. The TANZANIA KNITWEAR LTD case proceeded on the premise that, there is no law which prohibits the lumping applications together. That was an application to set aside a temporary injunctive order and also for the granting of an injunction. It may well be that, confined to its facts, the applications in the TANZANIA KNITWEAR LTD could be lumped together because one did not depend on the other, while in the IDDI MPEMBAS case, the remaining prayers were dependent on the application for extension of time first being granted. On the other

hand, even where such applications have been lumped together, it is also arguable that to avoid a multiplicity of applications, the prayer for extension of time can be considered first and if it fails, then the rest of the prayers are rendered incompetent. In these circumstances, I do not think that the decision in IDDI MPEMBDA case overrules the decision in TANZANIA KNITWER LTD or renders that decision to be bad law. I think in a proper situation where the supporting affidavit covers or supports all the prayers lumped together, and in this case it has been argued that, that is not the case, an application containing more that one prayer is not ipso facts defective. If that was the position in IDDI MPEMBA, I would gladly depart from it. The preliminary objection that the application is not maintainable in law o in grounds only that it lumped / together several prayers is therefore dismissed.

We are left with the last objection that **" the application is incompetent for non citation and wrong citation of enabling provision f law"** It has been argued by the Respondent that the provision cited in the chamber summons ie Section 68, 95 Orders 43 Rule 2 and 39 Rule 19 , all of the Civil Procedure Code and Section 14 of the Law of Limitation Act, 1971, all these do not enable the court to grant the orders sought in the chamber summons. It has been contended that Sections 68 and 95 can be invoked where there are no specific provisions on the subject and that order 43 Rule 2 directs that all application be made by

chamber summons supported by an affidavit while Order 39 Rule 19 is for re admission of an appeal. As for the citing of Section 14 of the Law of Limitation Act, the Respondent submitted that the order of extension of time to file an application which has a heady been filed, cannot be granted. A number of authorities have been cited for the propositions that the applicant must cite the specific provision of the law which the applicant wants to move the court and failure to do so,..... the application incompetent. The Applicant is pointed with submission those ..... specific provision for setting aside a dismissed and therefore reference to Section 95 and 68 (e) and to Order 39 general 15 in order and legal Alternatively it has been submitted that the defect is availed. The ..... of the objection appears to be that, in the application that Applicant did cite the enabling provision for the prayer an application to reinstate the dismissed appeal. The Applicant has argued that the provision of Section 68 and 95 of the Civil Procedure Code which when cited, are appropriate, because there are is no specific provision ..... the subject. In rather words, who Applicant can codes that it there are specific provision cruising the subject, these provision must be cited but in absence, the supplemental provisions will suffice. It cannot therefore be gainsay, and authorities are abound, that failure to cite the provision under which application is made, is not fatal to the applicant. In the present application, ... To Act. owner the court to consider the application in so for as ie relates to extension of time. The second person of the application is "that this Honourable court may be pleased to set aside the order dated 15th

July 2005 dismissing Civil Appeal No. 160 of 2004 for want of prosecutor " The Applicant has valued an the provision of Section 68 (e) and 95 of the Court Procedure Code, on grounds that there is no specific provision of the law. With ..... do not argued under the Applicant. The dismissed appeal had been set for hearing by way of written submission for which a schedule for filing them was set. The Appellant ..... led not file the matter submission within the asked case as the result, the appeal was dismissed. Order IX Rule 3 of the Civil Procedure Code, Cap 33 R.E 2002, applied to failure to appear for hearing of a suit as were as, the hearing and appeal and for the consequences of dismissal for now appearance.

> " **Rule 4 of the same ask allows a party to " apply for an order to set the dismissal aside, ... if he satisfies the court that there was deficient cause ..... for his non appearance ....."**

It has been hold time and again by this court that failure to file written submission has the same effect as failure to appear at that heaving of the matter and attracts the some consequences. There are therefore specific provision ..... the subject matter which some have been cited to more the court to consider the application for setting aside to dismissal order. The supplemental provision of

section 68 and 95 of the Civil Procedure Code, or clearly implacable to more the court to consider this application. For this reason we uphold the preliminary objection that by citing Section 68 (e) and 95 of the Civil Procedure Code Cap 33 RE 2002 and failure to ie Order IX Rule 4, of the same, this court has not been properly moved. The application is therefore and as accordingly struck court, with costs.

J. I. Mlay

JUDGE

Delivered in the presence of Dr. TWAIB advocate for the Applicant and in the absence of the Respondent with notice, this 26th day of June 2009.

J. I. Mlay

JUDGE

26/6/2009