

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL CASE NO 14 of 2005**

**DR. HUBERT KRISCHE.....PLAINTIFF**

**VS**

- 1. THE EDITOR, RISASI NEWSPAPER.....1<sup>ST</sup> DEFENDANT**
- 2. GLOBAL PUBLISHERS &  
GENERAL ENTERPRISES LTD.....2<sup>ND</sup> DEFENDANT**
- 3. BUSINESS PRINTERS LIMITED.....3<sup>RD</sup> DEFENDANT**
- 4. NCHOLENCHOLE WAIRARO.....4<sup>TH</sup> DEFENDANT**

**Ruling**

Date of last Order: 01-06-2011

Date of Ruling: 06-06-2011

**JUMA, J:**

On 1<sup>st</sup> June 2011 when this suit came up for hearing, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants and their advocates Mabere Marando and Ms Tausi Abdallah were ready to proceed but Mr. Mbuya, the plaintiff's advocate was absent. In Mr. Mbuya's stead appeared Mr. Kileo the learned advocate. Mr. Kileo informed the court that he was holding brief for Mr. Mbuya and that he appeared in order to ask the court for an adjournment because

Mr. Mbuya was appearing before another Judge of this court in a Commercial Court case Number 23 of 2008.

Mr. Marando (for the 3<sup>rd</sup> defendant) strongly opposed any adjournment. Mr. Marando pointed out that the case was scheduled for hearing on that same day i.e. 1<sup>st</sup> June 2011 and on 6<sup>th</sup> June 2011. That if Mr. Mbuya knew he would be engaged elsewhere on the day scheduled for hearing, he should have instructed his client to instruct another Advocate to appear on his behalf to proceed with the hearing of the case. Mr. Marando also remarked that even the plaintiff himself was absent and that it is this very plaintiff who is specifically mentioned in Order IX Rule 8 of CPC.

According to the learned counsel, there is only one consequence that is stipulated under Order IX Rule 8, i.e. dismissal. Mr. Marando further submitted that appearances before another judge in the same High Court is not a good cause. And that appearance by an advocate holding his brief is not appearance for purpose of Order IX Rule 8. Mr. Marando asked this court to note the significance of the absence of the plaintiff himself and whose whereabouts is not known to the court. Ms Tausi Abdallah fully associated herself with Mr. Marando's submissions and the prayer seeking the dismissal of the suit.

Mr. Kileo had little to reply on. He informed the court that he thought Mr. Mbuya had already informed the defendants about his inability to appear on that date scheduled for hearing of the case. And that his instructions

under his holding brief did not extend to defending the defendants' prayer for dismissal of the suit.

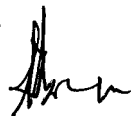
From submissions of the learned counsel, it quite apparent that Order IX Rule 8 of CPC is couched in mandatory terms:

*8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.*

When Order IX Rule 8 of CPC is read in conjunction with section 53 (2) of the **Interpretation of Laws Act Cap 1 R.E. 2002**, the duty of the plaintiff to appear when the suit is called on for hearing is obligatory. In my opinion, Order III Rule 1 of CPC governing appearance by an advocate does not cover the appearance by Mr. Kileo the learned advocate to seek an adjournment in the absence of the plaintiff when the suit is called on for hearing. When the suit is called on for hearing a plaintiff cannot fail to appear. Nor can the plaintiff send an advocate with only a holding brief to seek an adjournment. And it is for very good reason Order IX Rule 8 though supposedly handmaiden of justice should in the circumstances of this case should be construed as strictly as the provision provides. The best interests of justice demand that suits be heard expeditiously without delay. Filed way back on 8<sup>th</sup> February 2005, this Civil Case Number 14 of 2005 has been pending for a very long time- by any standard.

In my opinion, from 5<sup>th</sup> April 2011 when this court scheduled the hearing date to be on 1<sup>st</sup> June 2011, Mr. Mbuya had more than ample time to re-arrange his diary to ensure that this Civil Case Number 14 of 2005 does not coincide with the Commercial Case No. 23 of 2008 at the Commercial Court. That span of time was in my opinion sufficient to allow the learned Advocate to instruct another Advocate to appear for purposes of hearing but not to hold brief for the purposes of adjournment. I will agree with Mr. Marando that appearance of the plaintiff is significant under Order IX Rule 8 which emphasizes personal appearance of the plaintiff. At this stage when the suit is called on for hearing, there is no room for the court to determine the sufficiency or otherwise of the reasons behind non-appearance of the Plaintiff and his advocate.

On a plain reading of Order IX Rule 8, where defendant appears and plaintiff does not appear when the suit is called for hearing, court shall dismiss the suit. The Civil Case Number 14 of 2005 is hereby dismissed with cost. It is ordered accordingly.



**I.H. Juma**

**JUDGE**

**06-06-2011**

**Delivered in presence of:** Ruling is delivered in the presence of parties on record.



**I.H. Juma**

**JUDGE**

**06-06-2011**

