

IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM

CIVIL APPEAL NO. 31 OF 1992

(Original RM Civil Case No. 29 of 1988 - at Kisutu)

SAIDI RASHIDI.....APPLICANT  
VERSUS  
EMMANUEL BILIGE.....RESPONDENT

R U L I N G

KALEGRYA, J.

On 11\3\93, the Appellant, Saidi Rashidi, lost the appeal (PC Civil Appeal No. 31\92) before this court (Rubama, J.). Dissatisfied he filed a chamber summons supported by an affidavit on 13th July, 1993 praying for orders that

- "1. This Honourable Court orders stay of execution of the decree issued in favour of the respondent pending the hearing of this appeal."
2. That this court be pleased to grant leave to the applicant to appeal to the Court of Appeal".

When the application came up for hearing on 14\9\95 before Maina J. the applicant did not show up, and it was accordingly dismissed. On 26\10\95 as per ERV No. 00436543 he filed a chamber summons supported by an affidavit praying

- "1. That may the ..... court reinstate the appeal dismissed on 14\9\95 by Maina.
2. That the execution of the exparte judgement and decree made on the 14\9\95 be stayed pending the determination of this application and the main suit (appeal).....".

The above triggered on the filing of Respondent's Counter - affidavit in which they raised two preliminary objections - that

the application is hopelessly out of time, and that "prayers contained in the application have not been supported by the affidavit, the same are bad in law, the application is incompetent".

At the time of hearing, parties were allowed to argue on both the preliminary objections and the main application to restore the application dismissed on 14\9\95. Mr. Mwendela, Advocate, appeared for Respondent while Applicant defended himself.

Regarding the preliminary objections, Mr. Mwendela, argued that the application having been filed on 23\5\96 while the dismissal order was made on 14\9\95 it was deplorably out of time. I should observe here that Mr. Mwendela made that submission by erroneously treading on wrong facts. As already pointed out above the application was filed on 26\10\95 as per ERV 00436543 on record. So the lapse of time between the dismissal order and the filing of the application is not over seven months as contended by Mr. Mwendela but 34 days only. Does this make any difference regarding Mr. Mwendela's argument that the application is time barred? My answer to this is that it does. Mr. Mwendela insisted that an application to set aside a dismissal order in respect of the type of application as the one before us, filed on 13\7\93, has to be made within 30 days. As he is a layman the Applicant made no response to this technical legal point which I hereby examine instead. I hold the contrary view. The time within which one has to act is 60 days.

Part III of the 1st Schedule to the Law of Limitation Act does not provide specifically for such applications hence the applicability of the general item 21 which clearly states,

"An application under the Civil Procedure Code, 1966, the Magistrates' Court Act, 1963 or other written law for which no period of limitation is provided in this Act or any other written law... 60 days".

In view of the above provisions, and as the applicant acted within 60 days, the objection regarding limitation of time can't stand. It is dismissed.

On the 2nd ground, Mr. Mwendela argued that what is indicated in the affidavit does not support the chamber summons; that the chamber summons erroneously indicates the matter as being an appeal when it was a mere application; that the same chamber summons is wrongly entitled with O.9, Rule 13(1) and O.21 Rule 24(1) CPC as if it is a suit while the proper order ought to have been O.39, Rule 19 CPC.

In a brief reply to the preliminary objections the Applicant simply stated that if there are errors or defects in the application the blame should lie with his advocate who drew them (relevant documents) up and not him. Arguing on his main application he insisted that he did not turn up on 14\9\95 to prosecute his application as he had lost his child on same date, and called to his aid a letter of Katibu Mtendaji which forms an annexure to the affidavit.

In his final preliminary objection Mr. Mwendela observed that Applicant can't escape from advocate's acts, and on the main application challenged the authenticity of the relevant letter saying that the alleged death of Applicant's child is a cooked up story; that the letter could not have been written on 10\7\95 while referring to happenings which allegedly took place on 14th and 15th same month.

I should start by moving along with Mr. Mwendela that the chamber summons is wrongly entitled for O.IX, Rule 13 (1) CPC cited therein relates to applications to set aside ex parte decrees while O.XX1, Rule 1 relates to courts to which a decree has been sent for execution. That apart, the dismissal order was

in respect of the Application to appeal to the Court of Appeal and not the appeal itself. Such defects appearing in a document drawn up by a professional cannot be explained otherwise than on negligence, and, as rightly pointed out by Mr. Mwendela the Applicant can't sever himself from such acts of his Advocate by claiming that he is not to blame. He cannot run away from the document itself for it would be tantamount to denouncing his presence in court as it is by these documents that the court can see his presence before it.

Now having found that the chamber summons is pregnant with the above defects what consequences would ensue? Mr. Mwendela urges this court to dismiss the Application.

It is now trite law that wrong entitling of a pleading or document does not per se turn it into a nullity deserving only a dismissal. The court can proceed to order an amendment thereof or, if the nature of the case permits, disregard the irrelevant inclusions if any. [Fortunatus Luanyantika Masha vs Dr. W. Shija & another, Civil Application No. 6 of 1997 (CA) - Mwanza Registry, unreported and Hamed Rashid Hamed vs Mwanasheria Mkuu na Wenzake Watatu, Civil Application No. 9 of 1996 (CA) Zanzibar Registry -Unreported].

In my view the present matter falls in that category: where the defects should be disregarded. The entitling is indeed wrongly displayed. Neither 0.9 nor 0.21 CPC is applicable for reasons already explained above. At the same time however apart from s.95 and 68 there is no specific provision under the CPC which caters for this kind of situation. So at best the Applicant could have indicated only the two sections. He indicated only s. 95 CPC. In my view 0.9 and 0.21 CPC though indicated can be disregarded as they don't prejudice the other party. Again though the body of the chamber summons wrongly refers to the matter as an "appeal", considering the fact that it goes to a specific

order: dated 14\9\95, and as related to this case there was only one order on that day, by Maina J., it should be taken that what is being referred to is that order alone and nothing else - the dismissal order in respect of the application to appeal to the Court of Appeal. That being the case it cannot be said that the opposite party could confuse the order intended to be challenged with another one thus being prejudiced. As was the case with the defects relating to the title of the Chamber Summons the defects in the body are not prejudicial to the Respondent and thus cannot turn the application into a nullity. Under the quest to do justice with undue regard to technicalities, and, in exercise of the inherent powers conferred on this court by s. 95 CPC of giving orders as may be necessary for the ends of justice, and for reasons already discussed, the defects in the chamber summons are accomodatable. With this holding the two preliminary objections stand dismissed.

Next we turn to the main application. The Applicant alleges that he was stopped by a sufficient cause from appearing in court on 14\9\95: that it was due to his child's death. Annexure "P1" to the affidavit shows that it is a letter authored by one H. A. Hatibu, "Afisa Mtendaji Kata ya Tandale" and dated 10\9\95, and also addressed to,

"KWA YEYOTE ANAYEHUSIKA  
MAHAKAMA KUU  
DAR ES SALAAM".

The contents thereof are as follows -

**YAH; UTHIBITISHO WA KUFUWA MTOTO**

Kutokana na kichwa cha habari hapo juu tunathibitisha ya kuwa huyu ni raia wa Tandale kwa Tumbo. Nathibitisha kuwa amefiwa na mtoto wake tarehe 14\9\95 na kuzika tarehe 15\9\95.

Ninaomba asaidiwe".

I certify that this is a true and Correct copy of the Original. <span style="float: right;">5</span>
..... Senior District Judge High Court of Kenya
Dated .....