IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL REVISION NO.23 OF 1997
(Original civil Case No. 8 of 1997 of the
Resident Magistrate's Court
of DSM at Kisutu)

THE DSM REGION TRADING CO.LTD.....APPLICANT
VERSUS
AYUB MWENDA.....RESPONDENT

ORDER IN REVISION

KALEGEYA, J.

The applicant in this matter was the Defendant before the trial court (The Resident Magistrate's court of DSM. at Kisutu) in Civil Case No.8/97. The Respondent instituted a summary suit against applicant under **O.XXXV** of the Civil Procedure Code. Unfortunately however, when the Applicant's application for leave to defend came up for hearing the said applicant did not appear and the court ordered,

> *" Chamber application for leave to defend is dismissed due to the applicant/Defendant's absence in court. Judgement entered for the plaintiff as prayed."*

That was on 27/2/97. The day following, the applicant filed a chamber application praying,

> *" The Honourable court be pleased to restore the applicant's Application that was dismissed on 27th February, 1997 for lack of prosecution. (of course, the said application could not be restored before setting aside the judgement entered in favour of plaintiff.)"*

Reasons advanced for the absence of applicant were provided in Saniel Katala's supporting affidavit in which he states, that he was the one who was assigned the duty of making a follow up of the case; that on 27.2.97 the vehicle which he boarded broke down at Kamata Traffic lights and had to look for an alternative means of transport, and that by the time he arrived at the court premises the matter had already been dismissed. Saniel is the Personnel and Administrative Officer of the applicant.

In a brief ruling thereon, the trial court dismissed the application in the following wording,

> *" The advocate for the applicant was absent on the material day. The affidavit of Saniel Katala cannot be considered as he has failed to disclose sources of information. In the case of Premchand Raichand vs. Quarry Services (1969)(EA) 517 where Spry J.A. held*
>
> *"An affidavit in support of an application which does not disclose sources of information should be disregarded."*
>
> *Mr. Saniel Katala's affidavit does not give sources of information as to how his car broke down, reg. No. Mechanical problems, which alternative transport he took.*
> *I therefore dismiss this application with costs."*

Dissatisfied, the Applicant came to this court praying,

> *" That this Honourable Court may be pleased to call and revise the record and ruling of the Honourable Mr. Sameja RM, dated 6th May, 1997 issued in civil case No.8 of 1997 between the parties herein mentioned and the decree and order of execution be set aside and leave to defend the suit be granted to the applicant Defendant."*

Ms Bayona, Advocate, appeared for the applicant while Dr. Mvungi of the South Law Chambers (Advocates), appeared for the Respondent. They made their arguments by way of written submissions.

Ms Bayona vehemently argued, first, that the decree was based on a defective pleading in that having brought an action under **O.XXXV,** Rule 1(a) of the CPC the plaintiff should also have indicated therein that he had complied with S.48 and 49 of the Bills of Exchange Ordinance (Cap.215) by issuing a notice of dishonour. Citing Hussemali Dharamsi Hasmani versus The National Bank of India, Etd (1950) 17 EACA, page 55, in support thereof she insisted,

> *" Since there was no such notice of dishonour the suit was incompetent for failure to disclose a cause of action and the plaint should have been struck out under the provisions of O.VII, Rule 11(a) CPC."*

Secondly, Ms. Bayona argued that having proceeded under O.XXXV, rule 1(a) CPC the plaintiff should have claimed just shs 3,385,701/= allegedly being the sum indicated on the dishonoured cheque, and not crossing over into claims for damages, and that due to the latter's inclusion the matter should have been treated as a normal suit (cited Haja Arjabu Kasule vs F.T.Kawesa (1957) E.A 611. She went further and stated that the sums awarded over and above the liquidated amount of shs3, 385,701/=, without proof, was contrary to the provisions of orders **VIII**, Rule 14(2) and IX rule 6 (1) CPC (cited Kulwa Daudi v Rebecca Stephen (1985) T.L.R 116. Finally, she argued that the trial court erred in concluding that the affidavit was defective as it clearly indicated that all that was stated was in accordance with deponent's knowledge save para.7 whose source was disclosed; and that they have all along acted diligently in filing the various applications, which behaviour should be awarded by revising the verdicts entered by the trial court, i.e. dismiss the suit or alternatively be granted un-conditional leave to defend.

Countering, the Respondents stated that the argument regarding a defective plaint is misconceived because the requirement of notice would only have been relevant if Respondent was not aware of the dishonouring of the cheque which is not the case here as it was the one which gave a stop payment order to the Bank; that HASMAN's case is irrelevant as no one was seeking for amendment of the plaint; that O.VIII, rule 14 (2) and IX, Rule 6 (1)(a) CPC do apply where a party has failed to file a written statement of defence but not in a claim based on a cheque. Finally, they insisted without elaboration in relation to the facts at hand, relying on Premchand Reuchand versus Quarry Services (1969) EA 517, that " an affidavit in support of an application which does not disclose the sources of information should be disregarded."

I will start with the question of whether or not the affidavit of Katala was defective in a manner alleged by the trial court. With respect to the trial court and the South Law Chambers (Advocates), the authority cited is irrelevant in this situation as much as the charges levelled against the relevant affidavit are unsupportable. For clarity, even at the danger of making this ruling unnecessarily long, let the wording of the affidavit itself, in full, portray the picture:

> *"I, SANIEL KATALA, Adult, Christian and resident of Dar-es-Salaam, do hereby make oath and state as follows:*

1. *That I am a Personnel and Administrative Officer with the Applicant Company.*

2. *That the Applicant is the Defendant in the main suit.*

3. *That on the 20th February, 1997 the applicant filed Chamber application in this Court seeking for unconditional leave to appear and defend the suit.*

4. *That the said matter was fixed for hearing on the 27th February, 1997.*

5. *That I am the one who was assigned by the Applicant to make a follow up of the said matter in court.*

6. *That on the morning of 27th February, 1997, I left our Head Office at Nyerere Road for the Court. While on my way to Court, the Motor Vehicle I was travelling in broke down near Kamata Traffic Lights and I had to look for another transport.*

7. *That by the time I arrived at the court I met the Court's Clerk who told me that the matter had been called up and dismissal order entered against the Applicant.*

8. *That the non-appearance of the applicant in court when the matter was called up was not deliberate but was beyond our control.*

9. *That as the Applicant has a genuine and strong defence in the main suit, and in the interests of justice, I pray for the orders sought in the Chamber summons.*

10. *What is stated hereinabove is true to the best of my own knowledge except Para 7 which is based on information the course of which is disclosed.*

Looking at the above quoted affidavit can one justify the trial Court's condemnation of the same? The answer is obviously negative. All the main facts alleged should have obviously been in the deponent's knowledge. Possibly, the trial court, in part, had a quarrel with para. seven for not disclosing the name of the court clerk who told him (Katala) that the case had been dismissed. While conceding that it would have added

flavour if the deponent had disclosed the name, on the facts of this case, it was not necessary as much as it was not necessary at all to state that he had been told of the dismissal of the suit. He could have simply said " ***I found the application already dismissed***." Why? This is an undisputed fact. The case had been dismissed and that's why the application which was being considered had been filed. The deponent could have left out para. 7 and the affidavit would have remained unaffected. The above apart, it is now trite law that if an affidavit contains an offending paragraph, which however, if removed would not affect the otherwise full import of the said affidavit, the court should expunge it (para) leaving the other part of the affidavit intact. That apart I need not emphasize that " ***a Registration number of a vehicle***," ***Mechanical problems***" and related are in law, not "***sources of information***" envisaged in an affidavit. It is clear therefore that the trial court erred in basing its decision entirely, on irrelevant consideration and this alone is enough a ground entitling this court to interfere with the trial court's proceedings by way of revision.

Next is the question of whether or not the claims as laid down by the Respondent properly fall under O.XXXV of the Civil Procedure Code.

The Respondent claimed in his plaint that having been retrenched by the Respondent he was paid terminal benefits amounting to shs 3,385,701/= through cheque No.009374914 of 1/11/96 whose payment was however stopped by the drawer. In the concluding part of the plaint Respondent prayed:

> *" WHEREFORE the Plaintiff prays for judgement and decree as follows:*
>
> *(i) That the defendant pays to the plaintiff his terminal benefits of T.shs 3,385,701/= as per paragraph 4 above*
>
> *(ii) That the Defendant pays to the plaintiff damages of T.shs 5,000,000.00 as per paragraph 6 above.*
>
> *(iii) That the Defendant pays to the Plaintiff per diem allowance at the rate of T.shs 3,000 = per day from the date he stopped payment of the cheque to the date he shall lift the stop payment order*

(iv) *Interest on (i) (ii) and (iii) hereinabove at the commercial rate of 40% p.a. from the date the cause of action to the date of judgment.*

(v) *Interest on (i)(ii) and (iii) hereinabove at the Court's rate from the date of judgment to the date when full payment is made.*

(vi) *Costs of this suit.*

(vii) *Any other relief(s) this honourable court may deem fit to grant."*

Although in para (i) of the prayers the Respondent states of terminal benefits, in accordance with the body of the plaint it stands out clear that he is referring to the cheque whose payment was stopped. In my considered view failure to use the usual magic words *" the amount of the dishonoured cheque"* is not fatal in the circumstances as the substance is clearly the same. This would be a proper claim under O.XXXV CPC. But then, what about para. (ii) – (iv)? Can claims for general damages, interest at 40% and per diem allowance be claimed under O.XXXV CPC? In my view the law does not permit. Neither does the CPC allow this nor the Bills of Exchange Ordinance. O.XXXV CPC provides in part:

" 1. This order shall apply to –

a) suits upon bills of exchange (including cheques) or promissory notes

b) .....(not relevant

c) ..... " "

d) ..... " "

e) ..... " "

f) ..... " "

2. (1)...(not relevant)

(2).....

(a) where the suit is a suit, referred to in paragraph (a), (b) or (d) of Rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of such mortgage is claimed, to a decree for any sum not

exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims

(b) more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith;
(c) .....(not relevant)
(d) .....(not relevant)"

The quoted part of O.XXXV does not provide for damages in the nature claimed by Respondent. Even Rule 6 under the same order which provide for recovery of expenses incurred in relation to the dishonoured cheque does not go to the extent of providing for damages. It prescribes:

" 6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for no-acceptance or no-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note."

The same picture is presented by the provisions of the Bill of Exchange Ordinance (Cap 215). S.57 thereof states as follows:

" 57. Where a bill is dishonoured the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:-

a) the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser
  i) the amount of the bill;
  ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
  iii) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest;
b) in the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and

the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to

c) *him the amount of the re-exchange with interest thereon until the time of payment;*

d) *where by this Ordinance interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.*

Can we read damages and interest in the nature claimed by Respondent in his prayers to the plaint? It does not require an eye of an expert in law to arrive at the obvious negative answer.

From the above I have no difficult in upholding the applicant's submission that it was wrong to have included other claims which basically are not directly related to the dishonoured cheque and which are purely contenstible and not disposable by way of summary suit. I should hurriedly add however that under O.XXXV CPC, a party claiming is entitled to interest on the amount indicated on the dishonoured bill but that should be at the court rate.

Now, let us turn to the argument that failing to issue a notice of dishonour to the Applicant and/or failing to disclose the fact of the notice of dishonour in the plaint rendered the plaintiff's suit incompetent: incapable of giving rise to a lawful decree.

I do appreciate that, legally, a notice of dishonour should generally be given by the drowee to the drawer or endorser and that failure thereof of discharges the latter. The principles stated in the cited case of HASMANI are not as irrelevant as the Respondent would want us to believe. True, in the case at hand there was no prayer for amendment of the plaint but what is stated therein is that failure to implead in the plaint that a notice of dishonour was issued and served makes the pleading defective. This is clearly put in the Bills of Exchange Ordinance. S.47 describes what is meant by dishonouring of the cheque. S.48 shows the effects of failure to issue such notice. S.49 provides what should be done for a notice of dishonour to be valid and effective. Let part of the very wording of ss.47 and 48 speak for itself:-

" S.47 – (1) A bill is dishonoured by non-payment:-

a) when it is duly presented for payment and payment is refused or cannot be obtained; or

b) when presentment is excused and the bill is overdue and unpaid.

(2) subject to the provisions of this Ordinance, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

S.48. Subject to the provisions of this Ordinance, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:"

On the facts at hand the Respondent admits that he never acted even a speck closer to what is prescribed in the quoted provisions of the law. He hurriedly adds however that he was not supposed to issue any notice. The learned counsel for the Respondent did not cite any authority in support thereof but I am of a settled view that he is correct. This stand finds support in S.50 (2) of the Bills of Exchange Ord. which provides: -

" 50 (1) (not relevant)

(2) Notice of dishonour is dispensed with-

a) ..(not relevant)

b) ...(" ")

c) as regards the drawer in the following cases, namely:-

i) .. (not relevant)

ii) ..(not relevant)

iii) ..(not relevant)

iv) ..(not relevant)

v) where the drawer has countermanded payment.

d)..(not relevant)"

The word "countermand" is easily comprehended but to borrow the definition given in The Black's Law Dictionary, sixth Ed, put simply, the word means,

> *" A change or revocation of orders, authority, or instructions previously issued."*

The evidence on record, at least as presented by the plaintiff in the plaint and its annextures, shows that the applicant issued a cheque to Respondent but by the time he presented it to the Bank the former had already issued a stop order! A copy of the cheque forming an annexture to the plaint speak aloud of this. In the premises then, the Respondent has an advantage of having the matter falling under the exceptions where a notice of dishonour is dispensed with. The applicant's attack on this is accordingly dismissed.

Now, the above said, what should this court do? We have already concluded that the trial court erred in taking into consideration irrelevant matters and or misconstruing the principles of law pertaining to defective affidavits. Indeed, the discretion here was exercised arbitrarily and based on total misunderstanding of principles governing use of such discretion let alone of the principles dealing with the issue before the court. Here, we are not referring to the verdict given by the court, i.e dismissing the application. No. We are looking at the manner by which it arrived there. We have concluded that the Respondent was perfectly right in filing the suit under O.XXXV CPC in relation to the dishonoured cheque; that he was not required to issue and serve notice of dishonour on Applicant but at the sametime we are agreed that the claim for shs 5,000,000/= damages; 40% interest, and per diem allowance was out of place.

I have carefully considered the question of what course should this court take. Should I remit the file to the trial court with directions that the application for leave to defend be dealt with according to law or should I put myself in the trial court's shoes and decide on it? After due consideration I have concluded that the latter course will meet the scales of justice, and more specifically regard being had to the lapse of time involved.

Having carefully analysed the affidavits in support of the applications to set aside the exparte order and for leave to defend I have been convinced up to the standard required that even if the trial court had properly directed itself on the principles of law involved in deciding on a defective affidavit it would not have granted the former

application as no sufficient reason for failure to appear before the court had been adduced nor could it have granted the latter (for leave to defend) because the Applicant had not revealed any substantive arguable issues. Here, we take it that in whatever hearing that could have taken place no new evidence would have been adduced apart from expanding or illustrating what is contained in the two affidavits.

Regarding the application to set aside the dismissal order, merely asserting that the vehicle which he boarded broke down and had to hire another one is not enough. The applicant's officer's movements were within the city of DSM. The alleged car breakage took place at Kamata Traffic Lights which is almost in the city centre. The exercise of looking for another vehicle can hardly take three minutes. In any case, if it had involved substantial time applicant could not have failed to specifically point it out. Katala didn't. We remain with only one reasonable inference that whatever attempts were made to make an appearance in court, if any, were commenced late hence late arrival at the court premises. It need not be stressed that this cannot be a sufficient ground which can convince the court to set aside a decree passed specifically because of the party's failure to be diligent. Mr. Katala knew very well the time when court proceedings were to start. A party who is supposed to make appearance in court has to give himself/herself enough time in which to act and has to give an allowance for such possibilities as breakdown of the motor vehicle, traffic jams and the like. If he he/she camps on mere chances she cannot be heard to call the same to his/her aid when courts pass decisions exparte due to his/her late arrival. So although based on different reasoning, both the trial court and this court's findings are the same: that the application deserved dismissal.

What about the application for leave to defend? The answer is the same. Applicant does not dispute retrenching Respondent; does not dispute issuing him the cheque; does not dispute issuing a stop order thereto. The only reason advanced for its **u-turn** is that it later came to realise that the Respondent had already reached 55 years of age and therefore due to retire, and that mistakes were made by the account's personnel. Apart from the obvious that the relevant affidavit tells lies because Accounts personnel generally deal with payments as per the authority of the administration hence could not have decided on their own regarding Respondent's retrenchment or otherwise, it is self-contradictory for stating that though retrenched it came to realise that he had struck the

retirement age of 55. The respondent cannot be victimised on applicant's laxity or related. Applicant does no allege any fraudulent or related behaviour on Respondent let alone conniving with any person either in the Administration or accounts Department. The above apart, the applicant does not allege that Respondent was paid any other terminal benefits such that paying him on the dishonoured cheque would be double payment. The obvious is that they retrenched him; computed his dues and issued a cheque. Appreciatively, a party confronted with a decree under O.XXXV CPC emanating from a dishonoured cheque for shs 3,385,701/= which has shot up to shs 12,369,981.40, and more specifically, which includes shs 5,000,000/= purportedly being damages and shs 3,534,250/= as interest at 40%, whose source cannot be easily comprehended is bound to put up a fight but, as I have already illucidated that fight has to have legs on which to stand if leave to defend is to be granted, and unfortunately, here there is none.

In conclusion, acting under the wide powers of this court provided under S.44(1) of the Magistrate's court Act,1984, I hereby revise the trial court's ruling in which dismissal of the application was made simply because the affidavit was allegedly defective by substituting it with a dismissal of the application but on reasons that no sufficient cause was established by Applicant for their failure to appear before the court. In exercise of the same powers, I confirm the decree on the amount of the dishonoured cheque, shs 3,385,701/= and at the sametime set aside part of the decree which cannot be granted under O.XXXV CPC; that is, the decree for shs 5,000,000/= as damages and shs 3,534,280/= as interests at the unprecedented rate of 40%. On interest, in substitution thereof, it is ordered that the Respondent be paid interest on the sum of shs 3,385,280/= from the date when the cheque was dishonoured till payment at court rate. It is further ordered that, as legally, the Respondent is entitled to costs/expenses specifically incurred in pursuing the dishonoured cheque in terms of O.XXXV, Rule 2(b) and Rule 6 of the Civil Procedure Code and S.57 of the Bills of Exchange Ordinance (Cap 215) (that is, before the filing of the suit), **the same to be drawn up and filed before the trial court for determination after hearing both parties**. However, considering the fact that each party has won because each has had some of the issues decided in its favour I will pass no order as to costs which usually follow events in suits.

For that matter, all orders made by the trial court regarding costs are set aside. Each party to bear its own costs both in the court below and this court save what I have specifically provided for and sketched above. Application for revision partly succeeds.

L.B.Kalāgeya,
JUDGE