

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM MAIN REGISTRY

CIVIL REVISION NO 60 of 2009

**(Originating from Kisutu Resident Magistrate's Court Civil
Case No. 250 of 2005)**

ELIFARAJI MRINDOKO.....APPLICANT

VS

AIR TANZANIA HOLDING CORPORATION..... 1ST RESPONDENT

MAJEMBE AUCTION MART..... 2ND RESPONDENT

Ruling

Date of last Order: 23-05-2011

Date of Ruling: 15-07-2011

JUMA, J.:

The applicant commenced this application for revision by Chamber Summons filed on 14th December, 2009 praying for the following orders that:

"This honourable court call up for the record of Dar es Salaam Resident Magistrates Court in Civil Case No. 250 of 2005 and examine the decision made on 5/11/2009 in particular as to its propriety, illegality and or injustice and on finding that any impropriety, injustice or illegality has been done then proceed to revise the same."

This application is supported by a three (3) paragraph affidavit sworn to by one Elifaraji Mrindoko setting out his ground upon which the power of revision of this court is sought. The applicant is basically contending that on 5th November 2009 he appeared as a plaintiff before the trial magistrate in pursuance of the civil case number 250/2005. His Advocate failed to make an appearance before the trial magistrate, because he was appearing before a Full Bench of the High Court. According to the applicant, although he (as a plaintiff) was right before the subordinate court, learned trial magistrate (M.C. Mteite-RM) all the same went ahead and dismissed the case. The applicant is aggrieved and contends that the trial magistrate should have specifically asked him whether despite the absence of his counsel he was ready to proceed with the trial of the case.

In opposing this application the respondents filed a five-paragraph counter affidavit dated 10th May 2011 and sworn by Mathew Simon Kakamba. Mr. Kakamba stated that Civil Case Number 250/2005 was fixed for hearing on 5th November 2009 and that the learned trial magistrate was

correct to exercise his judicial wisdom when he dismissed the suit.

Hearing of the application for revision was heard by way of written submissions. Written submissions in support of the prayer for revision were drawn and filed on applicant's behalf by Dominic Kashumbugu & Co. Advocates. The learned Advocate submitted that the absence of the applicant's counsel did not in the circumstances of the case entitle the trial court to dismiss the suit for want of prosecution because the applicant/plaintiff was present.

Mr. Kashumbugu submitted further that the learned trial magistrate did not even cite provisions of law to support the trial court's decision to dismiss the suit. According to Mr. Kashumbugu, where the plaintiff is present in person when the matter is called up for hearing; what the trial court should have done was to ask the plaintiff to adduce evidence if he is ready. Since the plaintiff was present before the trial court, it was not open for the learned trial magistrate to dismiss the suit for want of prosecution. Mr.

Kashumbugu requests this court to invoke its power of revision over the decision of the trial court.

The first respondent's replying submissions were filed on his behalf by Kakamba & Partner Advocates. The learned firm of Advocates strongly believes that the learned trial magistrate rightly applied the powers of the court when it dismissed Civil Case No. 250 of 2005 for want of prosecution. Mr. Kakamba drew my attention the record of proceedings which shows that the learned counsel for the applicant was absent in court not only on 5th November 2009 when the suit was dismissed, but also on previous other occasions. According to Mr. Kakamba, since the applicant who was present when the trial court dismissed his suit, he should have moved the court to at least adjourn the hearing.

I have examined the Chamber Summons in the light of provisions of section 44 (1) (b) of the **Magistrates Courts Act, 1984 Cap 11 (MCA)** which the applicant has employed to move this court to exercise its power of revision. Section 44-(1) (b) of MCA states,

44.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a)....

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit.

Apart from section 44-(1) (b) of MCA which allows a party to a suit that was determined in a district court or a court of a resident magistrate to apply for revision by this court if there is any error material to the merits of the determined case involving injustice. I have also scrutinized Order IX Rule 8 of the Order IX Rule 8 of the **Civil Procedure Code, Cap 33** which prescribes what courts should do where the defendant appears and the plaintiff does not appear when the suit is called on for hearing.

I believe the learned trial magistrate relied on Order IX Rule 8 when he dismissed the Civil Case Number 250 of 2005 for want of prosecution. From the foregoing provisions and from submissions which the two learned counsel have

made, I have formulated one main issue for my determination and I will identify this issue to be whether a suit can be dismissed for want of prosecution under Order IX Rule 8 where the plaintiff is present, but the advocate who the plaintiff has engaged to represent him is absent.

The record of proceedings of the trial court indicate that it was on 21st November 2008 when Mr. Kashumbugu advocating for the plaintiff/applicant prayed for hearing date to be scheduled on 23rd January 2009. The prayer was granted. Come 23rd January 2009 the plaintiff was absent. Hearing was rescheduled to 3rd March 2009 when the plaintiff was present while the defendant (respondent herein) was absent. When on 15th July 2009 both the plaintiff (applicant herein) and the respondent were absent, the trial magistrate raised his concern that the suit was dragging along much too long without prosecution. For purposes of present application my concern is not about the question whether the applicant failed to appear in other occasions when the suit was called for hearing but his case was not dismissed for want of prosecution. My concern is

with respect to the question whether on 5th November 2009 the trial magistrate had the power to dismiss the case.

Records of the trial court are clear that on 5th November 2009 when the trial magistrate (M.C. Mteite-RM) dismissed Civil Case Number 250 of 2005 for want of prosecution, the plaintiff was present while the defendant was absent. The records clearly show that the plaintiff was present but it was plaintiff's counsel and the defendant who were absent. Yet, the learned trial magistrate proceeded to dismiss the suit for want of prosecution.

In my opinion, appearance when the suit is called for hearing envisaged under the Order IX Rule 8 of **Civil Procedure Code Cap 33** is an appearance by a plaintiff not appearance by his counsel. Where the plaintiff is present in court when the case is called for hearing, the court cannot proceed to dismiss the suit for want of prosecution under Order IX Rule 8 without first asking the plaintiff who is present before the trial court if he is able to proceed without the assistance of a learned counsel. Order IX Rule 8,

just like other provisions of the **Civil Procedure Code, Cap. 33** is founded on the established principle of natural justice that both the parties must be given an opportunity to be heard. Although the applicant was present before the trial court as a plaintiff, he was not accorded any opportunity to be heard before the suit was dismissed for want of prosecution.

From the foregoing it is clear and I hereby find that there is a serious enough error apparent on the record of the trial court which has occasioned injustice to the applicant with regard to his Civil Case Number 250 of 2005.

Wherefore, the Order of the trial Resident Magistrate's Court of Dar es Salaam at Kisutu (M.C. Mteite-RM) dated 5th November 2009 is hereby revised and set aside. The trial magistrate shall proceed with the hearing of the Civil Case Number 250 of 2005 at RM's Court at Kisutu. The applicant is awarded the costs of this application.

It is ordered accordingly.



I.H. Juma
JUDGE
15-07-2011

Delivered in presence of the Applicant in person and Mr. Kakamba, Advocate (for 1st Respondent).



I.H. Juma
JUDGE
15-07-2011

