This section is in *pari material* with section 99 of the Indian Civil Procedure Code. In *Muhammad Hussain Khan v. Kishva Nandan* (2), cited in **Mulla on Code of Civil Procedure** (13 ed), Volume I, at page 430, the Privy Council, commenting on that section, said:

> ... there can be no doubt that the rule embodied in section 99 proceeds
>
> Upon a sound principle, and is calculated to promote justice ...

Commenting on the same section, in *Kiran Singh v. Chaman Paswan* (3) (also cited in the book referred to above), the Supreme Court of India said:

> When a case has been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice.

In his book cited above, at page 431, **Mulla** makes the following useful comments on section 99:

> A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped, or for non-compliance with Order 13, rule 4, in admitting a document in evidence, or for admitting a document declared invalid where the judgment is not based on that document, or because the wrong side was allowed to begin, or because the suit was decided on a Sunday, or because the suit was instituted by an agent under a defective power of attorney [Order 3, rule 2], or failure to obtain leave under Order 2, rule 4, or because the plaint was signed on behalf of the plaintiff by his wife, and no power of attorney was on record, or because an order allowing execution against the legal representative of a deceased judgment-debtor was made by the transferee court insead of by the court which passed the decree. All these are irregularities not affecting jurisdiction of the court and they are cured by this section.

It cannot be doubted that section 73 of the code is in accord with common sense. It enables the High Court or a Subordinate Court to do substantial justice, as opposed to justice based purely on technical grounds, when determining an appeal. It would be lamentable to the law if it were competent for such court to reverse or substantially vary a decree of a trial court on the ground not affecting the merits of the case or the jurisdiction of the

court. Subject to the law, justice ought to be administered in a manner that commands the respect of the ordinary man. Section 73 of the code was, in our opinion, enacted to enable relevant courts to achieve that noble goal. It should also be pointed out, for what it is worth, that that goal is also the spirit underlying section 37 of the Magistrates' Courts Act 1984.

What does justice demand in this case? We would answer that question by saying that it demands that the appeal be allowed but an order be made, in terms of proviso (a) to s.46 (1) of the Act, that the duty with which is chargeable to Exhibit "A" be paid. Accordingly, we allow the appeal, set aside the High Court's decision and restore the decision of the court of the Resident Magistrate. The respondent is hereby ordered to pay the duty with which Exhibit "A" is chargeable. We make no order as to costs.

CHARLES MUSSA MSOFFE *v.* NBC HOLDING CORPORATION

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 33 OF 1996

(From the decision of the High Court of Tanzania at Arusha, Munuo, J., dated 11 April 1996, in Civil Case No. 36 of 1995)

Administrative Law – Disciplinary Committee of Parastatal Organ – Decision of, on merits and substance – Whether appellable.

Civil Practice and Procedure – Mediation process - Order for costs may be made against defaulting or unprepared party unless exceptional circumstances exist –Instance of exceptional circumstances. Order 8A, rule 5 – Civil Procedure Code 1966.

A Following disciplinary proceedings the appellant services with the respondent were terminated. He filed a suit in the High Court claiming damages against the respondent, on the ground that the termination was unlawful. The case was scheduled for mediation but mediatory proceedings did not take place. The respondent strongly felt that as a
B matter of principle the matter could not be a subject of mediation. That attitude prompted the mediator to make an order, under rule 5 of Order 8A of the Civil Procedure Code, condemning the respondent in costs of the suit in any event. It was an issue before the High Court whether the wrongs complained of against the appellant were proved
C prior to termination. The finding of the trial judge was in the affirmative. The suit was dismissed, the judge saying, in relation to costs, that an order had been made by the mediator. The appellant appealed against the decision and the Court of Appeal considered whether the mediator's order was in conformity with Order 8A, rule 5.

D **Held:** (i) A mediator should make an order condemning a defaulting party in costs under Order 8A, rule 5, where the default is caused by exceptional circumstances;

(ii) It is an exceptional circumstance where a party does not appear at a mediatory conference, genuinely and reasonably feeling that submitting to mediation process
E would compromise his principles.

Appeal dismissed; mediator's order for costs set aside.

Statutory provisions referred to:

F (i) Civil Procedure Code 1966, Order 8A, rule 5, rule 3(1)

(ii) Appellate Jurisdiction (Amendment) Act 1994, section 4(2)

Mr. Makange, for the Appellant

G *Mr Maruma,* for the Respondent

JUDGMENT

(Dated 16 March 1999)

H

MFALILA, J.A.: In the High Court of Tanzania at Arusha, the appellant Charles Mussa Msoffe sued his employer, the former National Bank
I of Commerce claiming the following:

(a) For a declaratory order that the purported termination of his employment was wrongful and unlawful and amounted to a breach of contract of employment. A

(b) That he is entitled under the law, to a payment of special damages as averred and particularized under paragraph 13 of the plaint. B

(c) That he is entitled to a payment of the general damages as averred by paragraph 14 hereinabove.

(d) Costs of the suit. C

(e) Any other relief(s) this Honourable Court may deem fit to award.

The background to this suit was as follows: In December 1987, the National Bank of Commerce, now represented by the present respondent NBC Holding Corporation, employed the appellant as a bank clerk. D He continued in this service until 1994 when his services were terminated for misconduct. Although the appellant's misconduct appears grave, as according to the formal charge laid against him it led to his employer incurring a loss of TZS. 121 462 057-70, the appellant's services E were simply terminated and he was paid all his benefits. The appellant was however not satisfied with this punishment because according to him, the termination was wrongful, unlawful and illegal. The appellant asserted that his termination was unlawful because under the Parastatal F Service Regulations, it was carried out by an unauthorized body i.e. the bank management. He therefore considered his termination as null and void hence his claim for special and general damages amounting to TZS. 39 077 515-20 and TZS. 6 000 000 respectively. G

The respondents denied the allegation that their termination of the appellant's employment was unlawful, wrongful or in any way illegal because it was effected by a competent body.

H

At the trial in the High Court, the following issues were drawn up:

1. Whether the plaintiff's services were terminated by a competent disciplinary authority.

I

2. Whether the wrongs complained of against the plaintiff were proved prior to termination.

3. Whether the plaintiff is entitled to the damages he prays for.

4. To what reliefs if any are the parties entitled?

We do not know about the validity of the second issue because this was not an appeal against the substantive correctness of the decision to terminate the appellant's services, rather it was a suit to determine whether the body which the appellant alleges terminated his employment had the legal competence to do so.

At the hearing of the suit, the respondent led evidence showing that the appellant's employment was terminated by a disciplinary body within the bank, a body charged with the function of disciplining employees of the cadre to which the appellant belonged. This body is the Regional Human Reosurces Committee. A member of the Committee, Mr Faustine John Kimbengele (DW2), told the court that the Regional Human Resources Committee deals with disciplinary matters for staff in the salary scales PGS1 – 6. The appellant was a PGS6 so he came within the disciplinary authority of the committee. According to him, the disciplinary proceedings are initiated by the bank management in the person of the Resident Director or Manager. After initiating disciplinary proceedings, the Resident Director can suspend the employee concerned pending the decision of the Human Resources Committee. In the case of the appellant, he said, charges were drawn against him and were served on him. He was given time to answer them, which he did. When finally the matter was put before the Committee, it decided that the appellant's services be terminated and this decision was communicated to the Manager of the appellant's branch for necessary action. The branch manager on behalf of the management of the bank notified the appellant of the decision in his letter of 2 June 1995. According to this witness, therefore all the steps were followed before terminating the appellant's employment by the Human Resources Committee. The trial judge accepted this evidence.

On this evidence, the learned trial judge found and held that the appellant's services were terminated by the competent disciplinary authority and that the wrongs complained of against him were proved prior to termination although, as we have indicated, this last finding was uncalled for as the High Court was not seating on appeal on the merits and substance of the decision of the Regional Human Resources Committee. All the same the court dismissed the suit, without any order for costs. We shall come back to this later. Against this decision the appellant launched this appeal. A three-ground Memorandum of Appeal was filed on his behalf.

In ground one, the appellant complained that on the evidence adduced by both sides at the trial, the honourable judge erred in finding that the appellant's services were terminated by a competent disciplinary authority.

We think, the record indicates quite clearly that from the very beginning, the appellant was groping in the dark. In his plaint, he made a bare assertion that his services were terminated by an incompetent body i.e. the bank management in particular his branch manager. In his evidence he stated as follows:

> The Manager had no authority to terminate my service because the Resident Director of the Regional Office employed me so I expected the termination letter Exhibit P8 to come from him. Exhibit P8 comes from Manager NBC Mount Meru Branch though the letter speaks of the bank management terminating my services....

Later he added:

> The bank management means the bank authority in charge of the bank administration but I do not agree with the termination letter.

It is quite clear from the above that the appellant did not even know his disciplinary body. He appears to think that the disciplinary body applicable to him was the Resident Director because he is the one who employed him. But this view was wrong according to the evidence of Mr Faustine John Kimbengele (DW2) the Chief Operations Manager.

The relevant disciplinary body in relation to the appellant was the Regional Human Resources Committee, and this is the body which took the final decision to terminate his services. The appellant's main quarrel appears to be with the wording of the letter of termination which reads:

> We regret to inform you that the bank management have decided to terminate you from the bank services with effect from 1 July 1995 ...

We do not know where the appellant got the notion that a communication from the bank is invalid unless it emanates from the highest office in this case the Resident Director. At the hearing of this appeal, Mr Makange learned counsel who appeared for the appellant, submitted that he came to realize later that the proper disciplinary authority was the Regional Human Reosurces Committee and that according to the letter of termination Exhibit P8, the decision to terminate the appellant's services was not made by this committee but by the management which had no authority to do so. With respect, this is not in accord with the evidence of DW2. The trial judge accepted this evidence and we see no reason which can entitle us to differ from this finding. Accordingly, we find no merit in the complaint in this ground and we dismiss it.

In ground two, the appellant complained that the admissibility of Exhibit D1 (1 to 8) by the trial court in the course of the proceedings was contrary to the law thereby having the effect of erroneously finding that the fraudulent charges against the appellant were proved prior to this termination.

As we have already stated, this ground as well issue 2 which was framed at the trial are uncalled for because the court was not sitting on appeal against the merits of the charge against the appellant. The issue here was whether the appellant's termination of his services was effected by a competent authority. The merits of the charges could not be a subject of appeal to the High Court from the decision of the Human Resources Committee. We are certain there are appellate remedies within the institution itself. Therefore we dismiss this complaint.

In ground 3 the appellant complained that as the appellant was not called upon to controvert the investigation report which was prejudicial to him and on which the termination was based, the honourable trial judge ought to have made a finding that the appellant was not accorded a fair hearing prior to this termination.

In support of this ground Mr Makange submitted the appellant was not given a fair hearing by the Committee because he was not given an opportunity to controvert the investigator's report which was so prejudicial to him and that the appellant's written defence which was before the committee was not adequate. He added that the evidence by DW2 that the investigator's report contained the appellant's statement was not true.

On the other hand Mr Maruma learned counsel for the respondent, submitted that the appellant introduced this new complaint in his appeal which was not raised in his plaint. He added that the appellant did not raise the question that he was not given a fair bearing. We tend to agree with Mr Maruma's observation. The result is that the trial court did not get the chance to examine and determine the complaint. But even if the question had been raised in the trial court and considered, the outcome would not have been different because in our view the complaint has no merit. The committee had before it not only the investigator's report, but the appellant's statement on it. Mr Makange said DW2 was not telling the truth, but he did not proceed to tell us why. In any case as an Appellate Court we would not interfere with findings of fact without good reasons.

We are therefore satisfied that the complaint in this ground is not only devoid of any merit, but like ground two is misconceived.

In the final analysis therefore the appeal has no merit and we dismiss it in its entirety. Finally we turn now to the question of costs. In her judgment the learned judge made the following order:

> In view of the above the suit is dismissed. The order for costs was made by way of penalty on 5 December 1995 per the order of the mediator owing to the defendant's reluctance to engage in the then scheduled mediation.

The order of 5 December 1995 referred to by the learned judge stated as follows:

> **Date**: 5 December 1995
>
> Appearances as before.
>
> **Mr Nassoro:**
>
> I have instructions from my client not to participate in the mediation exercise because it would be against their principles. All my attempts to explain the advantages of settling the case through the mediation process were in vain.
>
> **mediator:**
>
> Since the defendants have been obstructive to the mediation process.
>
> **Order**
>
> The defendants are condemned in costs in any event in this case as a penalty under Order 8A, rule 5 of the Civil Procedure Code 1966 as amended by G.N. Number 425 of 1994.
>
> The case is returned to the trial judge for further proceedings as per the scheduling order.
>
> J.A. Mroso
>
> Judge
>
> 5 December 1995

This order appeared to us to be very harsh so we decided to give it a look. The provision of the Civil Procedure Code under which this order was made provides as follows:

> This is Order 8A, rule 5 of the Civil Procedure Code (Amendment of Schedules) Rules 1994.
>
> Where a party to a case or the party's recognized agent or advocate fails without good cause to comply with a scheduling order, or to appear at a conference held under sub-rule (1) of rule 3 or is substantially unprepared to participate in such conference, the court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders.

We note from the proceedings of 5 December 1995 that counsel for the respondents informed the court why he could not participate in the mediation process, namely, that it would not be within the principles of his clients the National Bank of Commerce. The mediator concluded from the above that respondents were being obstructive and penalized them to pay costs in any event. We ask ourselves: In what way were the respondents being obstructive to the mediation process when they gave what we consider a very good reason based on their operating principles? It must be remembered that a bank is an institution which is answerable to its Board of Directors. In the present case, the dispute between the respondent and its employee the appellant was on whether the appellant's employment was lawfully terminated by a competent body within the bank.

The appellant maintained that his services were terminated by a incompetent body hence the termination was unlawful for which he was entitled to special and general damages amounting to millions of shillings. On the other hand, the respondent bank maintained that the termination of the appellant's services was done by a competent body, therefore lawful for which the appellant was not entitled to any damages. Given this scenario, how could the bank hit a middle ground with the appellant and justify before its Board of Directors any payment of damages to him? If the respondent bank had made or reached such a compromise and made some payment under it to the appellant, eyebrows would have been raised within the Board of Directors. This is because the position is clear cut, either the appellant's services were terminated by a competent organ or not. We were therefore surprised to read counsel's comments to the court that his "attempts to explain the advantage of settling the case through mediation process were in vain." Counsel should have protected his clients by stating very firmly the reasons why his clients could not go through the mediation process. Had he done so, the mediator would not have found his clients obstructive and condemn them to costs in any event. The mediator would have found in these reasons "exceptional circumstances for not making such orders". The respondent bank was certainly in the circumstances of this case not "willfully and without good cause defaulting or unprepared to take part in the mediation process". If the respondent bank had been properly advised, it would have cross-appealed against the order condemning them to costs in any event. However, since we are satisfied that the order of the mediator on the costs is clearly erroneous and not in conformity with Order 8A, rule 3, we are compelled to exercise our Revisional Jurisdiction under section 4(2) of the Appellate Jurisdiction (Amendment) Act 1994. Having done so, we set aside the mediator's order condemning the respondents to pay costs in any event and instead award the respondent bank the costs of this appeal and those in the court below.

NICHOLAUS KANUNGA *v.* MIKA MELIYAR

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 8 OF 1998

(Appeal from the judgment/decision and Orders of the court of the Resident Magistrate's Court at Arusha, Rugazia, PRM, Extended Jurisdiction, dated 14 March 1997, in Civil Appeal No. 9 of 1996)

Customary law – Waarusha Customary Law –Dispute over ownership of a piece of land - Directive of clan council – Consequences of failure to comply with directive of clan council.

Land law – Customary land law – Dispute over ownership of a piece of land - Waarusha Customary Law – Directive of clan council – Consequences of failure to comply with directive of clan council.

The respondent sued the appellant in the court of the Resident Magistrate averring that two pieces of land occupied by the appellant belonged to his late father and that he was entitled to them. Before the matter was brought before the court the parties' clan elders held two or three meetings at which it was decided that the respondent gives to the appellant one calf and two tins of the *mbege* brew as appreciation for keeping the lands within the clan, upon which the appellant would hand over one of the lands to the respondent and keep the other. Before complying with the decision of the elders the respondent sued the appellant in the court of the Resident Magistrate where he won the case because the magistrate believed that the respondent had complied with the decision of the clan elders. Aggrieved by the decision the appellant appealed to the High Court in which the appeal was re-registered in the Extended Jurisdiction registry of the court of the Resident Magistrate. Among the points raised in the appeal were that the suit was time-barred and that the trial magistrate erred in declaring the respondent the lawful owner of the suit property. The Appellate Court dismissed the point of limitation because it had not been raised at trial and faulted the trial magistrate for declaring the respondent lawful owner of the disputed lands. However, thinking that the question of ownership could not be resolved on the available evidence, he dismissed the appellant's appeal because he believed the respondent had the right to redeem the lands. Aggrieved by the decision of the appellate Court the appellant further appealed to the Court of Appeal of Tanzania.

The Court of Appeal of Tanzania was of the view that the first Appellate Court was justified in dismissing the issue of limitation. The court considered the issue of ownership of the disputed lands.

Held: (i) There was no evidence of the respondent refunding the redemption price or complying with the clan's directive to pay the appellant a calf and two tins of liquor;

(ii) Since it was not disputed that the appellant had lawfully come by the suit property, whether by purchase, redemption or both, in the absence of any refund or customary payment by the respondent, the appellant was at all times and remains the lawful owner of the suit property;