

TANZANIA / JUDGMENT

20100810 TZHC Dar es Salaam

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. - - ~ ~ I ' : ~ ~ Cr ~ . 0A -- L - . ' - 11 ' i J , . l IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY} AT DAR ES SALAAM CIVIL REVISION No. 64 OF 2005 SIKUTE ENTERPRISES LIMITED APPLICANT VERSUS JOSEPH MAYOLI AND ANOTHER RESPONDENTS

RULING

Mruma, J The applicant through the services of Mr. Mchome learned counsel has lodged an application to this court seeking for the ' \- following orders; i). That this honorable court be pleased to call for the records and proceedings of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Employment Cause Page 1 of 24· No 86 of 1999 and revise the said Proceedings, judgment dated 10 th February, 2004, decree extracted there from, execution order and ruling and order dated 5 th September, 2005 dismissing the applicant's application for review. ii) Cost. iii) Any other relief (s) that this Honorable Court may deem iust and fit grant" (emphasis supplied). The application is footed on Section 44(1)(b) of the Magistrates' Courts Act, 1984, Section 79(1)(a) or (c) and 95 of the Civil Procedure Code and it is backed up by the affidavit of Mr. Mchome wherein he deposed to the facts which I briefly summarize as follows:- There was an employment Cause number 86 of 1 999 filed at Kisutu resident magistrate p r ~ for salary in lieu of notice, ~ ~ , , , , , / Page 2 of 24 leave and severance allowances. However, there were no issues drawn at the hearing of the said cause, and the trial magistrate proceeded to enter judgment without notifying the applicant then defendant. The affidavit proceed to aver that the decree extracted there from included a sum of Tsh. 191,000 /= for each plaintiff as transport allowance which had neither been pleaded nor granted and the Court ordered execution of the same. The mater did not end there. The applicant re-approached the same Court, this time seeking for review of the said decision which was refused and without addressing the issue of decree which was at variance with what was pleaded and granted, together with the judgment which lacks qualities of a judgment. He then averred that there is material irregularity and the court acted either without jurisdiction and or excised its jurisdiction illegally. He therefore invite ~ourt to revise the proceedings and quash the same. , / v0" ~ Page 3 of 24 · - , - " · - - - " " , · - ' · - · - · - - c = - . . The application came up for hearing on the 22 nd March, 2007 and Mr. Mayoli for the respondents prayed that it proceed by way of written submission meanwhile to be allowed to file their counter affidavit. One interesting fact apart from their vehement denial of the alleged facts in the affidavit, the respondents rose the issue of time lapse for the application-that it was barred

by the law due to time lapse-it is interesting because, they did not prefer it to come as a preliminary objection but rather decided to state it as a fact in their counter affidavit. They contended that the applicant had failed to show "eligible reasons" for the judgment of the resident magistrate to be reviewed, hence asked this court to dismiss the application with costs. Accordingly the parties were allowed to argue their cases by way of written submissions. gone through both Page 4 of 24 parties' submissions and indeed have been of valuable assistance to this court. But Before proceeding further, suffice it to recount what transpired until the application and the said arguments via affidavits. The employment Cause no 86 which is the nucleus of this matter was filed in the Kisutu resident magistrate court as a labour officers' report under s.132 of the Security of employment Act, cap 310. This was after the plaintiffs, now respondent were claiming their terminal benefits from the defendant now applicant due to their being terminated without notice or payment in lieu thereof and other terminal benefits as befits them per the law. The reconciliation had failed hence the report to the court which was filed as a complaint, and to be precise, it contained, as per the record, only three claims. I hereunder reproduce the part of the statement which contains the said claims: .. , ~ Page 5 of 24

STATEMENT OF THE COMPLAINT: "That they were employed by the above Employer in the capacity of grass cutter from 17/2/97 up to 16/12/98 at the wage rate of 8000/= per week. That on the 16/12/98 they were terminated by the said employer without being paid their terminal benefit. I hasten to point out that as noted from the above claims there are only three claims in the statement of claim as from the labor report and hence the claim in respect of transport and house allowance is not spotted here, which is one of the grounds for the quarrel between Mr. Mchome learned counsel and the Resident Magistrate Court. At first the defendant/ applicant mounted a preliminary objection to dissuade the court from the matter or lack of jurisdiction, and ~ / Page 6 of 24 (!)-he then proceeded to argue his case basing on sections 28 and 42 of the Security of Employment Act Cap.574 which ousts the jurisdiction of the normal courts to try employment causes. This was argued by way of written submissions too and he submitted therefore that since the plaintiffs had been terminated without either notice or salary in lieu thereof, it was a summary dismissal which civil Courts are not allowed to entertain by the said law. To counter these arguments, the plaintiffs/ respondents argued that, the issue of jurisdiction cannot arise since; they were not employees but were under a contract for service and were just paid on a weekly basis. And since the matter was based on contract for service it was well within the ambit of the Court. The trial Resident Magistrate was convinced by this argument and ultimately he ruled out the objection and had the matter proceed to a hearing. Page 7 of 24 The attempt to have the matter extinguished at the outset by the defendant/applicant did not end just there. At the hearing, at the close of the plaintiff's case, he submitted a plea of no case to answer, on the grounds that the plaintiffs/ respondents had no any written document to prove their contract and neither did they have any appointment letters or termination letters for that matter. He thus charged that there were no triable issues. The plaintiffs/respondents countered that argument by submitting that not all oral contracts need be established by formal writing as per the s.2 of the Employment Ordinance Cap.368. Once again the trial magistrate was in consonance with their counter argument and ruled that the matter should proceed to a full hearing inter-parte. It was from there that, a series of non appearances without notice, as it appears on record,

for the hearing of the matter by the defendant took ground, until the t 1 • Magistrate got weary Page 8 of 24 of the same. Eventually, the learned trial Magistrate entered judgment, and I think, rightly so, against the defendant. For easy of later reference, I reproduce the judgment which also forms part of the nucleus of this application:- "The non appearance of the defendant and his counsel Mr. W.Mchome has now been notorious. I find reason to enter Judgment in favor of the two defendants as prayed". Sgd. Hon. Mirumbe- SRM. 10/2/2004. Accordingly a decree was subsequently extracted, or rather drawn there from to the effect that the plaintiffs were entitled to all prayers as prayed ,and over and above, a transport and housing allowance to the tune of 1 9 1 , ~each. As I pointed W // 'UV\../-- Page 9 of 24 out earlier, this was not pleaded in the statement of complaint. It is incomprehensible as to why did they decide to bring it up during trial and why did the trial Magistrate award the same. For avoidance of doubt, I reproduce the part of the said decree hereunder DECREE: "WHEREFORE: - The Plaintiffs claimed from the defendant their terminal benefits which were not paid to each as follows: 1 . One month salary in lieu of notice 32,000/=

2. Severance allowance 38,400/=

3. Leave 52,266.70/=

4. Transport and house allowance 191,000/= Total 313,666.70 Q .A ;V c____ {~. _ Page 10 of 24 Judgment entered in favour of the plaintiffs as prayed " The said judgment and the decree there from landed into the defendant. He was aggrieved by the same. He decided to move the court by way of application for review so that the Court can review its judgment and the decree there from, and applied for stay of execution of the same pending determination of the matter. Stay was granted. The grounds for seeking review were thus

1. That the Court erred when it passed judgment as prayed without addressing itself to specific issues required to be proved and whether the same were proved.
2. That there is error or a mistake because no issues were drawn and proved. Page 11 of 24
3. The Court erred as it did not address the point raised in the written statement of defense particularly paragraphs No. 1 and 4 that the Applicant Company was incorporated on 31. 1 2.1 997 while the claim is from February 1 997 before incorporation.
4. That there is a mistake or apparent error on the face of record because the decree included Transport allowance of Tshs. 191,000/= for each Respondent which was not a matter pleaded and proved.
5. There is apparent mistake because proof of oral contract of service could only be by way of record of oral contract under s.35 of the Employment Ordinance Cap.366 which the respondent did not prove its existence.

6. That there is an apparent mistake on the ground for entering judgment as prayed because the reason given was notorious absence of the applicant and his counsel [!Lt/) p ~ L-- Page 12 of 24 while no-appearance after delivery of ruling on no case to answer was on two occasions only as per the court's record(i.e. 16th January 2004 and 10th February 2004)
7. That no notice of judgment was served to the Applicant when judgment was passed thereafter till in early June,2004 when fourteen days notice of intention to execute was served and the contents of the said judgment and decree were known to the applicant on 11th June, 2004 after paying perusal fee and reading the file. Time stated running on that day. Having evaluated their submissions, the principal resident magistrate, in a single paragraph refused the application and he advised the applicant to file an appeal. He ruled that the applicant had failed to show eligible reasons for review. Part of his decision is here under reproduced for caption purposes: Page 13 of 24 "Studying the submissions above it is clearly that the applicants counsel has failed to point out the eligible reasons for the judgment to be reviewed. The issue of error on face of records does not stand. To the contrary the counsel seems to have undertaken to fault the courts evaluation of evidence. On these basis it is my profound opinion and finding that the applicant" His decision however, left much to be desired to the extent that the applicant was left without any other avenue except this court by way of revision of the matter. Accordingly the applicant had no option but to move this court to call for and revise:-
 1. The proceedings of the employment cause no.86 and the judgment thereof dated 10th February,2004
 2. The Decree extracted there from~ution :der, . ~ c?lAA ~ · Page 14of 24
 3. The ruling and order dated 5th September dismissing the applicant's application for review. In short this court is now set to examine whether the requirements of the law were complied with by the courts below in the conduct of the employment cause no.86 of 1999. In this exercise, I am guided by section 79 of the civil procedure Act Cap.33 R.E 2002, and section 44(1)(b) of the Magistrates' courts Act Cap.11 under which the application was preferred. From the above provisions, the necessary conditions for revision are that
 - i) There must be a case decided by a subordinate Court ii) No appeal to the High Court lie from such a decision iii) There is a jurisdictional error committed by the subordinate Court. It is not disputed that there was a case decided by the subordinate court and in this case is an employment cause no.86. " A I\ . /W~r <----- Page 15 of 24 of 1999. This was decided in the Resident Magistrate court and later on a review application which was refused by the same court. As to the second condition above, it will be satisfactorily met or answered by determining the proceedings and decision of the trial court which formed the basis of both applications for review and subsequent revision to this Court. I preface my analysis with an observation in consonance with the applicant's counsel regarding the question of a counter affidavit by the respondents which contained an issue of law, that is; they sought to bar the applicant from proceeding on the ground that it was time barred. The applicant has referred

this court to the decision in case of Uganda vs. Commissioner of Prisons, Ex- parte Matovu [1966] E.A 520 which was to the effect that affidavit for use in court, being substitute for oral evidence, should only contain statements of facts the witness /~ --- Page 16 of 24 .A • whether of his own personal knowledge or from information which he believes to be true, and such affidavits should not contain extraneous matter by way of objection, prayer or legal argument or conclusion. He therefore claimed that the counter- affidavit filed by the respondents was incurably defective and should be expunged from the records. I looked at the said counter affidavit and indeed, apart from general denial, they specifically mounted a prayer within to the effect that the application should be dismissed since it was time barred as it was lodged out of "60 todays" [sic], in their own writing! I have referred to this as an interesting move by the applicant earlier on. It may be that it was instigated by lack of knowledge on the requirement of the law with regard to affidavit by the respondents. In the circumstance, I find the said counter affidavit to be incurably def~. ~ Page 17 of 24 Now, I turn to the proceedings and judgment and decree of the trial magistrate on the employment cause no.86 of 1997. The applicant has faulted the whole proceedings firstly because the trial magistrate did not frame issues for determination, the respondents did not prove their case, and a notice for judgment was not issued to the applicant. He further contended that the judgment has no contents of judgment, that it does not show points for determination, and the reasons for decision. As of the decree he submitted that the decree contained a prayer which was not determined in the judgment and neither was it pleaded by the respondent. He therefore submits that there was nothing to appeal against as opined and suggested by the principal resident Magistrate. In the wording of Order XIV rule 1(1) of the Civil Procedure Code, [Cap.33 R.E 2002], it can be inferred that an issue is a point of variance between the p o the suit where a {/\\"- Page 18 of 24 i material proposition of the fact or law is asserted by one part but denied by the other. Under rule 5 of the same Order, framing of the issues upon which a right decision will be based is made a mandatory duty of a magistrate presiding over the case. I have gone through the record of the proceedings and I could not find the issues which were to be determined in the employment cause no.86. It follows there from that this was an error on the face of the proceedings. But failure to frame issues by itself is not fatal to proceedings as long as the parties to the suit knew what the real question between them is and the decision was taken on it, and the court considered that evidence on making the decision. The parties in the employment cause no.86 were at variance on various points mainly being the nature of their relationships and entitlements following the termination of their relationship. This can be gathered from the labour office~port to the court and L • Page 19 of 24 ' the subsequent submissions of the parties. To that extent I am inclined to believe that the parties knew what was the real points of their divergences and therefore for the determination of the Court, hence the failure to frame issues in this regard was not fatal. However, as contested by the applicant, the trial magistrate, upon non appearance by the applicant, entered judgment in favour of the respondents, without calling them to prove their case, and neither did his judgment contain evaluation of the evidence. Order XX rule 4 of the Civil Procedure Code [Cap.33 R.E. 2002] requires tha a judgment should contain a concise statement of the case, the points for

determination, the decision thereon and the reason for such decision. It does not...9.!

Jormat / Page 20 of 24 - ... - & ...-. the judgment should take. [see *Kasusura v. Kabuye* {1982} T.L.R 338]. I have gone through that judgment which I reproduced herein at the outset, on the face of it, it is loud and clear that the provisions of Order XX rule 4 of the CPC (supra) were violated. And eventually, therefore I agree with the submissions of the applicant that there was nothing to appeal against since the purported judgment was outside per view of the law and accordingly its resultant orders. In such circumstances the proper course was to move the court to review its proceedings and judgment. I accordingly find that there was no judgment made in the eyes of the law, and hence the second prerequisite qualifying this matter for revision is met. It makes it easier to discern that the decree also cannot stand and therefore whatever order made in respect of its execution. This is simply because, in terms of Order XX rule 6(1) of the -vv- Page 21 of 24 • CPC, a decree follows a judgment; hence if there is no judgment there cannot be a decree properly so called. Apart from that, the law under the same Order XX rule 6(1) of the CPC requires that the decree inter alia should contain particulars of the claim. The decree in issue did contain extraneous award of transport and housing allowance which was not pleaded nor proved by the respondents. I therefore find that there were jurisdictional errors committed within the course of the proceedings. This can be, in view of the decision in the case of *Venka Taairi v. Mindu* (1949) A.C 156, categorized as acting in breach of statutory provisions and committing some procedural errors within the trial which affected the ultimate decision. The applicant also wishes this court to revise the ruling and order refusing his application for review by the Principal resident Magistrate. This was an obvious conduct ~ ~ e a c h of Page 22 of 24 . . statutory provision of Order 42(2) of the Civil Procedure Code [Cap.33 R.E 2002], which is to the effect that the Principal Magistrate was not the right adjudicator of the matter. The law is very clear that such application for review should have been determined by the same magistrate whose proceedings or judgment forms the subject of review. It follows therefrom that the proceedings by the Principal trial Magistrate were out of the ambit of the law and therefore the ruling therefrom rejecting the review cannot stand the test of legality. There are no reasons assigned as to why the matter coming for review was sent to the principal magistrate to make a ruling instead of the senior resident Magistrate whose proceedings and judgment were sought to be reviewed. To make the matter even worse, the principal resident magistrate simply stated "the applicant has failed to sign eligible reasons for review". Page 23 of 24

- • ~:.....- T • ~ ,, I find that the judgment was not a judgment in terms of the law governing judgments, and the resultant decree cannot survive. And the order refusing an application for review was also not justified. Henceforth this application is allowed, the judgment and decree thereof and hence the execution orders are hereby set aside. Let the matter be remitted to the trial magistrate for a proper course as provided by the law. I make no orders as to cost. JUDGE. Dated: 10th August, 2010 Words: 3,578 Page 24 of 24 • ' ' ., I , I

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