

TANZANIA / JUDGMENT

hamisi mninda kiula another vs public service social security fund two others

2023 tzhc 21683 10 october 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT
MOSHI CIVIL CASE NO. 10 OF 2023 HAMIS MNINDA KIULA.....1ST
PLAINTIFF GILLIAD ELISANTE NGOWI.....2ND PLAINTIFF Versus PUBLIC
SERVICE SOCIAL SECURITY FUND.....1st DEFENDANT TANZANIA REVENUE
AUTHORITY.....2nd DEFENDANT ATTORNEY GENERAL.....
3rd DEFENDANT

RULING

24th August & 10th October 2023. A.P.KILIMI, J.: The plaintiffs in this matter have sued the defendants claiming for payment of their employment benefits which include social security contributions, pension after retirement and general damages. The defendants through their joint written statement of defence raised three points of preliminary objection as follows:

1. That, the suit is res-judicata for contravening provision of section 9 of the Civil Procedure Code Cap. 33.
2. That, this court has no jurisdiction to entertain the matter 1
3. That, the plaintiff's claim is incompetent before this honorable court for contravening the provisions of section 8(1) & (2) (a) of the Public Service Social Security Fund Act No.2 of 2018 regarding parties to the suit. In disposing the above objections, parties through learned counsels agreed the same be argued by way of written submission. Mr. Michael Lugaiya represented all Plaintiff whereas both respondents were represented by Khadija Matewele assisted by Nyambilila Ndoboka both learned state Attorney. In their written submission, the counsels for respondents dropped third objection above. Thus, arguing in supported of the first ground, Ms. Matewele submitted that the case before this court is res judicata as described under section 9 of the Civil Procedure Code, Cap 33. He argued that what is being claimed in the claim by the plaintiff has already been dealt with in the former suit by the same parties and by a court competent to entertain the matter. She submitted further that in the claim the plaintiffs claim from the 1st and 2nd defendant for unpaid social security fund

and the claimed amounts are the same which were claimed in Labour dispute No. MOS/CMA/163/2013 where parties were the plaintiffs as complainants and 2 2nd Defendant as Respondent. He stated that the case was heard on merit and decided in favour on the plaintiffs. Submitting further, Ms. Matewele's submitted that the present suit before this court emanated from a labour dispute of which the Commission for Mediation and Arbitration had jurisdiction to entertain and the same was heard and determined on merit. The learned counsel argued that the doctrine of res judicata entails that where there was an issue subsequently raised and has been heard and finally decided by such court then no other court can come and try the same issue. She contended that the claimed public service social security funds amount was among the matter directly substantially in issue raised in the former suit and it was heard and finally decided that the 2nd defendant was ordered to refund such amounts. To substantiate the above she referred the case of Zuberi Paul Msangi vs Mary Machui [2022] TZCA 653 (TANZLII). Hence it was her submission that the relief claimed by the plaintiffs on page 6 item (a) (i) is res judicata. In respect to the second point of preliminary objection that this court has no jurisdiction, Ms. Matewele stated that the claim for retirement pension would require decision on whether the said employees were retired or not and this will go back to a labour dispute which this court will have no 3 jurisdiction to entertain. Then she concluded that this court has no jurisdiction to entertain it, thus the suit be dismissed with costs. Responding the submission above, Mr. Lugaiya contended that, the defendants have misrepresented the facts of the case and that through the misrepresentation they came to a wrong conclusion that the suit is res judicata. The learned counsel submitted that the plaintiff's case against the defendants is for only one main order that the 1st Defendant be ordered to pay the plaintiffs monthly pension for the rest of their life after retirement with effect from 20th September 2019 when they were terminated in lieu of reinstatement. He submitted further that the claim in paragraph (a) looks erroneously included in the prayers and that it would be dropped at an appropriate time because it is not supported by the cause of action and that from the presentation of facts in pleadings it is clear that the plaintiffs have no such claim against the 1st Defendant. He argued that the suit is not res judicata because there has never been a suit or issue before involving the plaintiffs and the 1st Defendant. Mr. Lugaiya submitted that the matter before the CMA was between the complainants against the TRA and that the present matter is between the plaintiffs and PSSSF. He argued that the present matter is intended to 4 request the court to compel PSSSF to pay pension to the plaintiffs as retirees, hence he contended that it had nothing to do with the issue of employment as it was in the earlier matter between the complainants and TRA. Moreover, in respect to res judicata stated the same does not qualify as a Preliminary Objection, because they have to go to the facts of the case to prove the same. He urged this court to refer the case of Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) 1 EA 696. In his further submission the learned counsel stated that the suit is not res judicata because in this suit the parties are not the same. That the matter directly and substantially in issue in the CMA is not directly and substantially in issue in the present suit. He went on stating that even the prayer for payment in paragraph (a) which is complained of was directed to the 1st Defendant while in

the former CMA suit there was no issue of payment but reinstatement of the plaintiffs. Furthermore, the learned counsel submitted that the principle of Res Judicata requires that a person relying on it as a defence to bring pleadings and decisions of the previous litigation into the latter litigation for comparison, however he said in the instant suit the above does not meet the legal test of Res judicata as stated in the case of Zuberi Paul Msangi vs Mary Machui (supra). In the strength of his submission 5 Mr. Lugaiya prayed for the court to dismiss the preliminary objection for lacking merit. Finally responding to the second point of preliminary objection that this court has no jurisdiction, Mr. Lugaiya submitted that this point has been misconceived. The learned counsel argued that this claim is not a labour matter but a matter of law upon retirement of a member who has contributed to the PSSSF fund for a period of not less than fifteen years and not determination of the employer employee status. He thus prayed for the objection to be dismissed for lack of merit. In her brief rejoinder Ms. Matewele reiterated the submission in chief and added that, they did understand the facts of the case and that is why they came up with the preliminary objection that the suit is res judicata and this court has no jurisdiction. She further said that the counsel for the Plaintiffs has contradicted himself by saying that they would drop the prayers under paragraph (a) of the plaint as it is erroneously included. She submitted that it is clearly like running from the effects of preliminary objection because the res judicata emanated from the amount stated which are the PSSSF contributions. She submitted that the argument of changing prayers cannot stand at this point after preliminary objections raised, because they have seen a merit in the preliminary objection. Furthering her submission in rejoinder Ms. Matewele observed that the counsel for the plaintiffs had contradicted himself when submitted that the present matter is between plaintiff and PSSSF while the TRA is also party to the suit as second defendant. She argued that this shows clearly that the plaintiffs have no claims/ cause of action against the second defendant because their case was previously heard by the CMA, and therefore suing them again amounts to res judicata. She was of the view that the counsel for the Plaintiffs was trying to change the pleadings, which is not allowed, since parties are bound by their pleadings. Ms. Matewele further was of the view that, the plaintiff should deal with the implementation of the execution because they were the judgment creditor and the execution order was in their favour instead of coming the other way around for the matter already dealt by court of competent jurisdiction. Before I proceed with the merit of above arguments, I find convenient to see the background, albeit in brief, as discerned from the pleadings of this 7 matter; the Plaintiffs herein were employees of the second Defendant, the first Plaintiff as Customs Officer and the 2nd Plaintiff as Assistant Accountant both stationed at Holili Customs Station in Kilimanjaro Region. The Plaintiffs were unlawfully terminated by the 2nd Defendant on 21st January 2011 and prosecuted in RM Criminal Case No. 9 of 2012 for allegation that they occasioned loss of revenue. The said court found them not guilty and discharged from said accusation. Thereafter, Plaintiffs being aggrieved by the termination of employment, they filed an application Number MOS/CMA/163/2013 in the Commission for Mediation and Arbitration (CMA) at Moshi, wherein their application was granted by ordering the second defendant to reinstate them. The facts show further, the 2nd Defendant

being aggrieved by the decision of CMA filed an Application No. 3 of 2017 in this court for extension of time, the same was dismissed for want of merit. However, after this decision the second defendant decided to terminate the Plaintiffs in lieu of reinstatement. They then claimed for their terminal benefits including their contribution on social security fund from the second defendant. Being unpaid they decided to execute the award of CMA in this court via Execution No. 36 of 2020 where on 04th June, 2020, this court ordered the commissioner 8 General of TRA to refund Tsh 23,766,738.24 for Mr Hamisi Mninda Kiula being ppf social security Fund Contributions and Tshs. 14,656,132.75 for Mr. Giliad Elisante Ngowi being pssf social Security Fund Contributions. It seems to date have never paid hence this suit. Back to the merit of the above objections, starting with the first point of preliminary objection where the defendants counsel has faulted the present suit to be in violation of the principle of res judicata. Principally the principle of res judicata is provided under the provision of Section 9 of the Civil Procedure Code, CAP 33 R.E. 2019 which states: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court". There are number of decisions on this point, that for the suit to be "res judicata," the parties to the suit must be the same, same subject matter and 9 same reliefs claimed. (See the case of Gerald Chuchuba vs Rector Itaga Seminary [2002] TLR 213 and Zuberi Paul Msangi vs Mary Machui (supra) Having gone through the pleadings particularly the plaint which instituted the present suit in comparison with the case that the defendants counsel has claimed to be subject of res judicata. To start with the argument of both counsels referred the case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (supra) while the counsel for defendant claimed that her objections are on point of law because the pleading was against section 9 of CPC, the counsel for plaintiff does not qualify because they have to prove facts. In my view the above amount to preliminary objection, and my reason is that, despite of being against the provision of the law state above, the same can be discerned apparent on the face of record, and this simple. Parties are seen on title of the case, relief claimed as well as cause of action on the pleading. Now let me test the above, under the circumstances of this case, the previous case which is annexed to the Plaint, is Execution case No. 36 of 10 2020 filed in this court, wherein the Hon. Deputy Registrar executing the case originated from CMA at Moshi in Dispute No. MOS/CMA/ 163/2013 which is also annexed by the plaintiffs as Annexure HK8 at page 4 the Deputy registrar ordered as here under; "Therefore, I grant the applicant and order the Commissioner General of TRA to immediately release or refund Tsh 23,766,738.24 for Mr Hamisi Mninda Kiula being PPF social security Fund Contributions and Tshs. 14,656,132.75 for Mr. Giliad Elisante Ngowi being pssf social Security Fund Contributions. " In above case, parties to the suit were only plaintiffs and the second defendant, compared to the present matter, all above parties are present but further the plaintiff has added PSSSF as first defendant and Attorney General as third defendant, otherwise the subject matter and prayer is the same in respect to first prayer of the plaintiff in this case at hand. Now, according to

the circumstances of this matter, which commenced from CMA these prayers cannot be separated, this is because, it is this court before Deputy Registrar ordered the plaintiff to be paid as above, the same prayer has been repeated in this case by the plaintiff in their prayer at page 11 6 of the plaint. According to the facts narrated in the background above, the same was decided by the Deputy Registrar as shown above, thus bringing again at this court is untenable, as said it is on the same subject matter. The plaintiffs' counsel has defended that it was erred and will be dropped. As rightly pointed out by defendants' counsel the same cannot be entertained after this objection raised, in my view, plaintiff argument is a mere afterthought after seen this objection. Be that as it may, since there is a ruling of Deputy Registrar which remained unrevised or set aside, the amount awarded by him remained undisturbed and cannot be paid by none other than the second defendant in this matter, thus suing again by adding the first and third defendants is useless. Therefore, in the above circumstances having different parties by the meaning stated above does not affect this matter to be res judicata as per the law stated above, hence I am satisfied this court lack jurisdiction to entertain this prayer because it has already decided by the competent court. I therefore find the first objection meritorious and sustained. Nonetheless, in their second prayer, they are claiming the first defendant to pay them pension after retirement, effective from 20th September, 2019. For this prayer, I acknowledge name of parties and the 12 claim itself are different from the previous case decided, but in my view the subject matter remain the same. However, what I can discern from this prayer, first, the proper legal person to be sued is the Board of Trustees of Public Service Social Security Fund and not the fund itself as plaintiff sued above, thus they have sued a none existing person. Second, it is also my view this matter is premature before this court, I am saying so because, this is a new matter never dealt at any tribunal or settling dispute machinery of previous employer of the plaintiffs. I am not in agreement with the Plaintiffs' counsel when he argued that since the plaintiff currently are not at work this cannot be a labour matter, I think, since these rights they are seeking for accrue from the work they did to the second defendant, then they cannot absolve their relationship with their previous employer. And indeed, this relationship is governed by respective laws. Thus, I am settled that this court lacks jurisdiction to entertain it. In the words of the Court of Appeal in Tanzania Revenue Authority vs Tango Transport Company Ltd, Civil Appeal No. 84 of 2009 (unreported) the Court stated as follows; 13 "Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests". Be that as it may, and without prejudice of the above, the first defendant is a creature of statute, which is "The Public Service Social Security Fund Act 2018" This Act establishes Public Service Social Security Scheme which provides for contributions to and payments of social security benefits in respect of the service of employees in the public service and it is the same Act repealed the Public Service Retirement Benefit Act, the LAPF Pensions Fund Act, the GEPF Retirement Benefits Fund Act and the PPF Pensions Fund Act. Furthermore, this act under section 3 defined 'Authority' to means the Social Security Regulatory Authority established by section 4 of the Social Security (Regulatory Authority) Act Cap. 135 R.E.2018, which under part VI provides mechanism of settling disputes from section 43 to 46. In my view, I think plaintiffs may use these laws and find any available remedies they can pursue

therein, instead of knocking doors of this court. 14 In view of what I have endeavoured to discuss above, I find the two preliminary objections raised by defendants are meritorious and is accordingly upheld and sustained. In the premises and from the foregoing reasons, the plaint filed by the plaintiff is hereby struck out. In the circumstances I make no order as to costs. It is so ordered DATED at MOSHI this 10th Day of October, 2023 X JUDGE Signed by: A. P. KILIMI Court: - Ruling delivered today on 10th October, 2023 in the present of Ms. Hadija Matewele, State Attorney and Steve Biko Principal State Attorney for first defendant. Also, second plaintiff present in person whereas Mr. Lugaiya for plaintiffs absent. Sgd: A. P. KILIMI JUDGE 10/10/2023 15

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