

TANZANIA / JUDGMENT

19980227 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM ~ ~ - - - - &... .., CIVD:, CASE. NO. .. f.9.U,1,2.91 KITERIA MENEZES & 33 OTHERS o . . . PWNTIFFS VERSUS AFRA' ENGINEERING WORK LTD 1b'i: DEFENDANT THI;;° ATTORNEY GENERAL ~.. . . . 2Nl 1 DEFENDANT .@.+PETA.J J. This is a ruling on preliminary points r,f ·law raised by Mr. Maira, Mr. , Kilindu, and Mr. Mugare 1 learned oounsels for the defendants/respondents . . The background of ·the matter is that on 21st October, 1997, Kit~ria Menezes ana. 33 others filed civil case no.297/1997 seeking, inter alia, an order to ,,,,. . -~.....-. ,nulli.fy the M.1.1eof · a building then situated on ·plot no. 16 ·, Old Kisutu/UWT Stte~t:i

- I to the plaintiff, On' 1_0th Nqvember, 1997, Kiteria Menezes' file,d a chamber application in that same case seeking, int~r a?,ia, leave to:- 11 represent 33 people who .have similar interest in this suit. · 1 On 18th December, 1997, the defendants, namely, Afra Engineering Worka_ttd, , . and_ tl;ie Attorney General, filed a counter affidavit opposing the chamber applica- . tion. On the same day they filed notice of proliminary objectiona oh three· points, namely, that the application had been brought under wrong provisiens of ' the law, that the application was incompetent for want of locus standi. in t.hat ~-~..-:.... "Ittn ...- ' Kiteria Menezes had.not oitained leave to institute the proceedings under repre- ·sentative procedure, . and that . the application was bad in law as it was founded . in a suit which is re,s_j_1:.,~~'t!! • I' • During the hearing of these proeedin~S;< permitted learned counsels s of bo'th · sides to address t~e court in respect ·of both the civil case and the app~ieation. Mr. Maira submitted that Kiteria Menezes· had no locus 'standi as she had not sought and been granted leave of the court to file a representative ' suit
- - - - - I .. under ... ' . ' . Order ' I, Rule 8 of.the Civil Procedure . Code, an omission which,he submitted, ·was :fatal to the proceedings. In his submission, the accepted practice and procedure . was for a party to file· a miscellaneous application for leave to file· such a . . suit 1something which had not been done in this matter and so, in law, there .js "" ' :no application but only a civil suit, Mr Maira accordingi prayed that all· the proce"edings be struck out as being incompetent. For this submission, learn~d . counsel ~elied_ on the case _of [<J_~~ ,v ...]:i~~· (197,1) ~.A. 443. Secondly, Mr. Maira submitted .t~t the suit was !:~.._judi,2.at.!, in that it ,. f ' ., offends section 9 of the Civil Proce.d.ure Code because the issues in this case between the parties· lvere decided in Kisutu Miscellaneous f\pplio~tion no. 263 of., 1997. .. . 2 1·l · .that the suit disclosed Thirdly, Mr. Maira~submitted no cause of

action because the plaintiffs did not state whose tenants they were. For those reasons, Mro Maira submitted that both the suit and the application were not properly before the court and so should be struck out. Mr. Kilindu added that in the application, the plaintiffs/applicants referred to it thus disclosing that they had already filed the suit. Mr. Salula, learned Senior State Attorney for the Attorney General, subscribed to 'the submissions made by Mr. Maira and Mr. Kilindu. Professor Fimbo, learned counsel for the applicants/plaintiffs, submitted that this was an application for leave to file a representative suit, and that the application, on which the suit was dependent, would stand alone. And so, he submitted, it could not be said that there was no application because there was no suit as both the suit and the application were filed on the same day. While conceding that an application for leave to file representative suit should precede the filing of such suits in his submission, there was nothing fatal to the application. As to the practice and procedure of this court, Professor Fimbo submitted that there was nothing expressly ruling out a situation where a representative suit is filed prior to the grant of permission and the requisite permission is sought subsequently. He relied for this submission on a ruling of this Court. (Late Mkude, Jo) in the case of *Calder & Jones Ltd v. The Attorney General* (HC) Civil case no. 117 of 1992, Dar es Salaam Registry. On the submission of no cause of action! Professor Fimbo submitted that pleadings could be amended. In the alternative, he submitted that the plaintiff did disclose a cause of action. On the question of res judicata, learned Professor submitted that the issues in the Kisutu R.M.S 1 Court matter were different from those in the Present suit, and so, he submitted, there was no question of res judicata in the present suit. The crucial question in these proceedings, it is clear to me, is as to whether Civil Case no. 297 of 1997, and the application filed in that case are properly before this court. Since Civil case no. 297 of 1997 purports to be a representative suit, then the provision of Order 1, Rule 8 of the Civil Procedure Code had to be complied with. In other words, the plaintiffs, as a precondition to filing that case, had to file an application for leave to file such a representative suit. The Plaintiffs did not do so before filing Civil case no. 297 of 1997. In my view, that was a fundamental error. I do not subscribe to the view expressed in *Bendall v. The Attorney General* (Supra) that one can file a representative suit and then apply for leave later. That would be putting the cart before the horse. The absurdity of such a situation is not far to seek: what if the court should refuse to grant leave? The law, in my view, is that a party desirous of filing a representative suit, as a precondition, seek and obtain leave before filing such suit. That, in my view, is the plain, ordinary, natural, and reasonable meaning of Order 1, Rule 8 of the Civil Procedure Code. To conclude, therefore, it is abundantly clear that Civil Case no. 297 of 1997 was prematurely filed and filed contrary to law, and so the same is not properly before this court. I now turn to the application for leave. As was correctly pointed out by Mr. Maira, the correct practice is that in applications such as the one canvassed here a miscellaneous application or cause must be filed as a substantive application. It cannot be filed as an interlocutory application because it is not dependent on existing proceedings, that is exactly what

- the plaintiffs/applicants didn't file the application as an interlocutory application in Civil Case no. 297 of 1997. That is clear not only from the contents of the chamber application but also from the fact that it bears the number of Civil case no. 297 of 1997. That was a serious error calculated to circumvent the provisions of the law. It appears to me that this application was filed as an afterthought after the plaintiffs had realized that Civil Case no. 297 of 1997 had been filed contrary to law. Incidentally, the application and Civil Case no. 297 of 1997 were both filed on the same day. The application papers were filed almost three weeks later. For these reasons, I hold that both Civil Case no. 297 of 1997 and the accompanying application for leave to file a representative suit are not properly before this Court. Both are accordingly struck out with costs to the defendants/respondents. It is so ruled. BOD, CHIPETA JUDGE, ... Ruling delivered in chambers this 27th day of February, 1998. BOD, CHIPETA JUDGE, ... -11a. ~ Prof. Fimbo .. for applicants/plaintiffs. Mr. Maira 1 Mr. Kilindu, and Mr. Mugare - for 1st defendant/respondents. Mr. Salula, S, SoA ... for 2nd defendant/respondent.

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