

TANZANIA / JUDGMENT

ag vs mary otaru and 2 others

2021 tzhc 2868 26 april 2021

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT MOSHI MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2020 (Arising from Civil Case No. 4 of 2020 and Misc. Civil Application No 23 of 2020 of the High Court of Tanzania, Moshi District Registry) IN THE MATTER OF AN APPLICATION FOR INTENTION TO BE JOINED AS A PARTY BETWEEN THE ATTORNEY GENERAL..... APPLICANT AND MARY PETER OTARU..... 1st RESPONDENT ONESMO BUSWELU..... 2nd RESPONDENT NAMSEMBA MWAKATOBE..... 3rd RESPONDENT 2gh February & 2Sfh April, 2021

RULING

MKAPA, J: This Ruling relates to an application by the applicant, The Attorney General (AG) seeking to be joined as a party in Civil Case No. 4 of 2020 and Misc. Civil Application No. 23 of 2020. The application is brought under section 17 (1) (a) (b), (2)

- (a) (b) and (3) of the Office of Attorney General (Dis rge of i \ Duties Act) Cap 268 [R.E 2019]. It is supported by an affidavit of Mr. Mkama Musalama learned State Attorney. The respondents filed counter affidavit to object the application. The factual brief which led to this application is the fact that, in Civil Case No. 4 of 2020 the 1st respondent sued in their personal capacities the 2nd and 3rd respondents who are Siha District Commissioner and Police Officer Commanding District (OCD) Siha District respectively, allegedly for the unlawful confinement/detention of the 1st respondent. At the hearing Mr. Mkama Musalama learned State Attorney represented the applicant while the 1st Respondent had the services of Mr. Elidaima F. Mbise learned advocate. In his submission Mr. Musalama contended that the 2nd respondent being a Siha District Commissioner in Kilimanjaro Region under the President's Office Regional Administrative and Local Government, in the course of performing his duties within Siha district he represents His Excellency the President of the United Republic of Tanzania within the locality. He went on submitting that, the 3rd respondent is a police Officer Commanding District (OCD) under the Ministry of Home Affairs entrusted with ensuring peace and security for the public including public properties. 2 Furthering his argument Mr. Musalama submitted that the acts done by the

2nd and 3rd respondents in the course of performing their duties were done on behalf of the Government and for the benefit of the public and nation as whole. He informed the court that on 23rd December 2019, the 1st respondent was summoned by 2nd respondent in his office where a meeting was held. The meeting was also attended by the OCD. The agenda of the meeting related to an outstanding rental claim due to KNCU 1984 amounting shillings 277 Million which was supposed to be paid by the 1st respondent. That, the meeting resolved the 1st respondent to pay the whole amount on the following day i.e. 24th December, 2019 or else face legal action including arrest until full payment of the outstanding claim. The learned State Attorney explained further that the 2nd and 3rd respondents were surprised to be summoned to appear before this honourable Court in Civil Case No. 23 of 2020 which the Applicant herein prays to be joined. Mr. Msalam faulted the 1st respondent's claim that District Commissioner's and Police Officer Commanding District OCD's actions were irrational since they were performing their public official duties thus cannot be sued in their individual capacity. In this regard it was Mr. Msalam's views that the suit ought to have been instituted against the applicant herein named, the Attorney General. To cement his argument, the State Attorney referred this Court to Article 6 of the Constitution of the United Republic of Tanzania, 1977 which defines the Government to include any person working on its behalf and section 10 of the Government Proceedings Act, Cap 5 [R.E 2019] which provides for all cases by or against the Government to be instituted by or against the Attorney General. Mr. Musalama averred that, section 17 (1) of the Attorney General (Discharge of Duties) Act No. 4 of 2015 [R.E. 2019] underscores the importance of the Attorney General to be joined in dispute similar to the one at hand. Thus denying him such audience tantamount to denying the Attorney General a right to be heard enshrined under Article 13 (6) (a) of the Constitution. The State Attorney referred this Court the decisions in numerous cases including, the Attorney General V. Oysterbay Villas Limited and Another, Civil Application No. 168/6 of 2017, CAT at Dar es Salaam (Unreported) and The Attorney General V. National Housing Corporation and 3 Others, Civil Application No. 432/17 of 2019 CAT at Dar es Salaam (Unreported) in which the Attorney General was joined as a party pending a suit to enable him defend public interest as well as Government interest. He finally prayed for the application to be granted as prayed. 4 Resisting the application Mr. Mbise submitted that the main issue for determination by this Court is whether the DC and OCD being Government Officials can be sued in their personal capacity in Civil Suit No. 4 of 2020. He went on explaining that, the confinement of the 1st respondent by the DC and OCD in police custody for five (5) days tantamount to tort of false imprisonment. That since the DC and OCD claimed that they were performing their official duties, they were the ones to seek the Government to be joined if they so wished. He referred this court to the decision Christopher Mtikila Vs Lyatonga Augustino Mrema (1993) TLR 60. The learned counsel challenged the cases cited by the State Attorney as distinguishable to the instant application since in the said cases the Government had interest in the properties involved. Mr Mbise argued further that, in the instant case no Government properties are involved thus the application to join the Attorney General is irrelevant. He added that Article 6 of the Constitution of the United Republic as pointed out in the applicant's application defines the

term Government to include a person executing his powers and authority on behalf of the Government. It was Mr. Mbise's argument that confining a person for six (6) days in police custody without any reason does not fall under the said definition rather, it only makes the DC and OCD tortfeasors. Furthering his argument Mr. Mbise argued that, it is a common law principle that, in every civil wrong committed by an employee it is not necessary for the employer to have interest in and be joined as a party. That, when the 1st respondent was summoned by the DC in his office she did inform the DC on the pending case at the Court of Appeal of Tanzania in respect of the same parties but she was ignored and ended up being detained at the police station. Mr. Mbise maintained that the DC and OCD intentionally decided to breach the law under the umbrella of Government officials while Article 15 of the Constitution clearly states that no one should interfere with the liberty of another person unless there is a court order which the 2nd and 3rd respondent did not have. He referred this Court to the decisions in the cases of *Moris Sasawata V Mathias Malieko* (1980) TLR 158 which emphasized that, anyone causing injury to the other shall be personally liable and in *Geoffrey James Ilunya and Others V R*

(1980) TLR 197 where police officers were sued in their personal capacity. 6 He finally reiterated his stance to the effect that, the DC and OCD were acting in their individual capacities outside the scope of their employment. He prayed for this to Court strike out the application with cost for want of merit. In rejoinder Mr. Musalama reiterated his earlier submission and maintained his prayer for the applicant to be joined as a party. Having considered parties' submissions for and against the application the only question for consideration is whether the applicant (the Attorney General) qualifies to be joined as a party in Civil Case No. 4 of 2020. From the outset it is necessary to refer the provisions of section 17 (1) (a) (b), (2) (a) (b) and (3) of Cap 268 which reads; 17.-(1) Notwithstanding the provisions of any written law to the contrary, the Attorney General shall through the Solicitor-General have the right to audience in proceedings of any suit, appeal or petition in court or inquiry on administrative body which the Attorney General considers-

- (a) to be public interest or involves property; or 7
- (b) to involve the legislative, the judiciary or an independent department or agency of the Government.
- (2) In the exercise of the powers vested in the Attorney General with regards to the provisions of subsection (1), Solicitor-General shall-
 - (a) notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and
 - (b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office of the Attorney General.

- (3) Where a suit, inquiry or any other proceeding is pending before the court, tribunal or any other administrative body to which the Solicitor-General does not have a right of audience, it shall be sufficient for the Solicitor-General to file a certificate of the intention of the Attorney General to be joined and the court, tribunal or any such administrative body shall immediately forward the record of the proceedings to the nearest court, tribunal or administrative body for purposes of enabling the Solicitor-General to appear. It is clear from a reading of the aforementioned provisions, that the Attorney General can be joined in a suit, appeal or petition in court or inquiry on administrative body to which the public or the Government has interest in. The term "administrative body" in this context may mean an administrative unit in the Government responsible for performing specific tasks. In the instant case it is evident that both the 2nd and 3rd respondents are not administrative bodies as they are being sued in their personal capacities as natural persons. However, there can be no doubt that, their involvement in this dispute against the 1st respondent is yet to be determined on merit for this Court to hold that they had acted ultra vires hence personally liable or otherwise. Order I Rule 9 and 10 (2) of the Civil Procedure Code, Cap 33, R.E. 2019 provides; "9.A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it." 10.-(1) N/A
- (2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. In the case of *Kassam V. The Regional Land Officer* (1971) H.C.D. where the applicant applied to be joined as one of the defendants to the suit alleging she was the equitable owner in respect of a plot and had an interest in the suit filed, the Court had this to say; "Whether or not the applicant would have succeeded in establishing her rights and against whom 10 have been a matter of proof. The learned magistrate seemed to have accepted that the applicant had beneficial interest, and if that was so, that would have been sufficient to allow the applicant to be joined as a co-defendant in the suit." Taking note of the above legal provision and case law, I find it prudent also justice so demands for the matter in dispute to be determined with the Attorney General as a party. This will enable this Court to effectively adjudicate interests of the parties. In the circumstance, I find the Application has merit and is hereby granted with no orders as to costs. It is so ordered. Dated and delivered at Moshi this 28th day of April, 2021. S.B. Mkaia Judge 28/04/2021 11

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