

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: RAMADHANI, J.A.; NSEKELA, J.A.; And MSOFFE, J.A.)
CIVIL APPEAL NO 8 OF 2004
BETWEEN
USANGU SUGAR PROCESSING ESTATES LTD... APPELLANT
AND
MBARALI DISTRICT EXECUTIVE DIRECTOR ...RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at
Mbeya)
(Mrema, J.)
dated the 30th day of April, 2003
in
Civil Case No. 26 of 2000
JUDGMENT

RAMADHANI, J.A.:

The appellant, Usangu Sugar Processing Estates Ltd., sued the respondent, the Mbarali District Executive Director who raised a preliminary objection containing three grounds. The first ground was dismissed but the other two grounds were upheld and the plaint was struck out.

MREMA, J. held that the appellants' claims cover a period before the respondent had been established. Then the learned Judge was of the opinion that the verification of the plaint was improperly done. The

appellant, aggrieved by those two findings and the consequent striking out of the plaint, has come to this Court with this appeal being represented by Mr. Augustino R. M. Naali, learned advocate.

Before we go to the merits of the appeal we have to point out two things: One, at the High Court the defendant was titled: "The Mbarali District Executive Director". In the appeal the respondent is titled: "The District Executive Director, Mbarali". Admittedly, there might be no substantive difference in the two title-styles but it is not purely semantics either. So, we order that the name of the respondent be exactly the same as that of the defendant in the High Court.

Two, we are of the opinion that there has been a misconception from the time this matter was in the High Court to the hearing of this appeal. The respondent is, and the defendant was at the High Court, the Mbarali District Executive Director. Throughout the proceedings, however, the subject has been the Mbarali District Council. Now, these two, that is, the Mbarali District Executive Director and the Mbarali District Council are not synonymous though organically

connected. We shall have this point in mind and revert to it right at the end.

Mr. Naali submitted that the learned Judge "reached a wrong conclusion that the Mbarali District Council (hereinafter the Council) did not exist during the transactions, acts and omissions" leading to the appellants' claims. The learned advocate had three reasons for saying so. One, he said that the learned Judge conceded that the notice for the proceedings was duly and properly served on the respondent on 12 June, 2000. If so, the learned advocate argued, the learned Judge conceded that the Council was in existence then. Two, the learned advocate pointed out that the Council was at the time operating and using headed papers titled as the Council. Lastly, Mr. Naali submitted that the office of the Council existed and had employees who gave evidence in a criminal proceeding by the Council against the appellants. Therefore, according to Mr. Naali, the Council was in existence.

Mr. Allan Ndomba, the Legal Officer of the Council, submitted that the Council was sued for claims made at a time when it had not been in existence. Mr. Ndomba pointed out that the Council was created by GN 260 of 2000 published on 7th July, 2000, while the claims are for the years 1997 to 1999. Mr. Ndomba conceded that the notice for the suit was received but pointed out that that did not mean that the Council was in existence. Equally, Mr. Ndomba contended that the use of headed papers is not evidence of establishment.

A District Council, like the Mbarali District Council, is a creature of the Local Government (District Authorities) Act, 1982, Act No. 7 of 1982 (hereinafter referred to as the Act). Section 5 of the Act empowers the Minister responsible for local government "after consultation with the President, by order published in the *Gazette*" to establish "such district councils as he may deem necessary for the purposes of local government". Such order, according to section 6, prescribes the name of the council and the date on which it shall be established; defines the area to be covered by the council; and prescribes the device and the official seal of the council.

Two months before making the order under section 5 the Minister is required to publish in the *Gazette* his intention to establish a district council, according to section 7, which prescribes an elaborate procedure to be followed. It is not necessary, in our opinion, to go into the nitty-gritty of section 7 but it suffices to say that a copy of such intention and a copy of the order of the Minister under section 5 have to be laid before the National Assembly. As soon as that is done, and in any case not later than the date specified for the establishment of the district council, the Clerk of the National Assembly issues a certificate under section 8 containing particulars enumerated in section 9. Again we do not need to go into the nuts and bolts of that except to point out that the certificate issued by the Clerk to the National Assembly is "conclusive proof and final authority for the establishment" of a district council which then becomes "a body corporate ... capable of suing or being sued" (section 12).

Thus the establishment of a district council is an elaborate statutory function surrounded with ceremony and pomp. It does not admit

clandestine and by-the-way operation suggested by Mr. Naali. The Mbarali District Council was established by an order under section 5 in Government Notice No. 260 published on 7/7/2000, which, according to paragraph 1(2), is the date when the order came into operation. It is glaringly evident to us that Mr. Naali was scrapping the barrels of argument when he submitted that the Mbarali District Council was in existence before 7/7/2000.

The issue is not whether at the time the suit was filed and, therefore, when the notice was served, the Council existed or not. The issue is whether the Council existed during the time covered by the claims, that is, between 1997 and 1999. The answer is loud and clear that the Council was not in existence then. So much for the Council.

As we have pointed out, the respondent is the Mbarali District Executive Director not the Council. Now, "Director" is defined by section 3(1) of the Act as "the District Executive Director appointed for that district council under section 22 of the Local Government Service Act" (hereinafter referred to as Act No. 10 of 1982). Section

22 of that Act provides as follows: "There shall be a District Executive Director for each district" who shall be "the chief executive officer of the Council and shall be answerable to the council for the discharge and exercise of his functions and powers".

We have to point out that Act No. 10 of 1982 has been repealed by the Public Service Act, 2002 (Act No. 8 of 2002). The change now is in the title. Section 5 of Act No. 8 of 2002 provides for the appointment of a Director of a Local Government Authority who is defined as the Executive Director of any Local Government Authority other than Director of City Council or Commission. So, the office of Executive Director exists.

It is abundantly clear to us that if Mbarali District Council was not in existence during the period forming the subject matter of the dispute, then there could not have possibly been a Mbarali District Executive Director. So, the respondent was not in existence during the period in question. Therefore, the suit did not disclose any cause of action and we agree with MREMA, J. that it ought to have been

struck out. We do not think that the other ground of appeal regarding the verification of the plaint need detain us.

We must say that the counsel for the respondent at the trial should have produced the certificate issued by the Clerk to the National Assembly which is "conclusive proof and final authority for the establishment" of the Council. That should have delivered a *coup de grace* to the issue. Anyway, the GN 260 of 2000 suffices. So, the appeal is dismissed with costs. It is so ordered.

DATED at MBEYA this 2nd day of June, 2004.



A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR