IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MJASIRI, J.A.)

CIVIL APPEAL NO.50 "B" OF 2008

1. STEVEN G. MALIPULA.....
2. REGINALD BUGERAHA.....APPELLANTS

VERSUS

TANZANIA REVENUE AUTHORITY .....RESPONDENT

(Appeal from the ruling of the High Court of Tanzania at Dar es Salaam)
(Mihayo, J.)
dated 13th April, 2007
in
Civil Case No. 234 of 2003
.....

JUDGMENT OF THE COURT

12th & 26th September, 2014

KIMARO,J.A.:

The appellants filed a civil case in the High Court of Tanzania contesting their dismissal on public interest. At the time of their dismissal both appellants were employees of the Tanzania Revenue Authority, the respondent. Before that they were employees of the Government of the United Republic of Tanzania. They served in different capacities up to June, 1996 when their employment ceased following the restructuring of the Revenue Departments and the formation of Tanzania Revenue Authority. They were dismissed at the time they had reached the title of

senior and principal collectors respectively. The letter of dismissal served on the respondents was written by the respondent but it specifically stated that the dismissal was made on the instructions given by the President of the United Republic of Tanzania.

At the time of filing the suit the appellants did not join the Attorney General as a party to the proceedings. It was after the closure of the plaintiffs' case, at the time when the defendant was ready to give its defence that the appellants made an application under Order VI rule 17, Order VIII A rule 3 (4) and section 95 of the Civil Procedure Code [Cap 33 R.E. 2005] to amend the plaint and join the Attorney General as a party in the proceedings so as to arrive at a just determination of the suit. The learned trial judge of the High Court (Mihayo, J.) as he then was, rejected the application holding that:

> *"In my considered opinion rule 17 of order VI is not without qualifications. Our development of the law has been on reasonably quick finalization of litigation. This is import of Order VIII A, VIII B, and VIII C and also GN 508 of 1991 published on 22/11/91. There must be an end to litigation. In*

principle, amendments under Order VI rule 17 are allowed without much ado when applications are brought in good time. In the present case, the plaintiff has closed its case. Allowing an amendment at this time will surely do an injustice to the defendants. An amendment to pleadings sought before the hearing should be freely allowed. But when hearing has started and more, where the plaintiff has closed his case, he is no longer on the stage and strictly, he cannot ask to amend what is already behind him."

After the conclusion of the trial, the learned trial judge made a finding that because the appellants' dismissal was made on the instruction of the President of the United Republic of Tanzania the plaintiffs' suit was bad for non- joinder of the Attorney General. It was dismissed with costs.

The appellants were aggrieved by the decision of the High Court and they have come to the Court with three grounds of appeal as follows:

1. The Honourable trial judge erred both in law and fact by refusing to grant leave to the Appellants to amend the pleadings so as to join the Attorney General as a necessary party to the suit.
2. That the Honourable trial Judge erred in law and fact by dismissing/defeating the Appellants' suit on ground of non-joinder.
3. That the Honourable trial judge erred in law and in fact by his failure to address himself on the issues in controversy as between the parties.

When the appeal was called on for hearing, Mr. Wilson Ogunde, learned advocate appeared for the appellants. He filed written submissions under Rule 34(2) of the Court of Appeal Rules, 2009 in support of his appeal and at the time of the hearing of the appeal he adopted the submissions. The respondent was represented by Mr. Felix Haule, learned advocate. The respondent too, filed written submissions in reply under rule 106(8) of the Court Rules 2009. The learned advocate for the respondent also adopted the submissions.

Both advocates were satisfied that the written submissions were detailed sufficiently to enable the Court to determine the appeal and there was no need for making any elaborations.

Before going to the substance of the submissions, it is worthy mentioning here that the specific rule under the Court of Appeal Rules 2009 which caters for written submissions in support of civil appeals and applications is rule 106 and not rule 34. Rule 34 deals with presentation of list of authorities and copies of judgment to be relied upon in the appeal. It was wrong for the learned advocate for the appellant to cite Rule 34 as the enabling rule for filing written submissions in support of the appeal. He ought to have cited Rule 106(1) of the Court of Appeal Rules, 2009.

In support of the first ground of appeal, the contention by the learned advocate for the appellant was that Order VI Rule 17 of the Civil Procedure Code allows the trial court to grant amendments at any stage of the proceedings provided that the amendment is aimed at resolving the real question in controversy between the parties and does not occasion injustice to the opposite party. He said the parliament in its wisdom saw such a need and that is why the trial court is also vested with power under Order 1 rule 10(2) to order amendment on its own motion without an application by a party to the proceedings. The order reads as follows:

> "*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, to order that the name of any 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 questions involved in the suit, added."

The learned advocate cited the case of **Tang Gas Distributors Limited Versus Mohamed Salim Said & Others** Civil Application No. 68 of 2011 (unreported) to support the first ground of appeal. He said it was not possible for the court to effectively and in a just way adjudicate upon the claims of the plaintiffs without joining the Attorney General. He also referred the Court to the case of **Farida Mbaraka & Another V Domina Kagaruki** Civil Appeal No. 136 of 2006 (unreported). He said the learned trial judge erred in rejecting the application on the ground that the appellants had closed its case. He prayed that the first ground of appeal be allowed.

As for the second and third grounds of appeal, the learned advocate cited Order 1 rule 9 and faulted the learned trial judge for failure to comply

with the said provision. He said the court ought to have dealt with the controversy between the parties for their interests by allowing the amendments under the Order and rule requested or by invoking Order 1 Rule 10. He said the learned judge also overlooked the provisions of Order 1 Rule 9 which guides the trial court in dealing with such matters. He prayed that the appeal be allowed with costs.

Responding to the first ground of appeal the learned advocate for the respondent submitted that in the circumstances of this case the Attorney General was a proper and not a necessary party. Since the appellants did not join him when the suit was filed, argued the learned advocate, the learned judge properly rejected the prayer to have him joined after the appellants closed their case. He said if the trial judge had allowed the amendments, the Attorney General would have been denied the right to hear and cross-examine the appellants' witnesses. The learned advocate submitted further that the procedure laid down under the Government Proceedings Act, [CAP 5 R.E.2002] requires a notice of ninety days to be served on the Attorney General indicating that the appellants wanted to sue him. Since that procedure was not complied with, the judge correctly rejected the application to join the Attorney General into the proceedings at that stage. His opinion was that the issue of joining the Attorney

General came as an afterthought. Since it was pleaded in the plaint that the President had no powers to order the dismissal of the appellants, said the learned advocate, this should have made the appellants to join the Attorney General from the time the suit was instituted and as a proper party. Regarding the cases cited by the appellants to support their appeal the learned advocate for the appellants said they are not applicable. He prayed that the appeal be dismissed with costs.

On our part we have gone through the record of appeal carefully, namely the pleadings, the finding of the learned judge in the trial and the submissions. We must say outright that we agree with the learned advocate for the respondent that the appeal before us has no merit. While we subscribe to our earlier decision of **Tang Gas Distributors Limited V Mohamed Salim and others** (supra) that amendment to proceedings can be made at any time, in the circumstances of this case the learned judge properly rejected the application to have the Attorney General be made a party to the proceedings. The reasons he gave are sound and we have no reason to fault him. It is apparent from the proceedings that the appellant pleaded that the President had no powers to terminate them. It was pleaded in the plaint at paragraph 12 that:

"That in terminating the Plaintiffs' employment, the defendants acted unlawfully and in breach of the contract of services aforesaid in that:-

PARTICULARS OF BREACH:-

(a) The provisions of Article 36(2) of the said Constitution covers only persons appointed by the President to offices in service of the Government of the United Republic of Tanzania, a category which the plaintiff do not belong to.

(b) There is nothing in the Constitution that authorizes the President to retire employees holding the Plaintiff's titles in the public interest and neither the Tanzania Revenue Authority Act, 1985 nor the Tanzania Authority Staff Regulations of 1998.

(c) The Constitutional power of the President to terminate the Plaintiff's employment in public interest ceased to extend to the Plaintiffs upon the cessation of the contractual relationship between the plaintiff and the Government of the United

Republic of Tanzania by reason of the Plaintiffs' re-engagement by the Defendant on new terms and conditions."

Among the reliefs sought by the appellants was a declaration that the President had no power to terminate the employment of the appellants in public interest.

Since the appellants specifically pleaded about the President unlawfully terminating their employment, and the only way in which the President could be joined into the proceeding was through the Attorney General, the Attorney General was a proper party for the fair determination of the appellants' suit. The prayer to join him after the plaintiffs' had closed its case was made too late in the proceedings because the Attorney General could not have been made a party without compliance to section 6(2) of the Government Proceedings Act [CAP 5 R.E.2002] which provides thus:

"No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of

his intention to sue the Government, specifying the basis of the claim against the Government, and shall send a copy of his claim

to the Attorney General."

Section 6(3) provides that:

"All suits against the Government shall, after expiry of the notice be brought against the Attorney-General, and the copy of the plaint shall be served upon the Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based."

Since the procedure of issuing a ninety days' notice to the Government before suing it is a mandatory requirement and that had not been complied with, while at the same time the appellants had pleaded that the President had no power to terminate their employment, the application for joining the Attorney General was rightly refused by the learned trial judge.

As regards the application of Order 1 rule 9 and 1 rule 10 of the Civil Procedure Code it could not be invoked by the learned trial judge to grant

the application given the nature of the appellants' suit. We dismiss the appellants' appeal with costs.

DATED at DAR ES SALAAM this 24th day of September, 2014.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL