

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A.; MSOFFE, J.A And BWANA, J.A.)

CIVIL APPEAL NO. 98 OF 2009

DIRECTOR, RAJANI INDUSTRIES LTD APPELLANT

VERSUS

ALLY KANUWA & 26 OTHERS RESPONDENTS

**(Appeal from the Judgment and Decree of the High Court
of Tanzania, at Dar es Salaam District Registry)**

(Mandia, J.)

dated the 3rd day of December, 2007

in

Civil Appeal No. 195 of 2005

.....

JUDGMENT OF THE COURT

14 February & 24 May, 2011

BWANA, J.A:

This appeal emanates from Employment Cause No. 4 of 2004 filed at the District Court of Temeke by a Labour Officer in terms of the then Section 130 of the Employment Ordinance, Cap 366 as amended by Act 5 of 1969 and which is now section 139 of the Employment Act, Cap 366, R.E. 2002.

Invoking the provisions of that law, the Labour Officer reported the labour dispute to the Temeke District Magistrate. The report specified the complainants as being **Ally Kanuwa and 26 others**. The Respondent raised a preliminary objection on 15th of December, 2003 to the effect that the suit was incompetent for want of leave to file a representative suit pursuant to the provisions of Order 1 Rule 8(1) of the Civil Procedure Code (the CPC). The trial District Court dismissed the said preliminary objection. An appeal to the High Court was not successful either.

In his decision, Mandia, J (as he then was) held in part thus:-

*"It is therefore wrong in law to argue that **parties to a labour dispute sent to court through a report by a labour officer should file a representative suit under Order 1 R 8 of the Civil Procedure Code**". (Emphasis provided).*

The above holding by Mandia, J, forms one of the grounds of appeal to this Court. The appellant herein raised three grounds of appeal in his Memorandum of Appeal. They are as follows:-

1. The learned High Court Judge erred in law in refusing to hold that the requirement for a representative suit under Order 1 R 8(1) of the CPC is mandatory even in employment cases initiated by the Labour Officer Report....
2. That the learned High Court Judge erred in law in holding that the Court of Appeal decision/case of **K. J. Motors & 3 Others vs Reichard Kishamba and Others**, Civil Appeal No. 74 of 1999.... is per incuriam section 139 to 143 of the Employment Act....
3. The learned High Court Judge erred in law in not making a finding on ground No. 3 of the appeal that the trial court erroneously entertained the suit which involved the interpretation of the Voluntary Agreement registered by the Industrial Court of Tanzania for which only the said Industrial Court has jurisdiction.

Before us, the appellant was represented by Mr. Odhiambo Kabas, learned advocate. The respondents were unrepresented although Mr. Ally Kanuwa, informed the Court that they have secured the services of one Benjamin Mwakagamba, advocate. The said advocate prepared the respondents' written submissions but never entered appearance when the appeal came up for hearing on 14th February, 2011.

The first and fundamental issue for our determination is whether or not it is mandatory in law, for parties to a labour dispute sent to court through a report by a labour officer, to file a representative suit under Order 1 Rule 8(1) of the CPC. The respondents submitted that it was not mandatory. Their averment was based on the following grounds.

1. That the labour officer's report to the Temeke District Court did stipulate the names of all the 26 complainants and the amount of money claimed by each complainant. Therefore, they are known and what each claimed is also known.
2. Throughout the proceedings in the courts below, the complainants were represented by the Labour Officer of Temeke, one Mr. Urassa. The complainants' pleadings were prepared, signed and lodged by the said labour officer on their behalf.
3. That Ally Kanuwa never testified on behalf of the complainants during trial because "**other complainants proved their cases successfully.... before the Temeke District trial Magistrate.....**" (Emphasis provided).

It is important first, to clarify the factual issue raised by the respondents as highlighted above, namely that "other complainants proved their cases.....before the Temeke District Trial Court". Our perusal of the trial court's record reveal that out of the 27 complainants, only four testified. These were Ally Kanuwa, John Lucas Kinawiro, Hamadi Bakari Nakamo and John Patric Kaddu. These four complainants could not, in our considered view, comprehensively testify on behalf of the remaining complainants without leave of the court. Our view is fortified by an earlier decision by this Court in the case of **National Agricultural and Food Corporation vs Mulbadaw Village Council and Others** (1985) TLR 88, 91 thus:-

*"....Each claim is different from the otherthey were individual claims. **A person may act and represent another person, but we know of no law or legal enactment which can permit a person to testify in place of another.....direct or incontestable documentary evidence is required to sustain aclaim. (Emphasis provided).***

Therefore, it is not insignificant to point out at this stage, that the most the trial court and the first appellate court would have considered were the evidence of the four witnesses/complainants who testified. The remaining complainants' views, statements or documents could not in our opinion, be presumed to be evidence properly before the court, without first adopting proper procedure, namely by way of a representative suit.

The epicenter of this appeal, as stated earlier, is whether Ally Kanuwa can come before us on behalf of the "26 others." In what appears to be an affirmation of that move, the first appellate court held that the views of this Court in the case of **K. J. Motors and Three Others vs Reichard Kishamba and Others**, (supra) were per incuriam sections 139 to 143 of the Employment Act. We will revert to this point shortly.

The proceedings before the Temeke District Court, ought to have been conducted, in our view, pursuant to the provisions of Order 1 R 8(1) of the CPC which provides:-

"Where there are numerous persons having the same interest in one suit, one or more of such

*or be sued or may defend in such suit, **on behalf of or for the benefit of all persons so interested.....**" (Emphasis provided).*

That is the law and settled procedure. The decision in the Kishamba case (supra) cannot be said to be **per incuriam** or, to be far fetched, it cannot be said to have been decided on technicalities. In that well reasoned judgment, the Court held and pronounced the following principles of law, when it comes to similar cases.

1. The provisions of section 134 (now s. 139) of the Employment Ordinance do not exclude the application of Order 1 R 8(1) of the CPC to employment cases.
2. The said Rule 8(1) governs certain categories of cases and requires such cases to be brought **with leave of the court.**
3. The discretion or option provided under Order 1 R 8(1) is given to the parties – either to sue as individuals or to be represented by one or some of them for and on behalf of the others.

4. Before granting leave to sue in a representative capacity, the court must satisfy itself that the complainants do exist and that they have duly mandated their representative to sue on their behalf.

In the **Kashamba case**, the Court concluded by stating that:-

*"We are firmly of the view that **compliance with Order 1 R8 is a necessary requirement even in employment suits...** (Emphasis provided).*

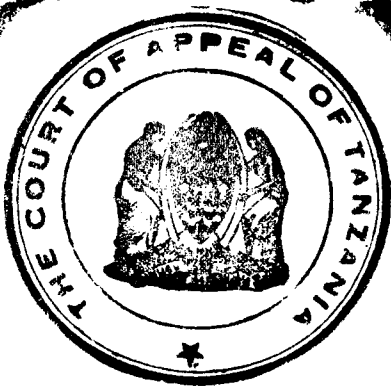
We subscribe to the foregoing views and proceed to hold that the same are authoritative and binding to the High Court. Failure to comply with that fundamental requirement that is, non compliance with Order 1 Rule 8(1), is fatal to the respondents' case. We are satisfied that the reasoning and finding of both courts **a quo** on this aspect of compliance with Order 1 Rule 8 of the CPC was faulty and seriously wanting in judicial objectivity. It therefore affects the rest of their decisions on the substantive case before them. The foregoing considered, we see no need to proceed with ground three of the Memorandum of Appeal (supra). Accordingly, we set aside the

costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of May, 2011.

E. N. MUNUO
JUSTICE OF APPEAL



J. H. MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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


J. S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL