IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And MANDIA, J.A.)

CIVIL APPEAL NO. 5 OF 2011

MICHAEL CHARLES.....APPELLANT

VERSUS

1. **PRINCIPAL SECRETARY PRESIDENT'S OFFICE**
2. **ATTORNEY GENERAL**
3. **TANGA CITY COUNCIL.....RESPONDENTS**

(Appeal from the ruling of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated 5th March, 2010
in
Civil Case No. 4 of 2009

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JUDGMENT OF THE COURT

3rd July, & 9th July, 2012

KIMARO, J.A.:

The appellant sued the three respondents in the High Court of Tanzania praying for reinstatement into his carrier as a teacher, and general damages of T. shillings. 100,000,000/=. He also prayed for recovery of salary arrears from the date of his dismissal until date of reinstatement.

In the plaint the appellant averred that he was served with a defective charge of absenteeism from work for a total of 61 days in the

period of January/May 2002 without specifying the relevant dates as required by the Teachers Service Commission. The charge was served to him by the District Education Officer acting as an agent of the Teachers Service Commission. He claimed that there were a lot of irregularities in the procedure which culminated into his dismissal and that is why he was not satisfied with the dismissal.

The first respondent was sued as Government Department dealing with staff matters in the public service, the second defendant as Officer responsible for advising the government on all matters involving the government and the third defendant as a body established under the Local Government (Urban Authorities) Act CAP 288 dealing with teachers employed in the Local Government (Urban Authorities).

In its written statement of defence, the third defendant/respondent raised a preliminary objection to the effect that the suit was filed prematurely against it as the plaintiff/appellant did not serve it with a prior written notice of intention to sue, before he filed the suit against it, as required by section 106 of the Local Governments (Urban Authorities) Act [CAP 288 R.E.2002].

In the trial court the objection was pursued through written submissions. It was contended by the third respondent that the suit was not maintainable because there was non-compliance by the appellant of section 106 of CAP 288. It was argued that it was a mandatory

requirement for the appellant to serve the third respondent with a statutory notice of thirty days before he could file the suit against the third respondent. On his part the appellant said he served all the respondents with three months notice as required by the Government Proceedings Act [CAP 5 R.E.2002] and copies of the same were served on all respondents. In his considered opinion, that was sufficient notice to enable him sue all the defendants.

The learned trial judge in addressing the preliminary objection observed that:

> *"...it seems to me that the requirement there is to section 106 does not only involve issuance of notice, rather, it is inclusive of there being evidence to its service. In as far as the latter requirement is concerned, the question begs as to whether or not the notice, presumably exhibited by the plaintiff, was truly served to the defendants."*

What followed later was that, instead of the learned judge looking for an answer to the question he posed, and give a decision on the preliminary objection, he went ahead and citing the case of **Tambueni and Others Vs NSSF** Civil Appeal No. 33 of 2000 (unreported), he held that the High Court was not the proper court for the appellant's

proceedings because his claims were a trade dispute. He struck out the suit for being incompetent.

Aggrieved by the decision of the High Court, the appellant has filed four grounds of appeal challenging the decision of the High Court. But for our purpose we think that the first and second grounds are sufficient to dispose of the appeal. In the first ground of appeal the complaint is that the learned judge deviated from deciding the preliminary objection that was raised by the third defendant and indulged on other points *"suo moto."* In the second ground of appeal the learned judge is faulted for holding that the appellant's suit was a trade dispute using the case of **Tambueni and others Vs NSSF** (supra) while his case was governed by Teachers Service Commission.

During the hearing of the appeal the appellant appeared in person. He had no advocate to represent him. The first and second respondents were represented by Mr. Joseph Sebastian Pande, learned Senior State Attorney. There was no appearance for the third respondent although the Court was assured that they were served. The Court decided to proceed against the third respondent despite its absence.

Since the issue which was before the Court was a legal one, the appellant being a layman, felt safer not to elaborate on his grounds of appeal. He left them for the decision of the Court. On his part the learned Senior State Attorney for the first and second respondents said he

was not supporting the appeal. He said since no notice was issued to the third respondent under section 106 of CAP 288 before the appellant filed the suit against the third respondent, the High Court was right to strike out the appeal. He cited the case of **Arusha Municipal Council v Lyamuya Construction Company Limited** [1998] T.L.R 13 to support his arguments.

On our part we do not think that this is an involving issue to detain us. As clearly indicated, the learned trial judge posed a question in respect of the notice which the appellant was supposed to serve and how to ensure that service was done. However, he did not answer the question. Instead, he, on his own, decided on another matter which was not brought before him by the parties, and without even hearing the parties, struck out the suit. With due respect to the learned judge, it was wrong for the learned judge to leave the preliminary objection hanging and decide on his own, other matters not raised by any of the parties, and without even hearing them and make a decision on them. The appellant was entitled to have a decision of the court on the issue which was raised. That would enable him to know the next step to take in pursuing for his rights. On numerous occasions the Court has stressed the importance of not condemning the parties unheard. See Transport **Equipment v Devram P. Valambia** [1998] T.L.R. 89. The right to hearing is fundamental and the courts should not decide on a matter affecting the rights of the parties without giving them an opportunity to express their views before a decision is made by the court. We find the first and second grounds of appeal

having merit and we allow the appeal with costs. The case file is remitted back to the High Court for a proper determination of the case on merit. It is accordingly ordered.

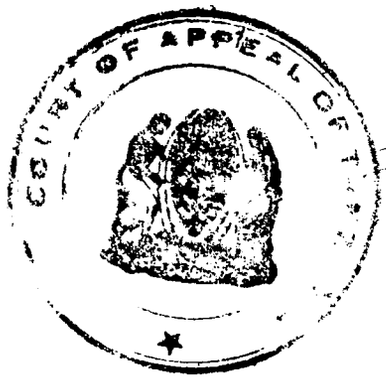
DATED at **TANGA** this 6th day of July, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL