IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MSOFFE, J.A., ORIYO, J.A., And MMILLA, J.A.

CIVIL APPEAL NO. 64 OF 2014

EX – B.8356 S/SGT SYLIVESTER S. NYANDA .....APPELLANT

VERSUS

THE INSPECTOR GENERAL OF POLICE
THE ATTORNEY GENERAL } **.....RESPONDENTS**

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated 15th day of April, 2014
in
HC Civil Case No. 10 of 2004

.....

JUDGMENT OF THE COURT

21st & 28th October, 2014

MMILLA, J. A.:

The appellant joined the Police Force on 10.8.1970. He served in that institution for about two and a half decades until 13.2.1998 when, then of the rank of a station sergeant, was dismissed from employment by the first respondent, the Inspector General of Police (IGP) on misconduct allegations. Convinced that his dismissal was unjustified and unreasonable, he made an administrative pursuit within the Police Force to have that decision reversed but

his efforts proved futile. It was then that he instituted a suit against the first respondent in which he joined the Attorney General who is the chief government adviser, the outcome of which resulted in the present appeal.

The substance of the appellant's case before the trial court was that the first respondent's decision to dismiss him from the Force was **"incompetent, unreasonable, irregular, unprocedural and unlawful, as such null and *void ab initio* having no legal effect whatsoever**." He had also pleaded that because of the complained of dismissal, he suffered general damages for loss of his 28 years of service in the Force. He had sought for three remedies namely; a declaration that his dismissal from the Police Force was unlawful; a declaration that throughout the material time he was and continued to be an employee of the Government without loss of his entitlements; and payment of T.shs 150,000,000/= being compensation for general damages for wrongful dismissal.

Prior to hearing of the case, the issues framed by the court and agreed by the parties were:-

1. Whether the dismissal of the plaintiff from the Police Force was unlawful.

2. Whether the dismissal of the plaintiff from the Police Force was ultra vires the powers of the first defendant.
3. Whether the plaintiff suffered of his being dismissed from the Police Force.

Besides himself, the appellant enlisted the evidence of Athumani Hussein Makinda (PW2) in support of his case. PW2 was intended to substantiate the appellant's point that he was wrongfully dismissed. On the other hand, the defendants/respondents resisted the appellant's claims through the evidence of DW1 Salum Ally and DW2 Inspector Deus Shatta.

After revisiting the evidence before it, the trial High Court abandoned those issues and framed a new one on which alone its decision rested. That issue was **"whether it was proper for the plaintiff to file the suit inter alia claiming his dismissal from the Police Force was unlawful."**

In answering that issue, the trial court held the opinion that the appellant's dismissal was based on the Police Force Service Regulations, 1995 G.N. No. 193 of that year. It added that since he was a station sergeant, thus a non - commissioned officer, the disciplinary mechanism for such officer was provided for under Part IV, Regulation C. 7 (1) of that G.N., and that under

Regulation C. 18 (3) thereof, the decision of the I.G.P. was final. It elaborated that given such a situation, the appellant ought to have **"resorted to challenge it (the decision of the IGP) by way of judicial review rather than filing this fresh suit against (the) defendants challenging his termination."** It consequently dismissed the suit. That court attempted to give justifications, including citing the cases of **John Mwombeki Byombarilwa v. The Regional Commissioner & Another** [1986] T.L.R. 73, **C.C.S.U. v. Minister of Civil Service** [1984] A.C. 374 and **Russell v. Duke of Norfolk** [1949] All ER 109.

Before us, the appellant appeared in person and was not represented, while Mr. Robert Kidando, learned State Attorney appeared for the respondents. He was hasty that he was supporting the appeal.

In an endeavour to challenge the decision of the trial High Court, the appellant's memorandum of appeal raised two issues as follows:-

1. That the learned judge erred in law in dismissing the appellant's suit without determining the merits of the same suit.
2. That, the learned trial judge erred in law in holding that the respondent's decision cannot be challenged in a suit like the one filed.

by the appellant, and that the only recourse open was to proceed by way of judicial review.

The parties filed their respective written submissions which they successfully prayed to adopt. It is pertinent to point out at this point in time that the appellant added one more issue in the course of his submission alleging that **"the learned trial judge erred in law in determining the suit on the basis of an issue which was neither reflected in the pleadings nor addressed by the parties at the trial."** Mr. Kidando submitted, and we hasten to agree with him, that this additional issue resembles the first issue reflected above, therefore that they will be discussed as one.

The crux of the appellant's submission was that it being a question of jurisdiction, the issue which was raised by the trial court ***suo motu*** was no doubt one which could be raised at any stage of the case, adding that the court had such power under Order XIV Rule 5 of the Civil Procedure Code (the CPC). However, he submitted, the trial court ought to have given the parties opportunity to address it first. He added that under Rule 5 of that Order, the trial court is mandated to amend, add or strike out issues as may be necessary for determining the matters in **controversy** between the parties. He maintained however, that where this is done, prudence requires that the parties are

afforded opportunity to address the court on the issues so amended or added, to conform to the principle of natural justice on the right to be heard. He relied on the cases of **Shomary Abdallah v. Hussein and Another** [1991] T.L.R.135, **National Housing Corporation v. Tanzania Shoes and Others** [1995] T.L.R. 251 and **Ndesamburo v. Attorney General** [1997] T.L.R.137. He contended that this was not done in the circumstances of the present case a fact which, he said, amounted to a fundamental procedural error and occasioned a miscarriage of justice.

On another point, the complainant stated briefly that since the decision of the trial court was anchored on the question of jurisdiction and not on the merits thereof, if anything, the trial judge ought to have struck out the suit instead of dismissing it. He relied on the case of **Ngoni – Matengo Co-operative Marketing Union Ltd v. Alimohamed Osman** (1959) E.A. 577 in which at page 580, the Court expressed the view that an order for dismissal implies that a competent appeal/suit has been disposed of while an order striking out implies that there was no proper appeal/suit capable of being disposed of. He faulted the judge for having not observed this.

As regards the second ground of appeal, the appellant submitted that the trial judge was in error in holding that the first respondent's decision could not

be challenged in a suit like the one he filed, also that the only recourse open was to proceed by way of judicial review because the suit was based on 5 different aspects, including allegations of wrongful or illegal dismissal from the Police Force, malicious prosecution and a request for declaration that the dismissal was unreasonable, irregular, unprocedural and unlawful. He stressed that it was equitable for the High Court to investigate and determine the reliefs claimed. He relied on section 7 (2) of the CPC and the cases of the **Registrar of Buildings v. Eliniiria Patton Mwasha** [1982] T.L.R. 242, **the Dar es Salaam Young Africans Sports Club v. The Registrar of Sports Association and 2 Others** [1982] T.L.R. 278 and **D.R. Kaijage v. Esso Standard Tanzania Ltd**, Civil Appeal No. 10 of 1982, CAT (unreported). In these cases, he maintained, the Court held in common that a declaratory order is a discretionary remedy and the court will only grant it if there is justification to do so. In his view, the position was more succinctly put in the case of **D.R. Kaijage v. Esso Standard Tanzania Ltd** (supra) where the court said that:-

> *"We wish to say, as we clearly said in Civil Appeal No 15 of 1981* ***Patman Garments Industries Limited v. Tanzania Manufacturers Limited****, wherein an act of by the Minister for Lands was questioned in a court of law, that, a party dissatisfied need not necessarily proceed by way of*

certiorari. He can file an ordinary civil suit as in the instant case. With respect therefore, the learned trial judge was in error in holding a contrary view. We wish to add, in any event, the learned judge's view cannot be right because proceedings in an application for certiorari would also be civil proceedings and so also excluded under section 28 if the argument were proper."

In that same case, the Court stressed that:-

"In the plaint, the appellant contended that there was injustice and the respondent has denied this. The learned trial judge appeared to agree that there might have been injustice but his view was that the only way to bring up the matter was by way of certiorari and mandamus, which, as we have pointed out, is not the case. There was a triable issue which the High Court should have tried notwithstanding the way this particular matter was brought."

In view of the above, the appellant pressed this Court to hold that the trial court was in error to have said that the only recourse open was to proceed by way of judicial review.

Mr. Kidando was in agreement with the submission of the appellant. He supported the view that it was wrong for the trial court to have decided the case not on the basis of among the issues canvassed during hearing, regard being had to the fact that parties were not heard to that effect. He relied on the case of **Peter Ng'homango v. The Attorney General**, Civil Appeal No. 114 of 2011, CAT (unreported).

Mr. Kidando supported similarly the second ground of appeal that the trial judge erred in holding that the decision of the first respondent could not be challenged in a suit like the one filed by the appellant, and that the only recourse open was to proceed by way of judicial review for the same reasons given by the appellant as reflected above. Mr. Kidando urged the Court to quash the decision of the trial court only in relation to the complained of defect and that the record should be remitted to the High Court to continue the proceedings as from 27.3.2014.

As we have already intimated, the first ground of appeal and the one which was raised in the course of submission will be discussed as one because of their resemblance. Also, we are concerned that in the circumstances of this matter, this ground is sufficient to dispose of this appeal for reasons which will unfold in the course of this judgment.

There is no dispute that three issues were framed at the commencement of the trial in respect of which the parties endeavoured to give evidence for or against the allegations in the pleadings which were filed. It is not out of place to remind ourselves that the essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case between them is to be fought to avoid the elements of surprise by either party. It also guides the parties to give evidence within the scope of the pleaded facts – See **James Funke Gwagilwa v. Attorney General** [2004] T.L.R.161 in which the case of **Blay v. Pollard and Moris** (1939) 1 KB 628 was relied upon. The essence of pleadings was best captured in the English case of **Farrel v. Secretary of State** [1980] 1 All E.R. 166 in which at page 173, the Court said:-

> *". .. pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice . . . . For the primary purpose of pleadings remain, and it can still prove of vital importance.* ***The purpose Is to define the issues and thereby to inform the parties in advance of the case they have to meet and so to enable to take steps to deal with it."*** [Emphasis added.]

There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed ***suo motu*** which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying any of the parties the right to fair hearing – See, among others, the case of **Mire Artan Ismail & Another v. Sofia Njati**, Civil Appeal No. 75 of 2008, CAT (unreported).

However, as correctly submitted by both parties, we are aware that the trial court had power to amend, add or strike out issues under Order XIV Rule 5 of the CPC. That provision stipulates that:-

> *"(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit;* ***and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.***"[Emphasis added].

It is important to note nevertheless, that this provision has qualified that the amendment or additional issues **should be done as may be necessary for determining the matters in controversy between the parties,** in our view, meaning limitation according to issues raised by the pleadings. We desire to add, as correctly submitted by the appellant that where this is done, prudence requires that the parties are afforded opportunity to address the court on the issues so amended or added, ***in tandam*** with the ***audi alteram partem*** principle of natural justice as has been insisted in a range of cases including those relied upon by the appellant as pointed out at the beginning. In the case of **Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R.251 in which the English case of **Ridge v. Baldwin** [1964] AC 40 was considered, the Court emphasized that:-

> "In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law, and declares in part:
>
> (a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu . . ."

We hasten to say that this was unfortunately not observed in the circumstances of the present case, for which we are constrained to find and hold that it amounted to a fundamental procedural error and occasioned a miscarriage of justice. The issue becomes; what is the attending consequence?

There are several authorities, including the case of **Peter Ng'homango v. The Attorney General (supra)**, in which the Court reversed or nullified the decision of the trial court upon being satisfied that the issue of jurisdiction was unilaterally raised and decided without affording the parties an opportunity to address the same. To be particular, the Court stated that:-

> "In the result, we have no option but to declare the judgment of the High Court a nullity. The move by the High Court to base his (sic: its) decision on an unconsidered issue was a fundamental procedural error and occasioned a miscarriage of justice."

The Court quashed the judgment of the trial court and set aside the dismissal order.

Since the situation in the present case is similar to what transpired in **Peter Ng'homango v. The Attorney General (supra)**, we resort to the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap 141 of the

Revised Edition, 2002 on the basis of which we quash the judgment of the High Court and set aside the dismissal order. We remit the record to the High Court with a direction to continue with the conduct of the case/proceedings as from where it ended on 27.3.2014 before a different judge. We direct further that it should be heard expeditiously taking into account that it is one of the oldest cases in the registry.

In the event, this appeal has merit and we allow it with no order as to costs.

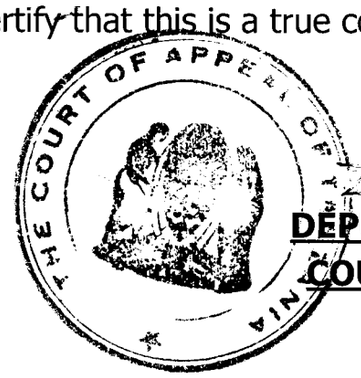
DATED at MWANZA this 27th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL