IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., LUANDA, J.A., And MMILLA, J.A.)

CIVIL APPEAL NO.73 OF 2014

1. KARATTA Ernest D.O
2. LWEBANGA, Bigeyo W.
3. MACHA Ambrose P.
4. MILLINGA Walafried .....**APPELLANTS**
5. MKANDAWIRE, Prince
6. KABUNGA Ahmed S.
7. OTHERS 5598

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

(Appeal from the ruling and Drawn order of the High Court of Tanzania at Dar es Salaam)

(Dr. Fauz Twaib,J.)
in
Civil Case No.95 of 2003

.....

JUDGMENT OF THE COURT

12th June 2015 & 29th January, 2016
KIMARO, J.A.:-

The appellants were employees of the then East African Community which died in June 1977. The East African Community which had three countries, namely Kenya, Uganda and Tanzania, operated joint activities which included a common air carrier, a harbours corporation, railways, posts

and telecommunications, cargo handling services, posts and telecommunication and others. With the collapse of the community each individual country established its own entity to take over the functions which were being operated under the community. The collapse of the community also brought to an end the employment between the community and its staff. Most of the staff were employed in the newly established institutions. The problem which occurred was that the employees of the defunct East African Community were not paid their pensions and other benefits they earned as East African Community employees promptly. It took them years to be paid.

The East African Community Mediation Agreement Act [CAP 232 R.E.2002] was enacted in 1984. Its purpose was to give effect to what the three countries had agreed on about the division of assets and liabilities of the former East African Community. Article 10.05 of the first schedule provided that each state shall:

(a) Pay its nationals, employed by the Corporations or GFS and retired from active service by the division date the pensions and other benefits due to then on account of such employment.

(b) Make provision for the pension rights and entitlements to other benefits accrued as of the division date in favour of its nationals in active service with such Corporations and the GFs at that date.

The government took initiatives to honor the agreement and started making payments to the ex-employees of the Community. The ex-employees were not satisfied with the payments. They felt they were being underpaid. It was then the appellants as plaintiffs filed Civil Case No. 95 of 2003 in the High Court of Tanzania at Dar es Salaam. On 21st September 2005 the case was marked settled as the parties had filed a deed of settlement showing the conditions upon which they had agreed to settle the matter.

Somehow the appellants found themselves discontented to what they had agreed on the deed of settlement. It is important we mention that although the case was filed by the appellants and 5,598 others only, the number of employees who the government listed for payment was 31, 831 employees. This made them go back to the High Court on several occasions. The last application the appellants filed in the High Court was filed under

section 15(1) and 16 (1) and (2) of the Government Proceedings Act [Cap 5 R.E. 2002]. The appellant prayed for the following order:-

> *"That the Honourable Court be pleased to issue to the Decree-holders/Applicants certificate for the amounts payable to the decree holders/Applicants as particularized in the attached lists or otherwise as the Court may find."*

A joint affidavit which was sworn by Mtango Jotham Lukwaro Andrea and Charles Kibaja Semgalawe on behalf of the appellants showed at paragraph 4 that the applicants' claims were:

(I) *Pension*

(II) *Additional Pension*

(III) *Provident Fund*

(IV) *Severance Allowance*

(V) *Gratuity 70% EACHSER monthly pay over the entire period of service.*

(VI) *Redundancy payment in lieu of notice*

(VII) *Loss of office benefits*

(VIII) Outstanding /accumulated leave

(IX) Repatriation expenses

(X) Real value

(XI) 7% compound interest

(XII) Pensionable emoluments

(XIII) Costs

(XIV) Damages

Claims (i) to (xiii) to be determined in accordance with the applicable defunct EAC laws and with the individual claimants staff records.

The appellants wanted the High Court to issue a certificate for T. shillings 416, 166, 090, 304.30 claiming that it was the amount which was still unpaid.

The learned trial judge heard the parties and made a finding that on the basis of the materials supplied to him in the application, there was no entitlement that remained unpaid by the respondent. He said:-

"Since my findings are that there is no shortfall, the Applicants cannot get what they are seeking. This Court cannot issue a certificate sought.

Consequently, I hereby dismiss the application in its entirety."

The appellants were aggrieved and they filed an appeal consisting of twelve grounds of appeal as follows:-

1. That the learned judge erred on the law and fact in finding that there is no entitlement to the appellants that remains unpaid by the respondent. Having found that most of the items contained in the lists (annexture 3A and 3A1) are supported by the judgment of the court, decree and the deed of settlement he ought to have found that there are several entitlements that remain unpaid and order a certificate to issue in respect of those entitlements.
2. The learned judge erred on the law and fact in rejecting the claim on damages on the erroneous ground that this item does not fit in the list of employment records. He ought to have recognized that damages are natural consequences of breach and could not form part of employment records; and that the same relief was provided for under the deed of settlement, judgment and the decree.

3. The learned judge erred on the law and in fact in finding that the real value is supported by the judgment of the court and the deed of the settlement.

4. The learned judge erred in fact in finding that the applicants were overpaid by 10.5%.

5. The learned judge erred on law and fact by refusing to order that the certificate be issued.

6. The learned judge erred in law and fact in finding that what the appellants were seeking is a second payment of the same claims. Having found out that item 21 of Annexture EAC-APP1 was correct and accurate, the learned judge erred in fact by failing to compare the said item with what was actually paid by the respondent and issue a certificate for the balance.

7. The learned judge having determined that the respective retiree' employments with the defunct EAC were terminated on the basis of abolition of office and therefore each of them indiscriminately entitled to pension among other terminal benefits, the learned judge ought to have determined and ordered recalculation of such terminal benefits with pension and associated benefits to all retirees.

8. The learned judge having adopted the law and the formulae applicable for the calculation of the Appellants' terminal entitlements as presented by the Appellants , grossly erred by hurriedly and erroneously concluding that such laws and formulae were applied without first looking into specific items complained of by the Appellants.

9. The learned judge erred in the law and fact by failing to investigate the Appellants' claim on underpayment. Having held that where there is proof that the full payment according to the Court's order has been made no certificate should be issued. The learned judge should have proceeded to determine whether there was such proof of payment from the respondent instead of assuming that the appellants were undisputedly paid all items of the claim.

10. Having adopted and ruled that all claims in the deed of settlement were to be paid on the basis of the individual record of each employee; and in accordance with the laws of the defunct East African Community, the learned judge was duty bound to examine every individual payment under the decree as presented by the

appellants and not make assumptions in a blanket conclusion that there is no entitlement that remain unpaid by the respondent.

11. The learned judge misdirected himself in adopting the Respondent's unknown formula for calculation of Real Value and rejecting the one provided by the East African Community Mediation Agreement, 1984 agreed upon by the negotiators of the Deed of Settlement; or failure to accept the Appellants' alternative argument on the shilling value and purchasing power as laid upon by the best practices and applied by the Courts in Tanzania.

12. The learned judge erroneously interpreted the definition of a shilling as provided in the East African mediation Agreement 1984 is completely wrong.

When the appeal came for hearing, the appellants were represented by Mr. Jotham Lukwaro, learned advocate assisted by Mr. Charles Semgalawe, Mr. Adronius Byamungu and Mr. Narindwa Sekimanga learned advocates. Mr. Gabriel Malata, learned Principal State Attorney appeared for the respondent. He was assisted by Mr. Mtuli Mwakahesya and Mr. Harun

Matagane learned Senior State Attorneys and Ms. Alice Mtulo learned State Attorney.

Looking at all the grounds of appeal, the complaint against the learned judge is his refusal to grant a certificate to the appellants indicating that they were entitled to more payment other than the amount of Tanzanian shillings one hundred seventeen billion (say T.shs. 117,000,000,000/=) only. That was agreed by the parties in the deed of settlement. But in deciding whether or not the appellants were entitled to get a certificate, the learned Judge asked what was the essence of issuing a certificate while the appellants admitted that payment of the said amount had been paid. He said in the ruling at page 1966 that:-

> *"The conclusion is, therefore, that where there is proof that the full payment according to the Court's order amount has been made, no certificate should be issued. That was also the essence of Hon. Mwaikugile J' statement in this same case on 27th July 2010. The rationale for this is clear: Issuing a certificate for the amounts not currently due would not only be academic, as Mr. Malata puts it, but may*

confuse matters and even result in a wrongful payments being made, over and above what the decree holder at the time the certificate is issued, because the relevant accounting officer is obligated to comply with the Certificate and the amount stated therein...From the foregoing, and on the materials made available to me in this application, there is no more entitlement that remains unpaid by the Respondent....Clearly, then it is not a certificate for TZS 117, 000,000,000/= that the applicants want issued. It is a certificate showing what they consider to be the short fall in the payments due to them, which shortfall they calculated at TZS 416, 166, 090, 304.30. Even counsels' submissions and the alternative prayer in the chamber summons "or otherwise as the court may find" which should be construed ejesdem jeneris, seems to suggest that the alternative will be a certificate for any lesser sum, but certainly for something that is over and above

what has already been paid. Since my findings are that there is no shortfall, the Applicants cannot get what they are seeking. The Court cannot issue the certificate sought."

In view of the decision of the learned judge the issue the Court has to determine is whether the learned judge was wrong in refusing to issue the certificate the appellant's were asking for.

We have gone through the record of appeal and the submissions by the learned advocates and the learned Principal State Attorney representing the parties in this appeal. It is not disputed by the parties that the suit that was filed by the appellants (Civil Case No.95 of 2003) was settled by the parties themselves. What they did was to inform the Court on how they agreed to settle the matter. That was done by filing the Deed of Settlement in court. The Deed of Settlement was filed in Court on 21st September, 2005, before Oriyo, J. as she then was. The record of appeal at page 1233 shows that on that day Mr. Lukwaro learned advocate represented the appellants. He informed the Court as follows:

"We have executed a deed of Settlement between the Plaintiffs on one part and the defendants on the other. We pray that a consent Judgment be entered pursuant to the Terms contained in the Deed of Settlement."

Mr. Ngwembe, learned Senior State Attorney by then, represented the Respondent. He conceded that the parties had settled the matter. He informed the Court in response to what Mr. Lukwaro had said, that:

"That is the correct position that the matter be marked settled."

The learned judge then recorded:-

" I have perused the Terms and conditions of the deed of Settlement and I am satisfied that the contents represent the agreement of the parties to settle the suit as submitted by their learned counsel. It is ordered as follows:

Order: 1. *By consent, Judgment is entered for the plaintiffs on*

On the terms and conditions set out in the Deed of

Settlement filed on 21/9/2005.

2. The suit is marked settled. It is ordered."

Let we pause here to make an emphasis that it was a slip of a pen for the learned trial judge to indicate that the parties made a consent judgment. What the parties did is reaching a settlement out of Court.

The Deed of Settlement that was filed in Court shows the respondent had agreed to pay all Tanzanian employees of the defunct East African Community who totaled 31, 831 pensions, additional pensions, provident fund, severance allowance, gratuity, redundancy payment in lieu of notice, one month salary in lieu of notice, loss of office benefit, outstanding/accumulated leave, repatriation expenses, real value, 7% compound interest, pensionable emoluments costs and damages. The terms of settlement had ten conditions. In condition 2 the payments had to be paid according to individual record of each employee. In condition 3 the respondent agreed to pay the appellants a total amount of Tanzanian Shillings one hundred seventeen billion (say 117,000,000,000/=) only. Any

other genuine payment arising from the exercise had to be submitted to the respondent within six months after 28thOctober 2005.

Condition 8 bars the appellants from making any further claims against the respondent in connection with Civil Case No. 95 of 2003 if the payments were effected in accordance with the Deed of Settlement. In condition 9 the parties had agreed to strictly comply with the terms and conditions of the deed.

The application giving rise to this appeal was filed in October 2010 five years after the Deed of Settlement. Reading closely section 16 of the Government Proceedings Act [CAP 5 R.E.2002] we agreed that the learned Judge correctly pointed out that a certificate must be issued to an applicant who has claims against the government indicating the exact amount he is claiming for purposes of enabling the Permanent Secretary to the Treasury to make payments. The rationale is simple. It is for purposes of accounting. It makes no sense to issue a certificate to a party who had agreed to be paid for a certain amount of money in settlement of his/her claim and then comes later on to claim for additional payment which did not even form part of the original agreement. If the appellants required a certificate they had to ask for one after the claim was settled and before the payments were effected.

That would have enabled the applicants to know whether the amount of Tanzania Shillings 117,000,000,000/= would have settled the amount they were claiming. Coming to Court after the payments were made and after a period of five years had elapsed, questioning the deed of settlement, and claiming that the payment was not made in accordance with the Deed of Settlement amounts to asking the Court to reopen the negotiations.

The applicants made an attempt to file an application in the High Court after a period of one and half years after the Deed of Settlement where they asked the Court to give directions as to the true interpretation, meaning, and effect of the order that was given on 21/9/2005, to determine whether or not the respondent has fully complied with the judgment. The learned judge did observe correctly in our view that:-

> *"The above judgment is not conventional type of judgment based on facts and evidence received by the court. It is not a reasoned judgment but merely a judgment recorded by the court. The basis of the judgment is the deed of Settlement. The basis of the*

Settlement is privy to the parties and unknown to this court. It was the applicants and the respondent and their representatives who negotiated and agreed on the terms, drafts and signed the Settlement Deed. When ready, they filed the Deed of Settlement in Court. It is only the applicants and the respondents who know the

basis and the spirit of the terms and conditions contained in the Deed of Settlement . It is only parties who know how much each gained, took and give out in the process of the negotiation."

The observation that was made by the learned judge when the appellants went back to the High Court to question the Deed of Settlement sufficiently explained the role of the court in as far as the Deed of Settlement is concerned. It was an agreement between the parties alone. How they arrived to the terms of settlement is a matter known to them alone. It was not a case in which evidence was given. What the Court was requested to do was to record what the parties had agreed upon. It is therefore wrong for the appellants to come to the Court to fault the learned judge for refusing

to issue a certificate. If they needed one, they should have asked for it when they recorded the terms of settlement and before the respondent started making payment.

With that observation, we find the appeal to have no merit. We dismiss it.

DATED at **DAR ES SALAAM** this 25th day of January, 2016.

N.P.KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL