IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CASE NO. 17 OF 1994

J. S. MUTUNGI.....APPLICANT

VERSUS

THE UNIVERSITY OF DAR ES SALAAM...RESPONDENT

R U L I N G

KALEGEYA, J.

On 17\11\95, this court, Bubeshi J, ordered the Applicant, J. S. Mutungi, to amend his chamber summons together with its accompanying affidavit. This was a result of a preliminary objection raised by the Respondents, University of Dar es Salaam challenging the provisions of the law on which the application had been brought.

Let me pose a little here and relate briefly the background leading to this state of affairs. The Applicant was employed by the Respondent on 27\2\70 as an Accounts Clerk at a monthly salary of £ 360 p.a. On 17\11\81 his employment was terminated allegedly for negligence which led to theft of a cheque worth US. $ 52,260/= issued as a grant and later found to have been cashed in Geneva. By then he had already been promoted to Accountant Grade I. He could not accept the termination hence his appeal to the Conciliation Board which upheld his complaint and so is the Minister responsible for Labour matters to whom the Respondents appealed to challenge the Board's decision. The Minister ordered for his re-instatement. Instead of reinstating him the Respondent paid him terminal benefits amounting to shs. 1,183,320.35. Dissatisfied with this, Applicant filed an application citing O.20, R.6 and S.33 of the CPC, 1966 as well as s. 41 of Security

of Employment Act, Cap. 574, praying for, among others, the following order:-

> "That this Hon. Court...order the Respondent to pay to the applicant a sum of Tshs. 12,627,908\65 being terminal benefits and statutory compensation ordered under s. 40 A (5) of the Security of Employment Act, Cap. 574".

Nyangarika, Advocate, for the Respondents raised objection already referred to - that the wrong provisions of the law were cited - which objection was sustained and the court ordered,

> "I am mindful of the fact that the applicant is a layman - hence not conversant with the technicalities of the law. To that end I would allow him leave to amend his chamber application in line with section 27 and 40 A(5) of Security of Employment Act, cap, 574 and O.21 Rule 20. The applicant can claim damages arising from the Respondent's failure to comply with the decision of the Minister".

The Applicant proceeded and amended both his chamber summons and affidavit. For the chamber summons he indicated that he was acting "under sections 27, 41, 40A(5) and 50 of the Security of Employment act, 574; O.21, Rules 20 and 30 of the Civil Procedure Code, 1966 plus any other enabling provisions of the law.

He also made other amendments. He added two more Respondents - Prof. D. J. Mkude and Hashim Hamza Mtanga, and amplified on the prayers, among others, which run as under;

> "1. That Prof. D. J. Mkude, the Chief Administrative officer and Hashim Hamza Mtanga, the Principal officer of the University of Dar es Salaam, judgement debtor, be called upon to show cause why they should not be detained as civil prisoners for refusing to comply with the decision of the Minister for Labour dated 5\4\93.

2. That in addition, or in the alternative the Applicant be awarded damages for failure of the judgement-debtor to carry out the Minister's decision dated 5\5\95, AND,

3. That the Applicant be paid shs. 2,524,275 the aggregate of statutory compensation computed in accordance with S. 35 AND a sum equal to Twelve months wages amounting to shs. 2,019,420/= in terms of Section 40A (5) of the security of Employement Act, leave pay of shs. 929,871/=, Senior Staff superanuation 1,097,076/=, Transport of personal effects 339,300/=, transport of family 231,955/=, Housing allowance of shs. 1,005,720/= apart from damages.

4. That upon failure to show cause the two said officers, Prof. D. J. Mkude and Hashim Mtanga be detained as civil prisoners.

5. That the first Respondent judgement debtor be prosecuted of the offence prescribed under section 50 of the Security of Employment Act".

When the matter came before the Court (Bubeshi J), Mr. Nyangarika, Advocate, who represented the Respondents again raised a preliminary objection that the court order had merely allowed Applicant to amend the chamber application by providing the necessary provisions of the law and not to bring totally a new cause of action involving new parties and new prayers. He also argued that as the 3rd Respondent is no longer an employee of the 1st Respondent he can not in law be joined in this matter. He further argued that an affidavit could not be amended and that if he wished he could bring a supplementary affidavit. He prayed for dismissal of the application for offending O.6, Rules 16 and 18 CPC.

Mr. Mbuya for Applicant countered by arguing that there is nothing new in the application; that all prayers relate to an application to have the Respondents comply with the Minister's order of re-instatement.

The matter was then reserved for a ruling. Unfortunately, however, in between, Madame Bubeshi, J, realised that she had been appointed a member to the University of Dar es Salaam Council and excused herself from further dealing with this matter. It was re-assigned to Kaji, J. Upon moving on transfer the matter was re-assigned to me. When it came before me, I proceeded with it unaware that there was a ruling pending. Although the Applicant was present in person and Mr. Nyangarika still represented the Respondents, I think also due to inadvertancy, none bothered to point this out to me, and we proceeded to fix dates for filing written submissions. The Applicant duly complied with the order but the Respondents didn't. Belatedly, for unknown reasons, Respondents were jolted to their alertness and swiftly filed a reply out of time (and without leave of the court) and therein pointed out the defect which had touched the procedure: that what was being awaited was a ruling.

I have gone through the background detailedly for clarity, Indeed the last order of arguing the main application was prematurely made, for, it could only be argued after disposing the preliminary objection which was fully argued before Bubeshi J, and ruling reserved.

Having so discovered I hereby proceed to give the relevant ruling.

I have carefully considered the arguments presented before Madame Bubeshi, J, and the relevant law and have arrived at the following findings. O.6,. Rule 16 and 18 of the Civil Procedure Code cited by Mr. Nyangarika are irrelevant here. The Court did not strike out applicant's pleadings; it simply directed amendments, and not for being unnecessary, scandalous, prejudicial, embarrassing or .....to delay trial as provided under O.6, Rule 16 CPC but simply because it cited wrong provisions of the law. Neither is O.6, Rule 18 applicable, for,

indeed the applicant effected the amendment which amendments have made him (Nyangarika) to complain. In any case, O.6. Rule 17 does not limit the extent which pleadings can be amended once the court grants leave -

> "The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between parties".

In the case at hand, amendments though highly amplified as compared to former pleadings, as rightly argued by Applicant, centre on one issue, failure to comply with the Minister's order of re-instatement. It should be noted that even the court order (Bubeshi, J.) which allowed the amendment did not limit Applicant to mere amendment of sections and orders as Mr. Nyangarika would want us to believe - it advised him to go further and apply for damages if he wished.

Concerning the complaint that the 3rd Respondent is no longer in the employment of the 1st Respondent, that would be subject of arguments during the hearing of the main application itself.

Finally, I should turn to the argument that there should not be what is termed as an amended affidavit. I am in full agreement with Mr. Nyangarika, Advocate, that, generally affidavits being evidence, legally, it sounds odd to say that a witness has amended his evidence. The usual procedure is for a party who has come across a new fact to swear and file a supplementary affidavit. However, a supplementary affidavit can only be filed where there is a valid application before the Court. In a situation like the present one, an order to have a chamber summons amended does away with both the chamber applications and the affidavit which supports it. Thus when an amended chamber

summons is filed the affidavit in support thereof cannot be termed as "supplementary" for there is no affidavit, legally recognisable on record, which can be supplemented, but rather, it is that there is an independent, affidavit by itself in support of the amended application. Notwithstanding the above observation, I don't go with Mr. Nyangarika that this (entitling it as amended affidavit) is a defect which goes to the root of the said affidavit condemning it to be struck out. This is one of accommodatable errors on an affidavit, which can easily be struck off leaving the rest intact and legaly admissible. For this reason the offending word "Amended" appearing in the title of the relevant affidavit is struck off, leaving the rest of the affidavit intact. On the whole therefore, for reasons discussed, save for this last observation, the Respondents preliminary objections are dismissed.

(L. B. Kalegeya)

JUDGE

Delivered on 29/1/99