IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO.24/95

K.J. MOTORS..... APPLICANT

VERSUS

RICHARD KISHAMBA & 119 OTHERS.... RESPONDENTS

JUDGEMENT

KALEGEYA, J:

The Respondents, 120 in total, had their services terminated on 15/12/92 when Twiga Hotel closed its business. After some negotiations between them and Defendants regarding their terminal dues have proved futile the Labour officer filed a report with the Kisutu Rm's court as prescribed under S.132 of the Employment Ordinance, Cap 366, in consequence of which a civil cause leading to this application was filed. The Defendants then raised preliminary objections that the cause is prematurely before the court, for, One Kishamba who appeared on behalf of 119 others had no locus standi in that no leave had been sought and obtained under 0.1 Rule 8 of the Civil Procedure code which could make this cause a representative suit; that it was filed out of time for it was beyond one year since the cause of action arose, and that the 4th Defendant was improperly joined as there is no cause of action against him. The learned PRM (Longway) dismissed the objections hence this application by way of revision. In this application, Mr Ndyanabo, Advocate, for applicants pursued a disgruntlement against the trial court's decision in relation to

only two objections - the alleged non-existence of a representative suit and limitation of time.

I will start with the question regarding compliance or non-compliance with 0.1, Rule 8 CPC. The law is clear on the requirement, in civil suits, of a party to seek and procure leave to file a re-presentative suit before he is recognised by law to be a representative of others let alone instituting a suit at all before a court of law. This requirement is mandatory as can be discerned from the following commentary by two learned authors, sir John woodroffe and Ameer Ali in their Code of Civil Procedure, 3rd Ed,. Vol.II on 0.1 rule 8 of the Indian civil Procedure Code, which provision is in pari materia with our 0.1, Rule 8 (cited with approval by Samatta, Jk, - as he then was - in (Hc) Misc. Civil application No.114/94, George Mpondela and 2 others V. Salum Ipande and 674 others - D'Salaam Registry, unreported);

> "A representative suit cannot be said to have been validly instituted unless and until the mandatory provision of 0.1 rule 8 of the Civil Procedure Code are complied with.
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> .....
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> .....
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> common interest litigation can be conducted only in accordance with the provisions of Order 1, Rule 8 of the code. As already remarked, failure to comply with these

mandatory provisions is fatal to any such suit or application". (emphasis mine)

Unfortunately, however, for Mr Ndyanabo, learned counsel, the above mandatory provision does not apply to the present cause, for, it is not an ordinary suit.

In dismissing the objection on this, the learned PRM had the following to say,

> ".. On the same date, the court was informed that in order to facilitate process to continue smoothly; especially as some of the complainants have no means to travel to court, that mr Richard Kishamba would therefore stand in for all complainants. I do observe that this was not fully recorded, but which omission I consider is no indicator of the alleged breach of Order 1, Rule 8(1) of the Civil Procedure Code, 1966. This provision in my view was not mandatory. By nature of the suit and number of the complainants present in court the implied recognition of Richard Kishamba makes up for the absence of the labour officer who should be present in court to conduct process for the complainants" (emphasis mine).

With respect to the PRM, the excerpt from her ruling quoted above seems to be in contradictions although the conclusion is sound. It is not clear whether she is saying that the leave was sought, and granted or whether "by the nature" of the suit it is not legally required. If she meant the former, what was done here is far from compliance with 0.1, Rule 8 CPC. An application for leave must be properly made before the Court and if granted the record must reflect that. The PRM concedes,

> "I do observe that this was not fully recorded",

thus legally, it is as good as nothing, for, it does not exist on record. That apart, if leave is granted there is yet another mandatory requirement,

> "But the court <u>shall</u> in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct". (emphasis mine).

Thus, if the present cause was an ordinary cause Mr. Ndyanabo's complaint would have secured all blessings of this court.

However, as earlier indicated, this is not an ordinary suit. This is an employment cause (under the Employment Ordinance, Cap. 366) which though governed by the Civil Procedure Code it is not governed by strict adherence to the procedure provided under that code; it is not originated by normal pleadings (as the labour officer's report made to the court under S.132, Cap. 366 suffices) and the court is enjoined to determine it without undue regard to technicalities except that it should be guided by the need to do substantive justice. This is clearly borne out by the provisions of s.134 of the Employment Ordinance which state as follows:-

> "134(1) On receipt of a report under S.132 the Magistrate shall, where the facts appear to him to be such as may found a civil suit, issue such process as he may think fit to cause the parties or either of them and the witnesses to attend before him.
>
> (2) Upon the attendance of the parties the magistrate shall proceed to try the issues disclosed in the report as if the proceedings before him were a civil suit, without requiring the parties or any party to file any pleading.
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> (3) the provisions of the Civil Procedure Code, 1966, shall, in so far as they may be applicable, apply to proceedings under this section,

Provided that the magistrate shall hear and determine such proceedings according to substantial justice without undue regard to technicalities of procedure" (emphasis mine).

I think the learned PRM had this in mind on her second line of reasoning when she said "By the nature of this case" though she did not elaborate or expound further on it as she was required to do. On the clear wording of the quoted section therefore, Mr Ndyanabo cannot be heard to say that before the court could receive and act on the labour officer's report the respondents were supposed to secure leave mandatorily required before filing of a presentantive suit in ordinary suits. Where a case is originated by a labour officers report the technicalities of procedure prescribed under the civil Procedure Code may not be followed and it lies wholly within the discretion of the court to direct which cause to be followed and all this is without undue regard to technicalities of procedure so as to attain substantive justice.

Next we turn to whether or not the cause was filed beyond the prescribed period of limitation. Mr Ndyanabo argues that as the Respondents were dismissed on 15/1/92 and as their claims fall under item 1 of the 1st schedule to the Law of Limitation Act, 1971, which sets the period within which to take action at one year, filing a complaint on 15/9/94 violated the law as it was time barred. The Respondents maintained that there were negotiations going on between them, their employers and labour office regarding their actual entitlement hence they are not

barred as claimed.

In dismissing the objection on this, the trial PRM observed that upon termination of the Respondents, computations were made, some money paid to them while further efforts went on to verify actual accounts; she stated,

> "I take judicial notice that employment claims process have claim processes and as such time could have been consumed. However, because the claim was broken by various agencies action, I find that the complainants' claim has not yet been time barred".

I should hastily observe that it should always be remembered that if a party leads another to engage in negotiations which however turn out to be fruitless after a long period of engaging in the same, the party who is supposed to file an action cannot rely on these negotiations when it comes to computation of time once an argument arise regarding Limitation period. Negotiations, however potentially desirable they may be in a particular case, do not arrest or check limitation period. Thus, whatever negotiations that may have taken place between the parties in this case, per se, cannot have checked the period of limitation as the trial PRM, by the except of her ruling quoted above, would want us to hold.

The ruling however shows that that was not the only reason

which made her dismiss the objection. There is yet another ground. She observed,

> "Another aspect I have found proper to look at is that of whether the complainants' claim is a compensation. The items of claim are all affiliated to salary and terminal benefits, arising from a contract of employment, in my considered view there are not compensation. In the premises since the claims are recoverable under Cap 366 .....
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> .....
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> I find that the claim is not one of compensation and therefore unaffected by limitation provisions quoted".

While I don't subscribe to the learned PRM's observation that claims recoverable under Cap 366 are not covered by Limitation Act, I am on all fours with her that the present claims are not the "compensation" referred to under item 1, First schedule, Law of Limitation Act, as urged by Mr ndyanabo, Advocate. This is clearly brought out by the very report which initiated these proceedings. The Labour officer's report (amended) among others states,

> ".... they were jointly employed by the defendants on different dates and on diverse jobs in the business of Twiga Hotel.

> 2. That in the course of employment and thereafter they were not paid (or provided with) a total sum of shs.45,425,763.15 as indicated in Annexture "A" to this report.
> 3. That on repeated demands the defendants failed to pay the plaintiffs ....."

The annexture referred to then goes into breakdown of the stated sum and it is indicated that the sums claimed include - Salary arrears, terminal benefits, repatriation expenses to their villages and disturbances. While one may argue that "disturbances" could be interpreted to fall under the definition of "compensations" there is no way the rest of the claims could be called compensation.

Item 1, first Schedule to the Law of Limitation, provides,

> "Compensation for doing or omitting to do an act in pursuance of any written law..."

The word "compensation" in this context should not be looked at superficially. We should always ask ourselves, "compensation" for what. In our case all the claims are centred on the contract of employment between Applicants and Respondents, and they are divided into two parts - their dues which were not paid (i.e. salary arrears) during the subsistence of the contract, and, their entitlements as pronounced under the law upon their termination. The nucleus of the controversy therefore is contractual. I concur therefore with the finding of the trial

court that the action being based on the contract of Employment between parties and which contract was terminated on 15/12/92, filing the present action on 15/9/94 the Respondents are well within time as an action found on contract has its limitation period as six years (item 7 of the First Schedule to the Law of Limitation Act, 1971).

On the above discussed premises the application for revision is dismissed.

L.B. Kalegeya

JUDGE

Delivered in the presence of Mr Ndyanabo, Advocate.

L.B. Kalegeya

JUDGE

8/2/99