IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE No.283 OF 1999

(Orginating from KISUTU 460/98)

ANITA KAVERA - PLAINTIFF

VERSUS

AFRICARE TANZANIA - DEFENDANT

R U L I N G

IHEMA, J.

On the 5th day of July, 1999 this Court granted Africare Tanzania the present defendant permission to transfer RM's Civil Case No.460/98 at Kisutu to itself at Dar es Salaam District Registry. The case was titled Civil case No.283/99. Upon the said transfer both parties were granted leave to amend their pleadings. In her amended plaint ANITA MWANGIGA KAVEVA the plaintiff pleaded for special and general damages for breach of contract due to unlawful and unreasonable termination of her employment as well as defamation. The plaintiff claimed a total of T.Shs.43,080,000/= as damages. On the other hand the defendant in its amended written statement of defence raised,among other things, two points of preliminary objection as well as a counter claim amounting to T.shs.34,462,800/= a claim which gave rise to a preliminary objection by the plaintiff to the effect that the counter claim was bad in law for having been amended without leave of the court. The preliminary points of law raised by the defendant allege incompetence of the suit for reasons that (1) the plaintiff did not follow the procedures laid down by employment law on enforcing remedies (if any) for breach of contracts of service and (II) the amended plaint exceeds the scope allowed by the court and offends the provisions on amendment of pleadings.

As the preliminary objections had to be determined first and foremost the parties were allowed to present written submissions to argue the objections raised. Mr Luguwa learned advocate argued for the plaintiff while Mr Ngatunga learned Counsel represented the defendant.

Let me deal first with the defendant's points of preliminary objection on the inconpetence of the suit on grounds of non compliance with laid down procedures laid down in employment laws in enforcing remedies for breach of contracts of service as well as excess of the scope allowed by the Court and the contravention of provisions of amendment of pleadings

On the first limb of the preliminary objection it is submitted by the learned advocate for the defendant that the previsions of the Employment Ordinance Cap 366 require a prospective plaintiff to report to a labour Officer who in turn is to initiate the process of enforcing the remedies under the contract of service. Sections 130, 131, 132 and 134 as well as case law were cited in support of the contention. In reply Mr Luguwa with an apparent confusion that this court is a district court submitted that the court is vasted with jurisdiction to try the matter under reference in terms of section 133(1) of the Employment Ordinance.

Clearly this is a misdirection and a confussion on the part of Mr. Luguwa learned advocate and does not meet Mr. Ngatunga's submissions. However the issue to be determined is whether the suit is properly before this Court. It is not in dispute that orginally the plaintiff filed her suit in the Resident Magistrate Court of Dar es Salaam at Kisutu claiming special and general damages for breach of contract. This action was filed as an ordinary suit grounded on breach of contract on termination of employment and not an issue of non payment or otherwise of salaries and allowance as it were. In addition it is also not in dispute that the suit found itself in this court by virtue of an order of this court by Mapigano, J. (as he then was) delivered on 25th July, 1999 at the instance of the defendant who now turns around with the courage of protesting the jurisdiction of the very Court she sought its forum. Surely the defendant cannot be heard to eat its cake and at the same time have it. But most glaring is the clear fact that once this court made its order to have the suit transferred to itself its jurisdiction is given and may only be challenged on appeal in the Court of Appeal. On this premise therefore the preliminary objection that the suit is incompetent is both misconceived and an absurdity.

With regard to the second limb of the defendant's preliminary objection the learned advocate has contended that leave was granted to the plaintiff to change the title of the suit to reflect the change of the court avenue as well as the case number, but instead over and above what had been allowed the plaintiff added another cause of action ie defamation. In support P.C. Mogha in Mogh's Law of pleadings, 14th Edition at page 151 was cited. The said author writes:

"Amendment cannot ordinarily be allowed where it would convert the suit into one of a totally different character based on entirely different and wholly inconsistent allegations with the original plaint."

The same position, the learned advocate argued is echoed by PM Bakshi in Mulla on Civil Procedure - Volume II, 15th Edition at page 1195 where it is stated:

"-----The object of rule 17 is to allow an amendment for the purpose of determining the real questions in dispute between the parties. That being the purpose for which an amendment is allowed, no amendment should be allowed which would introduce a totally new and different case ...."

On this preliminary objection Mr. Luguwa thinks otherwise and pleads that the aforesaid amendments are within the prayers granted by the Court.

I am minded that on 2nd September 1999 when the case came for mention Mr. Luguwa learned Advocate indeed prayed for leave to amend "the pleadings in order to change the title to read: the High Court of Tanzania. Also we intend to amend the claim so as to raise the value thereof. We undertake to file the same amended plaint by 10/9/99. In reply Mr. Ngatunga is recorded to have said: "My Lord I have no objection to the title to the pleadings. However I would object to the the raising of the value of the claim" On Mr Ngatung's objection to the raising of the quantum or value of the claim, I ruled that the same be dealt with in the written Statement of Defence. Thereafter a schedule to file the amended pleadings was set.

It is to be noted that the plaint and or pleadings which the plaintiff sought leave to amend are those filed on 8th December 1998 in the RM's Court of Dar es Salaam at Kisutu with eleven paragraphs limited to the prayer for judgment and decree against the defendant for special and general damages for breach of contract. In the amended plaint containing twenty (20) paragraphs filed on 10th September, 1999, the value of the claim was increased as prayed with a further cause of action of defamation arising out of the alleged termination of employment by the defendant and the manner in which the defendant handled the determination as well as the effect of the defendant's letter of termination of employment.

I agree that what is contained in the quoted paragraphs from the books of the renowed legal scholars is generally the position of law on pleadings. My attention however is attracted by the provisions of Rule 7 of Order VI of our Civil Procedure Code 1966 which provide that "no pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. "(enphesis supplied). Equally under Rule 17 of Order VI pleadings may with leave of the court be altered or

amended in such manner and on such terms as may be just necessary for the purpose of determining the real questions in controversy between the parties.

The question which is to be determined is whether the claim for defamation pleaded in the amended plaint is not just necessary for determining the real questions in controversy between the parties. It is clear in my considered opinion that the claim of defamation in the amended plaint may be inferred to derive its root from the contents of the letter of termination. Indeed the defendant cannot be said to have been prejudiced by the claim of defamation in view of the fact that the said defendant made reference to, albeit through denial in paras 8 - 11 of its amended written statement of defence.

In the circumstances I would also decline to allow the objection of the defendant on this ground. In sum and for the reasons I have given I will dismiss the two grounds of preliminary objection by the defendant. Costs to abide the cause.

As stated earlier on the plaintiff also raised a preliminary objection in reply to the amended written statement of defence and counter claim that the counter claim is bad in law for having been amended without the leave of the Court. The effect of the amendment is to raise the claim from T.shs.27,613,855/= to 34,462,800/= without leave of the court is the gravamen by the plaintiff. This to say the least is a gross misconception and misdirection; for in the first place it is on record that the parties were on 2nd September 1999 allowed to amend their pleadings by the Court. At any rate the provisions of Order VIII Rule 9(1) correctly cited by the defendant's counsel puts the case of the defendant beyond doubt, making the objection futile and without any colour of merit. It is accordingly dismissed. Costs will abide the cause.

S. Ihema

JUDGE

2/7/2002

Coram: Mutungi DR/HC
Mr. Luguwa For Plaintiff
Mr Luguwa/Ngatunga For the Defendant

CC: Komba

Court Ruling read this 2/7/2002 in court by F.S.K. Mutungi DR in the presence of counsel Luguwa for the plaintiff also holding brief of Ngatunga for the Defendant.

F.S.K. Mutungi