

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 58 OF 2004

BURTON LUPELO KIHAKA.....PLAINTIFF

VERSUS

- | | | |
|--|----------|-------------------------|
| 1. TANZANIA ELECTRIC SUPPLY | } | |
| CO. LTD.(TANESCO). | } |RESPONDENTS |
| 2. THE PARASTATAL SECTOR REFORM | } | |
| COMMISSION (PSRC) | } | |

RULING

SHANGWA, J:

In this case, the first defendant TANESCO and the second defendant PSRC gave notices of preliminary objections to the suit. The point of preliminary objection which was raised by the first defendant in its notice is that the amount claimed in the suit is below the pecuniary jurisdiction of this Court. The point which was raised by the second defendant in its notice is that the claim in the suit before the Court is not provable in bankruptcy and that for this reason the plaintiff has no cause of action against it.

On 5.10.2004, learned Counsel for both parties prayed the Court to argue their preliminary objections by way of written submissions. The Court granted their prayer and ordered that their written submissions should be filed by 26.10.2004.

Whereas the second defendant did file its written submissions as ordered by the court, the 1st defendant did not do so. So far, it is not known as to why it did not do so or even pray for extension of time to file the same. For that matter, I am inclined to think that its point of preliminary objection has been abandoned. I will therefore consider the second defendant's preliminary objection only.

Learned Counsel for the second defendant M/S B&B Law Partners, Advocates made long submissions and strenuous arguments that the plaintiff's claims against the second defendant made at paragraphs 13 and 16 of his plaint let alone the claim made at paragraph 15 of his plaint are not provable in

bankruptcy and that the second defendant cannot be held liable in respect of these claims. Looking at paragraphs 13, 15 and 16 of his plaint, it will be seen that the plaintiff has more than one claim against the defendants.

At paragraph 13, he is claiming for subsistence allowance or rations for himself, his wife and three children for a period of 880 days while they were awaiting for repatriation to his home village in Mbarali Constituency after terminating his employment when he chose to contest for Mbarali Constituency through the ticket of Tanzania Labour Party (TLP) in the Parliamentary General Elections held in October, 2000. This claim is at a rate of Shs.15,000/= per diem per adult and Shs.7,500/= per diem per child under 18 years old.

At paragraph 15, he is claiming for general damages to the tune of Shs.40,000,000/= for Psychological sufferings and loss of reputation during the period of his termination.

At paragraph 16, he is claiming for gratuity of Shs.14,161,000/= for long service of 14 years of employment with the 1st defendant and Rufiji Basin Development Authority (RUBADA).

It was contended on behalf of the 2nd defendant by learned Counsel M/S B&B Law Partners Advocates that the plaintiff's claims against their client are not capable of being called debts or liabilities provable in bankruptcy since they came into being from September, 2000 onwards and not before, or at the date when the 1st defendant TANESCO fell under its receivership by the Minister's order made under S.38 of the Public Corporations Act, 1992 as amended by Act No. 16 of 1993.

In support of their contention, they cited S.35 (3) of the Bankruptcy Ordinance Cap. 25 which inter-alia provides as follows:

“S.35 (3)... all debts and liabilities, present or future, certain or contingent to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.”

In reply, learned Counsel for the plaintiff Mr. Dennis Michael Msafiri submitted that the contention by learned Counsel for the 2nd defendant is misconceived and untenable. He argued that despite the fact that the plaintiff's claims arose after the time when the first defendant fell under the second defendant's receivership, they are debts provable in bankruptcy within the meaning of S.35 (3) of the Bankruptcy Ordinance Cap.25. He said that the obligation to the defendants to repatriate the plaintiff was a liability in the future and contingent upon termination of the plaintiff's employment and that it is a liability which the first defendant has become subject

before his discharge or removal from the list of specified public Corporations.

For me, I think that the question as to whether or not the plaintiff's claims are provable in bankruptcy and the question as to whether or not the second defendant is liable for his claims cannot be entertained at this stage of the proceedings. These questions should be raised as triable issues in the suit and the court will resolve them sometimes later after full hearing of the suit.

It would have been quite acceptable at this stage had the second defendant been raising an objection on ground that the plaint does not disclose a cause of action or that the suit is time barred or that the court has no jurisdiction to try it or that the plaintiff has no locus standi.

At any rate, the second defendant knows very well as to why the first defendant is under its receivership and as to why the plaintiff is interested in joining it in the suit together with the first defendant. I think the plaintiff is interested in joining it not because he has a cause of action against it or because his claims are provable in bankruptcy. He is so interested for the purposes of indemnity in the event the 1st defendant falls in total bankruptcy and becomes unable to discharge its liabilities.

For the reasons I have given in this ruling, I hereby dismiss the 2nd defendant's preliminary objection. However, I order that each party should bear its own costs.

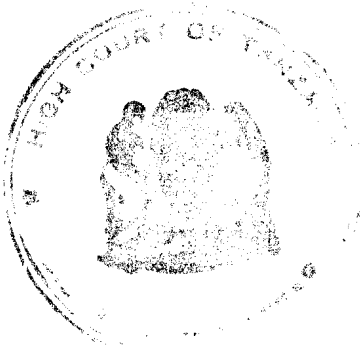


A. Shangwa

JUDGE

28.2.2005

Delivered in open Court at Dar es Salaam this 28th day of
February, 2005.




A. Shangwa

JUDGE

28.2.2005.