

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**IN THE DISTRICT REGISTRY
AT MWANZA**

MISC.CIVIL APP. NO.19 OF 2005

***(RM. Misc.Appl.No.73/2004, originating from RM's
Civil Appl.No.309 of 2003)***

KASIAN LUSHINGE.....APPELLANT

Versus

MANAGER ASPEN HOTEL LTD.....RESPONDENT

26/9/2006 & 11/12/2006

JUDGMENT

RWEYEMAMU,J:

The Appellant was a former employee of the Respondent. The matter commenced in the Labour Conciliatory Board where the respondent lost, and allegedly appealed the Board decision to the Minister of Labour. Subsequent to that, the respondent then filed Misc.Civil Application 309/2003 in the RM's court for stay of execution of the Board decision, pending the stated appeal to the Minister. The ruling thereof is subject matter of this appeal.

The respondent's application was resisted by the appellant who filed a Counter Affidavit, which affidavit met a Preliminary Objection (PO) from counsel for the respondent on ground that the same suffered a fatal defect in Jurat. In its ruling, the trial court sustained the PO, and ordered that the respondent (then applicant's) application be heard exparte, holding that *"I thus find that the Counter Affidavit is incompetent, hence I order that it should not be considered by the court, and the effect of this is thus that, the hearing of the application field by*

the Judgment debtor shall be heard ex parte as if no Counter Affidavit was filed by the respondent/decreed holder”.

The appellant was dissatisfied by that ruling hence this appeal where he submits two grounds in alternative. The first challenges the trial court's decision that the counter affidavit had a defective Jurat. The 2nd challenges the conclusion that the consequences of a defective Jurat is to have the matter heard ex-parte.

On the first issue; based on the Counter Affidavit decision cited of **Theobard Kainani Vs. The General Manager K.C.U.** (1990) Ltd, Civil App.3/2002 Bukoba sub-registry – unreported), and several other decisions, among them **Fares Murena Vs Asha Murena**, Civil Appl.9/2003, (Dar –es-Salaam registry – unreported); the trial court decision can not be faulted.

I differ however, with the conclusion of the trial court as regards the 2nd issue.

That issue is rather interesting. One; the application involves a fundamental legal question namely whether the jurisdiction of ordinary courts to enforce Board decision under the Security of Employment Act, extends to hearing an application for stay of Execution of the Board decision.

Two, it would be important to establish if the employer has indeed filed a reference to the Minister, and results thereof if any.

Three, assuming the trial court has jurisdiction in the matter and the Civil Procedure Code applies, the contentious issue is

whether a respondent files a counter affidavit later adjudged defective is on the same footing with one who has failed to respond at all. I believe not.

It is my firm opinion that this is one of the cases where the court should have used its discretion, in the interest of justice to strike out the defective affidavit but give time to the respondent to file a proper one, so that the application could be heard on merit.

In the circumstances, I partly allow the appeal by quashing the trial court ex-parte proceedings and judgment, and giving time to the appellant there respondent, to file an amended counter – affidavit in the district court. The appellant given time to file a counter – affidavit in a period of one month from the date of receipt of this judgment. Thereafter hearing of the case to proceed as usual in that court.

Sgd: R. M. RWEYEMAMU
JUDGE
11/12/2006

ORDER:

File sent to the DR for delivery of this judgment to the parties on 15/12/2006. Information should be sent to any party absent for them to collect their copy of the decision.

Sgd: R. M. RWEYEMAMU
JUDGE
11/12/2006

Date: 19/12/2006

Coram: J. R. Kahyoza - DR

Appellant: Present

Respondent: Absent

B/Clerk: J. Lwiza

Court: Judgment delivered in the presence of the appellant and
in the absence of the respondent.

Sgd: J. R. Kahyoza
District Registrar
15/12/2006

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

Sgd: J. R. Kahyoza
DR
19/12/2006