IN THE HIGH COURT OF TANZANIA
AT MTWARA

CIVIL CASE NO. 1 OF 2005

ABBAS MUHIDINI MWIRA ------PLAINTIFF
VERSUS
COL ELMON A. MAHAWA ----DEFENDANT

RULING

Date of Last Order: 21/6/2007
Date of Ruling: 23/8/2007

SHANGALI, J.

The plaintiff ABBAS MUHIDINI MWIRA is a resident of Kilimahewa Village at Nangopa ward in Masasi District of Mtwara Region. He is also the elected chairman of the said Village Government. The plaintiff is suing the defendant, Col. ELMON A. MAHAWA for Tsh.150,000,000/= being general, special and punitive damages for false imprisonment, malicious prosecution and defarmation of character willfully caused by the defendant. The cause of action arouse in November 2002 when the defendant was the District Commissioner of Masasi District of Mtwara Region. In that potfolio, the defendant is said to have issued an order to the effect that each household in Masasi District should cultivate two acres of cassava and other crops in the implementation of the "ONDOA NJAA MASASI" (ONJAMA) campaign.

In his endeavous to promote and supervise his campaign the defendant decided to visit and inspect in person each household shamba starting with the village Government leaders. In that course, the defendant was not satisfied with the attitude and performance of the Kilimahewa village Government leaders and its people. As a result he attacked the plaintiff in public and ordered for his arrest including other village leaders. The plaintiff and his colleagues were incacerated in Police custody for several days and later charged with the offence of disobeying a lawful order contrary to section 124 of the Penal Code, before Lisekese Primary Court at Masasi.

On 11th December 2002, the said Primary Court dismissed the case and discharged the plaintiff and his colleagues. The plaintiff was disgusted and infuriated by unwise conducts of the defendant which he labled illegal, unreasonable, humiliating and malicious, hence the filing of this Civil suit claiming for the above said reliefs.

In his amended written statement of defence filed on 20th September 2005 the defendant who was being represented by Mr. Mutongore, Learned counsel from Kigoma Advocates law chambers, filed three grounds of preliminary objection on point of law and fact. The plaintiff was represented by Mr. Lissu, Learned counsel from lawyer's Environmental Action team of Dar es salaam.

On the request of both parties, on 16th November 2006, I allowed the counsels to argue the preliminary objection by way of written submission. This ruling is on determination of the preliminary objection raised by the defendant's counsel only.

The raised three grounds of preliminary objection contend as follows:

1) That, the suit is incompetent before the court as the same was filed contrary to Rule 3 of the Court Fees Rules (Government Notice No. 308 of 1964)

2) That, the Government Notices Numbers 375 and 376 of 2002 in support of filing the suit in forma pauperis are misconceived both in law and fact as they provide no remission of Court fees to the plaintiff.

3) That, the plaint is bad in law for non-joinder of the necessary party, namely the Attorney General in contravention of the provisions of the Government Proceedings Act, No. 16 of 1967, Chapter 5.

Submitting on the first ground of preliminary objection, Mr. Mutongore argued that the position of the law is that, every person who wishes to file a suit must pay requisite court fees, unless he has first applied for leave of the court to file the same without requisite court fees. He cited rules 3 and 4 of the Court Fees Rules, 1964 (Government Notice No. 308) and also Rule 8(2) of the same Rules which provide that an application for remission of fees shall

be by way of chamber summons supported by an affidavit, giving grounds for such application. The counsel for the defendant/objector supported his stance with the decision in the case of GEORGE EDWARD VS. COUNTRY DIRECTOR, INTERNATIONAL RESCUE.COMMITTEE, TANZANIA OPERATION & DUNCAN WACHIRA, Misc. Civil Appl. No. 16 of 2000, HC, Tabora Registry (unreported) in which the court showed the correct procedure to be adopted in the application for remission of the court fees. Mr. Mutongore contended that since no court fees were paid nor leave for remission of court fees was seek and granted, the suit is improperly before the court and the same should be dismissed with costs.

In reply Mr. Lissu, Learned counsed for the plaintiff, omnisciently, submitted that the rules cited by his learned friend are correct but he insisted that those Rules must be read together with and subject to the provisions of Rule 8(5) of the Court Fees Rules, 1964 which provide that no fees shall be payable by a person who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, Univesity of Dar es salaam, the Tanganyika Law Society, The Tanzania Woman Lawyers Association (TAWLA) or the Legal and Human Rights Centre in respect of proceedings instituted by or against such person exept, if he is successful in the proceedings, the court shall direct him to pay up the necessary court fees.

The plaintiffs counsel argued that, Rule 8(5) means that a party to judicial proceedings is automatically exempted from payment of the requisite court fees, if he is granted legal aid by any of the institutions stipulated under that provision. He submitted that, the plaintiff was granted legal aid under the Legal Aid Scheme of the Legal and Human Rights Centre and therefore not subject to the requirements of Rule 8(2) to file an application for remission of the court fees.

Consequently, the plaintiffs counsel hammered back that the case of GEORGE EDWARD (Supra) cited by the defendant's counsel, is distinguishable from the facts of this current case, because, in the cited case the applicant was not a recipient of legal aid from any of the legal Aid Schemes mentioned under rule 8(5) of the 1964 Rules, and therefore not qualified for an automatic exemption from payment of Court fees. In the result the applicant in the cited case was legally bound under the law to file an application for remission of court fees as he did.

In his rejoinder, Mr. Mutongore responded to the effect that, rule 8(5) of Government Notice No. 308 has no relevancy with Legal Aid Schemes,

because the Rules provide for modalities of the appeal against orders from the Court of the Resident Magistrate.

I took pains to visit the relevant Rules and discovered that under the Judicature and Application of Laws Act Chapter 358 of the Revised Edition 2002 (Subsidiary Legislation), a number of ten (10) Government Notices amending Court fees Rules, has been consolidated and cited as Court Fees Rules, 1964. Among them are Government Notice No. 308 and Government Notice No.430 of 2002 which specifically provide for remission of fees. All along Mr. Lissu, Learned counsel for the plaintiff has been correctly citing those Rules as Court Fees Rules, 1964 and rule 8(5) provide for what he stated to be position of the law. On the other side, Mr. Mutongore, Learned Counsel for the defendant has been specifically citing Court fees Rules 1964 (Government Notice No. 308). In my considered opinion all the counsels has been citing same Rules but Mr. Lissu has been more precise and uptodate although the Rules may correctly to be cited as The Judicature and Application of Laws Act (Court Fees Rules) 1964, Chapter 358 of the Revised Edition, 2002.

That being the position, I fully agree with Mr. Lissu that a party to judicial proceedings is automatically exempted from payment of the requisite court fees if he is granted legal aid by any of the institutions stipulated by rule 8(5) of the Court Fees Rules, 1964. Secondly such automatic exemption from payment of court fees ceases where and when the party enjoying the legal aid scheme services of the relevant institution succeeds in the relevant proceedings, because the provision further provide that the court shall, direct that successful party to pay up the requisite court fees.

With much respect to the objector, the first ground of preliminary objection is therefore rejected for lack of merits.

Now, the crucial question is whether the plaintiff was legally granted legal aid as asserted above or whether the case was filed in "forma pauperis" under the law. This issue brings us to the second ground of preliminary objection. There is, in the record of this court, a copy of a letter from the Legal Aid Scheme of the legal and Human Rights Centre with Reference No. LHRC/LAC/BUGN/04/506 dated November 3, 2004, addressed to the District Registrar of this court (here after referred to as "the letter"). The said letter is informing this court that the plaintiff has been granted legal Aid assistance in pursuant to the Government Notice No. 375 and 376 published on 9th August 2002.

Mr. Mutongore, learned counsel for the defendant/objector submitted that the two mentioned Government Notices No. 375 and 376 of 2002 relied upon by the plaintiff in support of his plaint being filed without payment of requisite court fees, are wrong and unapplicable. He contended that Government Notice No. 375 published on 9th August 2002 refers to the Appellate Jurisdiction (Tanzania Court of Appeal) (Amendment), Rules 2002 which relate to the exemption from payment of court fees or security for costs in respect of an appellant who has been granted legal aid; while the Government Notice No. 376 published on 9th August 2002 refers to the Election (Election petitions) (Amendment), Rules, 2002 which relates to the exemption from payment of court fees or security for costs in respect of a petitioner who has been granted legal Aid.

The counsel for plaintiff readly conceeded on that position of the law, and submitted that the Legal and Human Rights Centre cited inapplicable laws in granting legal aid certificate to the plaintiff. Indeed, there is no dispute that the two cited Government Notices of 2002 Rules, does not apply in the current case because it is neither an appeal to the Court of Appeal nor an election petition.

Nonetheless, Mr. Lissu strongly submitted that, the citation of wrong law does not render the suit unmaintainable in law, because a mistaken citation of the law is curable where the subject matter remains unchanged and where the omission does not occasion emberassment or injustice to the other party. In support of his proposition, he cited the case of ABUBAKAR MOHAMED MLENDA VS. JUMA MFAUME (1984) TLR 145,146 where it was held that the mere omission of a party to indicate the appropriate section of the law under which the matter is preferred is curable, particularly so where the omission is inadvertent, that is not intentional or negligent and where the substance of the matter remains the same. He also buffered his stance with the case of DUMMER VS. BROWN & ANOTHER (1953) 1 All ER 1158 where it was held that, an important function of a court of law is to prevent its procedures from being used to create injustice. Similaly, the counsel for the plaintiff called to his aid the case of ZOLA & ANOTHER VS. RALLI COMPANY (1969) EA, 691 where the court of appeal for Eastern Africa held that, court should hesitate to treat an incorrect or irregular act as a nullity, particulaly where the act relates to matters of procedure. Furthermore, Mr. Lissu requested this court to rely on the constitutional principles from the fourteen Amendments to The Constitution of the United Republic of Tanzania 1977 Chapter 2 of the Revised Edition of the laws, Article 107 A(2)(e) which

discourages and oblige the courts not to be unduly tied by procedural technicalities at the expense of substantive justice.

The Learned counsel argued that failure by the Legal and Human Rights Center to correctly indicate the appropriate law under which the plaintiff has been granted the said legal aid is one such technicality of procedure which the constitution and cited case authorities have ordained that, it must be avoided so that substantive justice is not jeopardiced.

In his rejoinder, Mr. Mutngore, Learned counsel for the defendant/objector submitted that by the fact that the plaintiff's counsel has admitted that the letter cited irrelevant laws, the defendant had a right to object to the filing of the suit without payment of requisite court fees and without application for remission of the same. He further contended that, since the cited law had no relevancy with the suit at hand, the admission of the same was illegal and hence can not be left to remain in the cases register. The defendant counsel argued that all the cited cases and constitutional Principles referred by the counsel for the plaintiff are correct because they refer on the minor issues of procedural technicalities in the adjudication of cases Vis-a-Vis substantive justice but not on the instance matter of grant of legal aid and institution of suit without payment of court fees.

In addition to those remarks, Mr. Mutongore further submitted that his learned friend, Mr. Lissu is not a Legal aider and there is no document that entitled him to handle this suit under that Legal Aid Scheme of Legal and Human Rights Centre. He argued that since the address of the plaintiff is care of Messes. Tundu A.M. Lissu, Advocates, it implies that the counsel filed this suit without any instruction from the Legal and Human Rights Centre.

At this stage and having studied the arguments by the Learned Counsels, I am satisfied that the letter which enabled and gave room to the instution of this suit, is highly defective for citing totally and completely, irrelevant provisions of the law.

In the foremost and just like the learned counsel for the defendant/objector, I have no quarrel with the excellent authorities cited by the plaintiff's counsel propounding and echoing on the position of the law to disregard minor procedural technicalities and the need for the courts to honour substantive justice. I may even add the passionate words of one eminent jurists who said"The wages of procedural sin should not be the death of rights". Nonetheless, it is trite to observe that, that position of the law does

not imply or mean that the procedural law should be disregarded. Each procedural sin should be weighed according to the circumstances of the case, its reparcation to the determination of the case and whether it occasion any injustice to the other party.

The question is whether in the circumstances of this case, one can, with certainty say, the procedural omission in this case is a minor and curable irregularity which does not change the subject matter nor occasion injustice to the other party.

Earnestly, much as I subscribe myself to the procedural principle that, defects which are trivial are curable, and courts can exercise their discretionary powers and act on the substantive question, I am not conviced that a legally defective certificate or letter purported to be issued in terms of Rule 8(5) of the Court fees Rules 1964, granting legal aid to an applicant is a minor or trivial procedural tecnicality. It must be observed that the whole current suit was filed on the bases of that defective and misleading letter and no court fees were paid. That is absolutely incurable defect which goes down to the roots of the whole suit. It is a fundamental irregularity and not a mere procedural technicality. In otherwords the suit has been erected on incurable defective foundantion. It goes without saying that once the letter is found to be dubious and irrelevant it renders the whole suit a nullity.

I am also in agreement with Mr. Mutongore, Learned counsel for the defendant on the question of the status and the appearance of Mr. Lissu, Learned counsel for plaintiff in this suit. Apart from a copy of that controversial letter from the said Legal and Human Right Centre purpoting to grant legal aid to the plaintiff under irrelevant provision of the law there is nothing else in the record to suggest that either Mr. Lissu is a lawyer from the Legal and Human Rights Centre or that he has been engaged or instructed by the Legal and Human Rights Centre to provide legal services to the plaintiff. The court record of proceedings indicate that Mr. Lissu has been appearing as an advocate for the plaintiff. Incidentally paragraph I of the plaint indicate that the address of the plaintiff, for the purposes of this suit is care of:

Messes Tundu A.M. Lissu, Advocates
C/o Lawyers Environmental Action team
Dar es salaam.

In addition the said plaint was signed by Mr. Lissu on 1st November 2004 and filed in court on 18th February, 2005, while the said controversial letter was written on 3rd November 2004.

I am inclined to believe that Mr. Lissu, Learned counsel was retained and engaged by the plaintiff personally, to conduct this case. If that is the position, and if the plaintiff was capable to hire such a prominent counsel, why should he evade to pay court fees and attempt to camonflage under the umbrella of Legal Aid Scheme of the Legal and Human Rights Centre.

Having given a close look at the counsels submissions and having scan the documents available Vis-à-vis the law involved, I am of the view that, once any of the institutions stipulated under Rule 8(5) of the Court Fees Rules, 1964 has decided to grant legal aid to any applicant, there must be a formal and precise letter or certificate from that institution to the relevant court informing it in clear and certain terms about that decision, by citing the relevant position of the law, reasons for the grant, and indicating the name or address of the instructed advocate to provide legal services if any. The need for such unambiguous and clear correspondence is to promote smooth and efficiency administration of justice and avoid doubts including those would be imposters under Legal Aid Schemes attempting to dodge and evade the payment of court fees.

To put the matter abreast, I am satisfied that the said controversial letter or certificate from the Legal and Human Right Centre purported to grant legal aid to the plaintiff is incurably fatal. The suit was therefore not legally filed under rule 8(5) of the Court Fees Rules, 1964 and no court fees were paid nor application for remission filed and granted. The second ground of preliminary objection is hereby upheld.

On the third ground of preliminary objection Mr. Mutongore submitted that this suit is unmaintainable in law for non-joinder of the Attorney General in terms of section 3(2) and 4 of the Government Proceedings Act, N. 16 of 1967. He contended that at the time when the cause of action arose the defendant was an officer of the Government and that, acts complained of were committed during and in the course of his official functions as a District Commissioner of Masasi District. Mr. Mutongore claimed that as the acts were done in the course of his employment and for public interest, the defendant is "sheltered" by the provisions of section 2 and 4 of the Government Proceedings Act and therefore the failure to implead the Attorney General is contrary to the law.

Mr. Lissu for the plaintiff submitted that the stance of the law is that a suit may be brought against Government officials in their personal and/or private capacities for any misdeed or acts committed while discharging their duties as Government officials. He contended that, the cited provisions of the Government Proceedings Act do not support the allegation that the Attorney General should have been joined in these proceedings because what section 2(2) provide is that, the proceedings by or against Government include civil proceedings in which the Attorney General or any officer of the Government as such, is a party. He stated that the phrase "any Government officer as such" means the officer in question appears not in his private or personal capacity but in his official or Governmental capacity. In otherwords, not every suit involving a Government officer is a proceeding by or against the Government. It is Mr. Lissu's contention that for a suit to qualify as such the Government officer must appear in the suit "as such" Government officer and not in his common and personal name like in the present suit. He submitted that, in this suit the defendant has been sued in his personal name and therefore it is incorrect for the defendant's counsel to claim that this is a suit against the Government in which the Attorney General must be joined as a party. Mr. Lissu added that the provisions of section 3(2) and 4 of the Government proceedings Act does not support the proposition canvassed by the defendants counsel that the tortious liability of the servant or agent of the Government automatically makes the Government vicariously liable in tort in respect of its servants or agents tortious act or omission.

In support of his submission, Mr. Lissu cited the case of ISMAIL LAZARO VS. JOSEPHINE NGOMERA – Civil App No. 2 of 2986 (CA) Mbeya Registry (Unreported) where is was held that section 3(4) of the Government proceedings Act, 1967 merely renders the Government civily liable vicariously for the acts done by its servants in the course of their official duties. In matters of tort, a tort feasor, a person who commits a tort, is always primarily liable. An employer is vicariously liable if his servant commits a tort in the course and within the scope of his employment. That does not absolve the liability of the servant for the tort committed. It only means that the employer is also liable as the tort was committed when the servant was supposed to be acting in place of or for the employer whose act it became. Mr. Lissu also called in aid the decision in the case of REV. CHRISTOPHER MTIKILA VS. THE EDITOR, BUSINESS TIMES and AUGUSTINO LYATONGA MREMA (1983) TLR 60 where it was propounded that the liability of a person who commits a civil wrong in the course of his employment is quite distinct from the liability of his employer even though the

liability of the later depended on the liability of the former. In that case it was also held that even ministers and other high public officials were not immune from the court process in their personal capacity. To cement his position, Mr. Lissu, learned counsel for the plaintiff also cited the famours case of MORRIS SASAWATA VS. MATHIAS MALEKO (1980) TLR 158.

The plaintiffs counsel submitted that the non-joinder of the Attorney General in those proceedings is also proper on the ground that the plaintiff can not be compelled to implead a person in an action for tort whom he does not wish to sue.

In his rejoinder, Mr. Mutongore insisted that the gist of their contention is that the defendant, being a District Commissioner who was by then implementing "ONJAMA campaign" would not have been sued in his personal capacity. He stated that even if the defendant did prosecuted the plaintiff, that was not done in his personal capacity but in the course of his employment or by virtue of his employment and within the scope of his employment. Mr. Mutongore contended that their argument is not on the immunity of the defendant but that the Attorney General should have been joined as co-defendant because the allegedly committed tort by the defendant occurred in the course of his official duties.

I entirely agree with Mr. Lissu, Learned advocate for the plaintiff that as the law currently stands there is no legislation that confers immunity, qualified or otherwise upon any public official or Government officer from being sued in their personal capacities for tort alleged to have been committed by them in the course of their official duties. I consider all cited case authorities to be the correct stance of the law.

It should be distinctly understood that a suit in tort filed against a public official or Government officer in his own capacity does not became bad in law simpy because the Attorney General was not impleaded. The decision to implead the Attorney General or not is upon the plaintiff who knows the extent of liabilities and tortious acts committed by the public official or Government officer. I am also convinced that on the same line of reasoning and law a plaintiff cannot be compelled to implead a person in an action for tort except in exceptional circumstances where the court find it absolutely necessary for the effective adjudication of the case.

At this stage nobody is clear if the defendant was acting under his official capacity or not. That question of fact and law could be thoroughly canvassed and determined during the hearing of the main case. If it happens through evidence that the defendant was actually acting under his official capacity and at the sametime the Attorney General was not impleaded, section 3 and 4 of the Government Proceedings Act might absolve the defendant from liability and the plaintiff could loose the hook and the fish. The third ground of preliminary objection is hereby rejected.

In conclusion, and for the above reasons enunciated under the second ground of preliminary objection, this suit is hereby declared a nullity for being filed in contravention of the Court Fees Rules, 1964. The same is hereby struckout with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

M.S. Shangali
JUDGE
23/08/2007

Ruling delivered todate 23/08/2007 in the presence Mr. Hyera Learned State Attorney, holding brief for Mr. Mutongore, Learned Advcate for the defendant/objector and the plaintiff Mr. Abbas Muhidini Mwira in person.

M.S. Shangali
JUDGE
23/08/2007