

**IN THE HIGH COURT OF TANZANIA**  
**AT MOSHI**  
**(DC) CIVIL APPEAL NO. 2 OF 2003**  
**[C/F DC MOSHI EMPLOYMENT CAUSE NO. 2/2002]**  
**ELISANTE ZUBERI CHALLAMBO ----- APPELLANT**  
**VERSUS**  
**1. MARY ALEX KYARA )**  
**2. THE NBC HOLDING ) ----- RESPONDENTS**

**JUDGMENT:**

**HON. JUNDU, J.**

In the trial court, the Appellant had unsuccessfully sued the Respondents for payment of terminal benefits (Tshs.1,350,187/50) arising from termination of his employment effected on 20/8/1998. At the commencement of hearing, the following issues were framed in the said court:

- (a) Which of the defendants, now, the Respondents if any was the employer of the plaintiff, now the Appellant.
- (b) Which of the defendants, now the Respondents, if any was liable for the terminal benefits claimed by the plaintiff, now the Appellant
- (c) What terminal benefits the plaintiff, now the Appellant, was entitled.
- (d) To what reliefs the parties were entitled to.

Thereafter, the parties adduced their evidence in the said court. The said court made its findings on the above framed issues as can be gathered in its Judgment delivered on 16/12/2002.

As regards the first issue, that is which of the Respondents (then defendants) if any was the employer of the Appellant (then the plaintiff), the trial magistrate found as follows –

“Upon considering the whole evidence adduced in this court and specifically the Plaintiff’s letter of employment (exh.P1) the court has find in relation to the first issue that neither the first nor the second defendant who employed the Plaintiff because the Plaintiff’s letter of employment (Exh. P.1) is very clear that the Plaintiff was employed by Executive Committee of the NBC Club which is now no longer in existence and the letter of employment was signed by Mr. Urassa who was the interim Chairman of the NBC Club and to my view the plaintiff was employed by the said committee under Section 15 (d) of the Club’s constitution which states that “Kamati itakuwa na uwezo wa kuajiri watumishi ---- kufanya shughuli maalum kwa malipo kulingana na mahitaji ya klab.

Therefore, from the above stated reason the court has find in relation to the first issue that the plaintiff was employed by executive committee of the NBC Club and not the first defendant who was the treasurer of the club or the then NBC so that the second defendant can be brought in this matter under Section 6(a) of Act No. 23/1997”.

As regards the second issue, that is which of the Respondents (then Defendants), if any, was liable for the terminal benefits claimed by the Appellant (then Plaintiff), the trial magistrate found as follows –

“Coming to the second issue which is about which of the defendant if any is liable for the terminal benefits

claimed by the Plaintiff, it is the finding of this court that even though I stated in one of the ruling which I have made in this matter that the second defendant is the right party to be joined in this case but after hearing the evidence from both sides I have been satisfied that neither the first nor the second defendant who is liable for the terminal benefits claimed by the Plaintiff.

The reason for the above find is because the court has already been satisfied that the Plaintiff was employed by the NBC Club which had power to employ and terminate the employment of its employee and not that he was employed by the first or the then NBC which has been succeeded by NBC (1997) Ltd and NMB so that the second defendant can be responsible for the claims against the then NBC.

The evidence of Israel Peter Makwabulo (DW.1) is very clear that the NBC Club was not the part of the then NBC but an organ which as established by the staffs of the then NBC and it was not depending on the financial support from the then NBC but from its members. Therefore, since neither the first nor the second defendant who employed the Plaintiff and also neither the first defendant nor the second defendant who terminated the Plaintiff's employment because the letter of termination of his employment dated 20/8/1998 is very clear that the

person who terminated his employment is the executive committee of the club and the said letter was signed by Mr. Mlatii who was the Chairman of the club then there is no way it can be said that either the first defendant or the second defendant is liable for the terminal benefits claimed by the Plaintiff. I think the right party to be sued by the Plaintiff in this matter would have been the chairman of the club but as it was stated and conceded by both sides the NBC Club is no longer in existence”.

As regards the third and the fourth issues, the trial magistrate found as follows –

“Basing on all what I have stated in the first and the second issues hereinabove I have come to the views that there is no need of to proceed dealing with the third and fourth issues because I have already find that the first and the second defendants are not liable for the terminal benefits claimed by the Plaintiff even if it would have been found that the plaintiff is entitled to any terminal benefit.”

Having made its findings on the aforementioned issues, the trial court dismissed the Appellant’s claims. It stated as follows –

“Therefore the court has come to the final finding that the Plaintiff has not been able to prove his case against the first and the second defendant’s hence his claims before this court are hereby dismissed and this

being an employment matter there will be no order as to costs”.

The Appellant, being aggrieved by the Judgment and Decree of the trial court, has appealed to this court listing eight (8) grounds of appeal in his Memorandum of Appeal namely that –

- (1) That the trial court erred both in law and in fact that the case was proved on the balance of probabilities by Plaintiff hence failed to reach fair decision.
- (2) That the trial court failed to evaluate the whole evidence adduced in court by both sides and as a result reach wrong findings.
- (3) That the lower court erred both in law and in fact when failed to consider that the first Defendant was served with summons for orders to file her Written Statement of Defence but she did not appear in court or filed her Written Statement of Defence hence the court failed to ENTER EX-PARTE JUDGMENT as a matter of practice and procedure and then proceed with the rest Defendant and as a result reached unfair decision.
- (4) That the subordinate court failed to take into consideration that the first Defendant in her Written Statement of Defence filed in court when the case came up in the first instance in Civil Case No. 33/1999 admitted that the liabilities for payment the Appellant were vested to the second Defendant and the court in this case ruled to that extent and the copy of Defence and judgment were tendered in court so as to prove the Respondent to be liable.
- (5) That the trial court failed to take into account that the matter has been placed before Mr. I.P. Kitusi – RM where the first Defendant was present it was ruled and directed that the second Defendant be the party as the NBC was defunct therefore the 2<sup>nd</sup> Defendant was the right party to be sued.
- (6) That the lower court failed to take into consideration that the Appellant’s letter of appointment was issued by the National Bank of Commerce where

at the foot of it was clearly indicated that “Wako BANKI YA TAIFA YA BIAASHARA” and his identity Card was from the National Bank of Commerce which were tendered in court therefore reached wrong findings.

(7) That the subordinate court failed to take into consideration that all the assets were properties of the defunct National Bank of Commerce all the liabilities were vested to the second Defendant, therefore it was proper to sue the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

(8) That the lower court failed to take into account that the second Defendant was the right person to be sued after the defunct of National Bank of Commerce and NBC Club and as a result reached unfair decision.

Based on the aforesaid grounds of appeal, the Appellant in his Memorandum of Appeal has prayed to this court to allow the appeal with cost in this court and the court below.

On 7/5/2007, by consent, this court, ordered the parties to argue the appeal by way of written submissions. The parties have so complied. The Appellant made his submission by himself so did the 1<sup>st</sup> Respondent. On the other hand, Mr. Maruma, learned counsel advocated for the 2<sup>nd</sup> Respondent.

I have carefully read the submissions of the parties in respect of the grounds of appeal. I will first deal with two technical shortfalls brought out by the learned counsel for the Respondents. First, 1<sup>st</sup> Respondent in her submission complained that the date of the Judgment is 16<sup>th</sup> day of December, 2002 while the date of the Decree is 16<sup>th</sup> January, 2003 hence the decree is defective in terms of Order XX rule 7 of the Civil Procedure Code, 1966. However, my careful reading of the copies of the Judgment and Decree available in the record shows both of them bear the same date of 16<sup>th</sup> December, 2002. Therefore, I hold that there is no contravention of Order XX Rule 7 of the Civil Procedure Code, 1966 contrary, to what the 1<sup>st</sup> Respondent has argued in her submission.

Secondly, Mr. Maruma, learned counsel for the 2<sup>nd</sup> Respondent in his submission contended that the appeal is not properly before this court as it contravenes Order XXXIX, Rule 1 (1) of the Civil Procedure Code, 1966 in that the parties cited in the Decree are just two instead of three. He recalled that the Appellant was given an opportunity to rectify the record of the lower court but only the Judgment was corrected to implead the 2<sup>nd</sup> Respondent. He contends that the decree and the Memorandum of Appeal do not impaled the 2<sup>nd</sup> Respondent. However, my own perusal of the record shows that this court on 17/9/2003 had ordered for the record to be returned to the lower court so that the Decree could be rectified to add the name of the 2<sup>nd</sup> Respondent which was omitted. The record was so returned and the correction was so done. There are only two Respondents in this appeal and not three. My perusal of the Memorandum of Appeal available on the record shows that the parties which have been cited there are the very parties cited in the corrected Judgment and Decree. Therefore, I hold that there is no contravention of Order XXXIX Rule 1(1) of the Civil Procedure Code, 1966 contrary to what Mr. Maruma, learned counsel for the 2<sup>nd</sup> Respondent has contended in his submission.

Has the Appellant prosecuted the grounds of appeal stated in his Memorandum of Appeal before this court? The 1<sup>st</sup> Respondent in her submission states as follows –

“--- reading the submissions of the Appellant as a whole it is abundantly clear that, he has decided to reproduce some of the grounds of appeal as submission without expounding them at all.

The grounds of appeal are mere unsubstantiated critics which the Appellant ought to have come up with facts that would go on to justify or substantiate

them. ---- It is like the Appellant has left it to the court to venture on his reasons for the complaints against the trial court. He has gone out of his way to refer to the Constitution of the United Republic of Tanzania to the court without any relevancy or any cause at all”.

Similarly, Mr. Maruma, learned counsel for the 2<sup>nd</sup> Respondent in his submission states as follows –

“--- we have read the submission of the Appellant, though filed belatedly. The submission in our humble opinion, is vague, confusing and generally unintelligible. It does not address adequately the grounds of appeal or even continue itself to the issues framed by the lower court”.

Indeed, my own reading of the submission of the Appellant, clearly shows that the Appellant, in his submission has merely reproduced some of the grounds of appeal without expounding them. He had not shown which misdirection or wrongs that the trial magistrate did which this court is called upon to rectify.

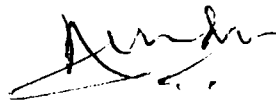
However, in my considered view, I would agree with the submission of Mr. Maruma, learned counsel for the 2<sup>nd</sup> Respondent that the essence of this appeal is two fold namely (1) Are the Respondents employees of the Appellant? and (2) Are the Respondents liable for the terminal benefits of the Appellant? In my considered view, judging from the findings of the lower court as I have adequately reproduced above, the said issues were well answered by the said court in its Judgment.

For the purpose of this Judgment, I will adopt the submission of Mr. Maruma, learned counsel for the 2<sup>nd</sup> Respondent. The trial magistrate found that



there was ample credible evidence to demonstrate that the Appellant was employed by the NBC Club and not the 1<sup>st</sup> Respondent and/or the National Bank of Commerce (NBC) or the successor-in-trick, NBC Holding Corporation, the 2<sup>nd</sup> Respondent. The evidence on record adduced in the trial court vividly showed that the NBC Club was a members Club with registered names (Exhibit D.2) and a constitution (Exhibit D.1). Further, the Appellant's letter of employment (Exhibit P.1) was signed by the interim Club Chairman in terms of the said club's Constitution and not the NBC. The 1<sup>st</sup> Respondent according to the evidence of DW.1 was a mere official of the NBC Club and that the NBC as a bank had its own employment procedures independent and distinct from that of the NBC Club Members. The evidence on record shows that the Appellant's services were terminated by one Mr. Mlatii in his capacity as Chairman of the NBC Club and not the NBC. Therefore, in my considered view, the Appellant had improperly joined the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the suit he filed in the lower court as both of them were not his employers nor did he have any cause of action against them.

In the upshot, I hold that the appeal filed by the Appellant in this court has no merit. The Appellant has miserably failed to challenge and fault the findings of the trial magistrate. The appeal is hereby dismissed. I uphold the decisions of the trial magistrate. However, I make no order as to costs as the appeal before this court emanates from an employment cause under the Employment Ordinance, Cap.366. It is so ordered.




**F.A.R. JUNDU**

**JUDGE**

**6/11/2007**

Right of Appeal Explained.



**F.A.R. JUNDU**

**JUDGE**

**6/11/2007**

6.11.2007

Coram: F.A.R. Jundu, J.

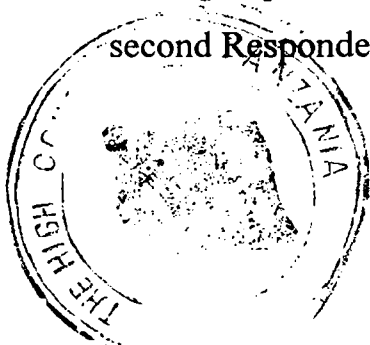
For the Appellant: present

For the 1<sup>st</sup> Respondent: present

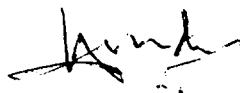
For the 2<sup>nd</sup> Respondent: Mr. Maruma, Advocate

C/C: Muyungi

**Court:** Judgment delivered in the presence of the Appellant and in the presence of the 1<sup>st</sup> Respondent and in the presence of Mr. Maruma, learned counsel for the second Respondent.



**AT MOSHI**



**F.A.R. JUNDU**

**JUDGE**

**6/11/2007**