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

CIVIL APPEAL NO. 72 OF 2010

(Original RM's Court, Kisutu, Misc. Civil Application No. 43 of 2008, Hon. Mugeta, SRM)

EDWARD MSANGO ..... APPELLANT

VERSUS

THE MANAGER, AGA KHAN SPORTS CLUB ..... RESPONDENT

Date of last order: 12/10/2010
Date of judgment: 12/11/2010

JUDGMENT

Dr. F. Twaib, J:

Briefly, the background giving rise to this appeal is as follows:

The Appellant was an employee of the Respondent until 1st February 1995, when the Respondent terminated his services. Aggrieved, the Respondent referred the matter to the Regional Reconciliation Board. By its decision dated 25th June 1996, the Board found that the Respondent's decision to terminate the Appellant's employment was justified.

Still aggrieved, the Appellant took the matter to the Minister for Labour. On 21st January 1997, the Minister dismissed the Appellant's complaint. It is instructive to quote what the Minister wrote:

> "Kwa mujibu wa kifungu cha 26 (2) che Sheria ya Usalama Kazini 1964, nauthibitisha uamuzi wa Baraza la Usuluhishi: Mfanyakazi aachishwe kazi kwa sababu ushahidi uliotolewa dhidi yake unathibitisha kwamba ni mtovu wa nidhamu na chanzo cha vurugu mahali pa kazi"

Neither the Board nor the Minister made any order for payment of terminal benefits. In any case, the Appellant had been paid all his terminal benefits by the time these decisions were made. That is evidenced by a note to that effect signed *inter alia*, by the Appellant and dated 8th February 1995. In 1999, the Appellant began putting up claims for more terminal entitlements. On 25th March 2000, he filed, through the Regional Labour Officer, Employment Cause No. 138 of 2000 at the Kisutu RM's Court. On 17th November, 2000, the Appellant withdrew this case. While withdrawing it, he did not seek leave to refile it and none was granted.

On 31st January 2001, through the Labour Commissioner's letter of 29th January 2001, the Appellant filed Employment Cause No. 31 of 2001 at the Kisutu RM's Court. The Respondent successfully raised the plea of *res judicata* and the suit was dismissed. The Appellant was not satisfied. He preferred an appeal to this Court (Appeal No. 15 of 2002).

In a judgment delivered on 9th May 2003, the Court (Bubeshi, J.) held that the Appellant's acknowledgement of payment of terminal benefits which also discharged the Respondent from any further liabilities arising from the Appellant's termination estopped him from raising any new claims. She thus upheld the decision of the RM's Court and dismissed the appeal. That

decision still stands, even though the Appellant had tried to appeal to the Court of Appeal, but he was time barred and an application for extension of time was dismissed by Massai, J., on 9th September 2004. There is no indication as to whether the Appellant ever pursued the matter any further.

The present appeal originates from yet another attempt by the Appellant to obtain some further terminal benefits from the Respondent. The Appellant appeared before me in person, while Mr. Byabato, learned Advocate, appeared for the Respondent.

On 23rd August 2008, the Appellant filed an Application for Execution of Decree at the RM's Court, Kisutu, as Misc. Civil Application No. 43 of 2008. By this application, the Applicant sought to execute an order allegedly contained in the letter by the Minister for Labour which dismissed his appeal. This was letter Ref. No. U.10/RF/6996/6 of 21st January 1999. The total sum he was seeking to secure payment of was TShs. 239,143,138/= by "issuance of a drawn order". This was the same letter that validated the Respondent's termination of the Appellant's employment. It is worth noting, once again, that the said nothing about any terminal benefits payable to the Appellant.

Pursuant to that application, the RM's Court, Kisutu, issued a Drawn Order dated 30th December 2008. Why this was done, while there was no Court order from which the "Drawn Order" could be extracted, is not clear. On 20th January 2009, the Applicant filed yet another "Application for Execution of Decree", this time seeking the Court's assistance in arresting one Shamshudin Alimohamed Jessani "to be detained as a civil prisoner". Upon being served, the Respondent filed, on 20th January 2009, an application for stay of execution and an order for review of the orders

dated 30th December 2008. Upon certain objections on points of law raised by the Appellant and conceded to by the Respondent, the application was dismissed on 14th September 2009. The next day, the Respondent filed a fresh application for similar orders. Subsequently, a number of applications and notices of preliminary objections were filed by the parties which, the Court decided later decided to strike out summarily in order to proceed to determine the real issue in controversy between the parties.

On 18th March 2010, the matter was called on for hearing before Mugeta, SRM. The Appellant prayed that the learned Magistrate should disqualify himself from further presiding over the matter. the learned Magistrate declined. The Appellant then walked out of the proceedings in protest. Rightly in my view, the learned Magistrate proceeded with the case in his absence. In his ruling dated 26th March 2010, he dismissed the Appellant's application for execution on grounds that the matter had already been adjudicated upon and determined by Bubeshi, J., in Civil Appeal No. 15 of 2005 between the same parties. He also vacated the Court's order of 30th December 2008.

Aggrieved, the Appellant came to this Court through the present appeal. In his memorandum of appeal, the Appellant raised four grounds. In sum, the grounds of appeal are challenging:

1. The RM's Court's finding that the matter had already been determined while the decision of the Minister for Labour dated 21st January 1997 has not been executed;

2. The order vacating the RM's Court order of 30th December 2008 by the then Magistrate in Charge (Lyamuya, PRM);

3. What he alleges to be a failure on the Magistrate's part to take into account that the Respondent had failed to show that he has complied with the Minister's order of 21st January 1997 and the RM's Court's order of 30th December 2008; and

4. What he alleges to be a failure on the learned Magistrate's part to take into account that the decision of the Minister has not been quashed by any competent court through *certiorari* and *mandamus* as provided by law.

I think I need not be detained by engaging in a determination of each of the grounds of appeal *seriatim*. The appeal can be disposed of by determining two main issues:

1. Whether the Minister's decision contained in his letter of 21st January 1997 included an order for payment to the Appellant of his terminal benefits; and

2. Whether the judgment of Bubeshi, J., rendered the issue of additional payment of terminal benefits to the Appellant *res judicata*.

We have already quoted hereinabove the words used by the Minister in his letter. It is plain to me that the Minister's letter said nothing about payment of terminal benefits to the Appellant. It was therefore wrong for the learned Lyamuya, PRM In-Charge, to entertain the application in the first place, let alone issue the impugned 'Drawn Order" which the Appellant now wants to be reinstated and enforced.

As was held by Mihayo, J. in **Tanzania Telecommunication Co. Ltd. v Titus Gunze**, Civil Revision No. 132 of 2004 (unreported), where the Minister's orders under the Security of Employment Act does not contain an order for payment of a certain sum, any monetary payment must follow laid down procedures. In the present case, those benefits were already paid, and there was no further procedure to follow. The Appellant's attempt to bring the amount by way of an attachment to an Application for Execution of Decree, assuming that the Court would simply grant a "Drawn Order" and extract payment of such a huge sum of money was clearly misconceived. Mihayo J., in **Tanzania Telecommunication Co. Ltd. v Titus Gunze** (*supra*), was faced with a similar situation and held thus:

> [The Respondent] always brought the "attached sheet" as an annexure and would assume that whenever the Court ordered execution of the Minister's award it had also ordered for payment of this colossal amount of money. This is almost a fraudulent move and this Court cannot support it".

Hence, the first issue as framed above is answered in the negative. The Minister's decision communicated through his letter dated 21st January 1997 did not contain an order for payment of terminal benefits or any amount of money. The Appellant was therefore not entitled to apply for "Execution of Decree" as he did herein on the basis of that decision. It contained no order for payment of money which the RM's Court could legally have executed.

The second issue I have framed concerns the judgment of Bubeshi J. in Civil Appeal No. 15 of 2002. The learned Judge had this to say:

> "The core issue for determination is basically one: Is the Appellant stopped from filing further claims against the Respondent. Put it

differently, did annexure ASC-2 discharge the Respondent from further liability he had towards the Appellant. "

In answering this question, the learned Judge held:

> "The whole case revolves around Annexure ASC-2. It was signed by the Appellant and through it he discharged the Respondent from future claims. He cannot now be beard to go round it and file new claims on the ground that he was duped. He is estopped. It is a sad fact but this being a court of law and not of mercy there is nothing that can be done."

It was therefore the Court's view that the Appellant had no recourse to any further payment with regard to termination of his employment by the Respondent. Since that decision has not been vacated, it must be taken to have finally and conclusively determined the issue. It was thus wrong for the Appellant to subsequently come up with the "Application for Execution" in the RM's Court—an attempt at obtaining the remedy through the backdoor. The learned SRM In-Charge was correct in dismissing the Application and in vacating the order made earlier by his predecessor on 30th December 2008.

In the upshot, I dismiss this appeal in its entirety.

Now for the issue of costs, which have been prayed for by Counsel for the Respondent. I am mindful of the legal position in section 153 of the now repealed **Employment Act**, Cap 366 (R.E. 2002) as applied vide section 50 of the **Security of Employment Act**, Cap 387 (R.E. 2002) (also repealed) which however apply to this matter, that the Courts should normally not order costs in proceedings under the two acts. However,

under proviso (b) to section 153 of the **Employment Act**, the Court may order costs against a party who commences proceedings that are found to be frivolous or vexatious.

Given the background of the facts as narrated above, I agree with Mr. Byabato, learned counsel for the Respondent, that the proceedings commenced by the Appellant at the RM's Court in Misc. Civil Application No. 47 of 2008 (from which this appeal emanates) are a gross abuse of the process of the Court. I have no doubt at all that in the circumstances of this case, the proceedings are frivolous and vexatious. I would therefore invoke this Court's discretion and order that the Appellant shall defray the general costs of these proceedings and of the proceedings in the Court below.

Dated at Dar es Salaam this 12th day of November, 2010.

Dr. Fauz Twaib
Judge
12th November, 2010