

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL CASE NO. 9/2015

HARUNA RAMADHAN PLAINTIFF

VERSUS

1. DISTRICT EXECUTIVE DIRECTOR,

KYERWA DISTRICT1ST DEFENDANT

2. YASIN JUMA 2ND DEFENDANT

RULING

24/11/2017 & 26/1/2018

Kairo,J.

This ruling emanates from the preliminary points of objections, (POs) raised by the State Attorney one Mr. Uhagile from the A.G Chambers on behalf of the two Defendants when filed their joint written

statement of defence. At first, the State Attorney raised four POs but when invited for oral submission to amplify them, he informed the court that he withdrew the fourth PO and that he will argue the remaining three which were couched as follows:-

1. That the suit is bad in law for being filed prematurely for the notice of intention to appeal against the Plaintiff has already been filed.
2. That the suit is bad in law in for failure to comply with the requirements of the Local Government (District Authorities) Act, Cap 287 RE 2002.
3. That the suit is bad for failure to join the A.G as one of the parties in a malicious prosecution case.

The Plaintiff is being represented by the Learned Counsel, Advocate J.S. Rweyemamu.

Mr. Uhagile submitted that, this case was instituted prematurely as the criminal case resulted to this matter has been appealed against by the Republic. He went on that, so far they have only managed to get the decision and were still following up for the proceedings. He argued that, this civil suit was supposed to wait for determination of the appeal filed. Mr Uhagile further informed the court that they have attached

the notice of an intention to appeal together with the WSD to verify his contention.

In the second limb of the P.O, the State Attorney submitted that the suit instituted contravenes the requirement of the provisions of the Local Government (District Authorities) Act No. 7/1982 Cap 287 RE 2002 Section 12 (1) (b) which stipulates that the District Council when established it becomes a body corporate with a capacity of suing or being sued in its own name thus the proper party in this suit was supposed to be Kyerwa District Council and not the Defendants herein as both are mere employees of the Council. He cited the case of **Deonatus Nkumbo & Another vrs The District Executive Bariadi District Council: Civil case No. 14/2009 High Court Tabora** (unreported) to support his argument.

For the third P.O, the State Attorney argued that the suit was bad in law for failure to join the DPP or AG in a suit concerning malicious prosecution, arguing that it is only the DPP who has the mandate to prosecute unless the DPP authorizes otherwise. He argued that in the case resulted to this suit, the matter was between the *Republic vrs Haruna Ramadhani & 3 Others* and not *DED vrs Haruna Ramadhan & Others; (Criminal case No. 81/2015)* as such it was not correct to

exclude the DPP in the case as was done by the Plaintiff. Mr. Uhagile thus prayed the court to dismiss this suit with cost.

Advocate Rweyemamu in a reply to the first P.O submitted that the attached notice of appeal has not shown that the same was served to the Plaintiff but it was copied to the District Registrar, High Court of Tanzania, Bukoba. He went further that the provision under which the notice was filed (section 379 (1) (b) of the CPA) provides that, a party has to file the petition of appeal within 45 days after filing the notice. He also argued that, there was no evidence in record that the Defendants have requested for a copy of the proceedings, and thus their contention that the proceedings are not ready is not authenticated by any correspondence. He added that one can file a notice of appeal and remain silent or opt not to proceed with it. He concluded that since there is no evidence to show that the appeal was lodged, there is nothing to prevent the Plaintiff from instituting this suit.

For the second P.O, the Advocate for the Plaintiff submitted that the requirement before one can sue the Local Government has been spelt out in section 190 of Cap 287 (supra). The same stipulates one month notice before instituting a suit. He went on that, the said provision doesn't stipulate that the notice is to be copied to the A.G which means

the Plaintiff is not compelled to sue the A.G and that the Plaintiff complied with section 190 of Cap 287 (supra) which established District Authorities.

With regards to the cited case of *Donatus Nkumbo (supra)*, Advocate Rweyemamu submitted that the Plaintiff inserted DED as a party so as to pinpoint the person to be served with documents but it is clear that the one sued is the Kyerwa District Council; as such the cited case cannot tilt the framing of this case. He further argued that, the decision is only persuasive as such this court can as well depart from the same and that according to his view, the said decision did not conclude by showing the proper party to be sued. He further argued that, the heading of the cited case reads “*The District Executive*” without saying which executive as there could be many executives in the District. He concluded by arguing that, the cited case is thus distinguishable with the one at hand.

With regards to the third P.O, Advocate Rweyemamu submitted that the laws governing claims of damages (Cap 287) doesn’t compel the Plaintiff to join the Director, thus, Yasin Juma was joined being the one dealing with the tasks complained of (ceasing) etc. He further argued that it is not mandatory to join the A.G once the District council is sued as it has the capability of suing or being sued in its own capacity/name.

The Advocate clarified that, Kyerwa District Council is an independent Institution and not a Ministry, thus the Government Proceedings Act which calls for notice to the AG is not applicable in this circumstance. The Advocate also pointed out another distinguishing feature of the case at hand with the cited one of *Deonatus Nkumbo (supra)* that in the Nkumbo's case the DED was sued instead of the Council which is not the case in the present case. He argued that section 190 of Cap 287 talks on the authority not otherwise, and that was the reason why DED was included as an authority to receive the notices and other communications. The Advocate thus prays the court to reject the POs raised.

When invited to make rejoinder, the solicitor for the council submitted that, the Advocate for the Plaintiff was misleading the court. He argued that, the Defendant's are not objecting that the proper notice before instituting the suit was not served under section 190 of Cap 287 rather their objection is hinged on section 12 (1) (b) of the Act which demands the inclusion of the name of Kyerwa District Council as a party in the case . Besides, Yasin Juma was doing his duties as "Fishery Officer" (Afisa Uvuvi) and no reason was given as to why he wasn't sued in his status. The solicitor argued that, the employer and employees are two distinct persons. He also argued that the title of the case at hand and that of *Nkumbo (supra)* are similar, arguing that DED is the title of the

officer and not corporate body. Further to that, it was the Republic which prosecuted the Plaintiff and not Kyerwa District Council and thus a claim for malicious prosecution was to be against the Republic, or DPP or AG.

In addition to the rejoinder Mr. Uhagile further submitted that according to section 379 (1) (a) of the CPA Cap 20 RE 2002, the notice of appeal is the one which initiates the appeal. He further argued that there is no legal requirement to serve the Plaintiff and the Plaintiff would have been notified upon getting the summons. The State Attorney conceded that, the law requires an appellant to lodge the appeal within 45 days from the date of the order appealed against. However the same law excludes the time used to pursue the necessary documents as per section 379 (1) (d), adding that though the decision was ready on the delivery date, but the proceedings weren't. He however conceded that there was no written correspondence to that effect.

In responding to the argument by Advocate Rweyemamu that the Government Proceedings is not applicable in the case at hand, Mr. Uhagile submitted that the essence of their third P.O lies on the nature of the case itself whereby the power to prosecute is vested on the A.G. through the DPP as per National Prosecution Service Act No. 27/2008.

That according to the said Act, no person can prosecute unless so directed/ authorized by the DPP (section 22 & 23 of the Act), but such powers cannot be vested on the people like DED or Yasin Juma. He thus reiterated their prayer to have the raised P.O upheld.

I will analyze the P.Os raised in seriatim.

Having heard the rival arguments concerning the first P.O, the issue is whether or not this suit was filed prematurely. It is not disputed that the notice of an intention to appeal was filed, indicating the intention to challenge the decision in criminal case No. 81/2015 which resulted to the institution of this suit. Advocate Rweyememu for the Plaintiff has argued that the filed notice could not operate as a bar to the lodging of this suit as the copy of the same was not served to the Plaintiff. Besides one can file the notice and remain silent. According to section 379 (1) (a) under which the notice of appeal was lodged, there is no legal requirement to serve the opponent party, as such non serving of the Plaintiff was not legally offensive.

The Defendants has argued that, after filing the notice, they were following up for the proceedings being among the necessary documents to enable them file the intended appeal. However in their submission they conceded that they don't have written correspondence to verify the follow-up made. It is true that an appeal

is required to be filed within 45 days from the date of the order to be appealed against and that the days a party was pursuing the relevant documents for appeal is to be excluded as per section 379 (1) (b). However the Defendants have conceded that they don't have written correspondence to verify the follow-up made. In those circumstances therefore this court cannot rely on such mere assertion. The Plaintiff's Advocate has rightly argued that a party can file the notice of intention to appeal and decided to remain silent without taking further steps. The records show that the notice was filed on 25/9/2015. According to Defendants, they were still following up the proceedings up to when the case was filed (8/2/2016) and that they have not received the same to-date. Despite the lapse of all that time the Defendants have not made any written correspondence in the alleged follow up, the omission which can be interpreted that they are no longer interested with appealing. The time lapsed and the absence of any written correspondence which could have acted as a reminder to the court in asking for the relevant documents to appeal is inconsistent with the furtherance of the intention to appeal, as such, the notice could not operate as a bar to the filing of this suit. Consequently the first P.O crumbles.

Coming to the second P.O, the issue to be determined by the court is whether or not the parties sued are proper ones. The Defendants

argues that the suit contravenes section 12 (1) (b) of the Local Government (District Authorities) Act, the argument which was refuted by the Plaintiff. For easy reference, let me quote the provision at issue:-

Section 12 (b) *“Every district council established under this part and in respect which there is furnished to the Minister by the clerk of the National Assembly, a certificate of establishment, shall with effect from the date of commencement of the establishment order, be a body corporate and shall:*

a)..... NA

b) In its corporate name be capable of suing or being sued”.

The contention in this point is that, the Defendants argue that the persons sued are the employees of the Kyerwa District Council as a corporate body. Thus according to the case of *Nkumbo (supra)* the proper party to be sued was Kyerwa District Council. The Plaintiff on their part argues that since DED being the Council’s authority is among the Defendants, then the party sued was Kyerwa District Council. Only that his title was included to pin point the person to be receiving the service with regards to the case.

It is not disputed that DED and Mr. Yasin Juma are employees of Kyerwa District Council and the wrong alleged to have committed was

in the course of performing their duties assigned to them by the employer. In my conviction therefore the District Council (Employer) person cannot be left scot-free in this case.

Advocate Rweyemamu has distinguished the *Nkumbo's case* with the one at hand by arguing that the heading reads *District Executive* without saying which one in particular as a district can have several executives. But with much respect I beg to differ; Page 3 of the judgment of *Nkumbo's case (supra)* the court framed the issue "*whether the DED can be sued in place of his respective district council*" which means the Executive referred in the case is DED, the same as the one sued in this case. The Advocate in further distinguishing the case asserted that section 190 of cap 287 talks on authority and that's why DED was included as an authority to receive notices and other communication. However, DED is an employee and since he was in the course of his employment when the alleged wrong was committed, the Employer must have been included. What the Plaintiff did was to sue the Defendants in lieu of their employer which is not correct as rightly argued by the counsels for the Defendants. Advocate Rweyemamu has also argued that the cited case is a High Court one which this court is not bound by the said decision, which is correct. But with much respect, I don't see any point to fault my learned brother to justify my departure from his decision. I thus uphold the 2nd point of objection.

The wanting question therefore is the consequence. The counsels for the Defendants pray the court to dismiss the matter. However in my conviction, the proper action is to reject the plaint for being incompetent, which means the proper remedy is to struck it out so as to allow the party concerned to correct the anomaly and re-file the case should he still so wish.

In the circumstances therefore I hereby struck out this case with no order as to the cost. Since the P.O disposes the case, I feel not obliged to continue determining the other P.O.

It is so ordered.




L.G. Kalro
Judge

At Bukoba

26/01/2018

Date: 26/1/2018

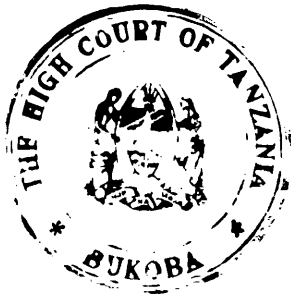
Coram: S.M. Kulita,DR.


Plaintiff: Abel Rugambwa (Adv)

1st Defendant: }
2nd Defendant: } Absent

B/C: R. Bamporiki

Court: The ruling is ready. It is hereby read over today 26/1/2018 in the presence of Mr. Abel Rugambwa (Advocate) for the Plaintiff. The Defendants are absent.




S.M. Kulita,DR.
26/01/2018