IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CASE NO. 71 OF 1986

1. JUWATA)
2. NATHANIEL MLAKI) . . . . APPLICANT

Versus

BOARD OF EXTERNAL TRADE . . . RESPONDENT

R U L I N G

Kimaro, J.

This is a duplicate file which shows that sometimes in 1986, the then JUWATA, did, on behalf of NATHANIEL MLAKI file a chamber application in this court seeking for an order for certiorari to remove into the High Court and quash the decision of the Permanent Labour Tribunal made on 10th February, 1986 as well as an order for mandamus against the Permanent Labour Tribunal requiring it to hear and determine Trade Dispute No. 16 of 1984.

Documents supplied into this court by learned Advocate Mrs. G. Mulebya, under the direction of this court, shows that Trade Dispute No. 16 of 1984 was filed at the Permanent Labour Tribunal. It was dismissed on a preliminary objection and the dismissal was made by the Permanent Labour Tribunal (Hon. Justice Mackanja) on 10th February 1986.

Mrs. Mulebya Advocate has been having the conduct of this case throughout. She is appearing for the Board of External Trade who are the respondents. The documents supplied by her have been very very useful in answering crucial questions which came to my mind when I first went through the file and noted, what was missing. Having noted that My Brother Judge Kazimoto dealt with the matter and made a ruling on 2/4/87, I was doubtful whether it was proper to have the case still going on. The doubts which I had made me to direct the advocates who are appearing in this case (Mr. Muccadam for the applicant and Mrs. Mulebya for the respondent) to adress the court on the propriety of having the case still pending. Each of them has complied with the order. I acknowledge efforts made by each of them in the preparation of their submissions.

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Before going to their submissions, it is worthy showing what took place after the Permanent Labour Tribunal had given its ruling.

The Permanent Labour Tribunal upheld a preliminary objection that it had no jurisdiction to entertain the trade dispute. Following the decision of the Permanent Labour Tribunal, the applicants filed a Chamber Application seeking for prerogative orders of certiorari and mandamus as indicated at the begining of this ruling.

My Brother Judge Kazimoto (as he then was) who heard the Chamber Application upheld a preliminary objection raised by Mrs. Mulebya Advocate that the application was incompetent because no prior leave of the court was sought and granted before the application for prerogative orders was filed. The order was made on 2/04/87.

Subsequent to the decision of My Brother Judge Kazimoto, Mr. Muccadam filed what he called an AMENDED CHAMBER APPLICATION wherein he sought for two orders:

(i) That the applicant be allowed to file the application and

(ii) An order of certiorari to remove to this Hon. court the decision of the Permanent Labour Tribunal Trade Dispute No. 16 of 1984 and annual it.

The application was filed on 23rd November, 1987, more than seven months after the decision of my Brother Judge Kazimoto. The application was dismissed on 24th August, 1990 because of non-appearance of Mr. Muccadam and his client. Mr. Muccadam filed an application seeking for restoration of the application. Both advocates concede that the application has not been heard todate. One of the reasons being misplacement of the original case file.

Well, misplacement of the original file notwithstanding, the main question which has been striking my mind is, was it proper for Mr. Muccadam to file what he called an amended chamber application after my Brother Judge Kazimoto had dismissed the original application which was filed?

Mr. Muccadam, submitted that since the original application was not dismissed, it was proper for him to file what he called an AMENDED CHAMBER APPLICATION. Mr. Muccadam submitted, further that leave was

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granted to file the application for prerogative orders and that since leave was granted he cautioned that judges of same jurisdication can not overrule each other. That what should be heard is the application for setting aside the dismissal.

According to Mr. Muccadam, the last time the case was called for a hearing before my Brother Judge Kalegeya his instructions to the advocates were to do a research on whether the application for prerogative orders should be heard by a single judge or a panel of judges. It was further submitted by Mr. Muccadam that the issue of the dismissal of the main cause was neither raised by my Brother Judge Kalegeya nor by her colleague - Mrs. Mulebya.

Mrs. Mulebya on the other hand disputed that leave to file an application for prerogative orders has ever been granted and that failure by Mr. Muccadam to mention the name of the Judge who granted the application nor submit the said order in court fortifies her point. Mrs. Mulebya said the amended chamber application which was filed subsequent to Hon. Judge Kazimoto giving his ruling on 2nd April, 1987 apart from not being accompanied by an affidavit and a statement was filed out of time. That the respondent had raised a preliminary objection pointing out the defects but the preliminary objection was not heard because the application was dismissed because of non-appearance of the applicant and his advocate.

The response of Mrs. Mulebya to the direction given by this court on 13th November, 2001 is that after Hon. Judge Kazimoto had declare the original application incompetent, it was not proper for Mr. Muccadam to re-file the application because there was contravention of the law. The alternative argument given by Mrs. Mulebya is that even if the ruling of Hon. Judge Kazimoto can be interpretated that it left room for the applicant to file a fresh application, then the fresh application should have been filed within the time limit which is allowed by the law.

Regarding what transpired in court when the advocates appeared before Hon. Justice Kalegeya, Mr. Mulebya denied that they were given instruction to research on whether the application could be heard by a single judge or a panel of judges.

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In brief that was the response of the advocates to the instructions given by the court on propriety of having this case still going on.

While I appreciate the submission made by Mr. Muccadam, I totally disagree with him that it is proper for the case to be still going on. It is true my Brother Judge Kazimoto declared the original application filed incompetent without ordering its dismissal. That however did not leave room for the applicant to take advantage of the omission of the word dismissal. It is common knowledge that once an issue is declared incompetent because of contravention of the law, a person can not refile the same without complying with the law. This is what Mr. Muccadam has done. For the original application, the law was not complied with. Leave was not sought and obtained before the application. This means . that the application was closed after Hon. Judge Kazimoto gave his ruling. For the sake of argument only, even if room was left for filing a fresh application, then the law had to be complied with. Leave had to be sought and obtained within the time limit allowed by the law. What Mr. Muccadam did was to file an Amended Chamber Application. The immediate question arising is which application was he amending while there was nothing before the court? Who granted permission to make the amend-ment and how could that amendment be allowed without having any application before the court. Mr. Muccadam has not given an answer to this important question.

Mr. Muccadam submitted that leave to persue the main application was granted. Mrs. Mulebya has disputed that leave was granted. Although Mr. Muccadam filed a rejoinder he has not mentioned when leave was granted and by which judge. This means that leave has never been granted. Failure by him to mention the date and the Judge who granted leave is sufficient evidence that no leave has ever been granted and the position remains to be the one which has been given by Mr. Mulebya.

While I thank Mr. Muccadam for the caution given in respect of judges with same jurisdition, I must assure Mr. Muccadam that he need not worry because I am well aware of it and I cannot go beyond limitations where circumstances do not permit.

In this particular case however, my Brother Judge Kazimoto having decided the original application on 2nd April, 1987 the matter was closed. It could neither be revived by a fresh application (because litigation would have taken years in court) nor could it be revived by an amended

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chamber application because there was no application which was still pending which could be amended.

This brings me to a conclusion that after the decision of my Brother Judge Kazimoto on 2nd April 1987, the matter became closed. The application for restoration of the chamber application is struck out. It is accordingly ordered.

N.P. Kimaro
JUDGE
5/02/2002

14/5/2002

Coram: N.P. Kimaro, J.
Mr. Muccadam - For the 1st applicant
For the 2nd applicant
Mrs. Mulebya For the respondent
C.C. Abedi

Court: Ruling delivered.

Order: The application for restoration is struck out with costs.

N.P. Kimaro
JUDGE
14/04.2002