

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 297/1997

KITERIA MENEZES & 33 OTHERS ..... PLAINTIFFS

VERSUS

AFRA ENGINEERING WORK LTD ..... 1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

RULING

CHIPETA, J.

This is a ruling on preliminary points of law raised by Mr. Maira, Mr. Kilindu, and Mr. Mugare, learned counsels for the defendants/respondents.

The background of the matter is that on 21st October, 1997, Kiteria Menezes and 33 others filed civil case no. 297/1997 seeking, inter alia, an order to nullify the sale of a building then situated on plot no. 16, Old Kisutu/UWT Street, to the plaintiff. On 10th November, 1997, Kiteria Menezes filed a chamber application in that same case seeking, inter alia, leave to:-

" represent 33 people who have similar interest in this suit."

On 18th December, 1997, the defendants, namely, Afra Engineering Works Ltd, and the Attorney General, filed a counter affidavit opposing the chamber application. On the same day they filed notice of preliminary objections on three points, namely, that the application had been brought under wrong provisions of the law, that the application was incompetent for want of locus standi in that Kiteria Menezes had not obtained leave to institute the proceedings under representative procedure, and that the application was bad in law as it was founded in a suit which is res judicata.

During the hearing of these proceedings, I permitted learned counsels of both sides to address the court in respect of both the civil case and the application. Mr. Maira submitted that Kiteria Menezes had no locus standi as she had not sought and been granted leave of the court to file a representative suit under Order I, Rule 8 of the Civil Procedure Code, an omission which, he submitted, was fatal to the proceedings. In his submission, the accepted practice and procedure was for a party to file a miscellaneous application for leave to file such a suit, something which had not been done in this matter and so, in law, there is no application but only a civil suit. Mr Maira accordingly prayed that all the proceedings be struck out as being incompetent. For this submission, learned counsel relied on the case of Sonko v. Haruna, ( 1971 ) E.A. 443.

Secondly, Mr. Maira submitted that the suit was res judicata in that it offends section 9 of the Civil Procedure Code because the issues in this case between the parties were decided in Kisutu Miscellaneous Application no. 263 of 1997.

Thirdly, Mr. Maira submitted that the suit disclosed no cause of action because the plaintiffs did not state whose tenants they were.

For those reasons, Mr. Maira submitted that both the suit and the application were not properly before the court and so should be struck out.

Mr. Kilindu added that in the application, the plaintiffs/applicants referred to "the suit", thus disclosing that they had already filed the suit.

Mr. Salula, learned Senior State Attorney for the Attorney General, subscribed to the submissions made by Mr. Maira and Mr. Kilindu.

Professor Fimbo, learned counsel for the applicants/plaintiffs, submitted that this was an application for leave to file a representative suit, and that the application, on which the suit was dependant, could stand alone. And so, he submitted, it could not be said that there was no application because there was no suit as both the suit and the application were filed on the same day. While conceding that an application for leave to file representative suit should precede the filing of such suit, In his submission, there was nothing fatal to the application.

As to the practice and procedure of this court, Professor Fimbo submitted that there was nothing expressly ruling out a situation where a representative suit is filed prior to the grant of permission and the requisite permission is sought subsequently. He relied for this submission on a ruling of this Court (Late Mkude, J.) in the case of Captain Bendera and Others vrs. My computer and Others, (HC) Civil case.no. 117 of 1992, Dar es Salaam Registry.

On the submission of no cause of action, Professor Fimbo submitted that pleadings could be amended. In the alternative, he submitted that the plaint did disclose a cause of action.

On the question of res judicata, learned Professor submitted that the issues in the Kisutu R.M.S.' Court matter were different from those in the Present suit, and so, he submitted, there was no question of res judicata in the present suit.

The crucial question in these proceedings, it is clear to me, is as to whether Civil Case no. 297 of 1997, and the application filed in that case are properly before this court. Since Civil case.no.297 of 1997 <sup>purports</sup> to be a representative suit, then the provision of Order 1, Rule 8 of the Civil Procedure Code had to be complied with. In other words, the plaintiffs, as a precondition to filing that case, had to file an application for leave to file such a representative suit. The Plaintiffs did not do so before filing Civil case.no. 297 of 1997. In my view, that was a fundamental error. I do not subscribe to the view expressed in Bendera's case (Supra) that one can file a representative suit and then apply for leave later.

That would be putting the cart before the horse. The absurdity of such a situation is not far to seek: what if the court should refuse to grant leave? The law, in my view, is that a party desirous of filing a representative suit must, as a precondition, seek and obtain leave before filing such suit. That, in my view, is the plain, ordinary, natural, and reasonable meaning of Order I, Rule 8 of the Civil Procedure Code.

To conclude, therefore, it is abundantly clear that Civil Case no. 297 of 1997 was prematurely filed and filed contrary to law, and so the same is not properly before this court.

I now turn to the application for leave. As was correctly pointed out by Mr. Maira, the correct practice is that in applications such as the one canvassed here a miscellaneous application or cause must be filed as a substantive application. It cannot be filed as an interlocutory application because <sup>it</sup> is not dependent on any existing proceedings. That is exactly what the plaintiffs/applicants did. The application was filed as an interlocutory application in Civil Case no. 297 of 1997. That is clear not only from the contents of the chamber application but also from the fact that it bears the number of Civil case no. 297 of 1997. That was a serious error calculated to circumvent the provisions of the law.

It appears to me that this application was filed as an afterthought after the plaintiffs had realized that Civil Case no. 297 of 1997 had been filed contrary to law. Incidentally, the application and Civil Case no. 297 of 1997 were not filed on the same day. The application papers were filed almost three weeks later.

For these reasons, I hold that both Civil Case no. 297 of 1997 and the accompanying application for leave to file a representative suit are not properly before this Court. Both are accordingly struck out with costs to the defendants/respondents.

It is so ruled.

  
B.D. CHIPETA

JUDGE.

Ruling delivered in chambers this 27th day of February, 1998.

B.D. CHIPETA 

JUDGE.

Prof. Fimbo - for applicants/plaintiffs.

Mr. Maira, Mr. Kilindu, and Mr. Mugare - for 1st defendant/respondents.

Mr. Salula, S.S.A - for 2nd defendant/respondent.