

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 177 OF 2003**

**ALLY SALEHE SAIDI . . . . . APPELLANT**

**VERSUS**

**THE DIRECTOR,  
ALLIANCE FRANCAISE . . . . . RESPONDENT**

*Date of last order – 21/9/2006  
Date of Judgment – 6/11/2007*

**J U D G M E N T**

**Mlay, J.**

This is an appeal from the ruling of the Court of the Resident Magistrate of Dar es Salaam (Karuwa PRM), in Employment Cause No. 157 of 2001, arising from a referee from the Labour Officer, under section 130 of the Employment Ordinance, Cap. 366. In the said ruling, the Principal Resident Magistrate struck out the "suit", and the Appellant/Plaintiff being aggrieved by that ruling, has appealed to this court on two grounds, namely:-

*1. That the trial magistrate erred in law and in fact for acting or going beyond his powers when he decided to strike out the suit instead of considering the application which was brought before the court.*

*2. That the trial magistrate erred in law and in fact for failure to consider appellants written arguments hence reaching a wrong decision.*

At the hearing of the appeal the appellant appeared in person, while the Respondent was represented by MS. KIRETHI, learned advocate. The appellant gave a short background to this appeal. He told the court that he had instituted Employment Cause No. 157 of 2001 through the Labour Officer to claim bonus, children allowance, maternity leave and overtime, in accordance with his employment contract. He said his Employer (Respondent), did not attend court proceedings, inspite of being served and the appellant obtained judgment and also, subsequently applied for and obtained an order of execution. He contended that the Respondent promised the court broker to settle the claim but instead, filed an application for stay of

execution and for setting aside of the ex parte judgment. He further contended that the court ordered that the application be argued by way of written submissions but the respondent did not do so while the appellant did. He contended that when the ruling was delivered on 13/12/2002, the trial magistrate struck out the suit. The appellant submitted that he was not heard on the issue of his employment. He argued that what was before the court was an application by the respondent for stay of execution, for lifting the warrant of attachment and for setting aside the expertes judgment, but instead, the court struck out the appellants initial claim.

On the second ground of appeal, the appellant submitted that the trial court did not consider his written submissions and as the result, reached a wrong decision. He contended that he was an employee of the Respondent and that he resigned his employment in order to claim his rights. He stated that he resigned on 3/1/2001 and he reported the matter to the Labour Officer on 25/4/2001. He contended that he resigned in order to persue his claims because he was not paid his claims when he made them while he was employed.

In reply Ms. KIRETHI learned advocate for the Respondent submitted that the Appellant resigned his employment on 3/1/2001 and reported to the Labour Officer who instituted the proceedings on 23/8/2001, without prior contact with the Respondent. She contended that the matter came up in court for mention on 17/9/2001 and the court ordered the Respondent to be notified but the Respondent was not notified. She went on to say that, the matter came up again on 28/9/2001 and the court recorded that the Respondent was absent although the Respondent had not notified. In short, the counsel contended that up to the time the appellant was allowed to proceed ex parte and until an ex parte judgment was delivered on 15/10/2001, the Respondent had not been notified. She further contended that the appellant applied for execution on 18/6/2002 which was granted and a notice to pay and attachment of property was issued and served on the Respondent and it was at this stage that the Respondent became aware of the proceedings, and filed the application, the ruling upon which is the subject of this appeal. She told the court that in the said application which was filed on 31/7/2002, the Respondent applied for; extension of time in which to apply for setting aside the ex parte judgment; stay of execution

and lifting of the warrant of attachment, pending the hearing of the application for setting aside the ex parte for judgment. Ms. Kirethi informed the court that the hearing was set for 19/8/2002 but subsequently, the application was ordered to be argued by way of written submissions, which the Respondent filed on 19/9/2002 and served on the Appellant, who filed a reply on 1/10/2002 and the Respondent filed a rejoinder on 10/10/2002. The ruling on the application was delivered on 13/12/2002 in which the appellants suit was struck out.

On the first ground Ms. KIRETHI submitted that the court was not wrong to consider the issue of jurisdiction because such an issue can be raised at any stage either by the parties or by the court on its own motion. She referred to the case of **RAZA SOMJI VS. AMIDA SALUM** [1993] TLR 208 and the case of **TRANSPORT EQUIPMENT LTD VS. DEURA VALAMBYA** 1993 TLR 163. She contended that in the proceedings before the Court of the Resident Magistrate the court considered whether the matter was properly before it and the court decided that it had jurisdiction over the matter as it had been brought under the Employment Ordinance. She contended that the

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court then went on to consider whether the appellant was an employee and it was in this respect that the court found that the appellant was not an employee and could not therefore have gone to the Labour Officer and it was for this reason that the suit was struck out. MS. KIRETHI argued that it is within the power of the court to consider if the matter was properly before it and had the power to make a decision on it.

On the second ground of appeal, MS. KIRETHI submitted that the trial magistrate was right in not considering the appellants submissions, because they did not touch on the issue of jurisdiction.

In reply the Appellant argued that he was claiming from his employer that is why he went to the Labour Officer. He left it to the court to decide if he had used an improper channel.

Although the Appellant and the Respondent appear to differ on whether or not the Respondent was served and made aware of the proceedings in the trial court, they all agree that the appellant obtained an ex parte judgment and decree against the Respondent in the trial court. They also both agree that the appellant applied for and obtained an order for execution of the decree and a warrant of

attachment against the Respondent. It is not further in dispute that the Respondent subsequently applied for *ex parte* interim orders for stay of execution and lifting the warrant of attachment pending the hearing of the application "*inter partes*" for:-

1. *extension of time within which to apply to set aside the ex parte judgment and decree.*
2. *for stay of execution of the decree and lifting of warrant of attachment.*
3. *setting aside the judgment and decree entered ex parte*
4. *costs*
5. *any other order.*

The record of the lower court shows that the *ex parte* interim orders for stay of execution and lifting the warrant of attachment pending hearing of the application *inter-partes*, was granted vide an INTERIM ORDER dated 31/7/2002. The record of the trial court also shows that both parties filed written submissions on the application "*inter partes*", including rejoinder submissions by the present

Respondent. The Respondents main submissions are however not in the court record.

In the ensuing ruling, the trial magistrate stated in part as follows, and I quote the 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of pages 1 of the typed ruling:

*"Essentially, the application seeks to extend time within which the applicant may be allowed to apply to the court to set aside the judgment and decree of this court passed ex parte. The Applicants are also in search of an order to stay the execution and lift the attachment of the judgment debtors property so that the case could be heard inter parties. The application is supported by an affidavit sworn to by Mr. Chipeta himself . . . . .*

*Mr. Chipeta's main ground for so seeking is that the court had no jurisdiction to entertain the suit and therefore the proceeding thereof are void "ab initio" and the resulting judgment and decree are a nullity"*



Mr. Chipeta had other reasons. From the ruling, it appears that the other reasons which Mr. Chipeta had, were that:

*"in matters that have to do with disciplinary measures, in summary dismissal, proposed summary dismissal or deduction of an employees wages and matters of termination of employment, together with all claims of disputes resulted by such disciplinary measures or termination of employment, the courts jurisdiction is vested by subsection (1) of section 28 of the Security of Employment Act. In the premises, the complaint should have referred his grievances to a Conciliation Board".*

The trial magistrate having set out the supporting submissions by the present Respondent Advocate Mr. Chipeta, then proceeded to consider the present appellants submissions before that court, as follows:

*"The Respondent did not address his mind on the question of jurisdiction. He focused his mind on the exparte judgment. He contended that, the applicant*

*was properly served and wished the whole application dismissed”.*

The trial Principal Magistrate then proceeded to consider the main question for determination in the application at page 2 of the ruling, and stated:

*“The question is whether this court had the necessary powers to deal with this case”.*

At pages 3 of the ruling, the court decided the question of the necessary powers to deal with the case, as follows, and I quote:

*“The suit by the Respondent is not summary dismissal but rather for enforcement of labour contractual terms breaches i.e. unpaid leave and overtime.*

*In the upshot I grieve with confidence, and hold that this court has jurisdiction to hear the case”.*

Having disposed of the question of jurisdiction, the Principal Magistrate went on to consider, yet another ground raised by Mr.

Chipeta. This ground is stated at page 3, fourth paragraph, as follows:

*"Mr. Chipeta challenged the authority of the labour officer to deal with the Respondent claims for unpaid terminal benefits. According to Mr. Chipeta the Respondent wrongly referred his claims to the Labour Officer because during the time the labour officer entertained the dispute there was no contract of employment in existence between the Applicant and the Respondent as the contract ceased after the Respondent resigned. According to Mr. Chipeta the proper authority to deal with the Respondent claim was the Conciliation Board".*

In determining the issue whether the Labour Officer had authority to deal with the Applicants claim, the Principal Magistrate stated:

*I have ruled that this court is the right forum to deal with the Respondent(s) claims.*

*The issue is however the labour officer had requisite capacity to refer the dispute to this court.*

*The suit commenced by way of a report of the Labour Officer. **The Labour Officer did not indicate the salary** of the Respondent. However the Respondent claimed the sum of shs.132,000/= as leave for the month of December, 1997. That pre-supposes that the Respondent salary was shs.132,000/= per month. That being the case the complaint is not governed by the Employment Ordinance Cap. 366 by virtue of the Employment Ordinance (Exemption Order) 1961 GN 26 of 1961.*

*Among persons or class of persons exempted from the application of Part XI are persons in respect of wages exceeding light the said four hundred shillings. Per annum or the equivalent monthly rate of shs.700/= . . . .*

*Consequently, the Respondent is not an Employee for the purposes of section 130 and 132 of*

*the Employment Ordinance. The proceedings are accordingly reviewed and consequently the suit is struck out”.*

It is this decision and the reasons for it, which have been challenged by the appellant in the first ground of appeal. The main issue for determination of this ground, is whether, having granted an *exparte* judgment and decree and an order of execution of that decree, including a warrant of attachment of the property of the judgment debtor, the court had powers, in an application by the judgment debtor for extension of time in which to apply for setting aside the *exparte* judgment and decree, to review and consequently strike out the suit.

The provisions of the law governing REVIEW, are set out in Order XL II of the Civil Procedure Code Cap. 33 R.E. 2002 and Rule 1 that Order, provides as follows:

*"1. – (1) Any person considering himself aggrieved –*

- (a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
- (b) *by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment of the court which passed the decree or made the order.*

(2) *A party who is not appealing from the decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by same*


*other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he is present to the appellate court the case on which he applied for review".*

Proceedings instituted by the Labour Officer under section 130 and 132 of the Employment Ordinance Cap. 366, are governed by the provisions of the ordinance, and by virtue of section 139 (2) the magistrates court having jurisdiction, ***"shall adopt as far as possible . . . all as any of the provisions of the law for the time being in force relating to the procedure of subordinate courts in civil case"***.

As there are no provisions in the Employment Ordinance Cap. 366 which govern review, in relation to employment proceedings under the ordinance, the law applicable is the Civil Procedure Code, 1966 [Cap. 33 R.E. 2002]. The relevant provision governing review is Order XLII, rule 1 of which has been set out above.


According to the provisions of order XLII Rule 1, the party who desires to seek review, has to move the court by an application. In

magistrate competent to hear the matter. Costs to the appellant in this appeal.

  
J. I. Mlay

**JUDGE**

Delivered in the presence of the Appellant and in the absence of the Respondent this 11<sup>th</sup> day of November, 2007.

  
J. I. Mlay

**JUDGE**

11/11/2007