

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)**

**CIVIL APPEAL NO. 19 OF 2011**

**MBEYA CEMENT COMPANY LIMITED .....APPELLANT**

**VERSUS**

**MBEYA DISTRICT COUNCIL.....RESPONDENT**

**(Appeal from the Judgment of the High Court of  
Tanzania at Mbeya)**

**(Lukelelwa, J.)**

**Dated the 20<sup>th</sup> day of May, 2010**

**in**

**Civil Case No. 4 of 2008**

**.....**

**JUDGMENT OF THE COURT**

**17<sup>th</sup> & 24<sup>th</sup> JUNE 2013**

**LUANDA, J.A:**

Mbeya District Council, a local Government Authority (henceforth the Respondent) instituted a suit in the High Court of Tanzania (Mbeya Registry) against Mbeya Cement Company Limited (henceforth the appellant), a manufacturer of Tembo cement whose factory is situated at Songwe Industrial area within Mbeya District for declaratory orders and

injunctive reliefs pertaining to service levy. The respondent maintained that she is the sole beneficiary of the said levy because the products originates from the factory situated in her jurisdiction and not other district Councils where the products are sold.

The declaratory orders and reliefs sought by the Respondent were:-

- (i) Declaration that the statutory interpretation given by Assistant Director for Legal Services from the Prime Minister Office, Regional Administration and Local Government pertaining to Service levy should be adopted by this Honourable Court as the proper interpretation of "Service Levy".
- (ii) Declaration that the plaintiff is the one entitled to be paid the whole of the service levy accrued from the defendant.
- (iii) Perpetual injunction to the defendant that she should not pay any other local government authority the service levy accrued from her products produced at Songwe factory.
- (iv) There should be no order for Costs.

The appellant on the other hand denied the respondent's claim and set up a counter claim. However the respondent did not present a written reply to the counter claim as per requirement of O VIII, Rule 11 of the Civil Procedure Code, Cap 33 RE 2002. (the CPC). Be that as it may, the suit went for mediation, but it failed. Issues were framed and Mr. Danda, a legal officer appearing on behalf of the respondent informed the High Court that he had consulted with Mr. Mwandambo learned advocate for the appellant and had agreed to dispose of the matter by way of written submissions. The parties filed their respective submissions and judgment was handed down in favour of the respondent. Aggrieved by that judgment, hence this appeal.

In this appeal the appeal was represented by Mr. Lugano Mwandambo learned counsel; whereas the respondent was represented by her Senior Legal Officer one Mr. Prosper Msivala.

Mr. Mwandambo has raised four grounds in the memorandum of appeal. However, having carefully read the said grounds of appeal, we are of the settled view that this appeal could be disposed of on the strength of the first ground only which reads:-

*That the judgment of the High Court is a nullity in that the said Court committed a serious irregularity (sic) by proceeding to determine the issues framed on the basis of written submissions without calling evidence for and against the parties thereto.*

Arguing this point, Mr. Mwandambo said that by presenting a plaint, the suit was preferred under the CPC and so the suit was governed by no other law than the CPC. The suit presented under the provisions of the CPC requires, inter alia, to be heard in the manner provided under O.XVIII of the CPC where it explain how hearing of the suit and examination of witnesses is conducted. And after hearing the suit, in terms of O.XX Rule 1 of the CPC judgment follows.

In our case, he said, the learned judge did not follow the procedure provided in the CPC; he wrote judgment on the strength of the written submissions. The proceedings leading to the judgment were irregular and the judgment was a nullity. He prayed the Court to quash the proceedings, judgment and decree and order the case to start afresh. He cited **PSRC V Azania Bancorp. Limited (2006) TLR 1** and **Lalago**

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IN THIS CASE NO WITNESSES WERE CALLED. THE QUESTION IS WHETHER THERE WAS ANY HEARING AS PER THE REQUIREMENT OF THE CPC? THE ANSWER IS OBVIOUS; THERE WAS NO HEARING.

Mr. Msivala submitted that the course taken by the Court was proper. It is in line with 0.14, Rule 2 of the CPC. The Order reads .

*Where issues both of law and fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it think fit, postpone the settlement of the issues of fact until after the issues of law have been determined.*

The issues framed were:-

- 1. Whether the Defendant was/is liable to pay services levy to the plaintiff for sales of its products made outside the Plaintiff's jurisdiction.*
- 2. Whether other Local Government are entitled to the service Levy for sales made in their jurisdiction.*
- 3. If the answer in issue No. 2 is in the affirmative whether the plaintiff's demand for payment of service levy was justified.*

4. *Whether the Plaintiff was justified in withholding service levy collected from the Defendant otherwise payable to other local authorities.*
5. *What reliefs are the Parties entitled to if any.*

Having carefully read the issues, we don't think the case could be disposed of without the aid of evidence being adduced by the parties as disputed matters of mixed law and fact as in this case, cannot be resolved by way of written submissions. For instance how do we know that the appellant is selling her products outside Mbeya District? This shows very clearly that there are matters of mixed law and fact.

In **PSRC v Azania Bancorp Ltd** [2006] TLR 1 the Court citing its previous case **Board of Internal Trade V M/S G.B.L and Associates Limited** Civil Appeal No. 4 of 1983 (unreported) held:-

*" In the absence of evidence, disputed matters of mixed law and fact cannot be resolved by considering written submissions of learned advocate only."*

suggested by Mr. Msivala, then why did they seek an injunctive order? We agree with Mr. Mwandambo that the learned Judge was wrong to decide the case without evidence being adduced by the parties.

In fine, we allow the appeal, quash the proceedings, judgment and decree. We order the case to be tried *de novo*. We make no order as to Costs.

It is so ordered.

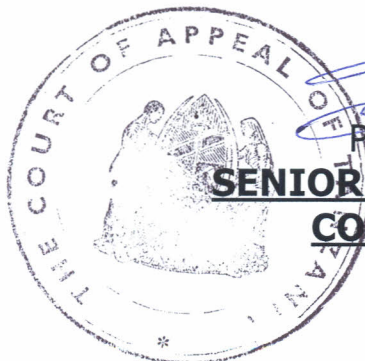
DATED at MBEYA, this 21<sup>st</sup> day of JUNE, 2013

E.M.K. RUTAKANGWA  
**JUSTICE OF APPEAL**

B.M. LUANDA  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

A circular stamp of the Court of Appeal of Tanzania, featuring a central emblem and the text "THE COURT OF APPEAL OF TANZANIA" around the perimeter.  
A handwritten signature in blue ink, likely belonging to P. W. Bampihya.  
P. W. BAMPIHYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**