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KLM ROYAL DUTCH AIRLINES v JOSE XAVIER FERREIRA

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COURT OF APPEAL OF TANZANIA

(Kisanga, Mfalila and Lubuva, JJA)

CIVIL APPEAL NO 23 OF 1993

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November 11, 1994 – DAR ES SALAAM

(From the decision of the Court of Tanzania at Dar es Salaam, Bahati, J)

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Labour Law – Jurisdiction – Summary dismissal – Ouster of the jurisdiction of the court – Section 28 of the Security of Employment Act, 1964.

Labour Law – Jurisdiction – Summary dismissal – Whether the court can split suit into compartments so as to exclude claims based on summary dismissal.

Civil Practice and Procedure – Amendment of cause of action – Whether judge can amend pleading without application of the parties.

This is an appeal against the decision of the High Court of Tanzania which, having accepted a preliminary objection that the court had no jurisdiction to hear the suit because it concerned summary dismissal, the court nevertheless proceeded to split the entire suit into separate compartments and held that as not all reliefs claimed were based on summary dismissal, the court had jurisdiction to hear and determine those claims which were not based on summary dismissal.

Held:

(i) Section 28 of the Employment Act, 1964, ousts the jurisdiction of the court in cases of summary dismissal, proposed summary dismissals and salary deductions as a disciplinary penalty; since the three situations have nothing to do with one another, they can be taken independently of each other;

(ii) The court cannot split a claim once it is partly found to be based on summary dismissal and the claims in this case were so interwoven on their foundation;

(iii) The court cannot take upon itself, without application from the parties, to amend the basis of the cause of action merely to take the claim away from the ouster clause of s 28 of the Security of Employment Act.

Appeal allowed.

Cases referred to to:

(1) *Kitundu Sisal Estate v Shingo and Others* [1970] EA 551.

(2) *Mohamedi and Others v Manager, Kunduchi Sisal Estate* [1971] HCD 430.

(3) *Allimasi v MS Kerewala Ltd*, [1974] LRT 39.

Majithia, for the appellant.

Mbuya, for the respondent.

Mfalila, JA, delivered the following considered judgment of the Court:

The respondent, Jose Xavier Ferreira, sued his erstwhile employers, Royal Dutch Airlines, otherwise popularly known as KLM by its acronym, claiming an assortment of reliefs including unpaid salary, transport and meal allowances and other reimbursements plus in-

terest at 31 per cent per annum from the date these payments were due to the date of judgment and at a further 31 per cent interest on the damages from the date of filing the suit to the day of judgment. The basis of these claims is contained in paragraph 6 of the plaint which is in the following terms:

> 'Furthermore, the defendant willfully and without any notice, cause or justification in contravention to the defendant's regulations as contained in the aforesaid conditions of employment – Local Staff Tanzania, unilaterally stopped the plaintiff from attending to his duties with affect from 20th November 1986 and until to-date has not lawfully terminated plaintiff's employment'.

In his written statement of defence and at the beginning of the trial in the High Court, the defendant, the present appellant, raised preliminary points challenging the jurisdiction of the Court on that the plaint disclosed no cause of action. In support of the preliminary point, Mr *Majithia* argued on the High Court that as this was a case of summary dismissal, the jurisdiction of the Courts was ousted by s 28 of the Security of Employment Act. The High Court (Bahati, J) agreed with Mr *Majithia* that this was a summary dismissal case and that therefore the jurisdiction of the court was ousted by s 28 of the Security of Employment Act. After making this finding, the trial judge then proceeded to recategorize the entire suit into separate compartments and held that as not all the reliefs claimed are based on summary dismissal, the court has jurisdiction to hear and determine those claims which are not based on summary dismissal. He said:

> 'But not all the claims in this case are based on summary dismissal. In paragraph 5 of the plaint there are claims for remuneration from March 1984 to-date, reimbursement of money paid by plaintiff to purchase tickets, failure by defendant since 1985 to honour fully the plaintiff's free and reduced fare air travel facilities. These claims are not based on summary dismissal because they are from 1984 whereas summary dismissal was in November 1986. These claims have, therefore nothing to do with summary dismissal and as such they cannot be excluded by Section 28 from the jurisdiction of this Court'.

The judge therefore held that the jurisdiction of the Court was not ousted by s 28 and he ordered the case to be heard and determined on merits. Against this ruling, the appellant Airline lodged this appeal complaining that the learned judge having found that there was summary dismissal, erred in not rejecting the plaint and

dismissing the suit and that therefore the learned judge erred in ruling that the Honourable Court had jurisdiction to entertain claims based on summary dismissal.

At the hearing of the appeal, Mr *Majithia*, learned counsel who advocated for the appellant, submitted that having determined that this was a case of summary dismissal, the judge should not have decided to proceed with the case on merits on the basis that some of the claims which he enumerated were not claims which he said were not summary dismissal flowed directly from such summary dismissal.

In reply, Mr *Mbuya*, learned counsel who appeared for the respondent, argued that the definition of summary dismissal enunciated in *Kitundu Sisal Estate v Shingo and Others* (1) is erroneous because it defined summary dismissal without taking into account the definition given in the Act itself namely that under the Act, termination becomes summary dismissal if there is intention to take disciplinary action, and that since in the present case the only intention was to terminate the respondent's services with the appellant, such termination could not be summary dismissal ousting the jurisdiction of the courts under s 28 of the Security of Employment Act. Mr *Mbuya* concedes that the High Court was bound by the definition in the *Kitundu* case but he said that this court is not. He supported the judge's action of severing the claims into those falling under the prohibition of s 28 and those which do not. He argued that claims available prior to the termination are not interwoven with the summary dismissal hence they can be severed.

We start with Mr *Mbuya's* second argument that this was not a summary dismissal case because no disciplinary action was envisaged. Mr *Mbuya* based this argument no doubt on the wording of s 28 of the Security of Employment Act which provides as follows:

> '28 – (1) No suit or other civil proceeding (other than proceedings to enforce a decision of the Minster or the Board on a reference under this part) shall be entertained in any Civil Court with regard to summary dismissal or proposed summary dismissal or a deduction by way of disciplinary penalty from wages of an employee'.

If Mr *Mbuya* sat back and reflected, he would no doubt find as we do that this section bars three types of situations from being actionable in Civil Courts. First, all summary dismissals, second all proposed summary dismissal and thirdly all deductions as disciplinary penalties from wages of employees. It is quite obvious that

A the first two situations have nothing to do with the third situation in which an employer deducts a sum from the wages of his employee as a disciplinary measure. Since the three situations have nothing to do with one another, they can be taken independently of each other. Hence, the Court of Appeal in the *Kitundu* case could not have
B defined summary dismissal with reference to the disciplinary action envisaged under a different situation.

We return to the High Court finding that since not all the respondent's claims can be regarded as flowing from the summary dismissal, then these other claims which do not are actionable in a Civil
C Court. According to the learned judge, these include all those claims which arose before the summary dismissal in November 1986.

In our view the first objection against this line of reasoning is that it conflicts with two earlier decisions of the case Court, decisions with which we are in agreement. The effect of these two decisions is
D that you cannot split the claim once it is found to be based on summary dismissal. The first of these cases is *Mohamedi & Others v Manager Kunduchi Sisal Estate* (2).

In that case fifty six persons who were employed by the Kunduchi Sisal Estate, sued their employer claiming Shs 81,741/= as compen-
E sation because of termination of their services without notice. This sum comprised of severance, leave and travel allowances as well as month's wages in lieu of notices. The Court held that the basis of the claim was summary dismissal and that by s 28 of the Security of Employment Act Cap 574 the jurisdiction of the Court was ousted.
F In his own words Onyiuke, J held:

> 'When an employee is dismissed summarily without justification he has a cause of action against the employer, that is to say he can bring an action of summary dismissal against the employer. Usually it
G takes the form of action for damages. These damages may be general or special depending on whether the employee is claiming a specified amount such as severance allowance or annual leave pay (special) or is asking the Court to assess his loss such as the claim for reasonable notice (general). These claims have to be founded on the cause of
H action . . . . Assuming without deciding the point that Section 32*(b)* provided an alternative remedy, the fact still remains that the cause of action is basically one for summary dismissal'.

Similarly in the present case, the claims which the learned judge attempted to sever from the rest, are all founded or based on the
I wrong described in paragraph 6 of the plaint namely that the defendant (present appellant) 'willfully and without any notice, cause

of justification . . . unilaterally stopped the plaintiff (present respondent) from attending to his duties with effect from 20th November 1986....'. A

The second case is *Allimasi v M S Kerewala Ltd* (3). That case commenced in the District Court as a result of a report submitted by the Labour Office Mtwara to the District Court under s 132 of B the Employment Ordinance. The appellant was a driver by calling. The respondent was a limited liability company carrying on quarrying operations among other activities in Mtwara/Mikindani. The appellant's case was that he was employed by the respondent in 1959 as a driver on a monthly wage of Shs 250/= and that he C had worked continuously for the respondent up to 20 October 1971 when his employment was terminated without notice, and without payment in lieu of notice. He claimed Shs 250/= being one month's wage in lieu of notice and Shs 1,625/= being severance allowance for fifteen years continuous service. D

The trial magistrate treated the appellant's claim as one of summary dismissal holding that since the plaintiff was neither given a notice nor paid in lieu of notice, then his termination in law is that of summary dismissal and that therefore he had no jurisdiction under s 28 of the Security of Employment Act. Against this decision the E appellant appealed to the High Court where one of the points raised in his favour was whether the appellant's claims could be treated separately so that his claim for severance should have been entertained in the Court below, and that if this was possible the learned judge should not have dismissed that part of the appellant's claims F for want of jurisdiction. Sections 3, 4 and 11 of the Severance Allowance Act Cap 487 were cited in support of this submission. Section 3 provides:

> '3 – Subject to this Act where an employee has been in the continuous employment of an employer for a period of three months or more G and, on or after the twenty fifth day of June 1962:
> *(a)* (1) The employment is terminated by the employer ... the employer shall pay to the employee a severance allowance'.

Section 4(1) of the Act provides: H

> 'An employer shall not be liable to pay any severance allowance to or in respect of any employee who:
> *(a)* Immediately before the cessation of his employment was
> (1) –
> (2) A casual employee I
> *(b)* Was summarily dismissed for lawful cause.

A And s 11 provides as follows:

> 'The amount of any severance allowance which an employer is required to pay to or in respect of an employee, may be recovered by the employee or in the event of his death by any of his dependants by
B suit as a debt to such employee or to such dependants'.

Onyiuke, J held as follows:

> 'I do not think that Section 11 of the Severance Allowance Act can be said to bypass the mandatory provisions of Section 28 of the
C Security of Employment Act. The basis of the appellant's claim whether in respect of the one month's wage or in lieu of notice or of severance allowance was that his employment was wrongfully terminated, that is to say summary dismissal for lawful cause and that he was therefore entitled to his claims. But for Section 28 of the
D Security of Employment Act the Court would have to inquire into the issue of wrongful dismissal. The effect of Section 28 however is to oust the jurisdiction of the Court to do just that. I hold that the appellant's claims are so interwoven that they fall within the ambit of prohibitory provisions of Section 28 of the Security of Employment
E Act and that the learned Magistrate was justified in dismissing his claim for lack of jurisdiction'.

We are also able to say in this case that all the respondent's claims are so interwoven on their foundation that they fall within the ambit of the prohibitory provisions of s 28 of the Security of Employment
F Act. We are satisfied that had the decisions in these two cases been brought to the attention of the learned judge, he would most certainly have followed their powerful reasoning and conclusions.

The second objection to the learned judge's reasoning is procedural. The learned judge's approach amounted to amending the
G plaint at that stage of the proceedings and indeed that is what Mr *Mbuya* was asking us to do. The learned judge could not take it upon himself to amend the basis of the cause of action without application from the parties merely to take the claim away from the prohibitory provisions of s. 28. It is even more remote in this
H Court.

Since as the learned judge found the respondent's claims were based on summary dismissal, the jurisdiction of the courts was ousted by s 28 of the Security of Employment Act, the learned judge should have allowed the preliminary objection and dismissed
I the claim.

Having so decided on the question of jurisdiction, we feel it is

unnecessary to consider the second limb of the appellant's preliminary objection namely whether the respondent's plaint disclosed a cause of action. A

For these reasons we allow the appeal and order that the respondent's claim be dismissed for want of jurisdiction. The appellant will have their costs both in this Court and in the Court below. B

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