IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, UTAMWA, MWAKIPESILE, JJJ)

MISCELLANEOUS CIVIL APPEAL NO. 11 OF 2009

EAST AFRICAN CABLES (TZ) LIMITED . . . . . APPELLANT

VERSUS

BEPHA B. MUGASA . . . . . RESPONDENT

Date of last order – 4/11/2011
Date of Judgment – 27/5/2013

J U D G M E N T

Mwarija, J.

This appeal originates from a decision of the defunct Industrial Court of Tanzania (hereinafter "the ICT") in Application for Revision No. 75 of 2008. In that application, the appellant, East African Cables (T) Limited sought for revision of the same court's decision C.E.R. William, Deputy Chairperson (as she then was) in Trade Inquiry No. 89 of 2007. The Revisional Panel of the ICT dismissed the application on the ground that it was filed out of time.

Aggrieved by the decision, the appellant has preferred this appeal raising two grounds of its dissatisfaction with the ruling.

The grounds of appeal raised by the appellant in its memorandum of appeal are:

> *"1. That the Industrial Court strayed into an error of law and fact in holding that the application for revision on behalf of the appellant was filed out of time.*
>
> *2. Alternatively, the Industrial Court erred in deciding on the question of time bar suo motu without affording the appellant an opportunity to be heard as a result of which the said Industrial Court breached the principles of natural justice."*

The respondent, Bepha Mugasa responded to the appeal by initially filing a notice of preliminary objection. The objection consists of two grounds; that:

1. *Revisional orders of the Industrial Court is (sic) appellable to the Court of Appeal of Tanzania and not the High Court of Tanzania.*

2. *The appeal in any event is time barred.*

On 24/8/2011 when the matter was called for hearing, on the agreed proposal by counsel for the parties, we ordered that the preliminary objection and the appeal be argued simultaneously by way of written submissions. The appellant was represented by Mr. Mwandambo, learned counsel while the respondent was advocated for by Mr. Ukongwa, learned counsel. We are bound to dispose of the preliminary objection first and if the same does not dispose of the appeal, we shall proceed to consider its merits or otherwise.

Submitting in support of the 1st ground of the preliminary objection, Mr. Ukongwa argued that the decision of the revisional

panel of the ICT is not appellable to this court. He relied on the provisions of section 28(4) of the repealed Industrial Court Act, Cap. 60 [R.E. 2002] (hereinafter "the ICT Act") which provided to the effect that decisions and awards of the ICT were final, hence not subject to appeal. The decision and awards could be challenged in the High Court by way of judicial review only on questions of jurisdiction. He argued therefore that this court does not have appellate jurisdiction over the impugned decision and contented that the appeal is, for that reason, misconceived.

As to the alternative ground, Mr. Ukongwa argued that since the period of limitation for filing an appeal to the High Court against a decision of the ICT was not provided in the ICT Act, the applicable law was item 2 of the schedule to the Law of Limitation Act, Cap. 89 [R.E. 2002] (henceforth "the Law of Limitation Act") which provides the limitation period for appeals whose periods are not stated in the Law of Limitation Act or any other written law to be 45 days. Pegging his contention on that position of the law, the learned counsel urged the court to find that the appeal, which was filed

after the period of 45 days from the date of the impugned decision, is time barred.

Responding to the arguments made by the learned counsel for the respondent in support of the preliminary objection, Mr. Mwandambo, learned counsel for the appellant submitted that the preliminary objection is misconceived. As to the 1st ground, the learned counsel argued that the objection was raised apparently because the learned counsel for the respondent was not aware of existence of an Act amending the ICT Act. Mr. Mwandambo pointed out that s. 28(4) of the ICT Act was amended by Written Laws (Miscellaneous Amendment) Act, No. 11 of 2003. The section was amended to the effect that the High Court was vested with appellate jurisdiction over awards and decisions of the ICT. He argued therefore that the appeal was properly filed in this court.

On the 2nd ground which is an alternative ground, although he agreed that the applicable law as regards the period of limitation for filing the appeal to this court is item 2 of Part II of the Schedule to the Law of Limitation Act, which prescribes the period to be 45 days, Mr. Mwandambo opposed the contention that the appeal was

filed out of time. He took refuge in the provisions of S. 19(2) of the Law of Limitation Act stating that the period between the date of the impugned ruling and the date of filing the appeal the appellant was awaiting a copy of the ruling. According to the learned counsel, through its counsel, the appellant wrote a letter applying for a copy of the ruling but could not get response from the Registrar of the ICT until on 24/12/2009 when it was informed that the copy was ready as from 1/12/2009. He stressed that the appellant then filed this appeal on 28/12/2009, within a period of 4 days from the date of the Registrar's letters.

Having duly considered the submissions made by the learned counsel for the parties on the preliminary objection, we have to state at the outset that we need not be detained much in considering the 1st ground of the preliminary objection. As correctly submitted by the learned counsel for the appellant, S.28(4) which was a finality clause for awards and decisions of the ICT, was amended by Act No. 11 of 2003. The section was amended by being deleted and substituted for the provision which had the effect of conferring the High Court with appellate jurisdiction over every

award and decision of the ICT. The substituted section provided as hereunder:

> *"Subject to the provision of this section, every award and decision of the court shall be called in question on any grounds in which case the matter shall be heard and detained by a full bench of the High Court."*

Clearly therefore, unlike before the amendment, awards and decisions of the ICT could not only be challenged in the High Court on the grounds of jurisdiction by way of judicial review but an aggrieved party could as well exercise his right of appeal against such awards and decisions. The argument by Mr. Ukongwa that s. 28(4) of the ICT Act remained to be in existence in the 2002 Revised Edition of the Laws hence making it the applicable provision cannot be accorded any weight.

The effect of amendment of a statutory provision is principally that the new provision comes into force, not the provision which existed before amendment even if the amended provision remains to

appear in the statute. That is in accordance with s.27 of the Interpretation of Laws Act, Cap. 1 [R.E.2002] which provides as follows;

> *"Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Act."*

In the book ***Principles of Statutory Interpretation,*** 12 Ed. 2010, Lexis Nexis Butterworths Wadhwa Nagapur, India, by Justice G.P. Singh, the principle is stated in the following words at page 311

> *"It is no doubt true that after a statute is amended, the statute thereafter is to be read and construed with reference to the new provisions and not with reference to provisions that originally existed."*

On the basis of the position which we have expressed above, the argument by the learned counsel for the appellant, that s.28(4)

of the ICT Act was the applicable provisions because it existed in 2002 Revised Edition of the statute, is a misconceived interpretation. That ground of the preliminary objection is therefore devoid of merit.

As to the alternative ground of the preliminary objection, there is no dispute that whereas the impugned decision was passed on 27/4/2009, this appeal was instituted on 28/12/2009 beyond the period of 45 days prescribed under item 2 of Part II of the Schedule to the Law of Limitation Act.

The learned counsel for the appellant submitted that the appeal was not filed out of time because under s.19(2) of the Law of Limitation Act, the period spent in obtaining a copy of the impugned ruling ought to be excluded. Although he submitted that the Appellant applied to the Registrar of the ICT for a copy of the ruling, the learned counsel did not produce a copy of the relevant letter. He only stated that such a fact would be borne out by the record, but did not substantiate. On his part, Mr. Ukongwa contended in his rejoinder that the letter written on 5/6/2009, over 40 days from the date of the decision was for calling the record.

With respect to the learned counsel for the appellant, we find his contention that the appellant wrote a letter applying for a copy of the ruling, to be lacking proof. The learned counsel had the duty of establishing the allegation that the appellant applied for the copy before expiration of the prescribed period of appeal. The only document in the record of appeal which is attached to the memorandum of appeal is a copy of a letter by the Registrar of the ICT bearing a heading: "CERTIFICATE OF DELAY FOR REV.75/2008 MANAGING DIRECTOR EAST AFRICAN CABLES (T) CO. LTD Versus BEPHA B. MUGASA". In the letter, the Registrar acknowledges a letter written by 'REX Attorneys Ref. No. REX/EADC/L.39/07/832/09 and confirmed that:

> *". . . the judgment for above mentioned case was delivered on 27/4/2009 before Revisional full bench of Industrial Court of Tanzania and it was collected by the applicant on 1/12/2009."*

We could not gather from the letter in reference, anything establishing the date on which the appellant applied for a copy of the ruling. In the absence of that evidence, the appeal cannot be

saved by s. 19(2) of the Law of Limitation Act. The reason is obvious. Computation of the period which is to be excluded commences from the date of application of a copy of the impugned decision. Commenting on the application of s. 12(2) of the Indian Code of Civil Procedure, 1908 which is in ***Pari materia*** with section 19 (2) of our Law of Limitation Act, learned authors T.R. Desai and R.K. Desai in the book ***Commentary on the Limitation Act***, 9th Edition, Universal Law Publishing Co. Pvt. Ltd, Delhi, state as follows:

> *"[The] period requisite for obtaining the copies should be credited to the applicant . . . This covers the interval between the date on which the application for copies is made and the date on which the copies are prepared and are ready for delivery. The date of delivery is the date of its being ready."*

We subscribe to the position as expressed above. Moreover, since the contention that the counsel for the appellant applied for a copy of the ruling within the prescribed period of appeal is a matter

of fact which requires evidential proof, the learned counsel ought to have established that fact by filing an application for extension of time. As the matter stands here, in the absence of the letter written by the appellant's counsel establishing the date on which the application was made, we agree with the learned counsel for the respondent that the appeal was filed out of time. We therefore uphold the alternative ground of the preliminary objection.

On the basis of the reasons stated above, we hereby dismiss the appeal for being time barred.

Dated at Dar es Salaam this ..... day of ..... 2013.

A. G. Mwarija,

JUDGE

J. H. K. Utamwa

JUDGE

G. K. Mwakipesile

JUDGE