IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CIVIL APPLICATION NO. 136 OF 2013

TANZANIA ELECTRIC SUPPLY CO. LTD ..... APPLICANT

VERSUS

GADIEL SHOO ..... RESPONDENT

(Application for leave within which to lodge an appeal from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Shangwa, J.)

dated the 4th day of November, 2011

in

Labour Revision No. 3 of 2010

RULING OF THE COURT

11th & 26th October, 2016

MMILLA, JA.:

The applicant in this matter, Tanzania Electric Supply Co. Limited is applying for leave to appeal to the Court against the decision of the High Court of Tanzania (Land Division) at Dar es Salaam dated 4.11.2011 in Civil Revision No. 3 of 2010. The application is brought by way of notice of motion and is founded under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The present application to the Court is a second bite in that it was filed

after the applicant's first application to the High Court was dismissed on the ground that no point of law was raised which ought to be determined by the Court of Appeal.

Mr. Majura Magafu, learned advocate, represented the applicant. Before he proceeded to make his submission in support of the application, the Court desired to satisfy itself on whether or not the record was complete in order to vouch its competence or otherwise. In particular, the attention of the parties was drawn to the absence of the drawn order of the High Court in respect of the decision which dismissed the application for leave.

On his part, Mr. Magafu readily conceded that the drawn order was missing, but was quick to add that since the ruling of the High Court has been incorporated in the Court record, the omission is not fatal so as to render the application incompetent. He urged the Court to proceed with the hearing and determination of the application on merit.

On the other hand, Mr. Evans Nzowa, the learned advocate who represented the respondent, submitted that notwithstanding the fact that the ruling of the High Court was attached, the drawn order too ought to have been incorporated as mandatorily required by the provisions of Rule

49 (3) of the Rules. He argued that the omission to incorporate it renders the application incompetent, liable to be struck out. He pressed the Court to strike it out.

In its wisdom, the Court directed the parties to submit as well on the main application in anticipation of proceeding to determine it on merit if it would find, in the end, that the requirement of incorporating the drawn order is not fatal.

Both counsel for the parties had filed written submissions and prayed to adopt their respective submissions.

In 1983, the respondent was employed by the applicant as an artisan. On 14.8.2009 he was terminated for absenteeism. He successfully contested the termination before the Commission for Mediation and Arbitration (the CMA). It ordered his reinstatement. The applicant was dissatisfied. She instituted revisional proceedings in the High Court of Tanzania (Labour Division) at Dar es Salaam. The High Court upheld the decision of the CMA. Relying on Rule 12 (2) of GN No. 42 of 2007, it held that though the misconduct conduct which was the subject of the disciplinary proceedings was serious in nature, it was not so serious as to

lead to an intolerable employment relationship. It thus confirmed the reinstatement as was ordered by the CMA.

In his submission in support of the application, Mr. Magafu maintained that having held that the conduct of the respondent which was the subject of the disciplinary proceedings was serious in nature, the High Court judge improperly construed the provisions of Rule 12 (2) of GN No. 42 of 2007 when she ordered reinstatement of the respondent on the ground that the said misconduct was not so serious as to lead to an intolerable employment relationship instead of confirming the employer's verdict of termination. He submitted that that interpretation was erroneous, requiring the consideration by the Court of Appeal.

Mr. Nzowa submitted on the other hand that the applicant has no valid ground capable of attracting the Court to grant the sought leave. He was forceful that the High Court properly directed itself in holding that the employer's punishment was severe in the circumstances of this case. He pressed the Court to dismiss the application.

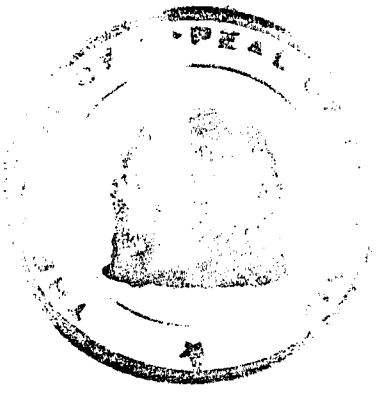
In a concise rejoinder, Mr. Magafu insisted his stand that the punishment which was meted to the respondent by his employer was apt in the circumstances of this case.

therefore, that the applicant did not comply with rule 46 (3) at all and the application before me would be incompetent."

Given the above position, it is clear that because the drawn order of the High Court was not incorporated, ***ipso jure***, the omission rendered the application incompetent liable to be struck out.

Since this point is sufficient to dispose of this application, that makes it the end of the matter. Consequently, for being incompetent, this application is struck out. We make no order as costs.

DATED at **DAR ES SALAAM** this 17th day of October, 2016.



N. P. KIMARO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL