IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MMILLA, J. A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 109 OF 2012

BANK M (TANZANIA) LIMITED ..... APPLICANT

VERSUS

ENOCK MWAKYUSA ..... RESPONDENT

(Appeal from the ruling and orders of the High Court of (Labour Division) at Dar es Salaam)

(Moshi, J.)

Dated 28th day of October, 2011

In

Revision No. 205 of 2011

RULING OF THE COURT

8th February & 9th March, 2017

MMILLA, JA.:

The appellant, Bank M Tanzania Limited, is appealing against the ruling and order of the High Court of Tanzania (Land Division) dated 28.10.2011 in Civil Revision No. 205 of 2011. That court declined to reverse the award which was given by the Commission for Mediation and Arbitration (CMA) in favour of the respondent, Enock Mwakyusa, instead it confirmed it.

In January, 2008, the parties entered into a contract of employment. Vide that contract, the appellant employed the respondent as its head of cash on conditions which were clearly stipulated, including being under probation for three (3) months. Later on however, during the probation period, the appellant alleged to have found that the respondent had failed to meet their expectations because his performance was poor. They contended that upon being asked to explain, the latter admitted that he was not performing well. He also admitted other allegations relating to misconduct. In view of that, the appellant charged him before the Disciplinary Committee which found that he had not met his employer's expectations. On the basis of that verdict, the appellant terminated the respondent from employment.

Dissatisfied, the respondent referred the matter to the CMA. That body decided that the termination was inapt because the appellant did not conduct performance appraisal, among others. That decision in return, aggrieved the appellant. They unsuccessfully applied for revision in the High Court (Labour Division), hence the present appeal to this Court.

Before us, Mr. Rosan Mbwambo, learned advocate appeared for the appellant, while the respondent enjoyed the services of Mr. Godfrey Mapunda, assisted by Ms Jane Gerald, learned advocates.

At the commencement of the hearing, the Court felt the need to satisfy itself on the competence or otherwise of the appeal before it. The focus was on two aspects; **one** that the date in the ruling which is the subject of the appeal differs with the date of the drawn order; and **two** that the appellant had applied for leave to appeal, but the order granting such leave was not included in the Court Record. The advocates for the parties were asked to submit on the legal implications thereof.

In his submission, Mr. Mbwambo began with the second arm of the points raised touching on leave. It is essential to point out here that his submission was off the track because it did not focus on what the Court had intended them to address, that is, the absence of the copy of the ruling for leave to appeal from the Court Record. Instead, he directed his submission on the requirement or otherwise of leave to appeal. He contended that in terms of section 57 of the Labour Institutions Act, an appeal such as the present is automatic, and that section 5 (1) (c) of the Appellate Jurisdiction Act Cap.141 of the Revised Edition, 2002 (the AJA) is

not applicable. He relied on the case of **Bulyanhulu Gold Mine (T) Ltd v. Nicodemes Kajungu & 1511 others**, Civil Application No. 37 of 2013, CAT unreported.

Concerning the variance of dates in the ruling and the drawn order, Mr. Mbwambo conceded the defect. He quickly pointed out however, that the defect was minor, thus inconsequential. He asked the Court to invoke the provisions of Rule 2 of the Tanzania Court of Appeal Rules (the Rules) which contemplates the Court to administer justice while taking on board the concept of substantive justice. Mr. Mbwambo prayed for the appeal to be heard on merit.

Like his learned friend, Mr. Mapunda too did not address the actual query raised by the Court regarding the absence of the copy of the ruling for leave to appeal from the Court Record. Instead, his submission was on whether or not leave was, in the circumstances of this case, necessary. In that regard, he was resolute that leave was necessary in terms of section 5 (1) of the AJA. He contended that the case of **Bulyanhulu** did not properly grasp the import of section 57 of the Labour Institutions Act. He urged the Court to hold that the appeal is incompetent for omission to seek leave to appeal.

As regards the, the variance of dates in the ruling and the drawn order, Mr. Mapunda submitted that it was a serious irregularity. He urged the Court to hold that the error rendered the appeal incompetent, the consequence of which is to strike it out.

Like counsel for the parties have done, we will similarly begin with the point touching on the aspect of leave. We hasten to point out however, that we do not intend to spend much time on the arguments on whether or not leave is necessary in the circumstances of this case because that was not our concern. We will be very brief.

We begin by restating that Part III of the AJA governs matters of appeals to the Court. Section 5 (1) of that Act which is under that part, is express that except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal with its leave. It is apt to point out however, that paragraphs (a) and (b) of subsection (1) of that section specify the types of decisions which are appealable as of right, and paragraph (c) of the same sub-section spells out the decisions which require leave either of the High Court or the Court of Appeal. Section 5 (1) of that Act provides that:-

"5-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say-

(i) an order superseding an arbitration where the award has not been completed within the period allowed by the High Court;

(ii) an order on an award stated in the form of a special case;

(iii) an order modifying or correcting an award;

(iv) an order staying or refusing to file an agreement to refer to arbitration;

(v) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(vi) an order filing or refusing to file an award in an arbitration without the intervention of the High Court;

(vii) an order under section 95 of the Civil Procedure Code, which relates to the award of compensation where an arrest or a temporary injunction is granted;

(viii) an order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, except where the arrest or detention is in execution of a decree;

(ix) any order specified in rule I of XLIII in the Civil Procedure Code, or in any rule of the High Court amending, or in substitution for, the rule;

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

As we observed in **Bulyanhulu's** case (supra), it is certain that this section does not restrict all appeals to be in its terms, but recognizes that there are other laws which may have granted automatic right of appeal to the Court outside its scope. One such law is section 57 Labour Institutions Act which provides that:-

"Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal of Tanzania on a point of law only."

The case of **Bulyanhulu** (supra) restated that the section permits a party to appeal to this Court without recourse to section 5 (1) of the AJA. Indeed, it provides a different avenue to that covered under section 5 (1) (c) of the AJA. We wish to point out also that the requirement that a party may appeal against the decision of that court **on a point of law only** means that if the appeal may be anchored on facts, leave to appeal becomes necessary.

Even if we were to say that leave was not necessary in the circumstances of this case, since the appellant had successfully applied for such leave in the High Court, the order granting such leave ought to have been included in the Court Record. We are saying so because the issue is not whether leave is necessary in the circumstances of this case; to the contrary, the issue is whether that order, having been part of the proceedings in the High Court, should or should not have formed part of the record of appeal in terms of Rule 96 (2) (a) and (c) of the Rules.

A situation such as this facing us here was experienced in the case of **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 77 of 2011 CAT (unreported). In that case the appellant omitted from the Court Record some of the documents which formed part of the proceedings before the subordinate courts. The respondent raised a preliminary objection to the effect that the record was incomplete. Submitting on the preliminary objection, the appellant was of the view that the missing documents were not necessary and that the respondent was not prejudiced. The Court stated that:-

> *"The suggestion by Mr. Bwana that the missing documents will not be relevant for purposes of determining the appeal is attractive but it is not relevant at this stage. What is important at this point in time is whether or not the documents were part of the proceedings at the trial. Since there is no dispute that they were, whether or not they will feature at the hearing of the appeal is a matter that could best be determined at the hearing thereof..."*

In the present matter, as stated earlier on, the appellant omitted the order granting leave because he thought that leave to appeal was not necessary, hence that it was useless. Also, we wish to remind Mr.

Mbwambo that it was **not** optional for him to choose which document to be included in the Court **Record**. Such mandate is vested on either a Judge or Registrar of the High **Court** or Tribunal. Rule 96 (3) of the Rules provides that:-

> *"A Justice or **Registrar** of the High Court or tribunal, may, on the application of **any** party, direct which documents or parts of documents **should be** excluded from the record, application for which direction may be **made** informally."*

In the case of **Fedha Fund Limited and Two Others v. George T. Verghese and Another,** Civil Appeal No 8. Of 2008, (unreported) The Court stated as follows:-

> *"..... the decision **to** choose documents relevant for the determination **of the** appeal is not optional on the party filing the record **of** appeal. Under rule 89 (3) [now Rule 96 (3)] of the **Court** Rules, it is either a Judge or a Registrar of the **High** court who, on an application by a party, has to **direct** which documents to be excluded from the record of **appeal**. Since the learned advocate for the*

appellant did not obtain such leave, it was mandatory for him to file the documents."

In the present matter, since the appellant did not include such an order in the Court Record, and because he did not seek and obtain leave as per Rule 96 (3) of the Rules allowing such an omission, we are constrained to hold that the record of appeal is incomplete for offending the provisions of Rule 96 (2) (a) and (c) of the Rules. Given that the record is incomplete, the appeal is incompetent. The only remedy is to strike it out as the Court did in the cases of **Fedha Fund Limited and Two Others v. George T. Verghese and Another,** and **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd** (supra).

Next is the point referring to the variance of dates in the ruling and the drawn order. As already pointed out, Mr. Mbwambo conceded the defect, but hastened to add that the defect is not fatal.

We are in accord with the learned advocates for the parties that the date in the ruling differs from the date in the drawn order. The decision against which the appeal is sought was pronounced by the High Court on 28.10.2011, but the extracted order was dated 18.10. 2011. Surely, the

variance of dates between these two documents is real. That contravenes the provisions of Order 20 Rule 7 of the Civil Procedure Code, 1966 Cap. 33 of the Revised Edition, 2002b (the CPC) which states that:-

> *"The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."*

We are aware that the above provision refers to a "decree" and not a "drawn order". However, Order XL Rule 2 of the CPC provides an answer to that query. Order 40 of the CPC provides that:-

> *"The rules of Order XXXIX shall apply, so far as may be, to appeals from orders."*

The referred Order XXXIX relates to appeals in original decrees. Thus, it includes a decree under Order 20 rule 7 of the Act which is required to be dated as of the date when the judgment was pronounced. As such, the drawn orders too should bear the date when the ruling was pronounced. See the case of **Mkama Pastory v. Tanzania Revenue Authority**, Civil Appeal No. 95 of 2006, CAT (unreported).

In **Mkama Pastory's** case, after considering the provisions of Order XL Rule 2, Order XXXIX and Order XX Rule 7 of the CPC, the Court stated that:-

> *"We think, therefore, that on the same parity of reasoning an extracted order of the High Court in original jurisdiction is required, under the authority of Order 40 (2) of the Act, to bear the date when the ruling from which the order was extracted was pronounced. We are of the view that that should be the case because it could not have been the intention of the legislature to require a decree to bear the date when the judgment was pronounced but leave it open for an extracted order to bear any date regardless of when the ruling appealed against was pronounced"*

The Court went on to strike out the appeal for being incompetent.

Having the above authority in mind, we hurry to disagree with Mr. Mbwambo that the variance of dates in the ruling and the drawn order in the present matter is a minor defect. See also the cases of **Dhow Mercantile (EA) Ltd v. Abdirizzak S. Tuke,** Civil Appeal No. 93 of 2004, **Jovin Mtagwaba and 85 Others v. Geita Gold Mining,** Civil Appeal

No. 109 of 2005 CAT and **Uniafrico Ltd & Others v. Exim Bank (T) Ltd,** Civil Appeal No. 30 of 2006 (all unreported). In those cases, the Court stated in common that where there is variance of the dates in the judgment/ruling and the decree/drawn order, ***ipso dure***, the appeal is incompetent and must be struck out.

That said and done, the present appeal is incompetent for reasons we have assigned. In consequence, the appeal is struck out with costs.

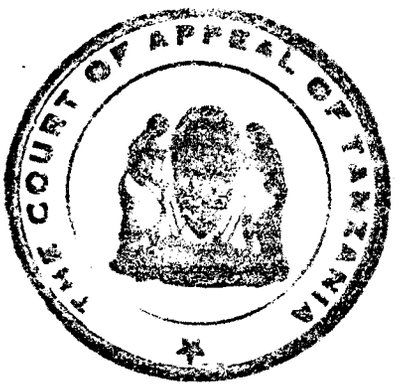
DATED at DAR ES SALAAM this 6th day of March, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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