

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CIVIL APPEAL NO. 211 OF 2016

**EDWARD NG'WENGE..... 1ST APPELLANT
ELIATOSHA NDOSI..... 2ND APPELLANT
SALOME DAVID LUNYILI..... 3RD APPELLANT**

VERSUS

PANGEA MINERALS LIMITED..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania (Labour Division)
at Shinyanga)**

(Mipawa, J.)

Dated the 23rd day of November, 2015

in

Revisions No. 106, 105 & 104 of 2015

RULING OF THE COURT

11th & 16th August, 2017

MMILLA, JA.:

The appellants, Edward Ng'wenge, Eliatosha Ndossi and Salome David Lunyiri were the applicants in Revisions Nos. 104/2015, 105/2015 and 106/2015 in the High Court of Tanzania (Labour Division) sitting at Shinyanga. In those applications, they sought the High Court's indulgences to call for the records in respect of Labour Dispute No. CMA/SNY/181/2013 by the Commission for Mediation and Arbitration (CMA), with a view to reverse the award issued in that arbitration,

vacate that award, and order their reinstatement and payment of all their remunerations from the date of termination.

After deliberating the competing arguments of the parties, the High Court dismissed the application on the ground that the exercise by the respondent to retrench or terminate the applicants grounded on operational grounds requirements of the employer was substantively and procedurally fair and valid. The appellants were aggrieved, hence this appeal to the Court.

When the appeal was called on for hearing on 11.8.2017, only the first appellant, Edward Ng'wenge, entered appearance out of the three of them. Eliatosha Ndossi and Salome David Lunyiri, the second and third appellants respectively, did not appear though they were served. The first appellant informed us however, that they had engaged the services of Adolos Law Chambers to represent them. Again, no one appeared from that firm, though served.

On the other hand the respondent, Ms Pangea Minerals Limited, enjoyed the services of Mr. Geoffrey Kange, learned advocate. Given the absence of the second and third appellants as well as their advocate, he

urged the court to proceed with the hearing of the preliminary objection, of which he had filed a notice to that effect on 9.3.2017, in the absence of those two appellants. We granted Mr. Kange that prayer under Rule 4 (2) (a) of the Court of Appeal Rules, 2009 (the Rules) and decided to proceed in the absence of the second and third appellants.

The notice of preliminary objection raised two grounds as follows:

- (1) That the appeal is incompetent as it was filed without leave of High Court.
- (2) That the appeal is incompetent for lack of complete records of appeal, thus in contravention of Rules 96 (2) (c) of the Rules.

At the commencement of hearing, Mr. Kange prayed to drop the first ground of preliminary objection on the ground that the question of leave to appeal in labour cases has been recently resolved by the Full Bench of the Court. He remained with only the second ground to proceed with.

In his submission in support of the second ground, Mr. Kange contended that the proceedings of the CMA are missing, an omission

which contravenes the provisions of Rule 96 (2) (c) of the Rules. He also cited to us the cases of **Jackson Mabula Njile v. CRDB Bank and Another**, Civil Appeal No. 21 of 2009, CAT, **Sylvia Albert v. Adam Moshi**, Civil Appeal No. 76 of 2014, CAT and **Mining Agriculture Construction Service Ltd v. Palemo Construction Ltd**, CAT (all unreported). In all those cases, he submitted, the Court held in common that where the record of appeal is incomplete, then the appeal will be struck out for being incompetent. He urged us to strike out the present appeal for omitting from the record the mentioned proceedings.

On his part, the first appellant admitted that the proceedings of the CMA are missing from the record, adding that they were not supplied to them by the CMA. He however, left the matter in the hands of the Court.

We have carefully gone through the Record of Appeal and satisfied ourselves that the proceedings of the CMA are missing. We also agree with Mr. Kange that since the appeal before us concerns a matter which was before the High Court on revision, and not in its original jurisdiction, the omission to include the proceedings of the CMA offends the provisions of Rule 96 (2) (c) of the Rules. That Rule provides that:-

" For the purpose of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court:-

(a)

(b)

(c) the record of proceedings;

(d)

(e)

(f)"

(Emphasis added).

Admittedly, there is a proviso to the above quoted Rule which contemplates the exclusion of copies of any documents or any of their parts that are not relevant to the matters in controversy in the appeal; that is Rule 96 (3) of the Rules. However, that Rule cannot be invoked without there being an application for directions. That Rules provides that:-

“(3) 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.”

See also the cases of **Fedha Fund Limited and Two Others v. George T. Verghese and Another**, Civil Appeal No 8. Of 2008, and **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 77 of 2011, CAT** (both unreported).

In **Fedha Fund Limited and Two Others** (supra), a case in which focus was on Rule 89 (3) of the old Court of Appeal Rules, 1979 which has been replicated in Rule 96 (3) of the Rules, the Court stated that:-

“.... 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) 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.”

Since the appellants in the present matter did not seek the directions as shown above, the omission to include the proceedings of the CMA renders their appeal incompetent. Thus, we are constrained to strike it out with no order as to costs.

DATED at TABORA this 14th day of August, 2017.

B. M. LUANDA
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.



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL