**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., WAMBALI, J.A. And LEVIRA, J.A.)**

**CIVIL APPEAL NO. 46 OF 2016**

**TANZANIA STANDARD (NEWSPAPER) LIMITED ..... APPELLANT**

**VERSUS**

**THE HONOURABLE MINISTER**
**FOR LABOUR EMPLOYMENT AND YOUTH..... 1ST RESPONDENT**
**THE HONOURABLE ATTORNEY GENERAL .....2ND RESPONDENT**
**JOEL MWAKIBETA ..... 3RD RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam District Registry)**

**(Sheikh, J.)**

**Dated the 11th day of September, 2017**
**in**
**Misc. Civil Cause No. 6 of 2017**

**RULING OF THE COURT**

19th July, & 20th November, 2019

**WAMBALI, J.A.:**

The applicant, Tanzania Standard (Newspapers) Limited through Miscellaneous Civil Cause No. 6 of 2007 approached the High Court of Tanzania at Dar es Salaam and sought leave to lodge an application for *Prerogative* orders of *certiorari* and *mandamus* against the decision of the Minister for Labour, Employment and Youth, the first respondent, who had upheld the decision of the Labour Conciliation Board which had ordered the reinstatement of the third respondent, Joel Mwakibeta. The third

respondent had earlier on been terminated from employment by the applicant on disciplinary matters.

The said application was supported by the affidavit of Mr. Emmanuel Tamila Makene, the Company Secretary of the applicant together with the statement as required by law.

Specifically, according to the statement in support of the application, the applicant sought an order of *certiorari* to quash the decision of the first respondent made on 6th September, 2006 reinstating the third respondent in his employment as an accounts clerk. Moreover, an order of *mandamus* was sought for purpose of compelling the respondents generally to act lawfully and as provided by the relevant laws.

According to the record of appeal before us, the first and second respondents, the Honourable Attorney General through the learned State Attorney lodged a counter affidavit and opposed the application. The first and second respondents also lodged a notice of preliminary objection to the effect that the High Court was not properly moved for non-citation of proper provision of the law.

However, there is no indication, as per the record of appeal that, the third respondent lodged a counter affidavit. But the learned counsel for the third respondent is on record to have supported the preliminary objection of the first and second respondents. Be that as it may, the High Court (Sheikh, J.) heard the rival submissions of the counsel for the applicant and the first and second respondents and in the end, in the ruling dated 9th September, 2014, the applicant's application was struck out with no order as to costs for being incompetent.

It is that ruling which seriously aggrieved the appellant, who through the services of the learned advocate lodged the current appeal before the Court comprising the following four grounds of appeal: -

> **1.** *That the Honourable High Court erred in law and the fact by holding that the appellant's contention that the* ***Laws Revision Act, Act No. 7 of 1994 and also the Revised Edition of the Laws of Tanzania R.E. 2002*** *have not yet come into force was made to pre-empty the preliminary objection raised by the 1st and 2nd Respondents and not as a defence of the appellant against the Respondents' contention that the application was bad for citing the provisions of the*

***'Law Reform (Fatal Accidents and Miscellaneous Provisions Ordinance;*** *Chapter (Cap.) 360 instead of the Provisions of '****the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002';***

2. *That the Honourable High Court erred in law and in fact by holding to the effect that in the absence of a 'Substantive proceeding' for reliefs of nullification of a subsidiary legislation or a provision thereof in conflict with a provision of a principal legislation, the Court can only give effect to the provisions of the offending subsidiary legislation and ignored the offended principal legislation;*
3. *That the Honourable High Court erred in law and in fact for holding to the effect that* ***the Laws Revision Act, Act No. 7 of 1994*** *and also* ***the Revised Edition of the Laws of Tanzania, 2002*** *had (at the time of filing of Misc. Civil Cause No. 6 of 2007 in the High Court on 22/1/2000 and at the time of passing the decision in the High Court on 11/9/2014 come into force;*
4. *That the Honourable High Court erred in law and in fact by holding that the law applicable for moving the High Court for orders of certiorari and mandamus is* ***Section 19 (2) and (3) of the Law Reform (Fatal***

***Accidents and Miscellaneous Provisions Act) Cap. 310 of the R.E. 2002*** *or any provision of that Act, and not* ***Section 2 (2) of the Judicature and Application of Laws Ordinance Cap. 453*** *(which is Section 2 (3) of the* ***Judicature and Application of Laws Act, Cap. 358 R.E. 2002).***

Moreover, we think it is not out of place to reproduce the appellant's proposed orders to be made by the Court as outlined in the Memorandum of Appeal hereunder:

*(a) A declaration that the* ***Law Revision Act, Act No. 7 of 1994*** *and also* ***the Revised Edition of the Laws of Tanzania R.E. 2002*** *has (at the time of filing of Misc. Civil Cause No. 6 of 2007 in the High Court on 22/1/2007 and at this time of passing the decision in the High Court on 11/9/2014) not legally come into force; and*

*(b) A declaration that the appropriate provision for moving the High Court for prerogative orders is* ***Section 2 (2) of the Judicature and Application of Laws Ordinance Cap*** *453 (which is* ***Section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2002);*** *and consequently:*

(i) *An order quashing and setting aside the whole decision of the High Court in Miscellaneous Civil Cause No. 6 of 2007 dated 11/09/2014;*

(ii) *An order of restoration of Miscellaneous Civil Cause No. 6 of 2007 in the High Court;*

(iii) *An order directing the High Court to hear Miscellaneous Civil Cause No. 6 of 2007 and decide it on merit;*

(c) *Costs of this appeal and the proceedings in the High Court*

(d) *An order granting any other relief that to this Court appears just and proper to grant in favour of the Appellant."*

At the hearing, Mr. Audax Kahendaguza Vedasto, learned advocate appeared for the appellant, while Ms. Mercy Kyamba, learned State Attorney appeared for the first and second respondents. On the other hand, the third respondent appeared in person, unrepresented.

The appeal could not however proceed to hearing based on the grounds of appeal stated above, as we requested the parties to address us on whether the appeal is properly before the Court. The request was necessitated by the fact that according to the drawn order extracted from

the ruling of the High Court the application for leave was struck out and not dismissed.

In his response, Mr. Vedasto for the appellant strongly submitted that, the order of the High Court striking out the application for leave to lodge prerogative orders is appealable as of right under the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap 310 R.E. 2002 and not under the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA). He supported his contention by relying on the decision of this Court in **Attorney General v. Philemon Ndesamburo,** Civil Appeal No. 14 of 1998 (unreported) referred in **Grace Umbe Mwakitwange v. Suma Clara Mwakitwange Kaare and Seven Others,** Civil Appeal No. 88 "A" of 2007 (unreported) at pages 6 – 7.

The learned advocate for the appellant explained further that, the nature of the order that was issued by the High Court when it struck out the application of the appellant is in conformity with the decision of the Court in **Tanzania Motor Services Limited and Presidential Parastatal Sector Reform Commission (PSRC) v. Mehar Singh t/a Thaker Singh,** Civil Appeal No. 115 of 2005 (unreported). In the

circumstances, Mr. Vedasto urged us to hear the appeal on merit as the order of the High Court determined the rights of the parties.

Nevertheless, in the alternative Mr. Vedasto argued that if we find that the ruling and order of the High Court is not appealable as of right we should take the following action. **Firstly,** to direct the High Court that whenever it finds an appeal or application incompetent for non-citation, it should direct a party to rectify the mistake or defect instead of striking the same out. **Secondly,** as we are possessed with the record of appeal, we should invoke the powers of revision vested into the Court under section 4(2) of the AJA and revised the proceedings and quash the ruling and order of the High Court based on the illegalities it committed in the course of its decision as pointed out in the grounds of appeal. To this end, the learned advocate contended that it will not be the first time the Court embarks on such a stance as it was applied in **Typhone Elias @ Ryphone Elias** and **Prisca Elias v. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017, **Yahaya Suleiman Mralya v. Stephano Sijia,** Civil Appeal No. 316 of 2017 and **Interconsult Limited v. Mrs Nora**

**Kassanga and Methew Ibrahim Kassanga,** Civil Appeal No. 79 of 2015 (all unreported).

In the end, while pressing high reliance on the stated decisions of the Court, Mr. Vedasto urged us not to strike out the appeal even if it is found incompetent, but instead revise the proceedings and set aside the ruling and order of the High Court and determine the issues raised in the grounds of appeal.

In reply, Ms. Kyamba, resisted the submission of Mr. Vedasto on the contention that, the ruling of the High Court is not appealable as of right as no substantive decision was made on the application which was before it. The learned State Attorney argued that after the application was struck out by the High Court for non-citation of the enabling provision of the law, the applicant was entitled to rectify the defect and lodge a fresh application for leave to lodge an application for prerogative orders before the same court. To support her submission, she referred us to the decision in **Ngoni Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** [1959] I.E.A. 577.

Ms. Kyamba argued further that, the circumstances obtaining in the decision of this Court in **Tanzania Motor Services Ltd and PSRC** (Supra) are distinguishable and cannot apply in the present appeal. Similarly, the learned State Attorney argued that the decisions relied upon by Mr. Vedasto to press the Court to revise the proceedings and set aside the ruling and order of the High Court are inapplicable. Her contention is that, in those decisions the Court embarked on revision in the course of determining the grounds of appeal which is not the case in the present appeal. She thus concluded that the prayers of the appellant's counsel are misconceived as the appeal is not properly before the Court and the consequence which should follow is to strike it out with costs.

On his part, the third respondent, being a lay person did not have anything to comment on the competence of the appeal, but left it upon the Court to determine in accordance with the arguments of the counsel for the appellant and the first and second respondents.

On our part, having heard the counsel for the parties we think the question to be determined is whether the appeal which emanated from the ruling of the High Court striking out the application is competent.

At this juncture, to appreciate the deliberation which will follow, we deem it appropriate to reproduce the order of the High Court as per the drawn order which is the subject of the present appeal: -

> *"THIS COURT DOTH HEREBY ORDER THAT*
>
> *This application being undoubtedly incompetent due to non-citation of the provision of the law empowering this Court to grant the orders sought is hereby struck out with no order as to costs."*

From the above extracted order of the High Court, no one can doubt the fact that, the High Court struck out the application after it sustained a preliminary objection raised by the first and second respondents concerning non-citation of enabling provision by the appellant. The High Court therefore, did not determine the substantive prayers for leave to lodge an application for prerogative orders of *certiorari* and *mandamus*.

It follows that, while we agree with the contention made by Mr. Vedasto based on the decision of this Court in **The Attorney General v. Philemon Ndesamburo's** (supra) that, an appeal from an order or decision of the High Court from the proceedings for applying prerogative

orders lies to this Court under Cap. 310, we do not, with respect, agree that any order, including the one striking out an application for leave due to procedural irregularities may be a subject of appeal to this Court. We are of the considered opinion that, for there to be a proper appeal from the said proceedings, the resulting order or decision must have the effect of finally determining the rights of the parties as provided by the law.

In the present matter, it is on record that the appellant had just initiated the application seeking leave to be allowed to lodge an application for orders of *certiorari* and *mandamus*. Unfortunately, even that application was not determined to entitle the applicant to rely on the provisions of sub section (5) of section 17 of Cap 310. In this regard, we think that the provisions of subsection (5) only comes into play where there is an order by the High Court either refusing the application for leave or upon hearing the substantive application for prerogative orders that finally determines the rights of the parties. The application of subsection (5) therefore is subject to the provisions of subsection (2) of the same section in which an order on the rights of the parties must have been

made by the High Court. For purpose of clarity, we better quote in full the relevant provisions of section 17 hereunder: -

*(1)* *N/A*

*(2)* *In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition against any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be.*

*(3)* *No return shall be made to any such order and no pleadings in prohibition or certiorari shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5).*

*(4)* *N/A*

*(5)* *Any person aggrieved by any order made under this section may appeal therefrom to the Court of Appeal."*

In this regard, from the provisions quoted above, we are settled that, the High Court did not make any order under subsection 2 of section 17 refusing or granting leave which was sought by the applicant to lodge an application for orders of *certiorari* and *mandamus,* to entitle the appellant to rely on the provisions of subsection (5) to appeal to this Court as of right as argued by Mr. Vedasto.

In the event, even the decision of this Court in **Tanzania Motors Services Limited and PSRC** (supra) relied upon by Mr. Vedasto, does not, with respect, advance the appellant's contention that the order of the High Court, a subject of the present appeal, is appealable as of right. It is instructive to emphasize that in the said decision, the Court asked a fundamental question "whether the issue concerning the appellant's petition were fully canvassed and finally determined by the court below." The Court thus sought guidance from the case of **Bozson v. Artrincham Urban District Council (1903)** I KB 547 and quoted the statement of Lord Alverston at page 548 as hereunder:

> *"It seems to me that the real test for determining this question ought to be this: does the judgment or order, as made, finally dispose of the right of the parties? If it does,*

*then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order."*

The Court then adopted the test in **Bozson** case and treated the same to be in accordance with the language used in section 5(2) (d) of the AJA and stated as follows: -

*"In the present case, the decision of the learned judge refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in contracts for arbitration meaningless."*

Applying the above observation and holding in the present appeal, we are settled that the order of the High Court did not close the appellant's door to go back to the same court. The appellant could therefore had properly returned to the High Court to seek leave to apply for prerogative orders as the previous application was simply struck out and not dismissed.

This was also the position of this Court in **Joseph Mahona @ Joseph Mbije @ Maghembe Mboje and Another v. The Republic,**

Criminal Appeal No. 215 of 2008 (unreported) where it was categorically stated that: -

> *"In the instant case, the matter before the High Court was not dismissed but struck out. That implies according to* ***Ngoni Matengo Co-operation Marketing Union Ltd v. Aii Mohamed Osman*** *[1959] I.E.A. 577 the matter was incompetent which means there was no proper application capable of being disposed of.* ***The established practice is that the applicant in an application which has been struck out is at liberty to file another competent application before the same court before opting to appeal as it has appeared in this appeal.*** [Emphasis added]

We think that the above holding of the Court equally applies in the present appeal.

In the event, we respectfully agree with the submission of the learned State Attorney and conclude that, the present appeal is not properly before this Court and therefore liable to be struck out because of being incompetent.

Having reached that position, we do not, with respect, incline to grant the two prayers put forward by the learned advocate for the appellant on the way forward. We think this is not an appropriate time to order the High Court to ensure that, instead of striking out any application or appeal before it where there is anomaly or defect therein, it should order rectification of the same. This will be tantamount to issuing a blank general order without having the requisite materials to act upon. Besides, every case must be decided on its own merits and circumstances.

Moreover, we are settled that this is not an appropriate appeal in which we can embark into revising the proceedings of the High Court and setting aside its ruling and order, without having considered the appeal based on the grounds of appeal. Indeed, it is clear that this appeal emanates from the order striking out the application which in our firm opinion did not shut out the door to the appellant to return back to the same court to seek the requisite leave to apply for prerogative orders of *certiorari* and *mandamus*.

In the circumstances, we also agree with the learned State Attorney that the decisions of the Court relied upon by the appellant's counsel to

urge us to revise the proceedings of the High Court and set aside its ruling are distinguishable and not applicable in the present appeal.

In the end, as the appeal is incompetent, we hereby strike it out with no order as to costs.

**DATED** at **DAR ES SALAAM** 18th this day of November, 2019.

A. G. MWARIJA
**JUSTICE OF APPEAL**

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

The Judgment delivered this 20th day of November, 2019 in the presence of Mr. Derick Kahigi holding brief for Mr. Kahendaguza counsel for the Appellant, Ms. Mercy Kyamba, Principal State Attorney for the 1st and 2nd Respondents and Mr. Emmanuel Nsubisi Tom on behalf of the 3rd Respondent is hereby certified as a true copy of the original.

H.P. Ndesamburo
**DEPUTY REGISTRAR**
**COURT OF APPEAL**