

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 251 OF 2017

JUSTUS TIHAIRWA ..... APPELLANT

VERSUS

CHIEF EXECUTIVE OFFICER TTCL..... RESPONDENT

(Appeal from the judgment and Decree of the

High Court of Tanzania Labour Division

at Dar es salaam)

(Mashaka, J.)

Dated 2<sup>nd</sup> day of March, 2017

In

Revision No. 339 of 2015

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RULING OF THE COURT

25<sup>th</sup> February & 12<sup>th</sup> March, 2019

MUGASHA, J.A.

On 2/3/1988, the appellant was employed by the respondent as Post Officer II and he rose up to the position of Senior Accounts Assistant. Following the restructuring of the Corporation, the appellant was re-categorised as a storekeeper and transferred from Dar-es-salaam to Musoma on 27/11/ 2007. This precipitated a wrangle between the parties

which culminated into the appellant's termination from the employment on 9/5/ 2008 due to alleged misconduct.

The appellant challenged the termination before the Commission for Mediation and Arbitration (CMA) which ordered that, the appellant be reinstated into the employment, paid salaries and returned back to Dar-es-salaam. Thereafter, the respondent filed several applications to challenge the CMA award which were struck out for various reasons. This included Labour Revision No. 203 of 2010 as reflected at pages 307-311 of the record.

Subsequently, the appellant filed an application for execution No. 116 of 2011 dated 23/5/2011, seeking to enforce the CMA award. The appellant was successful since the Deputy Registrar gave an order commanding the respondent to reinstate the appellant and pay him all the salaries in arrears. Later, in between 6/10/2011 and 1/12/2011, the respondent's advocate notified the Deputy Registrar that the respondent had paid the appellant a sum of TZS. 21,622,669.90 and the matter was marked settled. Further, the respondent furnished the executing court with requisite documentation evidencing the payment as reflected from page

498 to 501 of the record of appeal in a letter dated 6/10/2011 addressed to the Deputy Registrar.

However, more than three years later, the appellant on 6/5/ 2015 filed another application No. 143 of 2015 for execution of the award by CMA as reflected at page 520 of the record of appeal. The appellant sought the Deputy Registrar to command his reinstatement and payment of all rights from the date of termination. The Deputy Registrar found the matter to have been already settled vide Application 166 of 2011. Thus, on account of *res judicata* the application No. 143 of 2015 was struck out.

Still undaunted, the appellant commenced revision proceedings before the learned High Court Judge who besides, confirming that the matter was already executed, ordered that the appellant be paid other terminal benefits apart from those stated in the CMA award.

Still aggrieved with the decision of the learned High Court Judge, the appellant lodged an appeal before this Court with the following grounds of complaint:

- "1. *That the Hon. High Court Judge erred both in law and upon facts in holding as she did that the Appellant's Application for Execution No. 143 of 2015 was Res-Judicata to the decision in Application No. Application No. 116 of 2011 dated 19.7.2017 without any prove (sic) that the Appellant's Award by the Commission for Mediation and Arbitration (CMA) had been heard and conclusively executed inter-parties (sic) before.*
  
2. *That after having found that the Appellant's Commission for Mediation and Arbitration (CMA) Award was conclusively executed in Application No. 116/2011, the Hon. High Court Judge erred both in law and upon facts when she re-visited the merits of the alleged execution and issued further orders which had*

*neither been contested nor prayed for by the Appellant.*

3. *That the Hon. High Court Judge erred both in law and fact in holding that the Respondent was legally justified in interfering with and changing the nature of the Commission for Mediation and Arbitration (CMA) Award by unilaterally issuing payment compensation in lieu of re-instatement of the Appellant without any prior consultation nor verification and confirmation by the Arbitrator of the Commission for Mediation and Arbitration on the actual quantum of the payable compensation."*

The appellant appeared in person whereas the respondent was represented by Mr. George Magambo, learned counsel. The respondent had lodged a notice of preliminary objection challenging the competence of

the appeal on account that it was sought against a non-existent respondent. However, after a brief dialogue with the Court, taking into account that the notice of appeal bore the correct name of the respondent who was in addition not prevented to enter appearance at the hearing of the appeal, Mr. Magambo prayed to withdraw the notice of preliminary objection and we marked it so.

At the hearing of the appeal we wanted to satisfy ourselves if the appeal is properly before us because, the appellant's letter to be supplied with the proceedings of the High Court for appeal purposes was not served on the respondent. We thus required parties to address us on this aspect.

The appellant claimed to have availed all the copies of the requisite documents to the respondent and he contended that, the appeal is properly before the Court. He added that, we should not be bogged down by technicalities but rather determine the merits of the appeal. On the other hand, the respondent's counsel confirmed that the letter was not served on them and urged us to strike out the appeal on account of being rendered incompetent.

The issue we raised is regulated by Rule 90 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which categorically states as follows:

*"90.-(1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with -*

- (a) a memorandum of appeal in quintuplicate;*
- (b) the record of appeal in quintuplicate;*
- (c) security for the costs of the appeal,*

*save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High*

*Court as having been required for the preparation and delivery of that copy to the appellant.*

*(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent”.*

It is not contentious that after lodging the notice of appeal the appellant did serve it on the respondent. However, the appellant’s letter dated 13/3/ 2017 seeking to be supplied with the record of the High Court for appeal purposes was not served on the respondent. This is reflected at page 696 of the record of appeal. In the result, the appellant cannot be allowed to rely on the exclusion of days he waited for the Registrar to supply her with documents for appeal purposes. - See **FATUMA A. SIMBAMBILI VS DOKASI MHINA**, Civil Appeal No. 84 of 2015 (unreported). The omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicality as viewed by the appellant because it has adverse impact on the time limit of filing the appeal since the appellant cannot rely on the exception under Rule 90 (1) of the Rules. We say so

because since the notice of appeal was filed on 14/3/2017 the appellant ought to have filed the appeal not later than 13/5/ 2017. As the present appeal was filed on 4/10/2017, the appeal is hopelessly out of time and we are constrained to strike it out.

**DATED at DAR ES SALAAM this 8<sup>th</sup> day of March, 2019.**

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

G.A.M. NDIKA  
**JUSTICE OF APPEAL**

M.A. KWARIKO  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**