

**IN THE COURT OF APPEAL OF TANZANIA**

**DAR ES SALAAM**

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

**CIVIL APPEAL NO. 2 OF 2018**

**TANZANIA ELECTRIC SUPPLY COMPANY LTD.....APPELLANT**

**VERSUS**

**SHAFFI ALI NURU (Legal Representative of the  
late HASSAN A. JAMBIA.....RESPONDENT**

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

**(Mihayo, J.)**

**dated the 6<sup>th</sup> day of October, 2005**

**in**

**Civil Appeal No. 6 of 2004**

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**JUDGMENT OF THE COURT**

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

**MUGASHA, J.A.:**

The late Hassan Jambia was employed as an Internal Auditor by the appellant in 1984. He had risen up to the position of the Principal Supplies Officer when his employment was terminated on 3/8/1995 due to among others, alleged misappropriation of the employer's property.

Discontented with the termination, he filed Trade Dispute No. 7 of 1995 against the appellant before the defunct Industrial Court of Tanzania. In its decision handed down on 10/10/2002, Mrs. C.E.R.

William (Deputy Chairperson) sitting with two assessors (Mr. Mbezi from Association of Tanzania Employers (ATE) and Mr. Pazi from Conservation, Hotel and Allied Workers Union (CHODAWU) decided in favour of the late Hassan Jambia. However, having considered that, Mr. Hassan Jambia was not in the employment for seven years after being terminated, it was ordered that he be paid all terminal benefits from the date of termination instead of being reinstated into the employment.

Unhappy with that decision, on 7/1/2004 Mr. Hassan Jambia lodged an appeal before the High Court of Tanzania at Dar-es-salaam Registry. On 6/10/2005, the learned High Court Judge having set aside the award given by the Industrial Court ordered that, Mr. Hassan Jambia be reinstated into the employment and paid arrears of the salary and increments that he would have got in the post held.

Aggrieved, the appellant has lodged an appeal to the Court to challenge the decision of the High Court. In the Memorandum of Appeal the appellant has raised the following grounds of appeal:

- 1. THAT, the Learned appellate Judge grossly misdirected himself in assuming jurisdiction to*

entertain the appeal contrary (sic) the then Industrial Court of Tanzania Act [Cap. 60 R.E. 2002].

*In the alternative to the first ground of appeal,*

2. **THAT**, having regard to the circumstances of the case, and the evidence on record, the Learned Appellate Judge grossly misdirected himself in fact and in law in setting aside the award of payment of 36 months salary to the late Hassan Jambia instead of reinstatement as ordered by the Industrial Court of Tanzania.

3. **THAT**, the Learned Appellate Judge grossly misdirected in himself in fact and in law in directing that the late Hassan Jambia, in the event the appellant failed to reinstate him, should be paid his benefits under the Security of Employment Act, when his employment was not governed by the said Act.

4. **THAT**, the Learned Appellate Judge grossly misdirected himself in fact and in law in ordering that payments to Hassan Jambia should take into consideration increments that would accrue if he was in the employment of the appellant."

Following the death of Mr. Hassan Jambia, his administrator of estate Mr. Shafii Ali Nuru took over the matter as the legal representative of the deceased who is referred to as the respondent in this appeal.

Parties filed written submissions in support and against the appeal as required by rule 106 of the Rules. The respective submissions were adopted by the parties at the hearing of the appeal.

At the hearing of the appeal, the appellant was represented by Messrs. Richard Rweyongeza, Majura Magafu, Joseph Sang'undi and Florence Ernest, learned counsel whereas the respondent appeared in person.

The appeal was confronted with preliminary objections raised by the respondent on the following points:

*"(1). That, the appeal is time barred.*

*(2). That, there is no valid notice of intention of appeal."*

As is the usual practice we had to hear first the preliminary points of objections before going to the merits of the appeal.- See **BANK OF TANZANIA VS DEVRAN P. VALAMBHIA**, Civil Application No. 15 of 2002 (unreported).

In addressing the Court on the first preliminary objection, the respondent relied on 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He contended that, since the appellant was aware that the proceedings were ready on 6/12/2016, she did not act promptly in filing the present appeal on 5/1/2018. The respondent was thus of the view that, the appeal is time barred. When probed by the Court that, what is before us is an appeal and not an application to have the notice of appeal struck out, he persistently maintained that, the appeal is not properly before the Court.

In arguing the second limb of the preliminary objection, the respondent's initial line of contention was that he was not served with the appellant's letter seeking to be supplied with the proceedings of the High Court for appeal purposes. However, he shifted the goal posts and contended that, the appellant did not serve him with the Certificate of delay. He viewed this as an omission which rendered the appeal not competent and urged us to strike it out.

On the other hand, Mr. Majura Magafu resisted the preliminary objections arguing the same to be misconceived. He pointed out that, since the respondent did not file an application under Rule 89 (2) of the Rules, he cannot be heard at this stage to complain that the appellant never embarked on the essential steps to lodge an appeal. Secondly, he submitted that, following the decision of the High Court handed down on 6/10/2005, the appellant lodged the notice of appeal and in the letter dated 11/10/2005 wrote to the Registrar seeking to be supplied with the proceedings of the High Court for appeal purposes. He added that, those documents were served on Mr. Ukwonga advocate on 24/10/2005 as reflected at pages 326 and 327 of the record of appeal. He added

that, the service was done before the death of Mr. Hassan Jambia. Mr. Magafu thus, asked the Court to overrule the preliminary objections.

Regarding the first point of the preliminary point of objection, as earlier stated, the respondent faults the appellant for not having taken essential steps to lodge an appeal. He relied on rule 89 (2) of the Rules which basically provides as follows:

*"Subject to the provisions of sub-rule (1), a respondent or other person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time."*

We found the first preliminary point of objection to be rather strange because before us is an appeal. This is not an application to have the notice of appeal struck on account of the appellant's failure to

take essential steps to institute an appeal which ought to have been lodged in an application under the cited Rule instead of challenging the competency of the appeal before us by way of the preliminary objection.

We have also gathered that, the respondent has abandoned the second preliminary point of objection. Instead, he concentrated on addressing us on some other things which were not in his notice of the preliminary objection possibly, because he is a layman. However, we found that the appellant lodged the notice of appeal which was served in time to the respondent. Moreover, from the evidence on record, the appellant complied with the requirements under rule 90 (1) and (2) of the Rules by serving the respondent's advocate with a copy of the letter seeking to be supplied with requisite documents from the High Court for appeal purposes. In the circumstances, the appellant is entitled to the exception in sub-rule 90 (1) of the Rules. See - **JULIUS SINGOYAN KULEY VS LAZARO KARISIANI**, Civil Application No.1 of 2013 (unreported).

We also found the respondent's complaint on the non-supply of the Certificate of delay to him to be rather strange as the law does not



require its service on the respondent be it by the court or the appellant. We say so because according to the law, the certificate of delay is availed by the Registrar to the appellant who has applied to be supplied with the proceedings of the High Court for appeal purposes. The requisite Certificate is valid as it excludes the period of waiting to be supplied with the proceedings to file an appeal. As earlier stated, we believe that, the respondent raised this complaint due to his unfamiliarity with the procedure as he is a layman.

Therefore, the present appeal is properly before the Court. We thus dismiss the preliminary points of objection on account of being misconceived.

We now proceed to determine the merits of the appeal. In addressing the first ground of appeal, Mr. Sang'udi initially contended that, the learned High Court Judge lacked jurisdiction to determine an appeal from the defunct Industrial Court. He argued this to have contravened the provisions of section 28(4) of the repealed Industrial Court Act which required such appeal to be determined by the full bench of the High Court.

In reply, the respondent resisted the appeal contending that, the learned High Court Judge had jurisdiction to preside over and determine the appeal against the decision of the defunct Industrial Court. He added that, the restriction to appeal on the sole ground of jurisdiction was held to be unconstitutional as it deprived a person of his basic right of appeal or another legal remedy. To support this proposition he cited to us the case of **OTTU (ON BEHALF OF P.P MAGASHA VS ATTORNEY GENERAL AND ANOTHER** [1997] T.L.R 30. As such, he concluded that, the learned High Judge was justified to preside over and determine the appeal.

In rejoinder, Mr. Rweyongeza brought to the attention of the Court that, the law was amended in 2003 widening the scope on which a person aggrieved by the decision of the defunct Industrial Court could appeal on any ground before a full bench of the High Court. He thus, concluded that, the learned High Court misdirected himself in assuming jurisdiction not vested in him under the law and urged us to allow the appeal.

After a careful consideration of arguments of the parties the issue for our consideration is whether the learned High Court Judge had jurisdiction to preside over and determine an appeal against the decision of the defunct Industrial Court of Tanzania.

At the outset, we wish to point out that, jurisdiction of courts is a creature of statute and not otherwise. In the case **ISIHAKA MZEE MWINCHANDE VS HADIJA ISIHAKA**, Civil Appeal No. 99 of 2010 (unreported) the Court among other things said:

*... the term "jurisdiction" connotes the limits which are imposed by statute upon the power of a validly constituted court to hear and determine issues between parties seeking to avail themselves of its process,... to the subject matter of the issue;... But, unless there are express provisions limiting or ousting the jurisdiction of courts, there is always a presumption in favour of jurisdiction."*

We understand that, the award and the decision of the defunct Industrial Court was by law final and not liable to be challenged, reviewed, questioned or called in question in any court except on the grounds of lack of jurisdiction in which case the matter was to be heard and determined by a full bench of the High Court. However, the provision limiting the ground on jurisdiction upon which the decision of defunct Industrial Court could be challenged before the High Court was considered in the case of **OTTU (ON BEHALF OF P.P MAGASHA VS ATTORNEY GENERAL AND ANOTHER** (supra). The High Court declared section 27 (1C) to be unconstitutional as it purported to whittle down the right under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.

Subsequently, in the year 2003 the repealed Industrial Court Act was amended vide Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the Amendment Act) whereby the sub-section (1C) of section 27 was deleted and substituted with the following:

*"Subject to the provision of this section, every  
award and decision of the Court shall be called in*

*question on any grounds in which case the matter shall be heard and determined by a full bench of the High Court”.*

The Amendment Act came into force on 23/5/2003. As rightly pointed out by Mr. Rweyongeza, the Amendment Act widened the scope of challenging the decision of the defunct Industrial Court on any ground before the High Court. Therefore, since Civil Appeal No. 6 of 2004 was filed on 7/1/2004 before the High Court this was after the coming into force of the Amendment Act, which allowed an appeal against the decision of the Industrial Court to lie on any ground and be heard by a full bench of the High Court. Thus, Mr. Hassan Jambia's appeal could have enlisted any ground of grievance including that touching on the jurisdiction of the defunct Industrial Court.

In view of the aforesaid, the remaining question to be answered is whether the learned High Court Judge was vested with jurisdiction to preside over and determine Civil Appeal No. 6 of 2004? With respect, the answer is in the negative because the appeal ought to have been determined by a full bench of the High Court. As such, we agree with

the appellant that, the learned High Court Judge assumed jurisdiction not vested in him by law and that is why we earlier stated that, jurisdiction is vested by the law and not otherwise. We thus declare that the decision in Civil Appeal No. 6 of 2004 is a nullity.

For the above reasons, we allow the appeal on the first ground alone. Therefore, all the proceedings, judgment and the decree of the High Court are quashed. We direct that, the case file be remitted to the High Court for the determination of appeal No. 6 of 2004 by the full bench of the High Court.

Since this is a labour related matter, we make no order as to costs.

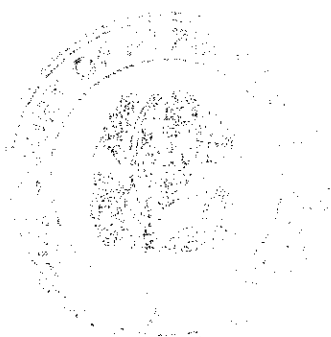
**DATED at DAR ES SALAAM this 8<sup>th</sup> day of March, 2019.**

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**