IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 436/1 OF 2016

ELIZABETH MPOKI. ....1ST APPLICANT

NOEL MASIMA...2ND APPLICANT

DANIEL MLACHA..3RD APPLICANT

VERSUS

MAF EUROPE DODOMA .... RESPONDENT

(Application for revision from the Ruling of the High Court of Tanzania, at Dar es Salaam)

(Shangwa, Mwarija & Muruke, JJ)

dated the 23rd day of August 2016

in

Civil Appeal No. 6 of 2007

RULING OF THE COURT

17th & 30th July, 2020

MWANDAMBO, J.A.:

The applicants have sought to invoke the Court's power of revision of the ruling of the High Court sitting at Dar es Salaam in Civil Appeal No. 6 of 2007 made on 23rd August 2016. The application which is by way of notice of motion, is made under section 4(3) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] (the AJA) and rule 65 of the

Tanzania Court of Appeal Rules (the Rules) is supported by the affidavit of Elizabeth Mpoki, the first applicant. Despite being served with the copies of the notice of motion and affidavit, the respondent, who enjoys the service of IMMMA Advocates, did not file any affidavit in reply.

The facts giving rise to this application may be easily narrated as follows: The applicants who were employees of the respondent lost their employment contracts through retrenchment having been declared redundant by their erstwhile employer; the respondent. Their attempt to challenge their termination before the defunct Industrial Court of Tanzania (the ICT) hit a snag, for the Deputy Chairman of that court found the termination justified. Aggrieved, the applicants preferred an appeal to the High Court in terms of the provisions of section 28 of the Industrial Court of Tanzania Act [Cap. 60 R.E 2002] now repealed by the Employment and Labour Relations Act, [Cap 366Cap. R.E 2019] In terms of section 28(4) of the repealed Act, appeals from the ICT were heard by the full bench of the High Court. It is noteworthy to state at this juncture that the hearing of the appeal before the High Court was by way of written submissions based on the grounds contained in the memorandum of appeal.

Having heard the arguments for and against the appeal, the High Court (Shangwa, Mwarija and Mutungi, JJ.) retired to compose its

judgment. However, that court found it compelling to dispose of the appeal on a jurisdictional issue it discovered in the course of composing its judgment. The High Court saw no reason to summon the parties to address it on the issue relying on the Court's decision in **Richard Julius Rukambura v. Issack Ntwa Mwakajila & Another**, Civil Application No. 3 of 2004 (unreported) in which this Court held that since an issue involving jurisdiction is fundamental to the matter, it can be raised and determined at any time without hearing the parties. Placing reliance on that decision, the High Court determined the appeal before it on the basis of the sole issue on jurisdiction it raised in the course of composing its judgment without summoning and hearing the parties. Being satisfied that it had no jurisdiction to hear and determine the appeal in which the applicants had not exhausted the remedy of revision available to them under the relevant law, it struck out the appeal.

Not amused, the applicants sought to have the High Court review its decision under the provisions of section 78 and Order XLII rule 1 of the Civil Procedure Code [Cap.33 R. E. 2002] henceforth to be referred to as the CPC. However, the application did not find purchase with the High Court which dismissed it upon being satisfied that the decision it made striking out the appeal would have been the same even if the court had invited the parties to present their arguments on the issue of

jurisdiction. In terms of Order XLII rule 7 of the CPC no appeal lies against an order rejecting an application for review. That means that the applicants' right of appeal was effectively blocked by judicial process and hence the recourse to the Court's revisional jurisdiction. The notice of motion is predicated on the following grounds:

> *"1. That the decision of the High Court dismissing the applicants' application for review ignored the decision of this Court which is bound to follow.*
>
> *2. The High Court's decision did not discuss the provisions of section 28 (1) of the Industrial Court Act read together with GN. No. 268 of 1990."*

The founding affidavit contains averments which are by and large a narration of what took place before the High Court and that explains why the respondent found it unnecessary to file an affidavit in reply. Instead, it lodged a notice of preliminary objection contending that the application is incompetent for want of certified copies sought to be revised. On that basis, it invited the Court to strike out the application with costs.

At the hearing of the application, Messrs. Jethro Turyamwesiga and Jonathan Wangubo, both learned advocates appeared for the applicants and respondent respectively. We heard the learned advocates first on the preliminary objection which had earlier on been lodged and

proceeded to hear their arguments on the merits of the application to save time hoping that should we sustain it, that will be the end of the matter and if we overrule it, we will proceed to determine the merit of the application without the need of calling the parties again.

Essentially, the respondent contends in the notice of preliminary objection that the application is incompetent for lack of certified copies of proceedings from which the application has arisen. Mr. Wangubo premised his submissions in support of the preliminary objection on the Court's previous decisions in **Tanzania Telecommunications Co. Ltd v. Alfred Anasa Shara**, Civil Application No. 226 of 2013, **Bakari Abdallah v. Dionis Christopher and 20 Others**, Civil Application No. 94 of 2014 and **SGS Societe General De Surveillance SA & Another VIP Engineering and Marketing Limited Another,** Civil Application No. 25 of 2015 (all unreported). In those cases, the Court has consistently held that where a party moves it to revise the proceedings of the High Court, he has an obligation to make available a copy of the proceedings sought to be revised failing which the application is rendered incompetent and liable to be struck out.

The learned advocate argued that since the applicants have not furnished copies of the proceedings of the High Court sought to be revised, the application is incompetent and should be struck out.

In his reply, Mr. Turyamwesiga invited us to overrule the objection because, according to him, copies of proceedings are not necessary where, as in this application there is no complaint against the proceedings per se. The learned advocate was adamant that the cases relied upon by the respondent's learned advocate are distinguishable because the applicants are not asking the Court to revise the proceedings of the High Court rather the ruling a copy of which is annexed to the affidavit and so the proceedings of the High Court are of no use for the purpose of the application.

We have painstakingly examined the arguments by the learned advocates for and against the objection and we think that they are in agreement on the rule of practice developed by the Court in **Mabalanganya v. Romwald Sanga** [2005] EA 236 on the requirement to attach a copy of the record of proceedings sought to be revised in exercise of its jurisdiction under section 4 (3) of the AJA. That rule has been applied consistently in various cases including those relied upon by the respondent's learned advocate. The only contention is, however, whether such a rule is applicable in cases as this one where what is sought to be revised does not relate to any complaint against any part of the proceedings rather against the ruling or order whose copy is annexed to the affidavit in support of the application. Having

examined the notice of motion and the decisions relied upon by Mr. Wangubo, we are constrained to agree with Mr. Turyamwesiga that those decisions must be applied in their own context. We are alive to the provisions of section 4 (3) of AJA which gives power to the Court to call for and examine the record of any proceedings before the High Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the legality of any proceedings of the High Court. What constitutes proceedings was discussed by this Court in **SGS Societe General De Surveillance SA** case (supra) to include a judgment. The Court held:

> *"So in its broad context, a proceeding is more comprehensive, and includes a judgment. In that context a judgment or order is part of a proceeding".*
> [At page 11)

Viewed from that context, we are prepared to answer the issue posed above affirmatively. We have taken that view because we are satisfied that the peculiar circumstances of this application do not require the Court to examine the proceedings before the High Court in the narrow context of the term to enable us determine the application. Apparently, both learned advocates are in agreement that the rulings as part of the proceedings in its broad context are sufficient for the

determination of the application before us because the error complained of is evident in the rulings whose copies are annexed to the founding affidavit. Accordingly, we are constrained to overrule the preliminary objection as we hereby do. That takes us to the merits of the application.

The sole issue we are confronted with is whether it was correct for the High Court to dismiss the application for review on the ground that hearing the parties on an issue involving jurisdiction would not have made any difference to its decision. Mr. Turyawesiga faulted the High Court for holding as it did that it had no jurisdiction to determine an appeal before it because the applicants had not yet exhausted revision remedy before the ICT without affording the applicants an opportunity to be heard. The learned advocate argued further that had the High Court invited parties to address it before making the decision resulting into the striking out of Civil Appeal No. 6 of 2007, it could have arrived at a different decision. According to the learned advocate, hearing the parties on that issue would have enabled the High Court to appreciate that the applicants' appeal was not covered by rule 4(2) of the Industrial Court (Revision of Proceedings) Rules, G.N. No. 268 of 1990 (the Revision Rules). Whilst conceding that the High Court was bound by **Richard Julius Rukambura** (supra), Mr. Turyamwesiga contended

that the High Court had jurisdiction to entertain the appeal. Under the circumstances, counsel invited the Court to quash that decision and order the High Court to hear the parties on the issue it raised suo motu.

Mr. Wangubo supported the approach taken by the High Court relying on this Court's decision in **Richard Julius Rukambura's** case (supra). The learned advocate argued further that the High Court had inherent jurisdiction to raise the issue and decide it *suo motu* under section 95 of the CPC in the interest of justice more so because that decision had no adverse effect on the rights of the applicants. He thus invited us to dismiss the application.

There is no gainsaying that in striking out the applicants' appeal, the High Court made the impugned decision on the basis of an issue it raised on its own motion in the course of composing its ruling long after hearing the parties on the appeal. The High Court justified its approach from the decision of this Court in **Richard Julius Rukambura** (supra). In that case, the Court is recorded to have held that the court has power to raise and determine an issue involving jurisdiction at any time without summoning and hearing the parties on it considering that it is settled law that jurisdiction of the court is such a fundamental issue which cannot be taken lightly. Whilst appreciating that the right to a hearing is

of utmost importance, it reiterated its stance in its ruling on the right to a hearing in the application for review on the ground that that did not apply to cases where the court raises an issue *suo motu* involving jurisdiction as it did. That court went on and stated that even if parties had been accorded the right to a hearing, it would have arrived at the same decision.

We need not overemphasise that jurisdiction is a fundamental issue in any proceedings which goes to the root of the court to adjudicate any matter before it. There is a litany of authorities on this including; **Fanuel Martin Ng'unda v. Herman M. Ng'unda** [1995] T.L.R 155. However, we do not think the High Court was right in holding as it did that hearing the parties could not have changed the conclusion it had reached when dismissing the appeal. We say so because that was contrary to the settled law. For instance, in **John Morris Mpaki v. The NBC Ltd And Ngalagila Ngonyani,** Civil Appeal No. 95 of 2013 (unreported) the Court aptly stated:

> *"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even*

if the same decision would have been arrived at had the affected party been heard." [At page 5]

Earlier, **In the matter of IPTL And In the Matter of the Companies Act, And in the Matter of a Petition by a Creditor for an Administration Order by Standard Chartered Bank (Hong Kong) Limited,** Civil Revision No. 1 of 2009 [**IPTL**'s case] (unreported) we said:-

> *"...no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice...."* [At pages 12&13]

See also: **Abbas Sherally &. Another v Abdul S. H. M. Fazalboy**, Civil Application No 33 of 2002 (unreported) in which the Court reiterated the position on the sanctity of the right to be heard before an adverse decision is taken regardless whether the same decision would have been reached had the parties been heard. The Court stressed that any decision made in violation of the right to be heard is a nullity.

It may be instructive to point out at this juncture that contrary to the contention by Mr. Wangubo, the decision of the High Court had the effect

of affecting the applicants' right to appeal. From the authorities we have referred to, we cannot but agree with the learned advocate for the applicants that the High Court was bound to accord the applicants an opportunity to address it on their right of appeal in the light of the limited scope to apply for revision before the ICT under rule 4(2) of G.N No. 268 of 1990. At any rate, the excerpt reproduced above do not make any distinction between cases involving jurisdictional issues as it were and those involving other issues. Taking the argument further, we have not read anything from **Rukambura's** case (supra) relied upon by the High Court establishing a rule that in all cases where an issue arises involving jurisdiction, the right to hearing is absolutely curtailed. That aside, we are aware that the majority of the Court's decisions at the time the High Court rejected the application for review held a contrary position from what it took in **Richard Julius Rukambura** (supra). For instance, in **Ibrahim Omary (Ex.D. 2323 Ibrahim) v. The Inspector General of Police, The Permanent Secretary, Ministry of Home Affairs & the Hon. the Attorney General,** Civil Appeal No. 20 of 2009 (unreported). In that case, after hearing evidence on the framed issues, the trial Judge discovered an issue involving jurisdiction in the course of composing judgment and dismissed the suit on that issue without hearing the parties

on the said issue. On appeal, the Court found the High Court acted irregularly and made the following remarks:

> *"There is no dispute that in law jurisdiction is a matter which can be raised at any stage of the trial in a case. In this sense, although it is a bit unusual and unfortunate that the issue was raised at a rather late stage of the case, strictly speaking the judge did not err in raising it at the end of the judgment. However, as far as this case is concerned, since the point appears to have come up as an afterthought we think that prudence and the interests of justice demanded that the appellant and the respondents be called upon to address the court on the issue before making a finding on it. If the judge had done so he would have had the benefit, advantage and opportunity of hearing the parties' views, or rather getting their inputs on the point, before making a definitive and balanced finding on the said point..." [At pages 5 &6]*

That decision was made on 27th August 2010 well before the High Court made the impugned decision. See also: **IPTL**'s case (supra).

The Court has taken a similar stance in other subsequent cases. In **Wegesa Joseph M. Nyamaisa v. Chacha Muhogo**, Civil Appeal No.161 of 2014 (unreported), the High Court sitting on appeal, raised two issues in the course of comprising its judgment. One of such issues involved pecuniary jurisdiction of the District Land and Housing Tribunal.

The learned first appellate Judge determined the appeal not on the basis of the grounds of appeal before her on which the parties were heard, rather on the issues she discovered in the course of composing her judgment. On a further appeal, this Court found it to be fatal to the decision relying on several other previous decision including; **Mbeya Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251 underscoring the right to be heard before a decision is reached. It also relied on **Ex-B.8356 S/SGT Sylvester S. Nyanda v. The Inspector General of Police** and **The Attorney General**, Civil Appeal No. 64 of 2014 (unreported) in which the High Court, like in the instant appeal, abandoned the issues framed for the determination of the suit and determined the appeal on a completely new issue. The Court had the following to say:

> *In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so." [At page 12]*

A similar stance was taken in **Margwe Erro, Benjamin Margwe & Pater Margwe v. Moshi Bahalulu,** Civil Appeal No. 111 of 2014 (unreported) in which the High Court determined an appeal on an issue involving limitation which neither party had raised it but raised by the judge in the course of composing her judgment. On appeal, the Court did not mince its words and held that holding that the right to be heard on the question of time bar which vitiated the whole judgement and decree of the High Court.

The three cases we have just referred to are almost on all fours with the instant application in that the decisions were predicated on issues on which parties had not been heard rather on issues raised *suo motu* in the course of composing judgment. As we observed in **Ibrahim Omary (Ex.D. 2323 Ibrahim)** (supra), had the High Court invited the parties on an issue it discovered in the course of composing its decision, the complaint in the review and eventually in this appeal would not have arisen.

In the event, we find merit in the application and in the exercise of our revisional powers under section 4(3) of the AJA, we quash the decision of the High Court in Civil Appeal No. 6 of 2007 striking out the appeal for being a nullity and set aside the resultant order. Having

nullified the decision in the appeal, the decision dismissing the application for review cannot stand. It is likewise quashed.

That said, we direct a different panel of the High Court to determine Civil Appeal No. 6 of 2007 and hear the parties on the issue it had raised involving its jurisdiction. Considering that the matter has been pending in court for such a long time, we direct that the hearing of it be expedited. Each party shall bear his own costs.

Order accordingly.

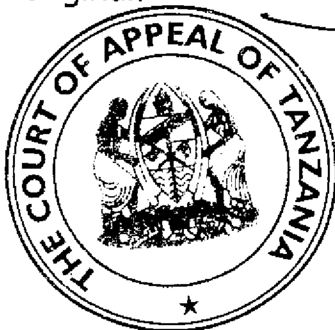
DATED at **DAR ES SALAAM** this 29th day of July, 2020.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Ruling delivered this 30th day of July, 2020 in the presence of Mr. Jonathan Wangubo learned counsel who hold brief of Mr. Jethero Turyamwesiga for Applicant, and in presence of Mr. Jonathan Wangubo learned advocate for Respondent, is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL