IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 68 OF 2020

DR. ABRAHAM ISRAEL SHUMA MURO .....APPELLANT

VERSUS

1. NATIONAL INSTITUTE FOR MEDICAL RESEARCH
2. ATTORNEY GENERAL } **.... RESPONDENTS**

[An Appeal from a decision of the High Court of Tanzania (Labour Division), at Mwanza]

(Nyerere, J.)

dated the 21st day of July, 2014

in

Labour Dispute No. 01 of 2014

RULING OF THE COURT

4th & 7th May, 2021

LEVIRA, J.A.:

In the High Court of Tanzania (Labour Division) at Mwanza, the appellant, a retired officer who was initially employed by the defunct East African Community and later by the 1st respondent unsuccessfully lodged a complaint vide Labour Dispute No. 1 of 2014 against the respondents claiming for the following:

1. *Payment of all retirement benefits;*
2. *An order for payment of general damages arising from loss of legitimate expectation in life after retirement from employment;*

3. *An order for payment of general damages for breach of trust, breach of fiduciary duty, breach of contractual and statutory duties;*
4. *An order compelling the defendant (the 1st respondent herein) to compensate him the sum of Tshs. 40,000,000/= for unlawful deductions of salary and failure to remit statutory deductions to the proper social security scheme;*
5. *Refund of Tshs. 477,311/80 plus 30% interest from September, 1981 to June 1999 which was unlawfully deducted from his salaries;*
6. *Costs of the suit and the interest thereon;*
7. *Any other relief as the court may deem just to grant.*

The gist of the appellant's complaint before the High Court was that his contributions which were deducted from his salaries were submitted to Parastatal Pension Fund (PPF) instead of Public Service Pensions Fund (PSPF). The appellant claimed that initially he was employed by the defunct East African Community (the EAC) from 30th March, 1976. Following the collapse of the EAC in 1977, the appellant worked with the Government under the Ministry of Health. In 1980 the Government established the National Institute for Medical Research (NIMR) (the 1st respondent herein) and the appellant was inherited as a research officer from July, 1981. All employees who were working under the 1st

respondent as a matter of law were subjected to PPF membership as it was a public corporation.

It is on record that from 1981 to 1983 the appellant's monthly deductions were remitted to PPF. When he was given an option to choose whether he wished to be a member of PPF or Government Pension Scheme, he chose the latter. However, the appellant expected his monthly pension contributions would be remitted to PSPF as he alleged to have had chosen to continue with the contract he had with the EAC under which his contributions were being remitted. Soon before his retirement, the appellant came to realise that his monthly contributions were being remitted to PPF instead of PSPF which he alleged to have opted from when he started working with the 1st respondent. The dispute between the appellant and the 1st respondent was referred to the Commission for Mediation and Arbitration (the CMA) for reconciliation but in vain. Thereafter, the appellant filed unsuccessfully the above introduced Labour Dispute in the High Court. In its decision, the High Court declared that the appellant was entitled to retire with PPF and not PSPF because he was not a member of PSPF. The 1st respondent in assistance with PPF were ordered to pay the appellant all the retirement benefits.

Aggrieved by the decision of the High Court, the appellant has presented before us a four grounds memorandum of appeal. However, for the reasons that will shortly come into light, we are not going to reproduce them herein.

At the hearing of this appeal, the appellant was represented by Mr. Deya Paul Outa, learned advocate, whereas the respondents had the services of Mr. Gabriel Paschal Malata, learned Solicitor General assisted by Ms. Subira Mwandambo, Mr. Stanley Kalokola and Ms. Sabina Yongo, all learned State Attorneys.

Before the inception of the hearing of the appeal, the Court *suo motu* inquired from the counsel for the parties about the propriety of the Certificate of Delay appearing on page 305 of the record of appeal. Counsel for the parties addressed the Court on the point raised where the counsel for the appellant was the first to address us.

Mr. Outa submitted that the Certificate of Delay excludes the period from 7th November, 2018 when the appellant requested for copies of proceedings, ruling and drawn order in respect of Misc. Labour Application No. 6 of 2018 up to 4th October, 2019 when the appellant was notified that the documents were ready for collection, a total of 332

days. However, he said, the starting date (7th November, 2018) which is indicated in the Certificate of Delay was a date on which the appellant wrote the said letter to the Registrar but the same was lodged on 12th November, 2018. Therefore, the Certificate of Delay was supposed to exclude days from 12th November, 2018 when the application letter was lodged instead of the date when the said letter was written. Although Mr. Outa conceded that the Certificate of Delay is defective for excluding time from a date even before the Registrar received the letter applying for documents for appeal purposes, he argued that the defect does not go to the root of the matter. He thus, urged the Court to invoke the overriding objective principle and proceed with the hearing of the appeal.

When the Court prompted Mr. Outa to submit on the validity of the Certificate of Delay in relation to the present appeal, he stated that the Certificate of Delay must be read from the title to the end (as a whole). Having so stated, it was his argument that, although the body of the Certificate of Delay does not mention the impugned decision in the intended appeal, the title indicates that the appeal is from the High Court Labour Dispute No. 1 of 2014 of 21st July, 2015, the current appeal. According to him, such title is a clear indication that the

Certificate of Delay also covers the current appeal. Mr. Outa insisted that the Certificate of Delay shows that the appellant has complied with the requirements of the law regardless the spotted defects which he acknowledges their existence. He thus, reiterated his prayer that we should proceed with the hearing of the appeal.

In reply, Mr. Malata commenced by stating that, there is no dispute that the Certificate of Delay under consideration is defective because it excludes the time by referring to the letter which was yet to be received by the Registrar (the court). Also, he said, there is no dispute that the proceedings and drawn order applied by the appellant were in respect of Misc. Labour Application No. 6 of 2018 which arose from Labour Dispute No. 1 of 2014 as reflected in the letter of the appellant found on page 303 of the record of appeal.

He pointed out that according to the said letter, the appellant applied to be supplied with documents in respect of two different matters, to wit, Labour Dispute No. 1 of 2014 and Misc. Labour Application No. 6 of 2018 to enable him prepare the record of appeal. However, he said, the applicant's prayer in that letter was not granted accordingly. Meaning that, the applied documents in respect of Labour Dispute No. 1 of 2014 were not supplied to the appellant. Therefore, it

was upon the appellant to consult the Registrar so as to be supplied with the requested documents, but the appellant did not do so. Instead, he proceeded to prepare the appeal as if everything was complied with while it was not.

It was Mr. Malata's argument that, in preparation of the record of appeal all documents relating to the main suit subject of the intended appeal must be included in the record of appeal. In the premises, he submitted that the highlighted defects in the Certificate of Delay are basic and they cannot be cured by applying the overriding objective principle as prayed by the counsel for the appellant. More so, in his view, because it is not known how those other documents found their way into the record of appeal.

Mr. Malata insisted that since the appeal before us is not against Misc. Labour Application No. 6 of 2018, the exclusion of the dates in the Certificate of Delay was supposed to be in respect of Labour Dispute No. 1 of 2014 which is subject of the current appeal but that is not the case. As such, he argued that since the substantive part of the intended appeal (Labour Dispute No. 1 of 2014) is not included in the Certificate of Delay the appeal becomes time barred. In the circumstances, he urged us to strike it out.

In rejoinder, Mr. Outa reiterated his submission in chief while insisting that the Certificate of Delay should be read as a whole from the title to the end. He stated further that the record of appeal includes all necessary documents for the purposes of this appeal. Expounding of this argument, he stated that the appellant was able to compile the record of appeal because he took other documents from the former record of appeal which was struck out by the Court. He was firm that since he certified the record of appeal to be true copy of the original records, there is no need to doubt the current record of appeal.

He referred us to page 299 of the record of appeal where the High Court vide Misc. Labour Application No. 6 of 2018 extended time for the appellant within which to file a notice of appeal to the Court against the impugned decision. He argued that the 14 days which were extended for the appellant to file notice of appeal should be considered as a base of counting time to the date of filing the appeal; that is, from 12th November, 2018 to 3rd December, 2019 and not counting from the date of delivery of the impugned decision.

Finally, he prayed for the Court to find that the identified defects in the Certificate of Delay do not go to the root of the appeal and order hearing of the appeal to proceed as normally.

Having heard the rival submissions of the counsel for parties regarding the propriety of the Certificate of Delay, we find it apposite to start with Rule 90(1) of the Tanzania Court of Appeal Rules (the Rules) which provides that:

> *"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 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 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."*

The above provision provides guidance to the Court in determining whether or not it is vested with powers to determine appeals presented before it. In the present appeal, the counsel for the appellant submitted that the appellant's first appeal to the Court was struck out and therefore the appellant had to apply to the High Court for extension of time within which to file a fresh notice of appeal vide Misc. Labour Application. No. 6 of 2018. Upon our perusal of the record of appeal, we discovered that in the said application the appellant had applied in the chamber summons for an extension of time to file a notice of appeal and appeal to the Court against the decision of the High Court in Labour Dispute No. 1 of 2014 out of time. (See page 263 of the record of appeal). However, the High Court in its Ruling handed down on 31st October, 2018 as found on page 290 of the record of appeal, granted only the first prayer where the appellant was given 14 days within which to file a notice of appeal. On 12th November, 2018 the appellant filed the notice of appeal appearing on page 300 of the record of appeal. On the same date (12th November, 2018) he wrote a letter to the Registrar of the High Court applying for proceedings, Drawn Order and other Documentary Exhibits tendered in Labour Dispute No. 1 of 2014, also

Proceedings and Drawn Order in Misc. Labour Application No. 6 of 2018 as per the letter found on page 303 of the record of appeal.

On 4th October, 2019 the Deputy Registrar of the High Court wrote the appellant a letter which is found on page 306 of the record of appeal informing him that the documents were ready for collection. On 3rd December, 2019 the appellant filed the memorandum and record of appeal. We think, circumstances obtaining in this appeal required the appellant to seek and acquire a valid Certificate of Delay. We say so because the appellant's letter to the Registrar referred to both matters, Labour Dispute No. 1 of 2014 and Misc. Labour Application No. 6 of 2018. Mentioning only Misc. Labour Application No. 6 of 2018 rendered the certificate invalid. For ease of reference the relevant part of the Certificate of Delay reads:

> *"**CERTIFICATE OF DELAY***
>
> ***(Made under Rule 90(1) of the Tanzania Court of Appeal Rules 2009 and GN. No. 344 of 2019)***
>
> *This is to certify that the period from **7th day of November, 2018** when the Appellant requested for copies of proceedings, ruling and drawn order in **Misc. Labour Application No. 6 of 2018** up to **4th day of October, 2019** when the*

appellant was notified that the documents were ready for collection, a total number of ***332 days*** *should be excluded in computing the time for instituting the appeal in the Court of Appeal.*

GIVEN under my hand and the seal of the court this ***4th day of October, 2019.***

Signed

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MWANZA"

The Certificate of Delay reproduced above is a clear evidence that the Registrar did not adhere to the requirements of Rule 90(1) of the Rules under which the certificate was made. The above Rule makes reference to the decision desired to be appealed against, and for the purpose of this appeal it is Labour Dispute No. 1 of 2014.

We are unable to agree with Mr. Outa that the High Court extended time for the appellant to file appeal out of time as earlier on intimated. Even if we assume that the appellant timely filed the notice of appeal on 12th November, 2018, after time was extended, still he ought to have filed the appeal within sixty days thereof, that is, by 11th January, 2019. This appeal was filed on 3rd December, 2019 which was almost eleven months after the notice of appeal was lodged. In our considered opinion, the mere fact that the appellant's first appeal was

struck out by the Court did not give him an automatic right to reinstitute his appeal without complying with the requirements of Rule 90 (1) of the Rules. In the circumstances, we are not persuaded by Mr. Outa's argument that the defects in the Certificate of Delay under consideration are trivial and that we can ignore them under the overriding objective principle and proceed with the hearing of the appeal.

We are alive to the current trend where under the overriding objective principle, the Court has shifted from striking out appeals due to defects in Certificates of Delay which would ordinarily be struck out - see: **Geita Gold Mining Co. Ltd v. Jumanne Mtafuni**, Civil Appeal. No. 30 of 2019, **M/s Flycatcher Safaries Ltd v. Hon. Minister for Lands and Human Settlements Development and Another,** Civil Appeal No. 142 of 2017 and **Ecobank Tanzania Limited v. Future Trading Company Limited,** Civil Appeal No. 82 of 2019 (all unreported). In all these cases, we have been allowing appellants to seek and obtain from the Registrar rectified Certificates of Delay. However, we do not think that this is a fit case to do so. We are unable to give such order to the appellant because no prayer has been made by the appellant's counsel in that respect. It is settled position that the court cannot grant a party or parties an order or relief which has not

been prayed for. In **Melchiades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga - deceased) & 2 Others,** Civil Appeal No. 57 of 2018 (unreported) at page 24, when the Court was dealing with a land matter where the trial High Court fell into error when it declared the second respondent in that appeal the lawful owner of the disputed land while he did not plead ownership by way of counter claim, it stated:

> *"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for-see also* ***James Funke Gwagilo v. Attorney General*** *[2004] T.L.R. 161 and* ***Hotel Travertine Limited & 2 Others v. National Bank of Commerce*** *[2006] T.L.R. 133."*

It is our observation that the appellant certified the record of appeal to be correct at page (iii) despite the fact that the Registrar neither supplied him with all the requested documents nor issued Certificate of Delay in respect of Labour Dispute No. 1 of 2014 as per the appellant's letter of 12th November, 2018. We appreciate Mr. Malata's concern regarding the record of appeal but we think, since the appellant is yet to be supplied with the requested documents in respect of Labour Dispute No. 1 of 2014 it will be inapt to decide on it now.

Having so stated, we refrain from applying the overriding objective principle to spare the invalid Certificate of Delay and proceed with the hearing of the appeal as prayed by the counsel for the appellant. Consequently, we strike out the appeal for being accompanied by a defective Certificate of Delay rendering it time barred.

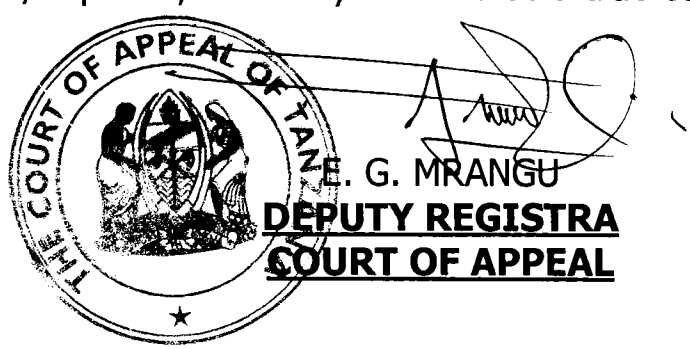
DATED at **MWANZA** this 6th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Ruling delivered this 7th day of May, 2021 in the presence of the Mr. Deya Paul Outa, learned counsel for the appellant and Ms. Subira Mwandambo, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRA
COURT OF APPEAL