IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)

CIVIL APPEAL NO. 474 OF 2020

TANZANIA POSTS CORPORATION .....APPELLANT

VERSUS

JEREMIAH MWANDI..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 13th day of May, 2020

in

Labour Revision No. 06 of 2020

RULING OF THE COURT

13th & 16th July, 2021

GALEBA, J.A.:

Jeremiah Mwandi, the respondent, was employed by the appellant as a clerk up to 16th January 2019 when he was terminated by the appellant's Regional Manager on allegations of misconduct. His appeal to the appellant's Post Master General was dismissed. Still aggrieved, the respondent filed Labour Dispute No. CMA/KIG/DISP/99/2019 in the Commission for Mediation and Arbitration for Kigoma at Kigoma (the CMA). The claim lodged was for payment of compensation on account of allegations of unfair termination by the appellant which did not comply with

the principles of natural justice in the processes of terminating the respondent.

As for the appellant, in addition to disputing the substantive claims of the respondent, it lodged a notice of preliminary objection inviting the CMA to strike out the complaint because the forum had no jurisdiction to entertain it. The reason advanced in the notice was that the complaint was lodged in the CMA prematurely as the respondent lodged it there without first exhausting internal dispute settlement procedures established within the appellant as a statutory body. According to the appellant, that offended regulation F.4 of Tanzania Posts Staff Regulations 2014 (the Staff Regulations) and section 32A of the Public Service Act [Cap 298 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act of 2016 (the Public Service Act).

The objections were argued by parties and by a ruling delivered by the CMA, (Hon. Doris A. Wandiba, Arbitrator) on 29.09.2019, the CMA upheld the objections and struck out the respondent's Labour Dispute No. CMA/KIG/DISP/99/2019. Essentially, the CMA ruled that it had no jurisdiction to preside over a labour matter involving a public servant on

one hand and a public body on the other in terms of section 32A of the Public Service Act, which provides that:

> *"A public servant shall, prior to seeking remedies provided for in the labour laws, exhaust all remedies as provided under the Act."*

In striking out the dispute, the CMA stated at page 149 of the record of appeal that:

> *"For the above reasons the dispute is prematurely before the commission and it must therefore be hushed through the exit door. It is accordingly struck out."*

In deciding as above, the CMA too, relied on many decisions of the High Court including the **Board of Trustees of the Public Service Pensions Fund v. Jalia Mayanja and Godfrey Ngonyani,** Labour Revision No. 248 of 2017, Nyerere J. (as she then was) (unreported).

That decision of the CMA aggrieved the respondent who approached the High Court and filed Labour Revision No. 06 of 2020, moving that court to revise it because, according to him, the CMA had jurisdiction to hear and determine his grievance. To be particular with the prayer made in the High

Court, let the substance of the prayer in the chamber summons speak for itself:

> *"1. This Honourable Court be pleased to call and examine the records of the Labour Dispute No. CMA/KIG/DISP/99/2019 of the Commission for Mediation and Arbitration for Kigoma and be pleased to revise the same accordingly.*
>
> *2. Any other order(s) this Honourable Court may deem just and fit."*

The substantive question for determination in the High Court was therefore whether the CMA had jurisdiction to hear and determine the respondent's complaint that had been struck out.

There was raised some preliminary objections before the High Court but the same were all overruled and the substantive matter quoted above from the chamber summons was heard. The High Court, Matuma J. after taking into account the appellant's Staff Regulations and other laws which are not immediately relevant for this ruling, he agreed with the respondent that indeed the CMA had jurisdiction to hear and determine Labour Dispute No. CMA/KIG/DISP/99/2019. Consequent to that finding, the High Court remitted the record to the CMA for determination of the respondent's

complaint on merits. The decree of the High Court at page 229 of the record of appeal states that: -

> *"1. The applicant's complaint at the CMA was competent and it was wrongly rejected.*
>
> *2. The application of the Applicant at the CMA is hereby restored and ordered to be heard on merits."*

The appellant was aggrieved with the above order. On 11.09.2020, he filed the present appeal predicating it on four (4) grounds of appeal which for reasons that will become apparent shortly, we will not reproduce them in this ruling.

At the hearing of the appeal on 13.07.2021, the appellant was represented by Mr Deodatus Nyoni learned Principal State Attorney assisted by Mr. Erigh Rumisha learned State Attorney. The respondent had the services of Mr. Sadiki Aliki, learned advocate.

Prior to commencement of hearing of the appeal, Mr. Aliki rose to inform the Court that although the appeal was for hearing, the Court had no jurisdiction to entertain it in view of section 5(2)(d) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA). Elaborating on his point, he submitted that the order of the High Court challenged before us was an

interlocutory relief because the High Court did not determine the merits of the matter between the parties. He added that the issue of unfair termination which is the substantive dispute between the parties was remitted to and is presently pending determination before the CMA. He submitted that, by law, this Court cannot hear and determine an appeal in respect of a matter which has not been heard and finally determined on merits. Counsel, did not refer us to any authority to support his arguments. He moved the Court to strike out the appeal for being incompetent, based on his arguments.

In reply, Mr. Nyoni, made a long submission but what we were able to gather from him was that this Court has jurisdiction to hear and determine an appeal arising from a labour dispute irrespective of whether the order appealed against is interlocutory or final, provided that the appeal is on a point of law. To back his position, he relied on section 57 of the Labour Institutions Act, No. 7 of 2004 (the Labour Institutions Act) and Rule 54 of the Labour Court Rules 2007, GN No. 106 of 2007, (the Labour Court Rules). He submitted that whereas section 5(2)(d) of the AJA was the general provision, the specific law relevant to guide us in the present scenario is section 57 of the Labour Institutions Act. Mr, Nyoni was,

however, not clear on whether the order of the High Court in this appeal was interlocutory or final, and like Mr. Aliki, he did not rely on any authority in which this Court has decided that an interlocutory order may be appealed against to the Court notwithstanding the provisions of section 5(2)(d) of the AJA. Mr. Nyoni only referred us to the case of **Tanzania Teachers Union v. The Chief Secretary and Others,** Civil Appeal No. 96 of 2012 (unreported), a decision, which as we will observe at some point in this ruling, that it is distinguishable.

Alternatively, Mr. Nyoni submitted that in case we find that indeed the order of the High Court was interlocutory and that an appeal against the order is restricted by the provisions of section 5(2)(d) of the AJA, then this Court be pleased to invoke the provisions of section 3A, 3B and 4(2) and (3) of the AJA and permit him to argue the appeal because there are many conflicting decisions of the High Court on the subject matter.

Mr. Nyoni implored us to overrule the objection so that the appeal can be heard on merits.

In rejoinder Mr. Aliki contended that for the point of law to be appealable under section 57 of the Labour Institutions Act, it must first be a final decree as required by section 5(2)(d) of the AJA. He argued that

this Court cannot invoke the overriding objective principle in order to circumvent the statutory requirements of section 5(2)(d) of the AJA, reiterating his earlier stance that this appeal is incompetent.

On our part, having attentively heard counsel on their submissions and critically reviewed the order of the High Court challenged before us, we are of the view that the issue for resolution before this Court is whether the Decree in Revision of the High Court, Matuma J. dated 13.05.2020 was an interlocutory relief or it was a final decree. After answering that question, the order we will make in respect of the objection raised on behalf of the respondent will have become obvious and easy to pronounce.

We now turn to examine both statutory and case law on the point raised by counsel, and as the central axis around which their submissions kept oscillating is section 5(2)(d) of the AJA, we will start with that provision. The section provides that:

> *"(2) Notwithstanding the provisions of subsection (1)-*
>
> *(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court* ***unless such decision or order has the effect***

of finally determining the suit." [Emphasis added].

It is important first to make our position clear on what does the term "suit" mean in the above section of the AJA as any obscurity on its contextual meaning could result in yet another confusion as we proceed. This Court in **Tanzania Motor Services Ltd v. Mehar Singh t/a Thaker Singh**, Civil Appeal 115 of 2005 (unreported), adopted a wider definition of the word *"suit"* to include all proceedings where parties are asserting their rights which are disputed by their counterparts in a court of justice. The Court quoted with approval a definition of the term "suit" from the Law Lexicon, Encyclopedia & Commercial Dictionary, 2002 (reprint) at page 1831 and construed the term to include a petition for staying proceedings in the High Court pending reference of the dispute to arbitration. According to that Dictionary:

> *"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding is a suit."*

In our considered view, as the respondent was asserting his statutory right of revision available to him under rule 28 of the Labour Court Rules, without any further ado, we affirm that the proceedings before Matuma J. in the High Court were "a suit" in the context of section 5(2)(d) of the AJA and for purposes of this ruling.

Next is, was the Decree in Revision that the High Court passed in the proceedings before it, interlocutory or it was final?

In **Seif Sharif Hamad v. S.M.Z.,** [1992] TLR 43, it was held that this Court has no jurisdiction to entertain an appeal challenging an interlocutory order. The Court further adopted the definition of the phrase "*interlocutory order*" from Blacks Law Dictionary (4th Edition) to mean:

> *"An order which decides not the cause, but settles some intervening matter relating to it."*

The 9th Edition of the same dictionary uses different words to derive the same understanding, it defines an "*interlocutory order*" to mean:

> *"An order that relates to some intermediate matter in the case, any order other than the final."*

In our view, what the above definitions entail, is that the orders that do not completely dispose of all issues of law and fact that were presented to the court are interlocutory decisions or orders; and the proceedings from

which they emanate, interlocutory proceedings. Such orders, under the law of this country are not appealable to this Court in view of section 5(2)(d) of the AJA quoted above.

In **JUNACO (T) Limited and Justin Lambert v. Harei Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016, (unreported) this Court having discussed the same issue (how to detect whether an order is interlocutory or final) in **Murtaza Ally Mangungu v. The Returning Officer of Kilwa and two Others,** Civil Application No. 80 of 2016 and **Peter Noel Kingamkono v. Tropical Pesticides Research,** Civil Application No. 2 of 2009 (both unreported) and seeking to answer the same, it stated that:

> *"In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply* ***"the nature of the order test".*** *That is, to ask oneself whether the judgement or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*
>
> [Emphasis added].

Before getting any further, we subscribe to the appropriate pronouncement of law in the above quotation, which requires that in order to determine whether the order is interlocutory or final, the test applicable is *"the nature of the order test".* In this matter we will apply the very test in determining whether the order of the High Court was interlocutory or it was final. After determining that issue, the rest will be simple.

It is significant at this point in the context of the decision in **Augustino Masonda v. Widmel Mushi,** Civil Application No. 383/13 of 2018 (unreported), where while discussing the sole import of section 5(2)(d) of the AJA, the Court stated:

> *"That section (5(2)(d) of the AJA), as already hinted at the beginning of this ruling, prohibits appeals and applications for revision from interlocutory orders of the High Court which do not have the effect of* ***finally and conclusively disposing matters before that court."***
>
> [Emphasis added].

We added emphasis in the above quoted part of the decision of this Court in order to underscore the importance of the venue of where the rights of parties must be conclusively determined. In our case, the

conclusiveness of the order must be at the High Court and not before any other fora.

Now back to the *"the nature of the order test".* That test requires answers to more or less two questions in the context of the matter before us; **one,** what were the remedies that were sought or the rights that the respondent was seeking to enforce or obtain from the High Court? And **two,** were all such rights or remedies conclusively determined by the High Court or there are certain matters in relation to the same rights that remained pending for determination at the High Court? In terms of the "nature of order test", if the answer to question **two** is that everything at the High Court was finally and conclusively wound up, the decree in revision will be a final decree and the bar at section 5(2)(d) of the AJA will not apply. Conversely, if the decree in revision by the High Court left an issue or issues ***at the same court*** (the High Court) undetermined, then the decree in revision is an interlocutory order and this Court will not have jurisdiction to determine the present appeal in view of section 5(2)(d) of the AJA.

The above is the substance, in our view, of the *"the nature of the order test"* which has been applied in many decisions of this Court

including **Murtaza Ally Mangungu** (supra), **Seif Sharif Hamad** (supra), **Peter Noel Kingamkono** (supra) and **Augustino Masonda** (supra). Other relevant decisions in which the test was applied are **Vodacom Tanzania Public Limited Liability Company v. Planetel Communications Limited,** Civil Appeal No. 43 of 2018 and **MIC Tanzania Limited and Three Others v. Golden Globe International Services Limited,** Civil Application No. 1/16 of 2017 (both unreported)

To make some headway, at this point it is opportune, we propose, to consider the nature of the rights or remedies that were presented to the High Court and decide whether they were finally and conclusively disposed of or they were not.

The application for revision which was filed by presenting the notice of application and the chamber summons and determined by the High Court was preferred under, rules 24 and 28 of the Labour Court Rules. Whereas rule 24 provides for the procedure of how to present applications to the High Court, rule 28(1) creates a right for a person who feels aggrieved or dissatisfied with an order or orders of the CMA to file an application for revision to the High Court. Rule 28(1) of the Labour Court Rules provides:

"28. The Court may, on its own motion ***or on application by any party*** *or interested person, call for the record of any proceedings which have been decided by any responsible person or body implementing the provisions of the Acts and in which no appeal lies or has been taken*

thereto, and if such responsible person or body appears-

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to eexercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally

or with material irregularity; or

(d) that there has been an error material to the merits of the subject matter before such responsible person or body involving injustice,

(e) ***the Court may revise the proceedings and make such order as it deems fit: Provided that, any party to the proceedings or otherwise likeiy- to be adversely affected by such revision shall be given an opportunity to be heard."***

[Emphasis Added]

The above provision therefore creates a right in favour of any party to the proceedings in the CMA to apply for revision of the order of the CMA to the High Court. In this case we indicated earlier that right or remedy that the respondent was seeking from the High Court was to "*call and*

examine the records of the Labour Dispute No. CMA/KIG/DISP/99/2019 of the Commission for Mediation and Arbitration for Kigoma and be pleased to revise the same accordingly". It is our considered position that that was the right or remedy which the respondent was moving the High Court to resolve or to grant him. Luckily, the court held in his favour. It revised the order of the CMA and ordered it to hear parties on the substantive matters that they had earlier presented before it. In our view, as far as the High Court was concerned, it delt with all rights sought before it and granted the remedies. To us, there is no issue pending in the High in respect of Labour Revision No. 06 of 2020 and neither did Mr. Aliki nor Mr. Nyoni point to us any aspect of either law or fact that remained undetermined in the High Court.

There is one point involving the characters or differences of the matters we have in focus; that pending in the CMA and the revision which is now closed in the High Court. It is significant that we say something in that line as it appears, it was because of the mix up of the two that Mr. Aliki submitted to us the way he did.

The point is; the complaint of the respondent in the CMA is completely different from the revision he filed in the High Court. The

remedies expected from orders of the CMA are different from remedies that were sought and obtained from the High Court. Whereas the CMA was being asked to order compensation founded on allegations of unfair termination, in the High Court, the respondent was seeking revision orders of the CMA, founded on statute. Literally, the claim in the CMA had no and has no relation with what the High Court was being asked to order, meaning that the fact that the CMA has not heard and finally determined the issues that were presented to it does not mean that the High Court too, has not heard to finality matters that were presented before it.

As for the submission of parties, starting with Mr. Aliki, his view was that because the dispute before the CMA has not been heard on merits, then the decree in revision that was passed by the High Court is interlocutory. We have amply demonstrated that the High Court was handling revision proceedings commenced by the respondent and not interlocutory proceedings. The application before the High Court was fully heard and conclusively determined leaving nothing behind for determination before it. As there is nothing pending in the High Court in the aftermath of Matuma J.'s decree in revision at the High Court, we

dismiss the argument by Mr. Aliki and hold that the order of the High Court was a final decree.

On his part Mr. Nyoni, submitted that as the appellant had a right to appeal under section 57 of the Labour Institutions Act on a point of law and rule 54 of the Labour Court Rules, it is immaterial that the order is interlocutory or final. According to him on both occasions, the order is appealable notwithstanding the provisions of section 5(2)(b) of the AJA. We will start with section 57 of the Labour Institutions Act, which provides that:

> *"Any party to a proceeding in the Labour Court may appeal against the decision of that Court to the Court of Appeal on a point of law only."*

Rule 54 of the Labour Court Rules provides:

> *"Subject to the provisions of section 57 if the Act, any appeal to the Court of Appeal of Tanzania shall be in conformity or as nearly as possible with the provisions of the Tanzania Court of Appeal Rules 1979."*

With respect to the learned Principal State Attorney, we have failed to read anything in the above section and rule which has the effect of permitting appeals in labour matters to the Court of Appeal challenging

interlocutory orders. The case of **Tanzania Teachers Union** (supra) held that appeals under section 57 of the Labour Institutions Act, do not require leave under section 5(1)(c) of the AJA. We neither located nor did Mr. Nyoni indicate to us any part of that judgement where it was held that appeals under section 57 of the Labour Institutions Act, need not comply with the requirements of section 5(2)(d) of the AJA. We therefore do not agree with counsel that the above provision (section 57) creates a special privilege in favour of losers in labour matter before the High Court to appeal to this Court in disregard of section 5(2)(b) of the AJA. That practise came to an end in 2002 when Act No. 25 of 2002 was passed among other provisions introducing the above provision of the AJA to restrict appeals and applications for revision challenging preliminary and interlocutory decisions leaving behind the main proceedings in the High Court.

In view of the foregoing, we have no hesitation to hold that the decree in revision which was passed in Labour Revision No. 06 of 2020 before the High Court at Kigoma, is a final decree of that court and not an interlocutory decree or order. We accordingly overrule the objection raised and under Rule 38A (1) of the Rules, we adjourn hearing of this appeal

which we find to be competent before the Court to a future date to be fixed by the Registrar.

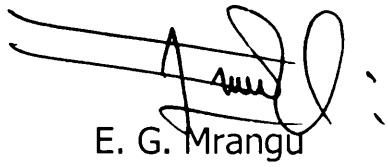
DATED at **KIGOMA**, this 16th day of July, 2021

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This judgment delivered this 15th day of July, 2021 in the presence of Mr. Raymond Kimbe, learned State Attorney for the Appellant and Mr. Sadiki Aliki, learned counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL