

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 272 OF 2019

GENERATOR LOGIC.....APPELLANT

VERSUS

ELI MUKUTA.....RESPONDENT

**[Appeal from the decision of the High Court of Tanzania, (Labour Division)
at Dar es Salaam]**

(Wambura, J.)

dated the 16th day of October, 2018

in

Revision No. 285 of 2017

RULING OF THE COURT

18th February, & 16th March, 2022

KITUSI, J.A.:

The respondent obtained an ex parte award before the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.1248/16, against the appellant his former employer. The appellant applied to the High Court, Labour Division for an order of revision of that award, but that application was struck out upon the High Court sustaining a point of preliminary objection that had been raised by the respondent. The point of preliminary objection was that the High Court had no jurisdiction over the matter.

Before the High Court, the parties had contending views as to how should a party assail an ex parte award. The respondent who had services of Mr. Byabusha learned advocate, submitted that the applicant had recourse to section 87 (5) of the Employment and Labour Relations Act, Cap 366 P.E 2019 (ELRA) by applying before the CMA to set aside the ex parte award. On the other hand, Ms. Asia Charli, learned advocate for the applicant, maintained that in terms of section 70 (2) of the Civil Procedure Code Cap 33 (CPC) a party has the right of appeal against an ex parte award.

The High Court (Wambura, J) struck out the application for revision, holding that the CPC was inapplicable on the issue because there is a provision under the ELRA, section 87 (5), that regulates applications for setting aside ex parte awards. But the appellant is still at it and has appealed to us, only to face another point of preliminary objection, the subject of this ruling. The point is: -

"1. That the impugned order of the High Court is not appealable".

The respondent appeared in person at the hearing, armed with very short written submissions drawn and lodged by Mr. Byabusha, well

ahead of the date of hearing. When he was invited to address us, the respondent just adopted them. However, these submissions lodged on 16th December, 2019 may not be of use in substantiating the point of objection raised on 27th January, 2020. On reading the submissions, they clearly address the merits of the decision of Wambura, J, and say nothing on the competence of the appeal before us, which is relevant to the instant issue.

Mr. Nazario Michael Buxay, learned advocate for the appellant, pointed out that section 87 (5) of the ELRA uses the words “may apply to have the ex parte award set aside” and proceeded to argue that the provision is only permissive. The learned advocate went on to argue that since the provision is permissive, there is also room for a party to apply for revision. He insisted on the application of section 70 (2) of the CPC and cited Mulla Code of Civil Procedure and the case of **Jaffari Sanya Jussa and Ismail Sanya Jussa v. Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 (unreported), for the principle that a party may appeal or apply for a review or revision or for setting aside an ex parte order.

In a one-liner rejoinder, the respondent submitted that as matters now stand, the ex parte award has been partly satisfied.

In resolving the point of objection, we will not cast our net wider than it is necessary, and without mincing words, we think the appellant is in a wild goose chase. The issue is whether the order of Wambura J, striking out the application for revision, is appealable.

We think the last two paragraphs of the Court's order are relevant for our determination of this point. We reproduce that part: -

*"Again, even if the provisions of the Civil Procedure Code would be applicable then again, the best procedure within the Civil Procedure Code would be to set aside the same under order 9 Rule 13 of the same, section 70 (2) of the Civil Procedure Code **is in actual fact optional.***
*In the circumstances, the preliminary objection herein raised is upheld. **Matter is struck out for being prematurely filed before this court**".*

Although the notice of preliminary objection (PO) is not elaborate nor are the respondent's scanty submissions, we are certain that he intended to attack the appeal as being from an interlocutory order.

Appeals against interlocutory orders are barred by section 5 (2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) which provides:-

"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".

In view of that provision of the law, the narrower question is whether the order of Wambura J, has the effect of finally concluding the rights of the parties. Over the years, case law has made this task easier for us. This is because case law has defined what an interlocutory order is and what it means by an order being final.

In **Murtaza Ally Mangungu v. The Returning Officer for Kilwa North Constituency and 2 Others**, Civil Application No. 80 of 2016, (unreported) after citing our unreported decision of **Peter Noel Kingamkono v. Tropical Pesticides Research**, Civil Application No. 2 of 2009, the Court stated: -

"From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties.

That means that the order or decision must be such that it could not bring back the matter to the same court".

In the instant case, the impugned order did not slam the door on the appellant's face completely, but observed that the appellant's application was premature. We have recently taken a similar position in **Celestine Samora Manase & 12 Others v. Tanzania Social Action Fund & Another**, Civil Appeal No. 318 of 2019 and; **Khadija Lumbi v. Tanzania Revenue Authority**, Civil Appeal No. 240 of 2019 (both unreported).

We shall avoid discussing Mr. Buxay's argument that section 70 (2) of the CPC applies, because that would only have come if the appeal had been properly before us. Even then, it escapes us why the learned counsel called the case of **Jaffari Sanya Jussa** (supra), to his aid.

The following excerpt from that decision does not support the appellant's mission, in our view: -

"It is our settled view that one should only come to this Court as a last resort after exhausting all available remedies in the High Court.

We think that sequence is orderly, logical and avoids confusion and duplication of litigation, as was the case here".

The above paragraph is more or less the same as what we recently stated in **Celestine Samora Manase & Others**, (supra):-

*"Perhaps as we conclude, it would be helpful to recall what we said in **Paul A. Kweka** (supra) as the rationale of the bar to appeals against interlocutory decisions:*

*"**Firstly**, it promotes an expeditious administration of justice, that it ensures timely justice, at the same time making access to justice affordable that is less costly. **Secondly**, and more importantly, it affords both parties in the case, equal opportunity to be heard at the full trial".*

We need not say more. It is our conclusion that the appeal attempts to challenge an interlocutory decision of the High Court against the dictates of section 5 (2) (d) of the AJA. It is therefore improperly

before us so we strike it out, with no orders as to costs because the matter arises from an employment cause.

DATED at DAR ES SALAAM this 11th day of March, 2022.


G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of March, 2022 in the presence of the Ms. Josepha Tewa and Ms. Agness Ndusyepo, both learned counsel for the appellant also hold brief of the Respondent, is hereby certified as a true copy of the original.




H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL