IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 21 OF 2017

MASOLWA D. MASALU .... APPELLANT

VERSUS

THE ATTORNEY GENERAL.. 1ST RESPONDENT

DISTRICT EXECUTIVE DIRECTOR

MBOZI DISTRICT COUNCIL .... 2ND RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Nyerere, J.)

Dated the 18th day of November, 2016
in
Labour Cause No. 325 of 2016

....

JUDGMENT OF THE COURT

13th September, 2021 & 10th February, 2022

WAMBALI, J.A.:

The appellant, Masolwa D. Masalu was an employee of the second respondent, the District Executive Director Mbozi District Council, as Principal Supplies Officer II. It transpired that sometimes in the course of his employment the appellant was transferred from the second respondent's office at Mbozi to Tunduma Township Authority because of misconduct allegations levelled against him. The allegations included soliciting bribe, having love affair with a fellow employee and giving false information to different government institutions against the second respondent.

Following the allegations, the second respondent conducted disciplinary proceedings against the appellant which in the end he was found guilty of insubordination and giving false information. Consequent to the findings of the disciplinary proceedings, he was terminated from employment by the second respondent on 17th November, 2009.

It is in the record that the appellant was aggrieved by the outcome of the disciplinary proceedings. The thrust of the appellant's displeasure was based on the contention that he was condemned unheard because the disciplinary proceedings were conducted in his absence as he was not summoned to appear at the hearing to defend the allegations. He thus appealed to the Public Service Commission (the Commission). As it were, in its determination, the Commission annulled the decision of the second respondent and ordered the immediate reinstatement of the appellant.

The second respondent was equally displeased by the decision of the Commission and thus she appealed to the President of the United Republic of Tanzania in accordance with the requirement of the law. The said appeal was allowed by the President, in which the decision of the second respondent was confirmed and that of the Commission quashed.

It is noteworthy that according to the record of appeal, though the decision of the President was delivered on 6th December, 2015 and the appellant seemed to have been aggrieved, he did not seek the prescribed legal remedy within the period provided by law. In this regard, on 18th August, 2016 through Miscellaneous Labour Cause No. 325 of 2016 he filed an application seeking three orders: first, extension of time within which to file an application for leave to apply for prerogative orders of certiorari and mandamus; second, leave to apply for certiorari to quash the decision which confirmed the appellant's termination from employment; and third, leave to apply for mandamus to compel the second respondent to reinstate the appellant as ordered by the Commission.

The appellant's application, however, encountered a notice of preliminary objection that was lodged by the respondents comprising three points of law. It is on record that during the hearing of the preliminary points of objection the respondents' counsel added another point of law to the effect that the appellant's application was incompetent for citing non existing law in the legal system. The respective point was considered by the High Court judge and in the end it was sustained leading to the striking out of the application. Consequently, the High Court did not deem it appropriate

to consider the respondents' other points in the notice of preliminary objection.

The decision of the High Court striking out the appellant's application aggrieved him. In the circumstances, he has approached the Court advancing two grounds of appeal premised on the following complaints: -

1. *The trial judge erred in law in holding that the application is incompetent in court for being brought under a non-existing law while there was other correctly and properly cited enabling provisions of the law to sustain the application.*
2. *The trial judge erred in law in holding that the applicant omitted to cite rule 56 of the Labour Court Rules, 2007, GN No. 106 of 2007 which is the only provision empowering the court to abridge or extend time, without hearing the appellant while there was a properly cited provision of the Law of Limitation Act.*

When of the appeal was called on for hearing before us, the appellant was represented by Mr. Odhiambo Kobas, learned counsel, while the respondent enjoyed the services of Mr. Benson Hosea, Ms. Lillian Machagge and Ms. Rehema Mtullya, all learned State Attorneys. It is noted that counsel for the parties prayed to adopt their respective written submissions for consideration of the Court in determining the appeal.

However, on our part, having scrutinized the nature of the order of the High Court in which the application was struck out for being incompetent, we requested counsel, in addition to the submissions for and against the grounds of appeal, to also address us on whether the instant appeal is properly before the Court.

Admittedly, the response from Mr. Kobas, learned advocate, on this issue was quick and brief. Basically, he submitted that though the appellant's application was struck out and not dismissed, the right of appeal against the decision of the High Court to this Court exists in terms of section 57 of the Labour Institutions Act, Cap. 300 (the LIA). He explained further that the right of appeal also exits because the High Court raised *suo motu* in the course of composing its ruling on the issue of non-citation of Rule 52 of the Labour Court Rules, 2007. He argued that the High Court decided that the said rule is a proper provision of the law to grant an application for extension of time without giving the parties right to be heard as complained by the appellant in the second ground of appeal. In the premises, Mr. Kobas urged us to find that the appeal is properly before the Court and proceed with the hearing and determination on merits.

In reply, Mr. Hosea, learned State Attorney who addressed us on behalf of his colleagues submitted that the appeal is incompetent because

the impugned ruling and order of the High Court did not determine the rights of the parties since the application was not dismissed but simply struck out for non-citation of the proper provisions of the law. In his opinion, in view of the nature of the order, if the appellant wanted to appeal on a point of law as contended by Mr. Kobas, he ought to have sought leave of the High Court or this Court to do so in terms of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA). He added that, the order sought to be appealed against does not fall within the provisions of section 5 (1) (a) and (b) of the AJA, which would have entitled the appellant to appeal as of right. Besides, he argued, section 57 (1) of the LIA cannot apply in the circumstances of this appeal to entitle the appellant to appeal as of right because the High Court did not deal with the case or application that emanated from the Labour legislations. On the contrary, he stated, the application before the High Court was for extension of time within which to lodge an application for leave to apply for prerogative orders of certiorari and mandamus which falls within the provisions of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002 (Now R.E. 2019). More importantly, he emphasized, the respective application was not determined on merits by the High Court but it ended in being struck out for being incompetent.

In the event, the learned State Attorney submitted that the appellant's appeal is incompetent for not being properly before the Court and urged us to strike it out with costs.

At this juncture, we think the issue for determination is whether the instant appeal which emanates from the ruling and drawn order of the High Court striking out the application is properly before the Court.

It is noteworthy that the drawn order included in the record of appeal simply indicates that "the application is struck out". However, our close scrutiny of the relevant part of the reasoning in the ruling of the High Court which led to the decision of striking out of the application is couched in the following terms: -

> *"Therefore the fact that applicant counsel in his application cited sections 51 and 52 of the Labour Relations Act, No. 7/2004 which is non-existence law in our legal system purporting to be Labour Institutions Act, No. 7/2004 renders the application incompetent before the Court. And further to that this Court noted suo mottu applicant omitted to cite Rule 56 of the Labour Court Rules G.N. 106/2007 which is the only provision which empowers this Court to abridge or extent time. The Law of Limitation cited by applicant is inapplicable law.*

Labour Court has its own procedural law which a party seeking redress must comply with".

After that reasoning the learned High Court judge then made reference to and reproduced part of the decision of the Court in **Citibank Tanzania v. Tanzania Telecommunication Company Limited and Others,** Civil Application No. 64 of 2003 (unreported) in respect of the consequences of non - citation of the proper provision of the law and proceeded to state as follows: -

> *"Guided by the above focused finding of the Court of Appeal,* ***this Court is ieft with no option than to find this application incompetent for non-citation of the enabling provision of the law.*** *Also this court finds no need to focus on the other grounds of the preliminary objection as the raised ground during hearing suffices to dispose of the application. In the end result this application is hereby struck out for the defects elaborated above".*
>
> *[Emphasis Added]*

It is clear to us that from the reproduced part of the ruling of the High Court, the main reason for striking out the appellant's application for extension of time within which to lodge an application for leave to apply for prerogative orders and other associated prayers was based on the conclusion that there was non-citation of the enabling provisions of the law.

We are however alive to the argument of Mr. Kobas that the appellant has a right of appeal because; firstly, the issue of non-citation of Rule 56 of the Labour Court Rules, 2007 was raised *suo motu* by the High Court in the course of composing the ruling without giving the appellant the right to be heard and, secondly, that the right of appeal exists in terms of section 57 of the LIA. Nevertheless, we think the counsel's arguments are misplaced because at this point our focus is not on the complaint in the second ground of appeal, but on the major reason for striking out the appellant's application. This is so because: firstly, according to the part of the ruling of the High Court which we have reproduced above, the thrust of the High Court's order striking out the application was due to non-citation of the enabling provisions of the law.

Secondly, section 57 of the LIA provides for an outright right of appeal on points of law only in cases where the High Court, Labour Division exercising original jurisdiction has finally determined the rights of the parties by either granting the reliefs sought or dismissing the claims. For clarity, section 57 provides as follows: -

> *"57. Any party to the proceedings at the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only".*

Our examination of the record of appeal reveals that the appellant's application which was placed before the High Court had three prayers, namely: extension of time to file an application for leave to apply for prerogative orders of certiorari and mandamus; leave to apply for certiorari to quash the President's decision dated 6th December, 2016; and leave to apply for orders of mandamus to compel the second respondent to reinstate the appellant. Basically, apart from the respective application being premised under the provisions of the Law of Limitation Act, the Labour Institutions Act No. 7 of 2004 (Cap. 300), the Employment and Labour Relations Act, No. 6 of 2004 (Cap. 366) and the Labour Court Rules, GN No. 106 of 2007; all the prayers were intended to ask the High Court to deal with the reliefs and orders grantable under Cap. 310. Basically, the right of appeal to an aggrieved party emanating from the powers of the High Court under Cap. 310 is provided under section 17 (5). However, the High Court did not exercise any power under the provisions of Cap. 310 as it simply struck out the appellant's application for being incompetent.

In the circumstances, we agree with Mr. Hosea that the appellant was not entitled to appeal as of right under section 57 (1) of LIA on a point of law as argued by Mr. Kobas. In any case, given the nature of the order of the High Court which in essence struck out the appellant's application for

non-citation of the enabling provision of the law, there is no automatic right of appeal. Indeed, in view of the appellant's complaint in the second ground of appeal, since the High Court did not determine the application on merits, there is no doubt that the impugned order falls under the categories of any other orders which are not appealable as of right. Therefore, in accordance with the law, the appellant would have legally appealed to the Court after obtaining the leave of the High Court or this Court as prescribed under section 5 (1) (c) of the AJA. This is strengthened by the fact that in terms of section 52 of the LIA in performing its functions the Labour Division has the powers of the High Court.

Most importantly, in the circumstances of this appeal, since the ruling and order of the High Court did not finally determine the rights of the parties as prescribed by law, the striking out of the application for non-citation of the enabling provision of the law did not close the door to the appellant to approach the same court for redress through a properly constituted fresh application. In short, considering the nature of proceedings in the record of appeal, the ruling and order of the High Court does not give the appellant an automatic right of appeal to this Court either in terms of section 57 of the LIA or section 17 (5) of Cap. 310.

In this regard, we are settled that the appellant was bound to return to the High Court for a fresh application if he wished as the previous application, whose ruling is a subject of this appeal, was struck out and not dismissed.

At this juncture, we wish to reiterate what the Court stated in **Joseph Mahona @ Joseph Mbije @ Maghembe Mboje and Another v. The Republic,** Criminal Appeal No. 215 of 2008 (unreported) that: -

> *"In the instant case, the matter before the High Court was not dismissed but struck out. That implies according to* ***Ngoni Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman*** *[1959] 1. E.A. 577 the matter was incompetent which means there was no proper application capable of being disposed of.* ***The established practice is that the applicant in an application which has been struck out is at liberty to file another competent application before the same court before opting to appeal as it has appeared in this appeal".*** *[Emphasis Added]*

To this end, we think that the above observation equally applies in the instant appeal. In the event, we agree with the submission of the respondents' counsel that the instant appeal is not properly before the Court because it is incompetent. In the result, though we heard oral and written

submissions of the counsel for the parties for and against the appeal, we do not deem it appropriate to deliberate and determine the two grounds of appeal.

Consequently, we strike out the appeal. However, having regard to the nature of the appeal before us, we make no order as to costs.

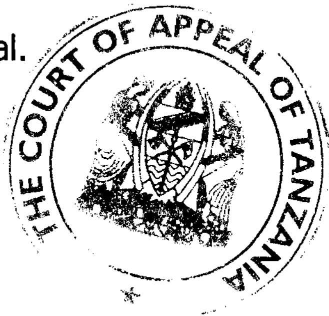
DATED at **DAR ES SALAAM** this 4th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 10th day of February, 2022 in the presence of appellant in person and Mr. Benson Hosea, learned State Attorney for the respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL