

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

(CORAM: WAMBALI, J.A., SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 270 OF 2020

GODWIN BENARD KAGARUKI.....APPELLANT

VERSUS

- 1. THE HON. PRESIDENT OF THE UNITED
REPUBLIC OF TANZANIA**
- 2. THE PERMANENT SECRETARY
PUBLIC SERVICE**
- 3. THE PUBLIC SERVICE COMMISSION**
- 4. THE HON. ATTORNEY GENERAL**
- 5. DIRECTOR, ILALA MUNICIPAL COUNCIL**
- 6. MUNICIPAL COUNCIL OF ILALA**

.....RESPONDENTS

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania,
Main Registry at Dar es Salaam)**

(Masoud, J.)

**Dated the 30th day of March, 2020
in
Misc. Civil Application No. 27 OF 2019**

RULING OF THE COURT

23rd March & 5th April, 2022

KIHWELO, J.A.:

This is an appeal in which the appellant, Godwin Benard Kagaruki is seeking to challenge the Ruling and Drawn Order of the High Court of Tanzania, Main Registry at Dar es Salaam (Masoud, J.) in Miscellaneous Civil Application No. 27 of 2019 dated 30.03.2020.

The brief background leading to the instant appeal may be recapitulated as follows; the appellant was employed by the 5th Respondent in the capacity of Assistant Medical Officer from 2006 up to and including 29.07.2015 when the appellant's employment contract was terminated by the 5th Respondent for the reasons to be explained shortly. The appellant, while still under the employment of the 5th Respondent on 29.08.2014, he entered into contract with the Permanent Secretary, Ministry of Health and Social Welfare to work as a Consultant in Monitoring and Evaluation Assistance for Basic Health Services Project in Katavi and Rukwa Regions. As a pre-requisite on 27. 07. 2014 the appellant sought leave without pay to the Permanent Secretary, Public Service Management and on 24.10. 2014 he was granted eleven months from 01.07.2014 to 31.05.2015.

Upon completion of his contract the appellant on 20.07.2015 reported back to work. Thereafter, the appellant was subjected to disciplinary proceedings for his failure to report back to work on 31.05.2015 when his leave without pay came to an end. After due process of the disciplinary proceedings, the appellant was found guilty as charged and accordingly, he was dismissed from employment. His attempt to protect his innocence before the Public Service Commission met a dead end as his appeal was dismissed.

Undeterred, he further preferred an appeal to the first respondent who upheld the appellant's dismissal. Still disgruntled, the appellant knocked the doors of the High Court in pursuit of justice. Because the appellant failed to lodge the application before the High Court in time, he filed an application predicated under section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2002 (now R.E. 2019) before the High Court seeking to move the court to enlarge time within which to lodge the application for leave to apply for orders of certiorari and mandamus against the decision of the first respondent. Upon hearing the parties, the High Court (Masoud, J.) found that the appellant failed to provide materials disclosing good cause for the court to exercise its discretion to extend the time. Consequently, the application was dismissed. Unhappy, the appellant has come to this Court by way of appeal.

The appellant has fronted three grounds of complaints which however, for reasons that will become apparent shortly, we do not intend to reproduce them.

When the appeal was called for hearing before us, Mr. Juvenalis Motete, learned advocate appeared, representing the appellant whereas, Mr. Edwin Joshua Webiro and Mr. Hussein Kambi both learned State Attorneys

appeared for the respondents.

But before the appeal could proceed to hearing in earnest, and as a rule of practice, the Court had to contend with the preliminary point of objection, notice of which had earlier been lodged by the respondents, under rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 as amended. The notice of preliminary of objection was to the effect that:

"The appeal is incompetent for want of leave and thus contravening the mandatory provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141."

Upon the respondents being asked to take the floor and expound their preliminary point of objection, Mr. Webiro very briefly and meticulously contended that the appellant in the instant appeal has lodged this appeal without first seeking and obtaining leave to appeal and went on to forcefully argue that under section 5 of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 ("the AJA"), it is only appeals against decisions under subsection (1) (a) and (b) which do not require leave to appeal. Elaborating further, he went on to submit that under subsection (1) (c) every other order, decree, judgment, decision or finding require the leave of the High Court or the Court. He rounded up by contending that since leave is a mandatory requirement and because the appellant did not seek and obtain leave prior

to lodging the instant appeal, the Court lacks jurisdiction to entertain the appeal whose omission renders the appeal incompetent and liable to be struck out, he stressed. Reliance was placed in the decision of this Court in the **Organization of Tanzania Trade Union (on behalf of One Hundred and Twelve Employees of National Poultry Co. Ltd) v. Presidential Parastatal Sector Reform Commission and Others**, Civil Appeal No. 20 of 1999 (unreported) in which we emphasized that obtaining leave to appeal under section 5 (1) (c) of AJA is a condition precedent before such an appeal is entertained by this Court.

When it was his turn, Mr. Motete, learned counsel for the respondent was adamant, he insistently argued that, although the appeal before the Court has several similarities with what the learned State Attorney stated but in his strong view the present appeal arises from extension of time which falls under section 5 (2) (d) of the AJA and that the application before the High Court was for extension of time and the order finally determined the matter and therefore leave was not required.

Upon being prompted on whether the impugned order was preliminary or interlocutory upon which to rely on section 5(2)(d) of the AJA instead of section 5(1)(c) of the AJA, Mr. Motete argued that, section 5(2)(d) of the

AJA is wider enough to cater for other circumstances and implored us to find that it is applicable in the circumstances of this case and hence the preliminary objection is not meritorious and thus, it should be dismissed. He cited the case of **Attorney General v. Wilfred Onyango Mganyi @ Dadii and Others**, Criminal Appeal No. 276 of 2006 (unreported).

In rejoinder, Mr. Webiro contended that, section 5(2)(d) of the AJA sets two conditions, **one**, it bars appeal on preliminary or interlocutory decision or order and **two**, it allows appeal on interlocutory matters where the decision or order has the effect of finally determining the suit. In his strong opinion, the appeal before us does not present a similar situation and therefore, even the case which was cited is distinguishable. Mr. Webiro emphasized, and rightly so in our considered opinion that, since the impugned order does not fall within section 5 (1) (a) and (b) of the AJA and since Mr. Motete has admittedly submitted that the appellant did not seek and obtain leave, the Court has no jurisdiction to determine this appeal.

After a careful consideration of the submission of the learned counsel for the parties, the issue before us is a narrow one and that is whether the appeal is proper before the Court.

For ease of understanding the provisions of section 5 of the AJA, we think, it is appropriate to reproduce the relevant parts which provides as follows:

"5(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

- (a) against every decree including an ex-parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;*
- (b) against the following orders of the High Court made under its original jurisdiction, that is to say-*
 - (i) an order superseding an arbitration where the award has not been completed within the period allowed by the High Court;*
 - (ii) an order on an award stated in the form of a special case;*
 - (iii) an order modifying or correcting an award;*
 - (iv) an order filing or refusing to file an agreement to refer to arbitration;*

- (v) *an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
- (vi) *an order filing or refusing to file an award in an arbitration without the intervention of the High Court;*
- (vii) *an order under section 95 of the Civil Procedure Code, which relates to the award of compensation where an arrest or a temporary injunction is granted;*
- (viii) *an order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, except where the arrest or detention is in execution of a decree;*
- (ix) *any order specified in rule 1 of Order XLIII in the Civil Procedure Code or in any rule or the High Court amending, or in substitution for, the rule;*
- (c) *with the leave of the High Court or the Court of Appeal, against **every other** decree, **order**, judgment, decision or finding of the High Court.*

(2) Notwithstanding the provisions of subsection (1)-

(a) N/A

(b) N/A

(c) N/A

(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]

Clearly, section 5 (1) (a) and (b) of the AJA conspicuously specifies types of decisions which are appealable as of right while those decisions that require leave of the High Court or the Court are provided for in terms of paragraph (c) of subsection (1) of the same section. Luckily, this Court has had occasion to pronounce itself on this issue in a number of decisions. Just to mention a few they include **Tanzania Breweries Limited v. Leo Kobelo**, Civil Appeal No. 17 of 2016, **Fatuma Khatibu v. The Treasury Registrar**, Civil Appeal No. 397 of 2020 and **Hussein Shabenga Jumanne S. Makanyanga and 6 Others v. Tanzania Port Authority**, Civil Appeal No. 39 of 2009 (all unreported) in which the Court underscored that every other matter which does not fall under any of the categories provided in section 5 (1) (a) and (b) of the AJA requires leave to be applied under section 5 (1) (c) of the AJA and that lack of leave renders the appeal incompetent.

This position was also taken in the case of **Enock M. Chacha v. Manager, NMB Tarime** [1995] T.L.R. 270 where this Court faced with analogous situation and stated that:

"Under section 5 (1) (c) of the Appellate Jurisdiction Act, appeals like the present must come to this Court only with leave of the High Court. The appellant neither sought nor obtained leave to appeal to this Court. The appeal is therefore incompetent for non-compliance with section 5 (1) (c) aforesaid."

The instant appeal emanates from the decision of the High Court (Masoud, J.) which dismissed the appellant's application for enlargement of time to lodge the application for leave to apply for orders of certiorari and mandamus against the decision of the first respondent. The impugned order in our respectful opinion, was any other order which falls under section 5 (1) (c) of the AJA implying that the appellant was required to seek and obtain leave before lodging the appeal. We therefore, find considerable merit in Mr. Webiro's submission that the appellant ought to have filed an appeal to this Court subject to the leave of the High Court or this Court.

Mr. Motete on his part had urged us to find that section 5 (2) (d) of the AJA is too wide and therefore relevant in the instant appeal as well. With respect, we do not agree that invitation and in our considered opinion, we

find that argument to be erroneous and misleading. We are fortified in this view by the fact that the instant appeal did not originate from a preliminary or interlocutory order, on the contrary the impugned ruling and order of the High Court finally determined the rights of the parties on merit.

If we can digress a bit, paragraph (d) of section 5 (2) of the AJA, as amended by Act No. 25 of 2002 was introduced with the sole purpose of preventing unnecessary delays, because most interlocutory orders do not finally and conclusively determine the rights of the parties. Ideally, one has to wait until the final outcome is known and if dissatisfied, he can appeal against all the grounds including the interlocutory decision. See, for instance **Karibu Textile Mills Limited v. New Mbeya Textile Mills Limited and 3 Others**, Civil Application No. 27 of 2006 and **Mahendrakumar Govindji Mohamani t/a Anchor Enterprises v. Tata Holdings (T) Limited and Another**, Civil Application No. 50 of 2002 (both unreported). In the latter case, the Court stated that:

"The reason is to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals against interlocutory decisions or orders."

In the circumstances, and for the reasons stated earlier on which we do not find any need to repeat here, section 5 (1) (c) of the AJA is the most appropriate in the present appeal and not section 5 (2) (d) of the AJA as Mr. Motete implored us to believe.

Consequently, we sustain the respondents' preliminary point of objection. Accordingly, the appeal is struck out for being incompetent. We do not make any order as to costs since this matter originates from a labour dispute.

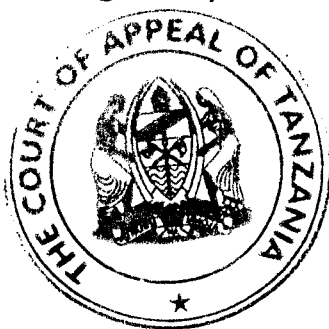
DATED at DAR ES SALAAM this 31st day of March, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered on this 5th day of April, 2022, in the absence of both parties though duly notified is hereby certified as a true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL