

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 204 OF 2018

JOSEPH DAUDI NDUNGURUAPPELLANT
VERSUS

TWIGA BANCORP LIMITEDRESPONDENT

**(Appeal from the judgment and Decree of the High Court of Tanzania
(Labour Division) at Dar es Salaam)**

(Nyerere, J.)

dated 18th day of June, 2018

In

Revision No. 373 of 2016

RULING OF THE COURT

18th March, & 21st April, 2022

LEVIRA, J.A.:

This ruling is in respect of preliminary matters raised at the hearing of the appeal by the counsel for the respondent one Innocent Felix Mushi after obtaining leave of the Court; namely, first, that the appeal was filed in contravention of section 57 of the Labour Institutions Act, Cap 300 of RE 2019 (LIA), that the grounds of appeal presented before the Court are on points of facts instead of law. Second, the TBCL Credit Policy, 2011 (the respondent's Credit Policy) which was tendered during trial is missing from the record of appeal. Mr. Amon Ndunguru,

also learned counsel appeared for the appellant at the hearing of this appeal.

Before we deal with the above matters, we find it pertinent to provide albeit briefly the background of the current appeal. The appellant, Joseph Daudi Ndunguru was employed by the respondent, Twiga Bancorp Limited as a Credit Officer and later was promoted to a post of Acting Chief Executive Officer. However, he entered in a labour dispute with his employer on the allegation of negligence and gross misconduct. Therefore, his employment was terminated. Aggrieved by the termination, he filed a labour complaint with the Commission for Mediation and Arbitration (the CMA) vide Labour Complaint No. CMA/DSM/KIN/352/15/662 suing his employer for unfair termination. Upon hearing of the parties, the CMA gave its award in favour of the appellant. The respondent was not satisfied with that award and thus it successfully appealed to the High Court. In its decision, the High Court found that the appellant's termination was justifiable under the law. As a result, the appeal was allowed, the CMA award was quashed and set aside. The appellant was aggrieved by the decision of the High Court and has filed in this Court three grounds of appeal, subject of the objection and current ruling as follows: -

1. That in the absence of proof of any loss, the learned Honourable Judge erred in law and fact in holding that the appellant committed gross negligence amounting to gross misconduct.
2. That in the absence of evidence as to the status of the property known as Plot No. 154 Block 4 Mbweni Mpiji, Kinondoni Municipality, Dar es Salaam held under certificate of title No. 65386, the learned Judge erred on the law and in fact in holding that the appellant committed the misconduct of gross negligence, hence a valid reason for termination.
3. That as the Commission for Mediation and Arbitration had found that the reason for termination was unfair, the honourable Judge erred on law in faulting the commission's order for reinstatement.

As intimated above, this appeal is attacked by the counsel for the respondent in two grounds, that the grounds of appeal are not based on points of law as required and that the record of appeal is incomplete. Submitting in support of the first point, Mr. Mushi stated that this appeal was filed in contravention of section 57 of the LIA which requires appeal from the High Court to the Court to be on points of law only. He argued that the grounds of appeal presented by the appellant are not points of law rather they are points of facts which require the Court to dig into

the evidence adduced at the CMA. As such, he said, the appeal lacks the ingredients stipulated under section 57 of LIA.

Regarding the missing record, Mr. Mushi submitted that the appellant has not included in the record of appeal the respondent's Credit Policy which is a very important document in the determination of this appeal. However, he intimated that the second point he raised is curable as the appellant may be allowed to file a supplementary record of appeal. He thus pressed on the first point and prayed for the Court to strike out the appeal because it lacks qualifications.

In reply, Mr. Ndunguru submitted that the Memorandum of Appeal was filed by the appellant who is not a lawyer. However, he said, the appellant raised a point of law regarding proof of a case. He clarified by stating that during hearing of the case, there was no evidence which was tendered to prove allegations against the appellant. He argued, the respondent had a duty to show how the dispute had occurred during hearing of the case, which he did not perform. Regarding the second ground of appeal, the learned counsel submitted that the appellant is still insisting on the evidence that the same was supposed to be considered during judgment writing.

As far as the third ground of appeal is concerned, Mr. Ndunguru stated that his submission on the first and second grounds of appeal suffices. He thus prayed for the Memorandum of Appeal to be considered as proper one and the hearing of the grounds of appeal to take place.

Submitting on the second preliminary point regarding the missing record, the learned counsel argued that the respondent is the custodian of the said missing record. Therefore, it is the respondent who was supposed to bring that document to the Court and not the appellant. However, he prayed for leave of the Court under Rule 99(1) of the Rules to file supplementary record of appeal. Upon being asked why making prayer under that Rule, his response was that since the issue regarding missing document was raised by the counsel for the respondent, the appellant turns to be the respondent.

The counsel for the respondent reiterated his submission in chief when accorded the opportunity to make rejoinder.

Having heard submissions by both sides, we think, the main issue for our determination will base on the second preliminary matter. As intimated above, the counsel for the respondent brought to our attention that the record of appeal is incomplete for omission by the

appellant to include a copy of respondent's Credit Policy. The counsel for the appellant conceded to the raised point and prayed under Rule 99(1) of the Rules to file supplementary record of appeal. We have thoroughly perused the record of appeal and we agree with the counsel for the parties that the respondent's Credit Policy which was tendered as exhibit TB2 before the CMA is missing from the record of appeal. We think, the said document is relevant to the determination of this appeal. Therefore, we accede to the prayer by the counsel for the appellant though under a different Rule to be cited shortly.

As regards the first issue whether the appellant's grounds of appeal are based on points of law or not, we do not think that it will be appropriate to determine it while the record of appeal is incomplete. It is our considered opinion that our determination of this issue may encroach in determining the appeal itself while we do not have complete record at hand. We say so because the misconduct allegedly committed by the appellant is mostly based on non-observance of the provisions of the respondent's Credit Policy which is omitted from the record of appeal. The law is now settled that whenever a record of appeal is incomplete, the appellant may be accorded an opportunity to file a supplementary record of appeal under the spirit of overriding objective

principle. We decided so in a number of cases, for instance in **Gurmit Singh v. Meet Singh & Another**, Civil Appeal No. 256 of 2018 (unreported). The counsel for the parties were at one that under the circumstances of the matter at hand, the only viable option is to accord the appellant such opportunity to file supplementary record of appeal. On our part, we do not have any justifiable reason to decide otherwise.

Consequently, in terms of Rule 96 (7) of the Rules, the appellant is granted leave to file supplementary record of appeal to include copy of the TBCL Credit Policy 2011 within thirty (30) days from the date of delivery of this Ruling. Hearing of the appeal shall be on a date to be fixed by the Registrar which will be communicated to the parties.

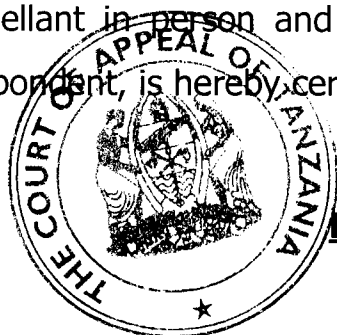
DATED at DAR ES SALAAM this 19th day of April, 2022.


R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 21st day of April, 2022 in the presence of appellant in person and Mr. Innocent Mushi, learned counsel for the respondent, is hereby certified the true copy original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL