IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPEAL NO. 484 OF 2021

JULIUS PHILIBERT SHADRACK.....APPELLANT

VERSUS

THE BOARD OF PAMBA SECONDARY SCHOOL.....1ST RESPONDENT

THE PERMANENT SECRETARY,
MINISTRY OF EDUCATION .....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

[Appeal from the Ruling of the High Court of Tanzania at Mwanza]

(Ismail, J.)

dated the 4th day of August, 2021
in
Miscellaneous Cause No. 151 of 2020

.....

RULING OF THE COURT

6th & 12th May, 2022

GALEBA, J.A.:

On 9th July, 2018, Julius Philibert Shadrack, the appellant, at the time a form two student at Pamba Secondary School, in Mwanza city, (the school) was discontinued from studies and subsequently expelled from school by the Board of Pamba Secondary School, the first respondent. The punishment was imposed following the appellant's acts of indiscipline and misconduct contrary to school regulations at the school. His first appeal to challenge his dismissal from school to the Regional Appeals Board did not succeed, it was refused and his

discontinuation from studies was confirmed. His further appeal to the Minister for Education was also dismissed, and the decision in that respect was communicated to him on 19th November 2019. He did not do anything immediately although, he was aggrieved with the decision of the Minister for Education. Later on, about thirteen (13) months later, he conceived an idea to escalate the matter to the High Court where he would apply for prerogative orders in the nature of *certiorari* moving the court to call and bring to its attention the said order of the Minister and quash it. However, as indicated above, the appellant was time barred in approaching the High Court, such that on 4th December 2020, he had first to file an application for enlargement of time as per the following prayers:

> *"1. Extension of time to file judicial review.*
>
> *2.The Honourable Court may be pleased to grant leave to apply for prerogative orders of CERTIORARI to bring and quash the decision of the respondents discontinuing the applicant from studies.*
>
> *3. Costs to follow the event.*
>
> *4. Any other relief(s) that this court may deem fit and just to grant."*

To determine the fate of the appellant's application, the High Court observed that the prayers in the chamber summons cannot be determined together in one application, because the prayers were completely different in context and called for different considerations in their resolutions. The High Court added that even if the application would have been properly before it, still there were no sufficient grounds to justify grant of the extension of time to file the intended application. As such, the High Court was quick to dismiss the application. This appeal is challenging that decision of the High Court which dismissed the appellant's application for extension of time.

The appeal is predicated on 7 substantive grounds of appeal, which however, for reasons that will become clear shortly, we will not reproduce them or even deal with them in this ruling.

At the hearing of the appeal before us, the appellant appeared in person without legal representation, whereas all the respondents had the services of a team of five learned State Attorneys led by Mr. Deodatus Nyoni, the learned Principal State Attorney assisted by Ms. Subira Mwandambo learned Senior State Attorney together with Mr. George Kalenda, Ms. Sabina Yongo and Mr. Joseph Vungwa, all learned State Attorneys.

At the outset Mr, Nyoni rose to argue a preliminary objection, notice of which had previously been given under rule 107(1) of the Tanzania Court of

Appeal Rules 2009, (henceforth, the Rules) and served it on the appellant in compliance with rule 107(3) of the Rules.

Mr. Nyoni, recited the preliminary objection he was about to pursue to be 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."*

In supporting the above point of law, Mr. Nyoni argued that the order of the High Court sought to be challenged before us falls under section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141, R.E. 2019], (henceforth, the AJA). He argued that as the order refusing extension of time to apply for prerogative orders and leave to apply for the said orders, does not fall under section 5(1) (a) or (b) of the AJA, which means obviously, the same falls under section 5(1) (c) of the AJA. To bolster his argument, he relied on the case of **Godwin Bernard Kagaruki v. The Honourable the President of the United Republic of Tanzania and Five Others,** Civil Appeal No. 270 of 2020 (unreported). In concluding his argument, Mr. Nyoni observed that the appeal, was in the circumstances of the case, incompetent and this Court had no jurisdiction to entertain it. He thus implored us to strike it out with costs, for the order challenged was appellabe, with leave of the court to do so.

In reply, the appellant submitted that at the time the decision was delivered in court on 4th August 2021, he was orally granted leave to appeal to this Court, because the judicial officer who delivered the ruling informed him that if was not in agreement with the decision he could appeal, if he wished. Then he was supplied with all the necessary documents for preparation of the record of appeal. To him that implied that he obtained leave of the High Court, and his appeal therefore, is with leave of the court. He thus, moved us to overrule the preliminary objection so that we proceed to hear the substantive appeal.

In rejoinder Ms. Mwandambo submitted that, there is nothing on record which indicates that the appellant was granted leave by the High Court before he appealed to this Court. She reiterated Mr. Nyoni's prayer to strike out the appeal with costs.

Our starting point, we propose to be the law itself. The law applicable is section 5(1) (c) of the AJA, but for an easier comprehension of what orders that are appealable with leave, one needs to know and eliminate those which are appealable as of right. The orders that are appealable as of right or without seeking any leave are provided under section 5(1) (a) or (b) of the AJA. Therefore, it is appropriate that we quote the whole of section 5(1) of the AJA in order to satisfy ourselves that indeed, the impugned decision of the High

Court does not fall within the orders listed in section 5(1) (a) or (b) of the AJA.

The whole of section 5(1) of the AJA 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 of the High Court amending, or in substitution for, the rule;

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

[Emphasis added]

Going through the above section, we are satisfied that indeed the order refusing to extend time for the appellant to file an application for leave to apply for prerogative orders and to apply for the said orders, is not one of the orders listed at section 5(1) (a) or (b) of the AJA. It follows therefore that, to challenge such an order needed procurement of leave of the High Court or of this Court in terms of rule 45(b) of the Rules. See also the case of **Godwin Bernard Kagaruki** (supra), in which it was stated that:

"*The instant appeal emanates from the decision of the High Court (Masoud J.), which dismissed the applicant'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 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."

That is exactly what the appellant was supposed to do when he lost in the High Court before he could lodge this appeal.

The above conclusion takes us to the next pertinent question, that is, did the appellant get leave as he alleged at the hearing, or he did not procure any, as was submitted by Mr. Nyoni and Ms. Mwandambo. Resolving this issue is not difficult. The appellant's point was that he was granted leave, when the judicial officer who delivered the impugned ruling told him that he had a right to appeal to this Court if he was dissatisfied with the decision. We have, however, very carefully studied the record of this appeal and we must state that what we noted at page 45 of the record of appeal, is clear that the impugned ruling was delivered by honourable C. M. Tengwa the Deputy Registrar and the proceedings on that day is as follows:

"Date; 04/08/2021
Coram; Hon. C. M. Tengwa, DR,
Applicant; Present
Respondent; Absent with notice;
B/C; J. Mhina

Court; *Ruling delivered today in the presence of the applicant.*

C. M. Tengwa

DR

04.08.2021."

Although the appellant submitted that a judicial officer who delivered the ruling granted him leave to appeal, that assertion is not supported or backed by the above record. What is reflected is only the fact that the ruling was delivered, and that is all. In any event, the judicial officer who delivered the ruling being a Registrar, he had no jurisdiction to grant leave to appeal. According to rules 45(b) and 47 of the Rules, only the High Court may grant leave to appeal or the Court, where the former refuses to grant it. We therefore do not agree with the appellant that he applied for leave to appeal and that the same was granted when the ruling was delivered. In the circumstances, we are settled in our mind that the appellant did not seek or obtain leave before he could lodge this appeal.

In law, where an appeal lies with leave, and it is lodged without it, like in the instant matter, the appeal is rendered incompetent. See **Norsad Finance Limited v. Shindika Group Limited**, [2017] T.L.R. 442 at 443, where this Court held that:

"(iii) As no leave was sought ahead of the institution of the appeal, the appeal certainly becomes incompetent."

There is therefore no gainsaying that this appeal having been lodged without first seeking and obtaining leave of the High Court or of this Court under the law, the same is incompetent. In the upshot, we uphold the preliminary objection raised by the respondents, and hereby strike out the appeal with costs.

DATED at **MWANZA** this 12th day of May, 2022

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of May, 2022 in the presence of the Appellant in person and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL