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. 318 OF 2019

CELESTINE SAMORA MANASE & TWELVE OTHERS ..... APPELLANTS

VERSUS

TANZANIA SOCIAL ACTION FUND ..... FIRST RESPONDENT
ATTORNEY GENERAL ..... SECOND RESPONDENT

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

(Wambura, J.)

dated the 21st day of June, 2019
in
Miscellaneous Labour Application No. 13 of 2019

.....

JUDGMENT OF THE COURT

18th & 24th February, 2022

NDIKA, J.A.:

By this appeal, the appellants sought to assail the ruling of the High Court of Tanzania, Labour Division at Dar es Salaam (Wambura, J.) dated 21st June, 2019 in Miscellaneous Labour Application No. 13 of 2019 setting aside an *ex parte* judgment of that court (Mipawa, J.) dated 13th May, 2016 in Miscellaneous Labour Application No. 218 of 2015. At the inception of hearing of the appeal before us on 18th February, 2022, we drew the attention of the parties to a threshold issue: whether an appeal lies against a decision of the High Court setting aside its *ex parte* judgment.

The foregoing question arises as follows: the appellants, who were employees of the Tanzania Social Action Fund ("TASAF" or simply "the first respondent"), instituted Miscellaneous Labour Application No. 218 of 2015 in the High Court against the first respondent along with the Attorney General ("the second respondent") as the necessary party seeking a determination whether under the existing labour legislation parties to a labour dispute could refer their dispute to an independent arbitrator as per their agreement instead of referring it to the Commission for Mediation and Arbitration. It occurred that the hearing of the matter proceeded *ex parte* before Mipawa, J. The learned Judge explained and justified that approach in his *ex parte* judgment, at page 36 of the record of appeal, as follows:

> *"The hearing of the application went on ex parte and by way of written submissions after the respondents, namely (to wit) TASAF and the Attorney General defaulted appearance (by failing to file) counter affidavit regardless of the fact that they were served by the applicants and it is also noted from the record that the respondents' representatives were appearing in court but did not file counter affidavit."*

Having considered the appellants' submissions, the learned Judge granted the application holding that in terms of the Employment and Labour Relations Act, 2004 (now Cap. 366 R.E. 2019) ("the ELRA") and the Labour Institutions Act, 2004 (now Cap. 300) ("the LIA") the parties could refer their dispute to an independent arbitrator of their choice in line with the terms of the agreement between them.

Resenting the aforesaid outcome, the respondents successfully moved the court (Wambura, J.) essentially pursuant to rule 38 (2) of the Labour Court Rules, 2007 and section 94 (1) (e) and (f) of the ELRA to set aside the aforesaid *ex parte* judgment on the ground that the respondents had a good cause for not appearing before Mipawa, J. on the appointed date and that they had notified the court in advance of their inability to attend the hearing.

Before us Messrs. Novatus Rweyemamu and Bernard Mbakileki, learned counsel, appeared on behalf of the appellants. Mr. Rweyemamu highlighted at a considerable length the written submissions he filed on the merits of the appeal and contended that the appeal was competent.

For the respondents, Mr. Charles Mtae, learned State Attorney, appeared along with Mr. Gerald Njoka and Ms. Kause Kilonzo, learned State Attorneys. Replying, Mr. Mtae submitted that the appeal was

incompetent on the ground that in terms of section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 ("the AJA") no appeal lies against an interlocutory decision or order lacking the effect of finally determining the matter appealed from. He backed up his contention by citing our decision in **Tanzania Posts Corporation v. Jeremiah Mwandi**, Criminal Appeal No. 474 of 2020 (unreported).

Rejoining, both Mr. Rweyemamu and Mr. Mbakileki took turns maintaining that the appeal does not fall within the web of section 5 (2) (d) of the AJA and that the justice of the matter demands that the appeal be heard and determined on the merits to allow for speedy resolution of the dispute between the parties.

It is vital and logical to begin our determination of the issue at hand by reproducing section 5 (2) (d) of the AJA:

> *"(2) Notwithstanding the provisions of subsection (1)-*
>
> *(a) to (c) [Omitted]*
>
> *(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]

The above provision has been consistently construed by the Court as having the effect of barring any appeal or application for revision against any preliminary or interlocutory decision or order of the High Court which does not have the effect of finally and conclusively determining the "suit" before the High Court – see, for instance, **Paul A. Kweka & Another v. Ngorika Bus Services and Transport Co. Ltd.,** Civil Appeal No. 129 of 2002; **Peter Noel Kingamkono v. Tropical Pesticides Research**, Civil Application No. 2 of 2009; **Murtaza Ally Mangungu v. The Returning Officer of Kilwa & Two Others,** Civil Application No. 80 of 2016; **JUNACO (T) Ltd. & Another v. Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016; and **Augustino Masonda v. Widmel Mushi**, Civil Application No. 383/13 of 2018 (all unreported).

The term "suit" referred to in the above provision has been defined so broadly to include any proceeding in a court of law in which a party is asserting rights which are disputed by the other party. The modes of proceedings may be diverse but the key feature is that the proceeding concerns an individual's pursuit of a remedy which the law affords him – see **Blueline Enterprises Limited v. East Africa Development Bank**, Civil Application No. 103 of 2003; and **Tanzania Motor Services Ltd. &**

Another v. Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005 (both unreported).

What, then, is a preliminary or interlocutory decision or order targeted by section 5 (2) (d)? In **JUNACO** (*supra*), the Court, having referred to its earlier decisions in **Murtaza Ally Mangungu** (*supra*) and **Peter Noel Kingamkono** (*supra*), answered that question so aptly as follows:

> *"In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to appiy 'the nature of the order test'. That is, to ask oneself whether the [decision] or order complained of finally disposes of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

In view of the above exposition of the law, we have to determine two issues: first, whether the matter before the High Court is a suit; and, if, indeed, it is a suit, whether the impugned decision of Wambura, J., is interlocutory.

We begin with the first issue. We stated earlier that the appellants instituted Miscellaneous Labour Application No. 218 of 2015 in the High

Court seeking a declaratory relief as to the manner of the arbitrability of their dispute with the respondents as per the agreement between them. The outcome of this matter was Mipawa, J.'s *ex parte* judgment. Arising from that application was Miscellaneous Labour Application No. 13 of 2019 instituted by the respondents for setting aside the *ex parte* judgment. It is undoubted that both matters are proceedings in which parties were pursuing certain remedies. While the first application was the main application, the second matter was an ancillary matter arising from the first application. Thus, for the purpose of section 5 (2) (d) of the Act, both matters were suits.

Coming to the second issue, we have no difficulty in answering it in the affirmative. The impugned decision of Wambura, J. in the ancillary application did not finally and conclusively dispose of the issues before the High Court because by setting aside Mipawa, J.'s *ex parte* judgment, the court essentially reopened the proceedings in respect of the main application for the parties to be heard *inter partes* and the matter to be determined on the merits. Thus, the question presented to that court by the parties on the manner of the arbitrability of their dispute remained unresolved.

As a matter of fact, we are not treading on an uncharted terrain. In **Paul A. Kweka** (*supra*), we held that an order granting an application pursuant to Order IX, rule 13 of the Civil Procedure Code, Cap. 20 R.E. 2002 (now Cap. 2019) to set aside an *ex parte* judgement is not appealable. That holding, we think, would equally apply to the impugned order, which, as indicated earlier, was made under rule 38 (2) of the Labour Court Rules, 2007.

By way of emphasis, we wish to state that we are aware that section 57 of the LIA creates a right of appeal to this Court on a point of law against any decision of the High Court, Labour Division. However, as we elaborated in **Tanzania Posts Corporation** (*supra*) cited to us by Mr. Mtae, the aforesaid provision does not have the effect of permitting appeals in labour matters to this Court against preliminary or interlocutory decisions. Simply put, the aforesaid provision does not override or supersede the peremptory proscription under section 5 (2) (d) of the Act. 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 is 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."*

All said, we are satisfied that the impugned decision granting the application to set aside the *ex parte* judgment is not appealable. This appeal against the aforesaid decision is, therefore, incompetent and we, accordingly, strike it out. We make no order as to costs bearing in mind that this matter is a labour dispute normally not amenable to awards of costs.

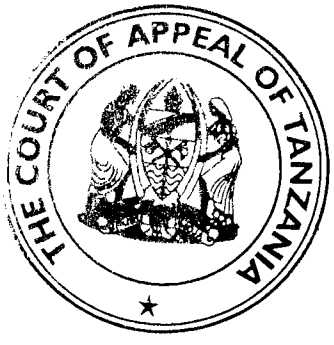
DATED at **DAR ES SALAAM** this 22nd day of February, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2022 in the presence of Mr. Novatus Rweyemamu assisted by Mathias Kabengwe, learned counsel for the Appellants and Mr. Charles Mtae, State Attorney for the Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL