IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., ISSA, J.A., And ISMAIL, J.A.)

CIVIL APPLICATION NO. 512/01 OF 2023

THE REGISTERED TRUSTEES OF NATIONAL CONVENTION FOR CONTRUCTION AND REFORM (NCCR – MAGEUZI) ..... APPLICANT

VERSUS

JAMES FRANCIS MBATIA ..... RESPONDENT

(Arising from the ruling and order of the High Court of Tanzania, (Main Registry) at Dar es Salaam)

(Mgonya, J.)

dated the 21st day of April, 2023

in

Misc. Cause No. 04 of 2023

RULING OF THE COURT

7TH & 17th November, 2023

ISSA, J.A.:

This is the second time the applicant is seeking leave to appeal to this Court. The High Court, vide Misc. Civil Application No. 17 of 2023 (Kagomba, J) dismissed the application for leave on 12.6.2023 for the reason that it was barred by section 5(2)(d) of Appellate Jurisdiction Act (AJA) as the order against which leave is sought is interlocutory. Hence, this application termed in legal arena as a second bite. The motion is

predicated on Rules 10, 45A (1)(a), 48(1) and 48(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by an affidavit sworn by Beati A. Mpitabakana, the Chairman of the Board of the Registered Trustees of NCCR-Mageuzi.

The following brief background facts will serve the purpose of appreciating the essence of the present application. The applicant is the Board of Trustees of a political party known as The National Convention for Construction and Reform (NCCR-Mageuzi). The respondent was a member, a national chairman, and at one time an elected member of parliament through that party. On 21.5.2022 NCCR-Mageuzi convened a meeting of a National Executive Committee at Dar-es-Salaam and resolved to suspend the respondent from being a chairman of the NCCR-Mageuzi, pending the approval of the National Congress of the party. On 24.9.2022 the National Congress of NCCR-Mageuzi convened a meeting and resolved to detach the respondent from his position as the chairman and expelled him from the party.

The respondent approached the High Court in Misc. Civil Cause No. 4 of 2023 (Mgonya, J as she then was) for leave to file an application for prerogative orders in the form of certiorari, mandamus and prohibition against the applicant. The main complaint of the respondent

was that he was illegally and unlawfully removed from the position of the national chairman of the NCCR-Mageuzi without the applicant adhering to the principle of natural and justice. On 21/4/2023 the High Court granted the respondent leave to apply for prerogative orders.

The applicant was aggrieved by the said order and lodged in the High Court (Kagomba, J) her application for leave to appeal to this Court in Misc. Civil Application No. 17 of 2023. The application for leave hit a snag when the respondent raised two preliminary objections; that the application for leave was premature as the order for which leave is sought is not appealable for being interlocutory, and that, the application is bad in law for being frivolous and vexatious. The High Court sustained the first preliminary objection and struck out the application for leave to appeal. Undaunted, the applicant has accessed this Court seeking leave on a second bite.

The respondent filed his affidavit in reply contesting the application. The application again met the resistance from the respondent who raised four preliminary objections, namely:

> *(a) The application for leave was filed out of time and there is no certificate of delay attached with the application;*

(b) The application is premature as the order which a leave is sought by way of second bite is not appealable for being an interlocutory order;

(c) The application is incompetent and bad in law for being frivolous and vexatious; and

(d) The application is incompetent as the applicant moved the court under wrong provisions.

The application was called on for hearing on 7.11.2022 and Mr. Beati A. Bitabagana, the chairman of the applicant appeared on behalf of the applicant and Mr. Hardson B. Mchau, learned advocate appeared for the respondent. Mr. Bitabagana informed the Court that the applicant is represented by an advocate but he was sick, hence, he prayed for adjournment. Although Mr. Mchau opposed the prayer, urging the Court to proceed with the hearing, the Court adjourned the hearing to 10/11/2023.

At the resumed hearing on 10/11/2023 Mr. Faustine Sungura, who introduced himself as Acting Secretary General of NCCR-Mageuzi appeared for the applicant and Mr. Mchau appeared for the respondent. Mr. Sungura informed the Court that their advocate was still sick and prayed for adjournment or alternatively, that the hearing should be by way of written submissions. Mr. Mchau, on the other hand, opposed this

prayer, branding it a delay tactic. He prayed to the Court to dismiss the application for want of prosecution.

The Court refused the applicant's prayer and ordered the parties to proceed with the hearing of the preliminary objections. The Court ordered the objections be heard first but reserved reasons for its refusal to be incorporated in the ruling. We shall give our reasons for that order. The powers of the Court in adjourning the matters before it are found in Rule 38A of the Rules which provides:

> *"(1) The Court may, upon good cause shown, adjourn the hearing of an appeal or application upon such terms and conditions as to costs as it may deem fit.*
>
> *(2) No adjournment shali be granted at the requests of a party or parties except where the circumstances are beyond the control of the party or parties as the case may be.*
>
> *(3) N/A*
>
> *(4) Where iliness of an advocate or his inability to conduct the case for any reason other than his being engaged in another court is put forward as a ground for adjournment, the Court shali not grant adjournment unless it is satisfied that the party applying for*

adjournment could not have engaged another advocate in time.

(5) N/A.

On the other hand, rule 59 of the Rules which regulates adjournments in applications stipulates:

> *"Subject to rule 38A of these Rules the Court may, upon good shown, adjourn the hearing of an application."*

In this application the applicant has pleaded sickness of an advocate as the reason for seeking adjournment of the hearing. It is trite law that adjournment on ground of sickness could only been granted when sickness is supported by medical records. This Court in **Christina Alphonce Tomas v. Saamoja Masingija**, Civil Application No. 1 of 2014 articulated the position as follows:

> *"The Court has always discouraged adjournments on grounds of sickness not supported by medical proof. The learned advocate is aware or ought to be aware that the Court has to have evidence to support grounds for an adjournment. We total discourage the idea of seeking adjournments not supported by concrete proof that they are genuine applications."*

In this case on both occasions: 7/11/2023 and 10/11/2023 the applicant failed to submit any proof of sickness of her advocate. Further, according to Rule 38A(4) the applicant is required to satisfy the Court that she could not engage another advocate in the time provided by the Court. Again, the applicant did not even mention if she attempted to look for another advocate. It is on account of the foregoing reasons this Court refused to adjourn the hearing of the application for the second time.

Now, coming to the hearing of the preliminary objections, Mr. Mchau withdrew the 3rd and 4th preliminary objections, and argued the 1st and the 2nd. With respect to the 1st preliminary objection, he submitted that the application for leave was filed out of time as it is supposed to be filed within 14 days from the order of dismissal, but in this case it was filed after 25 days. It was his further submission that, the decision of the High Court was delivered on 12/6/2023 but the application was filed on 6/7/2023 and there is no certificate of delay attached to the application. He bolstered his argument on our decision in **Tanzania Posts Corporation v. Jeremiah Mwandi**, Civil Appeal No. 474 of 2020 (unreported).

With respect to the 2nd preliminary objection, Mr. Mchau submitted that the application before the Court is premature as the decision from

which the applicant sought leave to appeal was interlocutory and section 5(2)(d) of the AJA barred that kind of applications for the reason that they are not appealable. He relied on our decision in **Tanzania Motors Services Ltd and Another v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (unreported).

In reply, Mr. Sungura conceded to both preliminary objections. He admitted that there was no certificate of delay attached to the application but urged the Court that in the interest of the people involved, the Court should overlook the infractions and invoke Article 107 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). In addition, he admitted that interlocutory orders are not appealable but insisted that this stance stops people from getting their rights. He again urged the Court to consider Article 107 of the Constitution, contending Court Rules violate the Constitution by denying people right to appeal and hence invalid.

In rejoinder, Mr. Mchau did not have much to say as Mr. Sungura had conceded to the preliminary objections. But he had a word on the overriding objective principle, which he submitted that it does not apply in this situation where there is a clear violation of the law. Further, he argued that, in the circumstances surrounding this application, there is

no violation of the Constitution and the Court cannot rescue the present application.

After hearing the rival arguments we are now determining the merit of the preliminary objections. We will start with the 2nd preliminary objection which touches on the jurisdiction of this Court in hearing appeals from interlocutory orders. Our quest will start with section 5(2)(d) of the AJA which provides:

> *"(2) Notwithstanding the provision of subsection (1) -*
> *(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 ours).*

First, it is important to make the position clear on what does the term "suit" mean in the above section. This Court has already dealt with that issue in **Tanzania Motors Services Ltd and Another v. Mehar Singh t/a Thaker Singh** (supra). The Court adopted a wider definition of the word "suit" to include all proceedings where parties are asserting their rights which are disputed by their counterparts in a court of justice. The Court quoted the definition of the term "suit" from the Law Lexicon,

Encyclopedia & Commercial Dictionary, 2002 (reprint) at page 1831 as follows:

> *"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding is a suit."*

In this case, the respondent approached the High Court with an application for leave to file an application for prerogative orders to challenge the decision of the NCCR-Mageuzi to remove him from his position and to expel him from the party. The applicant, on the other hand, marshalled resistance against the grant of the leave. Therefore, the proceedings before the High Court were a suit in the context of section 5(2)(d) of the AJA.

The second question is whether the ruling made by the High Court in the proceedings before it are interlocutory or final. The word interlocutory order has been defined in the Black's Law Dictionary, 9th edition on page 1207 as follows:

> *"An order that relates to some intermediate matter in the case; any order other than a final order."*

In our view this definition entails that interlocutory orders are those orders which do not finally dispose of the rights of the parties. But how can one detect if the order is interlocutory or final. This Court, in various decisions including **Junaco (T) Limited and Justin Lambert v. Harei Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 (Unreported) has answered that question in the following words:

> *"It is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the nature of the order test". That is, to ask oneself whether the judgment or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

The "nature of the order test" requires answers to two questions in the context of the matter before us; one, what were the remedies that were sought or the rights that the respondent was seeking to enforce or obtain from the High Court? Two, were all such rights or remedies conclusively determined by the High Court or there are certain matters in

relation to the same rights that remained pending for determination at the High Court. If the answer to question two is that everything at the High Court was finally and conclusively wound up, the ruling would be final and the bar under section 5(2)(d) of the AJA will not apply. Conversely, if the ruling of the High Court left an issue or issues at the same court undetermined, then the ruling of the High Court is interlocutory and this Court will not have jurisdiction to determine the intended appeal in view of section 5(2)(d) of the AJA.

If we apply "the nature of the order test" in the application before the High Court, it is crystal clear the ruling of the High Court did not determine the rights of the parties. It merely gave permission to the respondent to file his substantive application so that his rights could be determined later by the High Court. In fact, the purpose of the leave application is merely to filter out applications which are brought in court by busy bodies and to eliminate at early stage frivolous and vexatious cases. This was clearly articulated by Lord Diplock in the case of **Inland Revenue Commissioner and National Federation of Self-employed and Small Business Ltd** [1981]2 All ER 93 at page 104 when he said:

> *"The need for leave to start proceedings for remedies in public law is not new. It applied*

previously to applications for prerogative orders,... Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error...".

Turning to the application before us, it is clear that it emanates from the decision of the High Court on the application for leave to apply for prerogative orders. This application did not determine the rights of the parties, hence, it was interlocutory which is not appealable under section 5(2)(d) of the AJA. In **Seif Sharif Hamad v. S.M.Z** [1992] T.L.R. 43 the Court stressed it has no jurisdiction to entertain an appeal challenging an interlocutory order.

We will now canvass the point raised by Mr. Sungura on whether this application could be rescued by the overriding objective principle, and Article 107 of the Constitution. Overriding objective principle is now enshrined in our law in terms of section 3A and 3B of the AJA enjoining the courts to do away with legal technicalities and decide the cases justly. But this Court in **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported) clarified how the principle is to be applied. It held:

"The overriding objective principle cannnot be applied blindly on the mandatory provisions of

the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus; the proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms..."

Therefore, the overriding objective principle cannot be applied in this application in view of the clear bar to entertain appeals under section 5(2)(d) of the AJA.

With respect to Article 107 of the Constitution, Mr. Sungura implored us to consider this provision and allow the hearing to proceed. Article 107 of the Constitution provides:

"107A(1) The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.

(2) In delivering decisions in civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say - ...

(e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

In **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported) this Court had an opportunity to consider this provision of the Constitution and it held:

"A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as iron clad rule which bars the court from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice."

We are of the view that appealing against interlocutory orders is not a technicality falling within the purview of Article 107A (2)(e) of the Constitution. It is a matter which goes to the root of the jurisdiction of the Court and is clearly barred by section 5(2)(d) of the AJA. After all, Article 107A (2)(e) of the Constitution enjoins to administer justice in strict compliance with the requirements of the law.

In the upshot, this preliminary objection is sufficient to dispose of this application and for that reason we will not belabour with the first

preliminary objection. Eventually, for the stated reasons, we uphold the 2nd preliminary objection and hereby strike out the application. The respondent shall have his costs.

It is so ordered.

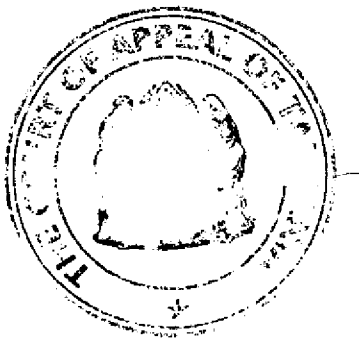
DATED at **DAR ES SALAAM** this 15th day of November, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 17th day of November, 2023 in the absent of the Applicant, who was duly notified and in the presence of Mr. Hardson B. Mchau, learned counsel for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL