

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 180 OF 2016

JIREYS NESTORY MUTALEMWA APPELLANT

VERSUS

NGORONGORO CONSERVATION AREA AUTHORITY..... RESPONDENT

**(Appeal from ruling and orders of the High Court of Tanzania, Labour
Division at Dar es Salaam)**

(Nyerere, J.)

dated the 19th day of August, 2016

in

Miscellaneous Labour Application No. 7 of 2015

.....

JUDGMENT OF THE COURT

4th October, 2022 & 21st April, 2023

MWANDAMBO, J.A.:

This appeal arises from a decision of the High Court (Labour Division) in Miscellaneous Labour Application No. 7 of 2015 dismissing an application by the appellant. That application had sought interpretation of the award of the defunct Industrial Court (the ICT) made on 12/12/2008 whose overall effect was to substitute dismissal with termination of the applicant from employment with the respondent with the effect from 26/6/2001 with payment of all of his terminal

benefits. The appellant approached the Labour Court for interpretation of the award pursuant to the provisions of, amongst others, sections 23 (e), 26 (2), 27 (1) and 29 of the repealed Industrial Court of Tanzania Act. After hearing the parties, Nyerere, J, dismissed that application.

Aggrieved, the appellant preferred an appeal comprising six grounds of appeal. However, as it will become apparent later, the disposal of this appeal turns on a ground different from those preferred by the appellant.

At the commencement of the hearing, the Court wanted to satisfy itself of the propriety of otherwise of the appeal. That became necessary because the Court had some doubts on not only its jurisdiction but also whether the impugned ruling was appellable without the leave of the High Court or of the Court. Both the appellant who appeared in person, unrepresented during the hearing, and the respondent represented by Ms. Peter J. Musetti, learned Senior State Attorney assisted by Ms. Grace Lupondo and Ms. Careen Masonda, learned State Attorneys addressed the Court with opposing arguments.

In essence, the appellant urged that the Court had jurisdiction over the matter. He also argued that leave was not necessary as the

ruling was appellable without any leave. Elaborating, the appellant argued that, the application before the Labour Court involved interpretation of the defunct ICT's award which was part of enforcement. It was his further argument that before Nyerere, J. had jurisdiction to entertain it and upon dismissing the same, he had an automatic right of appeal to this Court in terms of section 94 of the Employment and Labour Relations Act (the ELRA). He maintained that, since the order of the Labour Court was from enforcement, it was a decision of that court rather than of the defunct ICT and thus appellable to the Court without leave. From the submissions he made, the appellant invited the Court to hold that it has jurisdiction and that the appeal was properly before it and proceed to entertain it.

Mr. Musetti on his part urged that the Court had no jurisdiction in the light of section 4(1) of the Appellate Jurisdiction Act (the AJA) neither was the appeal properly before it. The learned Senior State Attorney argued that, the ruling from which the appeal emanated was a ruling of the ICT regardless of the fact that it was made by a judge sitting in the Labour Court. This is so, he argued, the award in favour of the appellant was made on 12/12/2008 whereas the impugned ruling

was made in 2015 on the basis of an application made under section 27 (1) of the repealed Industrial Court of Tanzania Act (the ICT Act) which stated clearly under section 3 thereof that the court meant the Industrial Court of Tanzania. According to Mr. Musetti, decisions of the defunct ICT were amenable to revision under section 28 (2) of the repealed Act in which case, an aggrieved party from a ruling on revision had a right to challenge it before the full bench of the High Court.

We also heard Ms. Lupondo addressing the Court on several aspects on the propriety of the appeal but most importantly was her argument that, even assuming there was a right of appeal from the impugned decision, it could not be exercised without leave in terms of section 5 (1) (c) of the AJA. She was as insistent as her learned colleague that, the appellant had no right of appeal but to challenge the impugned ruling before the full bench of the High Court. She wound up by urging the Court to find the appeal incompetent and proceed to strike it out.

The appellant was unmoved by the submissions made by the respondent's attorneys. He was stout that, the Labour Court dealt with an application for enforcement of the award pursuant to rule 48 (3) of

the Labour Court Rules, 2007 by way of interpretation and thus its decision was appealable to this Court without any leave calling to his aid the Court's decision in **Tanzania Teachers Union v. The Chief Secretary and Three Others**, Civil Appeal No. 96 of 2012 (unreported). Concluding, the appellant beseeched the Court to allow him restore his appeal in the interest of justice should it find that it has no jurisdiction.

For a start, we find inevitable to state that it is trite law that an appellate jurisdiction of the court is a creature of a statute. That has been the law as articulated in **Attorney General v. Shah** [1971] EA 50 cited by the Court in **H.M. Chamzim and 71 Others v. Tanzania Breweries Ltd**, Civil Appeal No 57 of 2004 (unreported). The Court reiterated that position in **CRDB Bank Ltd v. G.M. Kilindu and Another**, Civil Appeal No.137 of 2008 and **East African Development Bank v. Khalfan Transport Co. Ltd**, Civil Appeal No. 68 of 2003 (both unreported). To determine whether a right of appeal exists from an impugned decision one need not go further than the relevant statute. In this case; the replaced ICT Act. Despite the appellant's attempt to persuade the Court that Nyerere, J exercised jurisdiction in the Labour

Court acting under rule 48 (3) of the Labour Court Rules, we are not prepared to agree with him. This is so because, the award from which the appellant sought to enforce to use his own words, as part of the interpretation, was not a decision of the Labour Court within the meaning of it under rule 48 (1) of the said Rules. As submitted by Mr. Musetti and Ms. Lupondo supported by the impugned ruling itself, the Labour Court entertained that application stepping into the shoes of the defunct ICT mandated by paragraph 7 (4) of the Third schedule to the EALR. In our view, it seems to be obvious that, Nyerere, J sat to interpret the ICT's award made on 12/12/2008 in the same way a chairman of the defunct ICT could have done but for the repeal of the ICT Act. Clear as its is, the argument that Nyerere, J. exercised jurisdiction under the Labour Institutions Act and the Labour Court Rules has no semblance of merit and we reject it.

Having held that the impugned decision was not from the Labour Court as such, the remaining question calling for our answer is whether decisions of the defunct ICT were appellable to the Court. Our answer is to be found from section 27 (1C) of the repealed ICT Act which provided:

"Subject to the provision of this section, every award and decision of the Court shall be called in question on any ground in which case the matter shall be heard and determined by a full bench of the High Court."

We take judicial notice that aggrieved litigants have approached the High Court by way of appeals presided by a panel of three judges as a mode of calling into question the awards of the defunct ICT. It is thus as clear as day that, the legislature in its wisdom did not provide for appeals from the ICT to the Court but to the full bench of the High Court. Consistent with the decisions referred to above, a litigant cannot exercise a right of appeal which is not expressly prescribed by a statute neither can the Court assume jurisdiction not legally provided for.

We respectfully agree with Mr. Musetti that, the Court's jurisdiction to hear appeals is mainly derived under section 4 (1) of the AJA; hearing appeals from the High Court and Courts of Resident Magistrates with extended jurisdiction. We may add that, apart from the AJA, there are other statutes which provide for right of appeal to this Court such as, section 57 of Labour Institutions Act (the LIA) and section 25 of the Tax Revenue Appeals Act, to mention some of them but certainly, none from

the ICT Act. This will suffice to answer the first issue that the Court has no jurisdiction to entertain appeals from the decisions of the defunct ICT. At any rate, as rightly submitted by Ms. Lupondo, the impugned ruling was not a decree which could have been appealed without leave. It fell under section 5 (1) (c) of the AJA under the category of any other decision or order which could only lie to the Court on appeal upon leave being granted either by the High Court or this Court. None was granted rendering the purported appeal incompetent as submitted by Ms. Lupondo. We have examined the Court's decision in **Tanzania Teacher's Union** (supra) in which the Court resolved the conflict on requirement for leave to appeal from the decisions of the LIA. With respect, that decision is clearly distinguishable from the instant appeal in that, unlike here, the Court dealt with decisions from the Labour Court on a matter to which it had jurisdiction. That decision is therefore unhelpful to the appellant.

In the event, we hold that as the Court lacks jurisdiction, neither has the appellant obtained leave to appeal, it cannot entertain the purported appeal. Contrary to the appellant, there is no room for the

Court to allow the appellant to restore an incompetent appeal but to strike it out as we hereby do.

Considering that the appeal arose from a labour dispute, there will be no order for costs.

DATED at DAR ES SALAAM this 18th day of April, 2023.

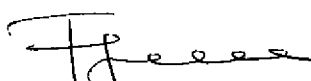
S. A. LILA
JUSTICE OF APPEAL

L. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of April, 2023 via video facility connected to Arusha High Court in presence of Dr. Mchami, learned counsel for the appellant and Mr. Leyani Mbise, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL