IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 356 OF 2020

SERENGETI BREWERIES LIMITED.....APPELLANT

VERSUS

BAHATI BALTHAZAR MALISA ..... RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania (Labour Division), at Moshi)

(Mkapa, J.)

dated 23rd day of April, 2020

in

Labour Application No. 18 of 2018

JUDGMENT OF THE COURT

7th & 14th December, 2023

MLACHA, J.A.:

This appeal has its genesis from an award of the Commission for Mediation and Arbitration for Moshi (the CMA) made in Labour Dispute No. MO/CMA/ILA/M/130/2013 where the respondent, Bahati Baltazari Malisa was awarded 60 month's salary, at the tune of TZS. 180,000,000/= and severance allowance TZS. 2,800,000/= total TZS. 182,800,000/= for unlawful termination. It was also ordered that she must be given a clean certificate of service. This decision aggrieved the

appellant, Serengeti Breweries Limited. The appellant made several attempts to vacate it without success and now has come before us in an attempt to set it aside. The appeal before us is aimed at creating a road to set it aside.

The background of the matter is produced as follows. The respondent was employed by the appellant on 25/9/2018 as logistics and warehouse controller. He worked up to 24/8/2013 when he was accused of causing a loss to the appellant company and terminated. Feeling that the termination was unfair, he referred the dispute to the CMA. The CMA heard the dispute and made the award as indicated above, which was communicated to the parties.

The appellant was aggrieved and lodged Revision No. 15 of 2015 at the High Court of Tanzania, Labour Division at Moshi to challenge the CMA award. The revision was found to be improperly before the Court for non-citation of the enabling provisions of the law and struck out at the preliminary stage. The appellant lodged a notice of appeal to the Court on 20/7/2016 but could not serve the respondent in time. Noting this defect, she filed Civil Application No. 158 of 2017 before this Court seeking extension of time upon which to serve the respondent with the

notice of appeal. The application was dismissed. She applied to withdraw the notice of appeal vide Civil Application No. 40 of 2018 so that she could return to the High. The application was granted by a single Justice of the Court on 19/11/2018. He returned to the High Court and filed Labour Application No. 18 of 2018 seeking extension of time upon which to file the revision against the decision of the CMA. The application was dismissed hence this appeal.

The grounds upon which this appeal is based can be put as follows:

1. That, the honourable trial judge erred in law in holding that the grounds adduced by the appellant for extension of time were not sufficient to grant the orders.

2. That, the honourable trial judge erred in law for failing to consider and uphold the principle of technical delay as a ground for extension of time.

3. That, the trial court grossly erred in law for dismissing the applicant's application without due regard to the principle of stare decisis.

At the hearing of appeal, the appellant was represented by Mr. Ally Hamza, learned advocate, while the respondent appeared in person. Both parties prayed to adopt their written submissions, earlier on filed, to form part of their oral submissions.

The appellant argued grounds one and two together. Mr. Hamza referred the Court to the ruling of the High Court at pages 352 to 353 of the record of appeal and argued that the judge erred in applying the principle of technical delay. He added that in dismissing the application, the judge held that, failure to serve the notice of appeal was negligence on the part of the appellant something which is not correct. It was his argument that there was a technical delay which is excusable by the law because the appellant was in all the time in the court's corridors fighting for her rights. To support his proposition, he referred us to the case of **Fortunatus Masha v. William Shija and Another**, [1997] T.L.R.154 where it was held:

> "A *distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly involved technical delays in the sense that the original appeal was lodged in time but had been found to be*

incompetent for one or another reason and a fresh appeal had to be instituted".

Further reference was made to **Yara Tanzania Limited v. D.B. Shapriya & Co. Limited,** Civil Application No. 498/16 of 2016 (unreported). In **Yara Tanzania Limited** (supra) it was stated that, the appellant having been penalized by having her case dismissed or struck out, it was wrong to dismiss the application again.

The appellant submitted further that, illegality was pleaded in para 4 of the affidavit deposed by George Stephen Njooka available at page 106 of the record of appeal, that the arbitrator had misinterpreted section 37 (5) of the Employment and Labour Relations Act, 2004 (ELRA) by holding that termination was done during the pendance of Criminal Case No. 174 of 2014 but the High Court never addressed its mind on it. The appellant has the view that if the Court had addressed its mind on this area it could have arrived at a different opinion because when termination was done on 23/8/2013, there was no any pending criminal case. To buttress his point, he referred us to cases of **Registered Trustees of Joy in Harvest v. Hamza Sungura**, Civil Application No. 131 of 2009 (unreported) and **Principal Secretary, Ministry of**

Defence and National Service v. Devram Valambhia [1992] TLR 185. In the **Principal Secretary, Ministry of Defence and National Service** (supra), it was held thus:

> *"Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 of the Rules of extending time (now Rule 10)".*

In ground three, it was submitted that the judge was referred to Court of Appeal decisions but he did not follow them. Neither did he uphold nor distinguish them. The Court was referred to pages 178 to 238 and page 303 to 342 of the record of appeal to ascertain this point. That, the decisions cited to her were not considered without apparent reason.

Based on his submission, he urged the Court to allow the appeal.

In his response to the first ground of appeal, the respondent argued that for a matter to be considered under technical delay it must not be decided on merits. It must have been struck out and not dismissed. Based on this assertion, he submitted further that, the delay

between 29/12/2016 to 20/7/2018 cannot fall under technical delay because the cases were decided on merits and dismissed. They were decided on ignorance of the law which is not a ground for extending time. He cited the case of **Hadija Adamu v. Godbless Tuma**, Civil Application No. 14 of 2013 (unreported) where it was observed that:

> *"As regards the appellant's apparent, ignorance of law and its attendant rules of procedure, I wish to briefly observe that such ignorance has never been accepted as a sufficient reason or good cause for extension of time. (See for instance,* ***Charles Machota Salugi v. Republic****, Criminal Application No. 3 of 2011 (unreported)".*

He argued further that, the case of **Fortunatus Masha** (supra) is distinguishable because it was struck out, not decided on merits.

The respondent admitted that the High Court did not consider the ground on illegality of the decision of the CMA but argued that, it should not be considered by the Court because issues which are not considered in the lower court cannot be considered by the Court.

In ground two, it was submitted that the delay of the appellant is not excusable because it does not fall within the technical delay and the trial court held correctly that the appellant did not act diligently coupled with ignorance of law by citing wrong provisions of the law and failure to serve with the notice of appeal.

In ground three, it was submitted that the application of the principle of *stare decisis* depends on the facts before the court. He argued that, the trial court directed its mind correctly as the facts in the cited cases differ with the ones which were before the court.

Having considered the submissions by the parties and perused the record of appeal, it is apparent that, the appellant raised illegality as one of the grounds for seeking extension of time. We agree with him that illegality of the decision of the CMA was pleaded in para 4 of the affidavit of George Stephen Njooka filed at the High Court, found at page 106 of the record of appeal where it was stated:

> *"4. That, the Commission for Mediation and Arbitration award is tainted with illegalities as follows:*

a) The arbitrator erred in law and in fact by failure to consider evidence on record as testified by appellant's witnesses.

b) The arbitrator erred in law and fact for failure to consider the exhibits tendered by the applicant's during trial.

c) The arbitrator erred in law and fact for considering matters which were not part of the proceedings.

d) The arbitrator erred in law and fact for holding that the reasons for determination of the respondent's employment were invalid and fair.

e) The arbitrator erred in law and fact for holding that the procedures for termination of the respondent employment were invalid and unfair".

It was submitted further that the arbitrator in his award at pages 53 to 54 misinterpreted section 37 (5) of the ELRA by holding that the reasons for termination was unfair since it was done during the pendance of Criminal Case No. 174 of 2014. Reference was made to **Registered Trustees of Joy in Harrest** (supra) and the **Principal**

Secretary, Ministry of Defence and National Service (supra) to support the view that illegality where proved to exist is a ground for extension of time.

Essentially, both parties agree that illegality was raised but left undetermined. When counsel for the appellant was asked as to what is the way toward, he submitted that the Court cannot make a decision on an issue which has not been decided upon by the High Court, so the remedy is to remit the record back to the High Court to decide the issue. The respondent agreed in his submissions that the matter should be referred back to the High Court for decision. However, he argued that illegality is not applicable in the circumstances of the appeal.

Reading through the record and decision of the High Court, we are certain that, illegality was raised as a ground for extension of time but it was not considered by the High Court. The judge made a deliberation on other grounds which she found to be baseless and dismissed the application. Illegality was left undetermined. The issue now is what is the way forward? This takes us to the jurisdiction of the Court.

The jurisdiction of the Court is contained in section 4 (1), (2) and (4) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) which reads:

> *"4. - (1) The Court of Appeal shall have jurisdiction to* ***hear and determine appeals*** *from the High Court and from subordinate courts with extended jurisdiction.*
>
> *(2) For the purposes of and incidental to the hearing and determination of any appeal in the exercise of its jurisdiction conferred on it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act,* ***have power of revision*** *and the power, authority and jurisdiction vested in the court from which the appeal is brought.*
>
> *(3) ....*
>
> *(4) The Court of Appeal shall have* ***power to review its own decisions.*** *" (Emphasis added)*

The power of the Court is limited to hearing appeals, revision and review. In relation to decisions of the High Court, subordinate courts with extended jurisdiction and tribunals jurisdiction is limited to hearing

appeals and revisions only. This means that, a matter not decided by the High Court, a subordinate court exercising extended jurisdiction or tribunal, cannot be entertained by the Court. This was said in a number of our decisions including **Swabaha Mohamed Shosi v. Saburia Mohamed Shosi** Civil Appeal No. 98 of 2018, **Alisum Properties Limited v Salum Selenda Msangi,** Civil Appeal No. 39 of 2018 and **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji,** Civil Appeal No 25 of 2006 (all unreported). In **Alisum Properties Limited** (supra), the Court had this to say:

> *"It is an elementary principle of law that an issue raised by the parties should be resolved. Therefore, the trial court is required and expected to decide on each and every issue before it, hence failure to do so renders the judgements defective. We are supported in that position by the cases of* ***Alnoor Shariff Jamal v. Bahadir Ebrahim Samji,*** *Civil Appeal No. 25 of 2006 (unreported) which quoted with approval a Kenyan case of* ***Kukal Properties Development Ltd v. Maloo and others*** *(1990) E.A. 281 when faced with a similar situation, it stated that, "A judge is obliged to decide on each*

and every issue framed, failure to do so constitute a serious breach of procedure."

In **Alnoor Shariff Jamal** (supra), it was held thus:

"One of the basic principles is the duty of the court to determine one way or another an issue brought before it. This is the principle which finds expression in rule 4 of Order XX of the Civil Procedure Code, 1966 ..."

The Court went on to state that:

"Once we have found that the matter that was before the trial judge for consideration was not determined, then it follows that we have no base for continuing to address ourselves with the rest of the grounds, most of which are concerned with the merits of a matter that had not yet been tabled before the trial judge".

In view of our finding that the High Court did not determine the ground on illegality which was brought to its attention and taking note of the consequences as pointed in the decisions of the Court cited above, we find no reason to consider other matters raised by the parties. We agree with counsel for the appellant that the remedy is to vacate the

decision of the High Court which we hereby do, and remit the record to the High Court to determine the said issue and compose a fresh judgment. Considering the circumstance of this appeal, we make no order as to costs.

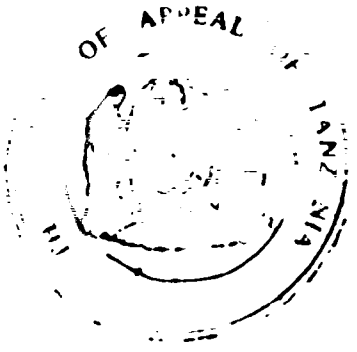
DATED at **MOSHI** this 13th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of Mr. Emmanuel Shayo, learned advocate holding brief for Mr. Ally Hamza, learned advocate for the appellant and respondent appeared in person, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL