

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MUSSA, J.A And MMILLA, J.A)

CIVIL APPEAL NO. 17 OF 2016

TANZANIA BREWERIES LIMITED APPELLANT

VERSUS

LEO KOBELO RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania

at Dar es Salaam)

(Mashaka, J.)

dated the 29th day of September, 2015

in

Revision No. 211 of 2014

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JUDGMENT OF THE COURT

29th August & 13th October, 2016

MJASIRI, J.A.:

This appeal arises from the decision of the High Court, Labour Division, (Mashaka, J.) confirming the decision of the Commission for Mediation and Arbitration (CMA) that the Respondent was unfairly terminated.

The appellant Tanzania Breweries Limited lodged a four point of memorandum of appeal which is reproduced as under:

- 1. The Honourable High Court erred in law and fact in confirming the decision of the Commission of Mediation and Arbitration (CMA) that the*

respondent was unfairly terminated while evidence on record and the law shows that termination was fair.

2. The Honourable Court erred in law and fact by failing to consider and confirm that the procedure used to terminate the respondent—a management employee was proper and lawful.

3. That the Honourable Court erred in law and fact in holding that the termination of the respondent was unfair while there is strong evidence to prove that the termination was procedurally fair and lawful.

4. That the Honourable Court erred in law in ordering reinstatement in the circumstances of this case.

At the hearing of the appeal the appellant was represented by Mr. Nuhu Mkumbukwa, learned advocate and the respondent had the services of Mr. Kamazima Idi, learned advocate.

Before the commencement of hearing we wanted to satisfy ourselves whether or not there was a competent appeal before us. Apparently both Mr. Mkumbukwa and Mr. Idi were anxious to proceed on the merits of the

appeal. Mr. Mkumbukwa on his part submitted that there is no requirement for leave and the law does not state that one has to file a certificate on a point of law. Mr. Idi was also of the view that this is the correct legal position.

We on our part, are of the considered view that it is important to determine whether or not the appeal is properly before the Court as leave to appeal was not obtained as required under Section 5(1)(c) of the Appellate Jurisdiction Act, [Cap 141 R.E.2002] (the Act).

The law is crystal clear. Unless provided otherwise by any other written law, Section 5(1) of the Appellate Jurisdiction Act, specifies under paragraph (a) and (b) of sub-section (1) of section 5, the types of decisions which are appealable as of right, and under paragraph (c) of the same sub-section the decisions which require leave either of the High Court or the Court of Appeal.

Section 5(1) 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 staying 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 I of 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 provided].”

It is evident from the decision made by the High Court that the Labour legislation and the rules thereunder do not fall within the scope of paragraphs (a) and (b) of section 5 of the Act. Therefore according to the Act, decisions made by the High Court, Labour Division are appellable under the provisions of paragraphs (c) of subsection (1) of section 5 unless there is another written law providing to the contrary. The opening words of subsection (1) of section 5 are “unless there is another law providing to the contrary.”

There is nothing in the Labour Institutions Act (Act No. 7 of 2004), the Labour Act, which provides anything to the contrary to what is laid down under sub-section(1) of section 5 of the Act.

Section 57 of the Labour Act, 2004, provides as follows:-

"57. Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal on points of law only."

No reference is made to the issue of leave, unlike in the Land Disputes Courts Act 2002, Act No. 2 of 2002 (the Land Act), where the issue of leave is specifically provided under section 47(1), which provides:-

"Any person who is aggrieved by the decision of the High Court (Land Division) in the exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."

It is also not provided in any of the labour legislations that there is an automatic right of appeal to the Court, and that leave is not required.

Given the circumstances, Section 5(1)(c) of the Act is applicable.

In **Zayumba Abeid Hussein Akida & Others versus Tanzania Ports Authority**, Civil Appeal No. 18 of 2009 CAT (unreported), the Court stated thus:-

"Without hesitation, we are in agreement with Mr. Msuya that the appeal is incompetent. Since it does not fall in any of the categories stipulated under section 5(1)(a) and (b) of the above Act, it was imperative that leave be applied for under (c) thereof. In the absence of leave applied for and granted the appeal is incompetent."

In **Hussein Shabenga Jumanne S. Makanyaga and 6 Others v Tanzania Port Authority**, Civil Appeal No. 29 of 2009. The Court had this to say:-

*"Since this is a matter which does not fall under any of the categories stipulated under section **5(1)(a) and (b) of the Appellate Jurisdiction Act, 1979** it follows that it was imperative that leave be applied for under **(c)** thereof. In the absence of leave, we have no jurisdiction to entertain the matter."*

The circumstances in the **Hussein Shabenga** case (supra) were similar to the instant case. The dispute commenced at the Commission for Mediation and Arbitration. Thereafter, it went on revision to the High Court

(Labour Division) where Mandia, J. (as he then was) dismissed the application hence the appeal.

Given the requirement under section 57 of the Labour Act, the need for leave is significant. This would provide an opportunity to the High Court (Labour Division) to determine whether or not there exists a point of law to be determined by the Court. It is obvious that it is not the role of the Court to determine the point of law to be adjudicated upon.

In the circumstances, as there was no leave granted for instituting the appeal to the Court against the decision of the High Court (Labour Division), the appeal is incompetent. It is hereby struck out. We make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 4th day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL