IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 128 OF 2016

1. BERNARD GINDO
2. EDMUND KUZENGWA
3. DEOGRATIOUS WILLIAM
4. JUMANNE SHABAN
5. DOE MUSA
6. ISAYA MWAKORO
7. DEOGRATIUS RWEGASIRA
8. AHAMADA K. AHMADA
9. RAMSON MLAY
10. HUSSEIN MOHAMED
11. IRENE AKILI
12. GEORGE MHINA
13. HAMSA S. MACKSOUD
14. SULTAN KILOKO
15. PHILLIP MICHAEL
16. HAMISI MTAMBO
17. KALUSE KIHEDU
18. WILLIET TEBENDA
19. ABDALLAH AMIN
20. SWEETBETHA BURAMU
21. ROSE KATWILA
22. FRED KIKONDO
23. FRANCIS NGONDE
24. AMOSI MWAMASO
25. ADREY MAGAI
26. HAMISI LUSANDA

..... APPELLANTS

27. JEROME JUMA
28. REVELIANA DAMIAN }

VERSUS

TOL GASES LIMITED ..... RESPONDENT

[Appeal from the Ruling and Orders of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Rweyemamu, J.)

Dated the 15th day of March, 2013
in
Labour Revision No. 18 of 2012

.....

RULING OF THE COURT

23rd Nov. & 24th December, 2020

SEHEL, J.A.:

When the appeal was called before us for hearing, Messers Daniel Ngudungi and Elisha Mosha, learned advocates appeared before us holding brief for Mr. Kalolo Bundala, learned advocate for the appellants. They intimated to the Court that they had full instructions to proceed with the hearing. On the other part, Mr. Frank Kilian, learned advocate appeared for the respondents.

After taking the floor, instead of arguing the appeal, Mr. Ngudungi sought leave to file a supplementary record of appeal. Hence, this is a ruling on that application.

Before going to the merit of the application, we find it apt to give brief facts relevant to the present application. The appellants were employees of TOL Gases Limited, the respondent. They were each employed at different dates and positions. On 15th August, 2011 they were retrenched from work on ground that the respondent's business was experiencing economic and financial hardship. Before their retrenchment, there were several unsuccessful consultative meetings between the appellants through their registered trade union (TUICO) and the respondent which at the end prompted the appellants to file a dispute before the Commission for Mediation and Arbitration (CMA). That dispute was decided in favour of the respondent. Aggrieved, the appellants filed an application for revision before the High Court, Labour Division. The application was dismissed for want of merit.

Still aggrieved, on 26th March, 2013 they lodged a notice of appeal and also wrote a letter applying for copies of proceedings, ruling and drawn order whose copies were served to the respondent. Upon receipt of the documents and a certificate of delay, the appellants lodged their appeal to this Court with five grounds of appeal, namely:-

1. *The learned Judge erred in law in holding that the appellant's termination on 14th August, 2011 was procedurally fair on the basis of alleged adequate consultation.*

2. *The learned Judge erred in law and in fact in holding that the matter could not be referred back to the Commission for Mediation and Arbitration (CMA) as it involved application and interpretation of Voluntary Agreement by virtue of CMA's order of 23/05/2011.*

3. *The High Court's decision that the retrenchment decision could not be faulted as neither party referred the matter to the High Court Labour Division was premature and thus the learned Judge erred in law.*

4. *The learned judge erred in law in holding that section 38(3) of the Employment and Labour Relations Act of 2004 ("the Act") applied only to termination where employees refuse to accept new terms and conditions of employment.*

5. *The Commission of Mediation and Arbitration and the High Court judge both erred in law in permitting Advocate Kariwa to represent the Employee in the proceedings in CMA and thereafter in the Labour Court when he was a potential witness, having taken part in the various meeting as Chairman representing the Respondent Employer.*

When the appeal was first called for hearing on 10th June, 2020, Messers Kamazima Iddi and Frank Kilian, learned advocates, appeared for the appellants and respondent, respectively. On that date, the Court noted and invited parties to address it on the competency of the appeal regard being to a defective certificate of delay that had certified a wrong date and it made

reference to the name of the 1st appellant while leaving out the names of other appellants.

After a short dialogue with the Court, Mr. Iddi conceded on the defects. He, therefore, sought leave of the Court, in terms of Rule 96 (7) of the Tanzania Court of Appeal Rules ("the Rules") to file a supplementary record of appeal to include a correct certificate of delay. Mr. Kilian did not object to the prayer.

Having heard the submission from the counsel for the parties, the Court reminded the counsel for the appellant on his legal duty of ensuring that a correct certificate of delay was included in the record of appeal. Nonetheless, mindful of the overriding objective principle, it granted leave to the appellants to file a supplementary record of appeal to include a properly drawn certificate of delay. That leave was granted in terms of Rule 96 (7) of the Rules and the appellants were given thirty days counted from the date leave was granted to file supplementary record of appeal. In compliance with the Court's order, the appellants on 8th July, 2020 filed the supplementary record of appeal.

After the appellants filed the supplementary record of appeal, the appeal was scheduled for hearing before us. As stated earlier, Mr. Ngudungi opted to seek leave of the Court to file a supplementary record of appeal in order to

include sixteen (16) exhibits, to wit, Exhibits D1 to D 16 which were tendered by the respondent and admitted by CMA. It suffices to state here that the exhibits were considered and held by CMA to be proof on compliance with the procedure of termination as envisaged under section 38 of the Act.

Mr. Ngudungi submitted that the missing exhibits are vital documents which ought to have been included in the record of appeal because they are relevant in respect of the first and fourth grounds of appeal. As such, he said, he would wish to use them in arguing the appeal. Upon being probed by the Court as to whether the application is not barred by the provision of Rule 96(8) of the Rules, he was of the opinion that the order for filing supplementary record of appeal was specific and it was issued following a concession to the preliminary objection raised by the respondent. Thus, he said, the appellant could not have included the exhibits in the supplementary record of appeal without leave of the Court. After reminding the learned counsel that the issue of defective certificate of delay was raised by the Court *suo moto*, he beseeched us to refrain from technicalities by giving effect to the principle of overriding objective for expeditious disposal and proper administration of justice.

In reply, Mr. Kilian was very brief that the prayer is barred by Rule 96 (8) of the Rules because the provision of the law is couched in mandatory terms. It was the view of Mr. Kilian that had the counsel for appellant diligently and properly scrutinized the record of appeal, he would have noticed that the record was incomplete and he could have invoked Rule 96 (6) of the Rules or sought leave on 10th June, 2020 not only to file a properly drawn certificate of delay but also the missing documents. He argued, since the appellants failed to prudently act on the two options available to them the appeal is incompetent. He therefore prayed for the prayer by the appellant's counsel not to be granted and the appeal be struck out for being incompetent.

Mr. Ngudungi rejoined by acknowledging that Rule 96 (8) of the Rules is of strict construction but reiterated his earlier submission that we should apply the oxygen principle to the application lest the appellants be subjected to multiple applications in trying to resuscitate the appeal while we could have saved them from the pain of starting afresh the process of filing appeal.

Having carefully considered the rival arguments by both learned counsel for the parties, we note that parties are at one that on 10th June, 2020 the Court granted leave to the appellants to file the supplementary record of appeal in order to include a properly drawn certificate of delay. That order, as

we have shown, was made pursuant to Rule 96 (7) of the Rules. The learned counsel for respondent contended that since the appellants were already granted leave to file supplementary record of appeal they are barred to bring a similar application by the provision of Rule 96 (8) of the Rules which states:

> *"Where leave to file supplementary record under sub-rule (7), has been granted, the Court shall not entertain similar application on the same matter."*

It is significant to note here that the provisions of Rule 96 (8) are couched in mandatory terms. Under this Rule the Court is enjoined not to entertain "*a similar application on the same matter*". The phrase "*a similar application on the same matter*" is not defined in the Rules but the language used in that Rule does not require any binary definition. Giving its simple, plain and literal meaning, the word "*similar*" as defined in the **Oxford Advanced Learner's Dictionary**, 7th Edition printed by Oxford Press in 2005 means "*like somebody or something but not exactly the same.*" And the word "*same*" is defined in the **Black's Law Dictionary,** 9th Edition printed by West Thompson in 2009 to mean "*the very thing just mentioned or described: it or them.*"

Therefore, the phrase "*a similar application on the same matter*" simply refers to the application for leave to file supplementary record of appeal which was granted pursuant to sub-rule (7) of Rule 96 of the Rules on the very same matter. In other words, the Rule precludes a party who had been granted leave to file supplementary record of appeal to be entertained again on a similar or like application.

In the case of **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited,** Civil Application No. 3 of 2018, we lucidly explained the purpose and reason of enacting Rule 96 (7) and (8) of the Rules. In that appeal, we were faced with almost similar scenario where the appellant was granted leave, in terms of Rule 96 (7) of the Rules, to file supplementary record of appeal to include vital documents missing from the record of appeal. The appellant did comply with the Court's order but when the appeal was called again for hearing the Court observed and invited parties to address it on the defective decree. The counsel for the appellant conceded to the defect and sought leave to file a further supplementary record of appeal in order to include a properly drawn decree. The Court being mindful that the applicant was once granted leave to file supplementary record of appeal, had this to say:-

"We think it will now be clear that ***rule 96 (7) was added with a view to giving effect to the overriding objective particularly section 3A (1) (c) of AJA and rule 2 of the Rules which enjoin the Court to handle all matters before it with a view to attaining timely disposal of the proceedings at a cost affordable by the respective parties. That explains why, instead of striking out the appeal for being incompetent which would have meant that the appellant starting the appeal process afresh, it granted leave to lodge a supplementary record. That was perfectly done to attain not only final disposal of the appeal but also at a cost affordable to the appellant.***

Concomitant with the above, ***it is to be noted that section 3B (2) (b) of AJA enjoins the Court to ensure efficient use of the available judicial and administrative resources. It is for this reason, rule 96 (8) was added to preclude the Court from entertaining further applications meant to cure like defects in the records of appeal.*** *The bottom line in our view is that defects in the record of appeal attributed to the omission of essential documents required under rule 96 (1) or (2) of the Rules can only be cured once in terms of rule 96 (8) of the Rules. Unlike Mr. Nyika, we are unable to find purchase in his argument*

that a litigant is given a blank cheque to resort to rule 96 (7) of the Rules as long as the subsequent application does not relate to the same documents for which leave to file a supplementary record was granted in a previous application. In our view, ***rule 96 (8) couched in mandatory terms, serves as a tool to check sloppiness amongst litigants which, if not controlled may militate against the very spirit behind the overriding objective.*** *That being the case, we do not think the learned counsel is right in inviting the Court to invoke the overriding objective to cure yet another defect in the record of appeal."* [Emphasis is added].

We reiterate the above position and we hasten to add that the overall objective of the introduction of the oxygen principle in the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the Act) vide Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act No. 8 of 2018) is to facilitate justice delivery and ensure that the ends of justice is met to both parties, expeditiously, proportionately and at affordable cost. From the plain meaning of the language of the Rule and by giving its literal meaning we do not see any doubt or difficulty in its construction and we do not see any reason as to why we should deliberately impose upon ourselves a construction of the overriding objective as Mr. Ngudungi would like us to do. To our understanding, there is

no overriding objective principle to be spelt out from it. In a number of occasions this Court has reiterated now and then that the introduction of the overriding objective was not designed or intended to disregard the rules of procedure couched in mandatory terms. (See the **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017, **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017, and **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (all unreported)).

In the matter at hand, the learned counsel for the appellants acknowledged that a similar application for leave to file a supplementary record of appeal was made and granted by this Court on 10th June, 2020. Therefore, by virtue of Rule 96 (8) of the Rules this Court cannot entertain the same prayer. That being the case, we entirely concur with Mr. Kilian that the appeal before us is incompetent for lacking vital documents. We say so because the omitted documents are relevant for the determination of the grounds of appeal. The non-inclusion of the exhibits which are relevant in the present appeal is in violation of Rule 96 (2) of the Rules which renders the record of appeal to be incomplete and incompetent.

In the end, pursuant to Rule 96 (8) of the Rules, we decline the application for filing supplementary record of appeal and since we find the appeal to be incompetent before us we proceed to strike it out. We make no order for costs as the appeal arose from a Labour dispute.

DATED at **DAR ES SALAAM** this 2nd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 24th day of December, 2020 in the presence of 8th and 9th appellants in person and Mr. Michael Kariwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL