

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL No. 397 OF 2020

FATUMA KHATIBUAPPELLANT

VERSUS

THE TREASURY REGISTRARRESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania,
(Dar es Salaam District Registry) at Dar es Salaam)

(Sameji, J.)

dated the 6th day of July, 2018

in

Civil Application No. 500 of 2017

.....

RULING OF THE COURT

20th October & 17th November, 2021

MKUYE, J.A.:

This is an appeal in which the appellant Fatuma Khatibu is challenging the Ruling and Drawn Order of the High Court of Tanzania (Dar es Salaam Registry) (Sameji, J. as she then was) in Misc. Civil Application No. 500 of 2017 dated 6th July, 2018.

The brief facts leading to the appeal are that: The appellant was employed by the defunct National Bank of Commerce (NBC) in the position

of Personal Secretary prior to its restructuring and privatization. Sometimes in 1994, the appellant was retrenched from employment.

Being aggrieved by that decision, the appellant instituted Trade Dispute No. 38 of 2003 in the Defunct Industrial Court of Tanzania claiming to be paid an amount of Tshs. 880,000,000/= as compensation. The trial court (Mwipopo, J. as he then was) upon hearing the parties partly found in favour of the appellant for a reason that the retrenchment was effected on her while there was a decision for the appellant to undergo treatment abroad, for which nothing had been said about it. Consequently, the appellant was awarded ten months salary at the rate which a Personal Secretary of her cadre, received at the time of the decision as compensation.

Dissatisfied by that decision, the appellant made an application through Review No. 45 of 2005 before a full bench of the Industrial Court to have the decision of Mwipopo, J. reviewed but she lost.

The appellant was not amused with that decision. She appealed to the High Court vide Misc. Civil Appeal No. 3 of 2013 against the decision of the full bench of the Industrial Court but the appeal was greeted with a

preliminary objection to the effect that the High Court lacked jurisdiction to entertain such appeal as the same was not predicated on lack of jurisdiction of the Industrial Court. The appellate High Court (Mujulizi, J. as he then was) sustained the preliminary objection where upon it was found that by virtue of section 28(4) of the repealed Industrial Court Act, Cap 60 R.E. 2002 which was saved by the Employment and Labour Relations Act, Act No. 6 of 2004 under item of 7 of the Third Schedule, the decision of the defunct Industrial Court could only be challenged on the reason of lack of jurisdiction and not otherwise. It, therefore, found that the High Court had no jurisdiction to entertain the appeal originating from the Industrial Court based on the point of fact but only issues of jurisdiction.

Still dissatisfied by the Ruling and Drawn Order by Mujulizi J, she made an application in the High Court, Misc. Civil Application No. 500 of 2017 for extension of time to lodge an application for review against the said Ruling and Drawn Order, the subject of this appeal, but the same was dismissed as alluded to earlier on.

The appellant has fronted only one ground of appeal. However, for reasons which will become apparent shortly, we do not intend to reproduce it.

When the appeal was called on for hearing, the appellant appeared in person without any representation; whereas the respondent enjoyed the services of Ms. Jesca Shengena, learned Principal State Attorney assisted by Messrs. Daniel Nyakiha and Evelius Mwendwa, both learned State Attorneys.

Before commencement of the hearing in earnest the Court required the parties to address it on the competence of the appeal regard being whether this appeal did not require leave to appeal to this Court.

Ms. Shengena readily conceded that the appeal is incompetent for lack of leave under section 5 (1) (c) of the Appellate of Jurisdiction Act [Cap 141 R.E. 2002; now R.E. 2019] (the AJA). She explained that under section 5 of the AJA it is only appeals against decisions under subsection (1) (a) and (b) (i) to (ix) which do not require leave to appeal. Under subsection (1) (c) any other order requires a leave to appeal to this Court. She said, in this appeal the appellant is appealing against an order of the

High Court that requires leave but filed it without first seeking and obtaining leave under section 5 (1) (c) of the AJA. This omission renders the appeal incompetent and liable to be struck out, she said.

On her part, the respondent being a lay person and not conversant with legal issues had nothing to comment seemingly leaving it to the Court to determine.

The issue for this Court's determination is whether this appeal required leave to appeal before this Court.

We have given due consideration to the uncontested submission by the learned Principal State Attorney regarding the issue we have raised. On the issue whether the appeal to this Court can be filed with or without leave is articulated under section 5(1) of the AJA which 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 filing 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 1 of Order XLIII in the Civil Procedure Code or in any rule or the High Court amending, or in substitution for, the rule;

*(c) with the leave of the High Court or the Court of Appeal, against **every other** decree, **order**, judgment, decision or finding of the High Court."*

[Emphasis added].

In the case of **Tanzania Breweries Limited v. Leo Kobelo**, Civil Appeal No. 17 of 2016 (unreported), the Court clearly stated that section 5 (1) (a) and (b) of the AJA specifies the types of decisions which are appealable as of right and those decisions which require leave of the High Court or the Court as per paragraph (c) of subsection (1) of the same section. Yet, earlier on, in the case of **Hussein Shabenga Jumanne S.**

Makanyanga and 6 Others v. Tanzania Port Authority, Civil Appeal No. 39 of 2009 (unreported), the Court underscored that, the matter which does not fall under any of the categories provided for under section 5 (1) (a) and (b) of the AJA it requires leave to be applied under section 5 (1) (c) of that Act and that lack of leave makes the Court to have no jurisdiction to entertain it.

This position of the law has been clearly expounded in a number of decisions of this Court. Just to mention a few they include **Enock M. Chacha v. Manager NBC Tarime [1995] TLR 270** as follows:

"Under section 5 (1) (c) of the Appellate Jurisdiction Act, appeals like the present must come to this Court only with the leave of the High Court. The appellant neither sought nor obtained leave to appeal to this Court. The appeal is therefore incompetent for non-compliance with section 5(1) (c) aforesaid."

In this case there is no dispute that the substantive matter emanates from a labour dispute which was initially commenced in the Commission for Mediation and Arbitration. Then it was taken for revision to the Labour Tribunal before it was taken to the High Court for review. Had this appeal

emanated from that matter (labour matter) we are certain that such requirement would not have been needed in the wake of disallowing such leave in order to appeal to the Court - See **Tanzania Teachers Union v. The Chief Secretary and 3 Others**, Civil Appeal No. 96 of 2012 (unreported).

The appeal at hand emanates from the decision of the High Court dismissing the application for extension of time to file an application for review against the Ruling and drawn order issued by Mujulizi, J. The order refusing to extend time, in our view, was any other order which falls under section 5(1) (c) of the AJA. (See also **Boniface Anyisile Mwambukusi v. Atupele Fredy Mwakibete and Two Others**, Civil Appeal No. 46 of 2021 (unreported). This implies that the appellant was required to seek and obtain leave before lodging the appeal to this Court.

In this regard, we agree with Ms. Shengena that since there was no leave to appeal that was applied and granted for filing the appeal in this Court, then this appeal is incompetent before the Court and, therefore, liable to be struck out.

In the final analysis, we are settled in our mind that failure by the appellant to seek and obtain leave as required by section 5 (1) (c) of the AJA before lodging this appeal renders the appeal incompetent and we hereby strike it out.

Since this matter originates from a labour matter, we do not make any order as to costs.

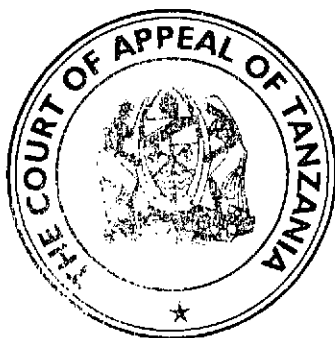
DATED at DAR ES SALAAM this 15th day of November, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 17th day of November, 2021 in the presence of appellant in person and Mr. Daniel Nyakiha, learned State Attorney for the respondent is hereby certified as a true copy of the original.




K. D. MHINA
REGISTRAR
COURT OF APPEAL