IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, JA., KENTE, J.A. And MASOUD, J.A.:)

CIVIL APPLICATION NO. 30/08 OF 2019

REMIGIOUS MUGANGA ..... APPLICANT

VERSUS

BARRICK BULYANHULU GOLD MINE ..... RESPONDENT

(Application for Review of the Judgment and Order of the Court of Appeal of Tanzania, at Mwanza

(Juma, CJ.; Mwarija, JA; and Ndika, JA.)

dated the 11th day of October, 2018

in

Civil Appeal No. 47 of 2017

RULING OF THE COURT

30th October, & 7th November, 2023

KENTE, J.A.:

This application was brought under section 4 (4) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (the AJA) together with Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant, namely, Remigious Muganga is asking the Court to review its judgment and decree dated the 11th October, 2018 in Civil Appeal No. 47 of 2017.

Initially the grounds upon which this application was premised as contained in the Notice of Motion, were that:

(a) The Court had omitted to consider and deal with several documents in the record which showed that the appellant (now the Applicant), had really raised the complaint of illegality, fraud and perjury in the Labour Court even before coming to this Court;

(b) The Court had omitted to consider and deal with the appellant's (now the applicant's) written submissions on ground No. 3 of the appeal as part and parcel of his written submissions on ground No. 5 of the appeal; and that

(c) The applicant was wrongly deprived of a full opportunity to be heard on the credibility of witnesses and on ground No. 5 of the appeal.

The application is supported by an affidavit deponed by the applicant which contains, by and large, a statement of the background facts giving rise to the present application. For obvious reasons, another remarkable

feature of the applicant's affidavit is a litany of accusations against the respondent.

On the other hand, the application was opposed by the respondent who filed an affidavit in reply sworn by Mr. Niwakweli Mushi, its Industrial Relations Officer.

Whereas, at the hearing of this application, the applicant was represented by Mr. Victor Karumuna, learned advocate, the respondent's case was advocated for by Mr. Faustine Malongo also a learned advocate.

In order to bring the whole dispute between the parties into a proper perspective, it behoves us to start off with a brief statement of the factual background culminating in the instant application. The applicant was employed by the respondent company. In 2010, his contract of service and those of some of his fellow employees, were terminated upon retrenchment. Aggrieved by the said termination, the applicant and other affected employees referred their grievances to the Commission for Mediation and Arbitration (the CMA) at Shinyanga. Their common complaint was that they were unfairly terminated and, to that end, they sought to be reinstated and compensated by the respondent for unfair termination.

However, as luck would have it, the dispute between the respondent and some of its former employees including the applicant did not take long. It was settled amicably at the mediation level. Accordingly, a deed of settlement containing various mutually agreed terms and conditions such as terminal benefits was signed by the representatives of the employees whose contracts of service were terminated and the respondent.

Two months after the date of settlement which had then resulted into a consent decree, the applicant lodged an application in the High Court at Mwanza seeking to execute the above-mentioned decree. Initially, he pegged the decretal sum at TZS 10,885,080.00 which, for the reasons to be stated soon, he later on inflated twice to TZS 193,555,714.00 and finally to TZS 334,150,084.00. The reason behind the never – ending increases in the decretal sum to the amount which was absolutely staggering, was the applicant's inclusion of what he claimed to be daily subsistence allowance for himself, his wife and child before repatriation, and the costs of transportation of his personal belongings from Kahama to his place of domicile in Bukoba.

However, before the application for execution could proceed to hearing, the respondent company, in terms of Order XXII Rule 2 (2) of the

Civil Procedure Code, (Chapter 33 of the Revised Laws,) lodged an application in the High Court praying for an order to be made to the effect that, the decree sought to be executed be certified as having been satisfied. It is worthwhile to mention here that, by that application, the respondent had intended to establish that in fact, there was nothing to be executed as the applicant had already been paid the agreed terminal benefits before the dispute was referred to the CMA. Even though, the application filed by the respondent was on 29th July, 2013 withdrawn with the leave to revive it and indeed, on 12th August, 2013 the respondent went ahead and re-instituted it. But then, on 5th September, 2013 the said application was struck out by the High Court Registrar. The striking out order paved the way for the hearing on merit and determination of the applicant's application for execution in which, as stated earlier, the decretal sum had already been raised to a sky-high amount of TZS 334,150,084.00.

After hearing both parties to the application, the Registrar of the High Court was satisfied and he accordingly found that, indeed the applicant had already been paid his entitlements by the respondent. Regarding the loan recovery which was by way a set-off of TZS 6,953,555.00, the High Court

Registrar took the view that, the respondent had acted wrongly since the existence of the loan was not raised in the CMA and above all, it was not agreed in the deed of settlement that the balance would be discharged by deducting it from the applicant's terminal benefits.

Aggrieved but undaunted, the applicant referred his grievances to the Labour Court. After hearing both sides, the learned Judge went on sustaining the decision of the Registrar holding that, the applicant's complaints were wholly, without merit. Still aggrieved, the applicant further appealed to this Court citing one ground of complaint (after the first four grounds were rejected by the Court on a preliminary objection for being violative of section 57 of the Labour Institutions Act, Cap 300), thus:

> *"The decision of the learned High Court Judge and that of the Registrar were procured by the respondent, illegally, by fraud and by perjury as the respondent deliberately suppressed the true facts and manufactured fake ones"*

For its part, the respondent resisted the appeal arguing that the applicant's complaint against the decision of the Labour Court was being

raised as an afterthought as it did not feature anywhere in the proceedings before the Labour Court.

After considering the appeal and the submissions made by the parties, this Court held, in respect of the argument that the applicant did not raise the issue of forgery or perjury in the Labour Court, that indeed it was being raised for the first time. On the basis of the above finding, the Court went on holding that the appeal was predicted on a matter which was neither raised before nor decided by the Labour Court. Relying on our earlier decision in the unreported case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 and many others on the same point, the Court finally held that, as a matter of principle, this Court will only look into matters which were canvassed in the lower courts and were decided, and not new matters which were neither raised nor decided by neither the trial court nor the High Court on Appeal. Briefly, this is what has precipitated the current application.

At the hearing of this application, Mr. Victor Karumuna, learned counsel successfully prayed in terms of Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules 2009 (the Rules) for leave to argue what he called "an

instance of manifest errors on the face of the record resulting in a miscarriage of justice to the applicant". After obtaining the Court's leave, the learned counsel went on summarizing the applicant's complaint thus:

> *"After properly holding that ground No. 5 of the appeal was based on a point of law, the Court omitted to address and determine the same on merit".*

Moreover, on being probed, Mr. Karumuna informed the Court that, he had abandoned the earlier mentioned grounds and that he would only argue the above-cited as a solitary ground in support of the application.

In order to make the import of ground No. 5 clear, it is important for us to briefly recapitulate that, in the said fifth ground of appeal, the applicant faulted the decision by the learned High Court Judge for allegedly being procured by the respondent illegally and by fraud and perjury. It is this complaint which, ultimately the Court found to have been raised as a new matter which was not raised before the lower courts.

Submitting in support of the application, Mr. Karumuna was very brief as he tried to get straight to the point. He argued that, since ground No. 5 of the appeal was based on a point of law, this Court ought to have

considered and resolved it. Otherwise, the learned counsel contended, the omission to deal with it was similarly a violation of the already cited section 57 of the Labour Institution Act which insists that, any party to the proceedings in the Labour Court may appeal against the decision of that court to this Court, on a point of law only.

Submitting in rebuttal, Mr. Malongo was of the quite different position. The gist of his argument was that, the applicant had not demonstrated by way of affidavit evidence that his complaints regarding perjury and fraud allegedly committed by the respondent were raised before the Labour Court. Referring to page 66 of the record of the application which contains the applicant's counter affidavit in respect of an application for execution (No. 1 of 2010 before the Labour Court), the learned counsel maintained that, there was no allegation of fraud, perjury or illegality which was tabled before the Registrar of the High Court. But, even if the said complaints were raised, the learned counsel further contended that, there was a need for the applicant to prove the said allegations by evidence. Moreover, Mr. Malongo still had another string to his bow. He argued correctly so in our view that, the Court could not have considered such affidavit evidence which was no longer on

the court's record after the two applications in which the evidence was contained were either struck out or withdrawn from the Labour Court.

We prefer to begin our discussion with a few general comments as a guidance to the prospective applicants for review before this Court. As the matters stand today, it is needless to say that, following the enactment and coming into force of section 4 (4) of the AJA, counsel before this Court, their clients and even unrepresented litigants or convicts, very often and lightly apply for review of the Court's judgments in the circumstances which are far from the exceptional requirements provided for under Rule 66 (1) of the Rules. It is for this reason that we wish to emphasize here that, a review application is not an appeal and it should not be preferred and argued as if it were so.

Still on the principle under discourse and in a comparative jurisprudential approach, it is generally accepted case law that, the review jurisdiction of the apex court like ours, is exercisable in very narrow and exceptional circumstances which have resulted into a miscarriage of justice. That is an unassailable benchmark when the Court is called upon to re-examine the decisions made by itself. The Supreme Court of Ghana put it in

the most poignant way, when it held in sooth, in the case of **Ablakwa and Another v. Attorney General and Another** (J7 of 2012) [2013] GHASC 143 (23 January, 2013), that the above requirement is a high hurdle for the applicant to surmount.

Considering the only ground advanced by Mr. Karumuna in support of this application, we wish to reproduce what was observed and finally found by the Court regarding the question as to whether or not the applicant had raised any complaint relating to fraud or perjury in the Labour Court. The observation and finding of the Court were exposited in the following succinct words, thus:

> *"Having considered the submissions of the appellant and the learned counsel for the respondent, it is common ground that the complaint is based on the accounting documents which were annexed to the affidavits filed in support of the two applications brought by the respondent. The applications were intended to establish that the appellant's terminal benefits had been fully paid. As shown above however, the two applications did not proceed to hearing. The same were withdrawn/struck out.*

Notwithstanding the invalidity of the parties' affidavits following the withdrawal/striking out of the respondent's applications, the argument that the appellant did not raise the issue of forgery in the Labour Court is supported by the record. After the Application for Execution had been decided, the appellant applied for Reference, the decision of which has given rise to this appeal. ***In the affidavit which he filed in support of Reference, the appellant did not raise any issue relating to fraud or perjury.*** *As submitted by Mr. Mwantembe therefore, the appeal is predicated on a matter which was neither raised nor decided by the Labour Court in the Application for Execution or in the Reference".*

[Emphasis added].

In considering the instant application, we have had sight of the applicant's affidavit evidence and the arguments canvassed by his counsel. To recap, Mr. Karumuna has forcefully contended that indeed, the applicant had raised the issue of fraud and perjury before the Labour Court and that, since it was based on a point of law, the Court had no choice other than to consider that ground and determine it. The decision by the Court not to consider the fifth ground of appeal, which turned on a point of law, was

according to Mr. Karumuna, a sufficient or justifiable reason for us to exercise our review jurisdiction in terms of Rule 66 (1) of the Rules.

With due respect to Mr. Karumuna, much as we are mindful that in deciding legal issues judges oftentimes make findings of fact and this is because most issues that arise in judicial proceedings are of a combination of law and facts, we wish to insist here that, before an issue can be made a subject of judicial determination, it must arise from the pleadings by which both the parties and the court are bound. That is to mean, a point of law whose determination entails the court's making a finding or findings of fact such as the allegations of fraud and perjury in this case, must in the first place arise from the parties' pleadings. For, it is very elementary that, in any judicial inquiry, the issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. It follows therefore that, it is neither desirable nor permissible for a court of law to consider and determine an issue which could have been but was neither raised by nor discernible from the parties' pleadings. In fact, that is what the Court abstained from doing in the impugned judgment.

In the result, having exhaustively gone through the record and the said judgment, we have not found any material to enable us to enterfere with our own decision in Civil Appeal No. 47 of 2017 by way of review. Upon the above observations, we find the application before us devoid of merit and we therefore dismiss it.

DATED at **MWANZA** this 6th day of November, 2023.

A. G. MWARIJA
JUSTICE OF JUSTICE

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 7th day of November, 2023 in the absence of the Applicant counsel despite being informed and Mr. Castory Pej holding brief of Mr. Faustin Malongo, learned counsel for the Respondent, is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL