IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A., And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 570 OF 2023

JIREYS NESTORY MUTALEMWA.....APPLICANT

VERSUS

NGORONGORO CONSERVATION AREA AUTHORITY .....RESPONDENT

[Application for Review of the Judgment of the Court of Appeal of Tanzania at Arusha]

(Lila, J.A., Mwandambo, J.A. And Fikirini J.A.)

dated the 21st day of April, 2023
in
Civil Appeal No. 180 of 2016

.....

RULING OF THE COURT

15th & 23rd February 2024

GALEBA, J.A.:

This application by Jireys Nestory Mutalemwa, the applicant, which is preferred under section 4 (4) of the Appellate Jurisdiction Act, (the AJA) and rule 66 (1) (a), (b), (c) and (e) of the Tanzania Court of Appeal Rules 2009, (the Rules), is for review of the judgment of this Court (Lila, J.A., Mwandambo, J.A., And Fikirini J.A.) dated 21st April, 2023.

According to available records, the applicant was an employee of the Ngorongoro Conservation Area Authority, the respondent, from 1988.

However, for reasons that are not relevant to this ruling, on 26th May, 2001, the applicant was summarily dismissed from employment. He challenged his dismissal before the defunct Industrial Court of Tanzania (the defunct ICT) (Mwipopo, Chairman), such that on 12th December, 2008, the latter court held that his dismissal was an excessive sanction and ordered that the appropriate punishment be termination, which is relatively less severe. About 7 years later, in 2015, the applicant approached the Labour Court and instituted Miscellaneous Labour Application No. 7 of 2015, seeking an interpretation of the defunct ICT award. The matter was duly heard and on 19th August, 2016, Nyerere J. at the Labour Court, dismissed it in its entirety. That dismissal aggrieved the applicant, and to challenge it, he approached this Court and lodged Civil Appeal No. 180 of 2016. That appeal was struck out primarily, for want of jurisdiction on 21st April, 2023.

The act of striking out the applicant's appeal, triggered filing of the present application. The notice of motion initiating this application is based on 34 grounds and the notice is supported by an affidavit of the applicant containing a total of 56 paragraphs. To resist the application, Mr. Mathew Fuko from the office of the Solicitor General in Arusha, swore and filed an affidavit in reply disputing all facts and positions contained in the affidavit of the applicant.

As for the prayers, initially the applicant in the notice of motion, had prayed for the following orders; **one,** that His Lordship the Chief Justice be pleased to compose a Full Bench of the Court, to reconcile several conflicting decisions of the Court and another from a foreign jurisdiction. **Two**, that in the interest of justice, in hearing this application, a different panel of members of the Court be composed excluding the three Justices of Appeal who participated in the hearing giving rise to the judgment he is presently challenging. At the hearing, we asked him whether he maintained the above prayers, or he had some reflection on them. In response, he dropped the first prayer and modified the second. In modifying his second prayer, the applicant was in agreement that, if we agree with this application, we exercise this Court's mandate as bestowed upon it, under rule 66 (6) of the Rules, which is to rehear the matter, reverse or modify the former decision or make such other orders according to law. Only then we were able to proceed to the substantive hearing.

At the hearing of this matter, the applicant appeared in person, whereas the respondent had the services of Mr. Peter J. Musseti, learned Senior State Attorney assisted by Ms. Grace Lupondo and Mr. Mathew Fuko, both learned State Attorneys.

After adopting his notice of motion, affidavit and his written submissions, the applicant, condensed his grounds into one substantive and overriding ground, namely that the decision of this Court in the aftermath of hearing his Civil Appeal No. 180 of 2016 is nothing but a nullity. His reasons for that ground were; **first**, in reaching that decision, the applicant was not given a right to be heard and; **second**, the decision was fraudulently and illegally procured.

In explaining the first reason of not being afforded a right to be heard by the Court which heard him on appeal, the applicant emphatically argued orally before us, that in reaching the decision, the Court applied provisions of law that were not discussed at the hearing. This very complaint is also expressed in paragraphs 1, 2, 6, 17, 18, 19, 27, 30 and 33 of his notice of motion. These complaints are repeated in numerous paragraphs of the applicant's affidavit as well. In this regard, he argued that several sections of the law cropped up in the judgment of the Court, but the same were not discussed at all during the hearing, although the laws have an effect prejudicial to his position. The sections and rules he complained of having been relied upon by the Court without according him a right to comment on, are; sections 27 (1C) and 28 (2) of the repealed Industrial Court of Tanzania Act, (the repealed ICT Act), item 7 (4) of the Third Schedule to the

Employment and Labour Relations Act, (the ELRA) and rule 48 (1) of the Labour Court Rules.

The applicant also complained at item 6 of his notice of motion, that except the case of **Tanzania Teachers Union v. The Chief Secretary and Three Others,** Civil Appeal No. 96 of 2012 (unreported), he was not advised that all other authorities would be relied upon in the Court's decision. It was his submission in this regard, as he puts it at paragraph 33 of his notice of motion, that this Court defrauded him of his right to be heard.

The other point he made is that, during the hearing, he relied on the case of **Pasmore and Others v. Oswaldtwistle Urban District Council** [1898] AC 387, but quite astonishingly, without assigning any reasons, the Court did not refer to that decision in its judgment. According to him, had the Court considered that authority, it would have noted that the decision had the effect of repealing certain sections of the AJA which required him to seek leave to appeal, such that he had an automatic and unimpeded right of appeal. To buttress his position, in his written submissions, particularly on the right to be heard, the applicant relied on the cases of **Margwe Erro and Others v. Moshi Bahululu**, Civil Appeal No. 111 of 2014; **Transport Equipment Ltd v. Devram P. Valambhia**, Civil Reference No. 7 of 1992

and; **Abbas Sherally and Another v. Abdul Fazalboy,** Civil Appeal No. 33 of 2002 (all unreported), among others. Reference was also made to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). Thus far was the applicant's submission as regards denial of his right to be heard.

The applicant's second ground of complaint was that, the judgment of the Court was a nullity. As a basis for that complaint, the applicant argued that the decision of the Court was procured illegally, because instead of relying on item 13 (4) of the Third Schedule to the ELRA, and hold that it is the Court that is an appropriate forum to determine his appeal, the Court relied on item 7 (4) of the same schedule thereby missing the point, by holding that the proper forum was a bench of three Judges of the High Court. It was the applicant's position that, the deliberate mix up of the law, was aimed at defeating his interest in the decree he had. The act was purposely done in order to protect the acts of, and side with Nyerere J., all aimed at ensuring that he does not realize his rights under the law. In elaborating further his position, the applicant contended that the mandate to compose the bench of three Judges of the High Court as an appellate body, was dissolved along with the repeal of the repealed ICT Act, on 1st September, 2004 upon publication of Government Notice No. 312 of 2004. In cementing

his point that repealed laws cannot be applicable in the aftermath of their repeal, the applicant complained that, although the case of **East African Cables (TZ) Limited v. Bepha B. Mugasa,** Miscellaneous Civil Appeal No. 11 of 2009 (unreported) was discussed at the hearing and was favourable to his position, nonetheless, the authority was not referred to or used in the judgment of the Court. His conclusion was that the decision was not taken into account by the Court, because it was in favour of his position.

All in all, according to the applicant, the only available appellate forum, where he could take his grievance from the decision of Nyerere J. under the laws of Tanzania, was this Court and not any other organ or body. Nonetheless, his efforts hit the roof when, the Court of appeal, although the only forum to hear him on appeal, denied to have any jurisdiction, he argued.

Based on the above submissions and authorities, the applicant implored us to hold that, this Court was wrong to declare that it had no jurisdiction to hear Civil Appeal No. 180 of 2016, which it unlawfully struck out. He thus impressed on us to set aside the judgment of this Court, and set down his appeal for hearing, because this Court is the only forum with jurisdiction to determine his appeal.

To respond to the applicant's arguments was Ms. Lupondo, who contended generally that, the application does not conform to the threshold requirements listed under rule 66 (1) of the Rules, thus according to her, the matter was not amenable to review. In that respect, she cited to us the case of **Pascal Bandiho v. Arusha Urban Water Supply & Sewerage Authority (AUWASA),** Civil Application No. 384/02 of 2022 (unreported). Coming to the issue of the right to be heard, the learned State Attorney, distanced herself with the position maintained by the applicant because, to her, the applicant was adequately availed with a right to be heard and he fully exercised that right. In supporting her view, the learned State Attorney contended that the applicant presented written submissions and appeared in person to argue his appeal. She stated that in the challenged decision, at pages 2 to 4 the Court detailed what the applicant submitted in arguing the points raised. As for the sections that were relied upon in the judgment without involving the applicant, Ms. Lupondo submitted that, the Court has a right to apply any laws in resolving disputes before it, and it can do so without involving parties. She submitted that there is no law that requires courts to call parties and hear them on the laws that it intends to rely upon in deciding a legal matter.

On the issue of relying on item 7 (4) of the Third Schedule to the ELRA instead of 13 (4) of the same schedule, the learned State Attorney submitted that, what was presented before Nyerere J., was an application for interpretation of an award and not an appeal or an application for judicial review, which are the proceedings referred to in item 13 (4) of that schedule, which the applicant wanted the Court to apply. Since interpretation or enforcement of an award, which the applicant had gone to the Labour Court to seek, is not contained in item 13 (4) of the schedule, but in item 7 (4) thereof, the Court was justified for not relying on item 13 (4). Thus, according to the learned State Attorney, item 7 (4) of the said schedule was the relevant law applicable in the circumstances, and the Court cannot be faulted for doing so. She submitted that as the matter had been heard and resolved, the complaint was a ground of appeal.

The learned counsel stated also that the review must relate only to the judgment of the Court of Appeal and not what happened or what was done in the Labour Court before Nyerere J. and cited the case of **Pascal Omari Makunja v. R,** Criminal Application No. 22 of 2014 (unreported), arguing that the error on the face of the record must be so apparent with no need of employing much effort to trace and unearth one. In the circumstances, she moved the court to dismiss this application with costs.

In rejoinder, the applicant submitted that the authorities relied upon by counsel for the respondent are all irrelevant and accordingly distinguishable because, in those authorities, appeals were heard and also the points complained of was an error on the face of the record, but in this matter; **one**, the appeal was not heard, and; **two**, his complaint is that the decision is a nullity not that there is an error on the face of the record. He insisted that his application be allowed with costs.

Anyhow, in due course we will carefully examine and consider the parties' contentions in seeking to definitely answer the applicant's complaints in view of our mandate in review applications, but before we do so, we think, coherence and logic demand that we start with the law and the basic principles guiding this Court when called upon to review its own decisions. The law relevant for our discussion, in terms of this Court's jurisdiction in matters of review, is section 4 (4) of the AJA. As for the orders that this Court may make in case a review succeeds, the relevant provision is rule 66 (6) of the Rules. The benchmarks or the criteria necessary for exercising review jurisdiction, the appropriate law is rule 66 (1) of the Rules which provides that:-

*"66.- (1) The Court may **review its judgment or order**, but no application for review shall be entertained except on the following grounds: –*

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;

*(b) **a party was wrongly deprived of an opportunity to be heard;***

*(c) **the court's decision is a nullity**; or*

(d) the court had no jurisdiction to entertain the case;

*(e) **the judgment was procured illegally, or by fraud** or perjury.*

[Emphasis added].

We added emphasis above because the present application is not predicated on all the five paragraphs of Rule 66 (1) but only on Rule 66 (1) (a), (c) and (e) which relate to the right to be heard, issues of the judgment being a nullity and illegal procuring of the decision, respectively.

As for the principles necessary to guide us, in a simple and understandable language, were summarized by this Court in the case of **Mirumbe Elias Mwita v. R,** Criminal Application No. 4 of 2015 (unreported), where this Court stated:-

*"**One**, the principle underlying a review is that, the court would not have acted as it had, if all the circumstances had been known... **Two**, a judgment of the final court is final and review of such judgment is an exception... **Three**, in review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same...**Four,** the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case... **Five**, the power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law... **Six**, the term 'mistake or error on the face of the record by its very connotation signifies an error which is evident **per se** from the record of the case and it does not require detailed examination, scrutiny and clarification either of the facts or the legal exposition... **Seven**, a Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision."*

We fully subscribe to the above principles and we will apply some of them in resolving the present application. In this matter, the issues we are called upon to resolve are two; **one,** was the applicant deprived of an opportunity to be heard in view of the above quoted rule 66 (1) (b) of the

Rules. **Two**, can this Court in review proceedings hear parties and declare its own judgment a nullity on account of relying on the law that it allegedly ought not to have relied upon.

We will start with the first point argued by parties concerning denial of the right to be heard. On this issue, the applicant's forceful argument was that, if the Court wanted to rely on any provisions of law or any past decisions with an effect of defeating his position, then the Court was duty bound to recall the parties and avail him an opportunity to be heard, so that he could react to such laws or authorities before the Court could rely on them, in its judgment. That is crucial because, the applicant contended, the laws and decisions were not discussed at the hearing. The respondent's contention was that, such obligation to the Court does not exist, under the law.

To underscore how it works, the issue of hearing of appeals in the Court of Appeal, it needs a brief description on how it all happens. Hearing of civil appeals in this Court is strictly regulated by the Rules. In the Court of Appeal as preliminary stages, a party who initiates an appeal has to comply with rule 83 (1) of the Rules by filing a notice of appeal and serving it to the other party or parties under rule 84 (1) of the same Rules. Then an appeal

is instituted under rule 90 read together with rule 96 of the Rules, and once all compliances are in order under Part V of the Rules, the appeal may be set down for hearing in terms of the notice of hearing issued under rule 108 of the Rules. Actual hearing of the appeal is provided for under rule 106 detailing the manner of presentation of written submissions and rules 112 and 113 of the Rules covering the entire subject of hearing. After hearing is completed, the Court has a duty to compose a judgment according to law, and deliver it to the parties under rule 116 of the Rules.

In this matter, we have revisited the Rules particularly Part V providing for all aspects of *Appeals in Civil Matters,* running from Rule 82 to Rule 117, but none of the rules guide us to adopt a procedure suggested by the applicant. In addition, there is no law, to our knowledge, and we were not referred to one by the applicant, in existence in this jurisdiction which requires the Court to recall parties and consult them after completion of hearing, in order to hear them on the laws or authorities that the Court might rely upon in the course of composing its judgment. We wish to make it clear here that, this Court has mandate to refer to any statutory laws of Tanzania or any cases decided by this Court or by Higher Courts from any foreign jurisdictions, particularly from the members of the Commonwealth of Nations, provided that such law or authority is aimed at resolving the matter

before this Court. Likewise, it is not the requirement of any procedural law that the Court must refer or apply all laws and cases discussed at the hearing, like the case of **East African Cables** (supra). Under the law as established, it was not mandatory for the Court to have to referred to it. In actual fact, even in this ruling we have been, and will continue to refer to decided cases that were not discussed when hearing this application, and we might omit to refer to any cases that were discussed at the hearing, because doing so is perfectly lawful. Thus, with respect to the applicant, the procedure he argued that it should have been followed in determining his appeal, is not found anywhere in our law books.

On the right to be heard, the applicant had yet another point. The complaint was that during the hearing of the appeal, he relied on the case of **Pasmore and Others** (supra) which is not at all referred to in the judgment of the Court. We wish to restate that the jurisdiction to entertain an application for review is as provided under section 4 (4) of the AJA and rule 66 (1) already quoted above. For clarity we quote the provisions of section 4 (4) of the AJA. It provides:

> *"The Court of Appeal shall have the power to review its own* ***decisions****."*
>
> [Emphasis added]

Rule 66 (1) of the Rules, which is complementary to the substance of the above section, states that the Court may review its **judgment** or **order**. The emphasis is what this Court is mandated to act upon in exercising its review jurisdiction. This has already been decided upon in the past. In the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of the estate of the later Dolly Maria Eustace) and Three Others,** Civil Application No. 314/12 of 2020 (unreported), this Court observed:-

> *"Rule 66 (1) of the Rules is very clear that, the Court may review its **"judgment"** or **"order",** which means, for the Court to determine an application for review all it needs to have before it is the impugned decision and not the evidence adduced during trial or decisions of subordinate court(s) as submitted by Mr. Malata. We need to emphasize here that, the record referred in review is either the **"judgment"** or **"order"** subject of review."*

The point is that, when a party brings up an application of this nature, the mandate of the Court is to look at the judgment and only the judgment sought to be reviewed. In this case we have gone through the impugned judgment and have been unable to trace any reference to the case of **Pasmore and Others** (supra). Therefore, that case or its effect is not part

of the judgment sought to be reviewed. That absence in the judgment, makes it to be a matter not subject of review. Review jurisdiction is impossible to exercise outside the judgment or order of the Court complained of. Thus, the applicant's complaint surrounding his reliance on the case of **Pasmore and Others** (supra) which was not referred to anywhere in the impugned judgment of the Court, in the context of section 4 (4) of the AJA and rule 66 (1) of the Rules, has no substance under the law.

In summing up the issue of deprivation of the applicant's right to be heard on both aspects, that is, of not being called to react to the laws and decided cases to be relied upon in the judgment, on one hand, and an omission by the Court to refer to the case of **Pasmore and Others** (supra), on the other; the resultant finding of this Court is that, the applicant in Civil Appeal No. 180 of 2016, was duly afforded an opportunity to be heard as required by the Rules. Thus, the applicant's complaint that rule 66 (1) (b) of the Rules was offended, is misconceived and we refuse it.

The second issue corresponds to the complaint that, instead of relying on item 13 (4) of the Third Schedule to the ELRA, and hold that the forum for his appeal from the decision of Nyerere J. was this Court, the Court relied on item 7 (4) of the same schedule and section 27 (1C) of the repealed ICT

Act, and erroneously held that his appellate forum was a bench of three Judges of the High Court. To appreciate the basis of that complaint, we think it is appropriate to quote, at a considerable length, the substance of the judgment complained of, relevant to the issue. It is from page 22 to 24 of the record of this application, where this Court stated:-

> *"To determine whether a right of appeal exists from an impugned decision, one need not go further than the relevant statute. In this case; the replaced ICT Act. Despite the appellant's attempt to persuade the Court that Nyerere, J exercised jurisdiction in the Labour Court acting under rule 48 (3) of the Labour Court Rules, we are not prepared to agree with him. This is so because, the award from which the appellant sought to enforce to use his own words, as part of the interpretation, was not a decision of the Labour Court within the meaning of it under rule 48 (1) of the said Rules. As submitted by Mr. Musetti and Ms. Lupondo supported by the impugned ruling itself, the Labour Court entertained that application stepping into the shoes of the defunct ICT mandated by paragraph 7 (4) of the Third schedule to the ELRA. In our view, it seems to be obvious that, Nyerere, J. sat to interpret the ICT's award made on 12/12/2008 in the same way a chairman of the defunct ICT could*

have done but for the repeal of the ICT Act. Clear as it is, the argument that Nyerere, J. exercised jurisdiction under the Labour Institutions Act and the Labour Court Rules has no semblance of merit and we reject it. Having held that the impugned decision was not from the Labour Court as such, the remaining question calling for our answer is whether decisions of the defunct ICT were appealable to the Court. Our answer is to be found from section 27 (1C) of the repealed ICT Act which provided:-

"Subject to the provision of this section; every award and decision of the Court shall be called in question on any ground in which case the matter shall be heard and determined by a full bench of the High Court."

We take judicial notice that aggrieved litigants have approached the High Court by way of appeals presided by a panel of three Judges as a mode of calling into question the awards of the defunct ICT. ***It is thus as clear as day that, the legislature in its wisdom did not provide for appeals from the ICT to the Court but to the full bench of the High Court****."*

We quoted the above text at a considerable length, to demonstrate that the point complained of in this review was considered and resolved. The

position of law is that where this Court on appeal, hears parties on a point, considers it and resolves the issue, this or the other way, the same Court has no mandate, based on statute or Court practise, to call into question such a decision by way of review. We so observe based on the comfort we obtain from cases decided earlier on. In the case of **Angella Amundo v. The Secretary of the East African Community,** Civil Application No. 4 of 2015 (unreported), it was held that:-

> *"As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction:* ***Kamlesh Varma v. Mayawati & Others,*** *Review Application No. 453 of 2012."*

See also this Court's decisions in **Mirumbe Elias Mwita** (supra), **Majid Goa @ Vedastus v. R**, [2017] T.L.R. 290 and; **Muhsin Mfaume v. R**, Criminal Application No. 43/01 of 2020 (unreported).

Thus, as long as what is complained of is the merit where to appeal between the Court of Appeal and the bench of three Judges of the High Court, the point raised is not a ground of review. It is a fit ground of appeal before a court which can exercise appellate jurisdiction, which unfortunately is not in existence, as we speak. The Court of Appeal, in this jurisdiction is

the final Court under the Constitution. We will end this point, and indeed this ruling, with what we observed in **Muhsin Mfaume** (supra), where this Court stated that:-

> *"The mere fact that the applicant is not happy with the judgment of the Court would not amount to a ground of review. As we stated in* ***Blueline Enterprises Tanzania Limited v. East African Development Bank,*** *Civil Application No. 21 of 2012 (unreported), a court will not sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. We also subscribe to an unreported decision of the Appellate Division of the East African Court of Justice in* ***Angella Amudo v. The Secretary General of the East African Community,*** *Civil Application No. 4 of 2015 in which it observed that it would be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard."*

Based on the above discussion, this Court, sitting in review refrains from entertaining the second ground of complaint for want of jurisdiction.

For the above reasons, the whole application lacks merit and we hereby dismiss it in its entirety. As for costs we make no order thereof, since the application traces origin from a labour dispute.

DATED at **ARUSHA**, this 22nd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Jireys Nestory Mutalemwa, the Applicant unrepresented, present in person and Ms. Zamaradi Johannes, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL