IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MUSSA, J.A.)

CIVIL APPEAL NO. 4 OF 2015

PAMELA P. BIKATUMBA ..... APPELLANT

VERSUS

THE DIRECTOR ABB TANALEC LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Sambo, J.)

Dated the 16th day of September, 2008
In
Civil Appeal No. 45 of 2007
.....

RULING OF THE COURT

16th & 19th February, 2016

MUSSA, J.A.

The appellant was an employee of the respondent till when she was summarily dismissed on the 16th April, 1997. Upon reference to the Arusha Conciliation Board, the summary dismissal was set aside and the Board instead ordered her termination from employment. Nonetheless, the parties were disagreed on some of the terminal benefits, whereupon the Regional Labour Officer initiated an employment cause on behalf of the appellant in the District Court of Arusha.

At the height of the District Court proceedings, the appellant emerged successful and was awarded terminal benefits which she computed to amount to a sum of Shs.113,479,639.40. The respondent was aggrieved and, on appeal to the High Court (Sambo, J.), the respondent's liability was scaled down to a sum of Shs.689,624.40. The High Court decision was handed down on the 16th September, 2008.

The appellant was dissatisfied and, initially, on the 5th August, 2011 the High Court (Nyerere, J.) granted leave to the appellant to lodge an appeal to the Court of Appeal. But, when the appellant presented herself before the Court, it was adjudged that the High Court was wrongly moved and, in the upshot, on the 18th May, 2012 the Court (Nsekela, J.A., Luanda, J.A., And Massati, J.A.) ordered that the Appeal cannot proceed to hearing until such time when the appellant properly instituted it.

Next, through High Court Miscellaneous Civil Application No. 220 of 2013, the appellant sought tripartite reliefs: First, she sought an order of the High Court extending time within which to lodge a Notice of Appeal against the decision pronounced by Sambo, J.; second, she sought another order extending time within which to apply for leave to appeal against the

decision desired to be impugned and; third, as a corollary to the foregoing reliefs, she impressed upon the High Court to proceed further and actually grant the requisite leave.

On the 3rd April, 2014 when the application came before Moshi, J. the learned Judge had no difficulty in finding the same to be omnibus and, on account of the impairment, she accordingly, struck it out. Undauntedly, a little later, on the 15th July, 2014 the appellant successfully petitioned the same court for extension of time within which to review the April 3rd decision. As it were, on the 25th September, 2014 the High Court (Mugasha, J., as she then was,) reviewed its own decision and granted the tripartite reliefs which were earlier refused in its earlier decision. In the aftermath, the appellant filed a Notice of Appeal on the 30th September, 2014 and, eventually, she purportedly mounted the present appeal in terms of Rule 90 (1) of the Court of Appeal Rules, 2009 (the Rules).

Against the foregoing backdrop, when the appeal was called on for hearing before us, the appellant was represented by Mr. Edmund Ngemela, learned Advocate, whereas the respondent had the services of Mr. Elvaison Maro, also learned Advocate. From the very outset, we prompted both

counsel to revisit the High Court proceedings and address us on whether or not it was proper for the appellant to obtain leave to appeal to the Court ahead of lodging the Notice of Appeal in terms of Rule 46 (1) of the Rules.

In his usual frankness, Mr. Maro contended that the application for leave to appeal was not competently before the High Court, the more so as, at the time the application was made and determined, the appellant had not yet lodged a Notice of Appeal. The learned counsel urged that, on account of the shortcoming, the Court should invoke its revisional jurisdiction and nullify the entire proceedings presided over by Mugasha J., as she then was, through which the leave to appeal to the Court was purportedly granted. For his part, Mr. Ngemela hesitated long before conceding that the ailment is fatal.

Addressing the matter of our concern, we should express at once that in raising the issue we were inspired by Rule 46 (1) of the Rules which stipulates:-

> *"Where an application for a certificate or for leave is necessary,* ***it shall be made after the notice of appeal is lodged****." [Emphasis supplied.]*

The bolded portion of the provision is purposive to demonstrate, beyond question, that it is imperative for the Notice of Appeal to precede an application for a certificate or leave to appeal, where necessary. As is plainly obvious, in the situation at hand, the appellant obtained the leave first and then lodged the Notice of Appeal which was, as the popular saying goes, tantamount to *"placing the cart before the horse."*

In doing so, we venture to observe, she contravened the provisions of Rule 46 (1) of the Rules and thereby rendering incompetent the entire proceedings which purported to grant her leave to appeal to this Court. In the result, we are constrained to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act and accordingly, we revise and set aside the High Court proceedings giving rise to the granting of the application for leave to appeal to this Court. That would suffice to push this matter backwards to where it was immediately before the granting of the leave and, that being so, without the requisite leave, the present appeal is left with no legs to stand on. Thus, in the final result, the appeal is struck out but as the same evolved from an employment cause coupled with the

fact that the incompetence was raised by the Court *suo motu* we refrain from giving any order as to costs.

We should, however, observe by way of a postscript that in his submissions the learned counsel for the respondent had braced himself to challenge the entire review proceedings of the High Court but, in view of the position we have taken, we need not decide this matter more than is necessary for its disposal. Thus, as we have found the contravention of Rule 46 (1) of the Rules to be fatal, we need not venture any further.

DATED at **ARUSHA** this 17th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL