IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MWARIJA, J.A., And MUGASHA, J.A.)

CIVIL APPLICATION NO. 172 OF 2016

PATROBERT D. ISHENGOMA..... APPLICANT

VERSUS

1. KAHAMA MINING CORPORATION LTD
(BARRICK [TANZANIA] BULYANHULU).....RESPONDENT
2. MINISTER FOR LABOUR, EMPLOYMENT
AND YOUTH DEVELOPMENT.....RESPONDENT
3. THE ATTORNEY GENERAL.....RESPONDENT

(Application for Revision of the decision of the High Court of Tanzania at Dar es salaam)

(Mihayo, J.)

Dated 19th day of November, 2009
in
Misc. Civil Cause No. 97 of 2007

RULING OF THE COURT

28th September & 2nd October, 2018.

MUGASHA, J.A:.

The employment of the applicant, PATROBERT ISHENGOMA was terminated on 30th August, 2003 by the 1st respondent. Aggrieved, he unsuccessfully lodged a complaint with the Labour Conciliation Board of Kahama. Undettered, the applicant lodged an appeal to the Minister responsible for labour matters who initially, on 1st April, 2004 ordered his reinstatement. However, two years later the said Minister made another decision whereby, apart from ordering termination of applicant's

employment, in addition ordered that he be paid terminal benefits. The execution of what was due to the applicant was in vain after the 1st respondent successfully filed before the High Court an application seeking to have the Minister's decision quashed by prerogative orders of Certiorari and Mandamus. The said application was sought against the 2nd and 3rd respondents. Before the said application was determined, the applicant's efforts to be joined thereto were futile and ultimately, the High Court quashed the decision of the Minister in Miscellaneous Civil Cause No. 97 of 2007 dated 19th November, 2009. This is what made the applicant to bring the present application seeking to have the High Court decision revised.

The application is brought under among others, section 4(3) the Appellate Jurisdiction Act (Cap. 141 R.E. 2002) (the AJA) upon among others, the following grounds: -

1. The proceedings, decision and ruling in question are highly tainted with several illegalities, irregularities and improprieties.
2. The applicant has been greatly affected by the decision and Ruling of High Court (Mihayo, J.) dated 19/11/2009 in Misc. Civil Cause No. 97/2007 without being afforded a right to be heard.

3. The applicant was not a party in the High Court proceedings and therefore has no right of appeal in the complained decision and ruling.
4. The decision in High Court Misc. Civil Cause No. 97 of 2007 was based on manifest error on the face of record as the same granted the order of certiorari and quashed the decision of the 2nd respondent (Hon. John Chiligati – MP) dated 25/11/2006 on ground that the applicant's reference to the 2nd respondent was time barred which in fact the said reference was in time.

The application is supported by the affidavit sworn by the applicant. In paragraphs 27 and 29 of the affidavit he has deposed as follows:-

> *"That, without joining me as a party or notifying me, the 1st respondent instituted Misc. Civil Cause No. 97 of 2007 in the High Court of Tanzania at Dar es salaam on 21/12/2007 against the 2nd and 3rd respondents. This was an application for prerogative orders of certiorari and mandamus to quash the decision of the 2nd respondent (Hon. John Chiligati – MP) dated 25/11/2006.*

That, when I became aware of Misc. Civil Cause No. 97 of 2007, I applied to the High Court on 20/10/2008 to be joined as a necessary and interested party in the application. To my surprise again the High Court never cared even to attend my said application or to communicate with me"

The application was opposed by the 2nd and 3rd respondents through the affidavit in reply sworn by Ms. Grina Aden, learned State Attorney.

To buttress the motion the applicant filed written submissions as required by rule 106(1) of the Tanzania Court of Appeal Rules (the Rules). It transpired that, before the hearing, the application was confronted by two preliminary objections raised by the 2nd and 3rd respondent. However, they were all withdrawn according to the Ruling of the Court dated 2/6/2017.

We had to determine the applicant's preliminary point of objection challenging the competence of the affidavit in reply of the 2nd and 3rd respondent on ground that, it is unknown if the deponent was personally known or identified to the Commissioner for Oaths. Since it is settled law, that the preliminary objection is the respondent's weapon, we found the

preliminary point raised by the applicant misconceived and as such, we accordingly struck it out. (See **HASMUKH BHAGWANJI MASRANI VS DODSAL YDROCARBONS AND POWER (TANZANIA) PVT LIMITED AND TWO OTHERS,** Civil Application No. 100 of 2013 (unreported).

Moreover, since, the 1st respondent had not filed an affidavit in reply, with leave the Court, Mr. Geofrey Kange, its advocate was permitted to address the court purely on points of law and not on facts in order to pave way for the progress of the application which arises from a matter which has been in courts for more than ten years. However, as shall be seen in due course Mr. Kange did not utilize the opportunity.

At the hearing, the applicant who appeared in person unrepresented, echoed what is contained in the notice of motion and the written submissions. He pointed out that, the High Court Judge erred to conclude that, the applicant's appeal was time barred before the Minister which is untrue as the appeal to the Minister in question was filed within time. He added that, apart from being aware of the Attorney General's notice of appeal against the decision of the High Court filed in 2009, he is seeking remedy by way of revision because he was not a party in the proceedings before the High Court and besides, he is not certain on the

progress and fate of the Attorney General's appeal which is yet to be lodged.

He reiterated that, the effect of quashing the Minister's decision without hearing the applicant was a violation of the basic principle of natural justice. He referred us to among others cases of **OMARI FAROUK KARAMALDIN VS JUSTINIAN KAHWA** [1996] TLR 100. **REGIONAL SERVICES LTD VS SECRETARY – CENTRAL TENDER BOARD AND THREE OTHER** [2001] TLR 184. He thus implored us to determine the present application on merits and urged us to revise Misc. Civil Cause No. 97 of 2007 and order the 1st respondent to pay the costs of this application.

On the other hand, Ms. Ellen Rwijage, Learned State Attorney representing the 2nd and 3rd respondents initially submitted that, on the wake of existing notice of appeal, the present revision application is premature. She pointed out that, the 2nd and 3rd respondents who are desirous of appealing against the whole decision of the High Court; their efforts to pursue an appeal have been impeded by the unavailability of the record of the High Court which the Registrar of the High Court has not supplied.

After a brief dialogue with the Court, the learned State Attorney conceded that, it is glaring on the face of record that, the applicant who was not a party to the proceedings in question was denied a right of hearing. She argued this to be a violation of article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). On the way forward, and since the notice of appeal stood as a stumbling block against the revision, she opted to withdraw it. Thereafter, she urged us to nullify the proceedings and the decision in Misc. Civil Cause 97 of 2007 and remit the case file to the High Court for a fresh hearing of the judicial review.

In rejoinder, the applicant had nothing to add apart from urging the Court to order the 1st respondent pay the terminal benefits and costs of the present application.

Before proceeding to determine the present application we acceded to the learned State Attorney's prayer and marked as withdrawn the Attorney General's notice of appeal filed on 30/11/2009 at page 205 of the record in order to pave way for the determination of the present application.

From the outset we wish to make it clear that, before us is an application seeking orders to revise the decision of the High Court in Misc Civil Cause No 97 of 2007. We have no appeal against a labour related dispute before us. In this regard, the applicant's prayer that we order the 1st respondent pay him the terminal benefits is for the time being not tenable.

Having pointed out the aforegoing, it is not disputed that the judicial review which is a subject of this application was heard and determined in the absence of the applicant who was not a party to the proceedings in question before the High Court. Apparently, what precipitated the current revision is the quashing by way of Certiorari the Minister's decision that had conferred on the applicant, the terminal benefits which indeed had marked the conclusion of the administrative process pertaining to the labour dispute as between the applicant and the 1st respondent.

A careful perusal of the record shows that, while the 1st respondent was in the process of seeking leave to apply for orders of Certiorari against the 2nd and 3rd respondents vide Misc. Civil Cause No. 75 of 2007, the applicant unsuccessfully applied to be joined thereto. However, his

application was struck out on grounds that, orders sought were in respect of leave to apply for certiorari against the public body. Thus, on 23/11/2007 while the 1st respondent was granted leave to apply certiorari, the applicant's application was struck out by Mandia, J,. as he then was.

Subsequently, after the 1st respondent lodged the main application seeking to have the Minister's decision quashed; the record reveals that on 20/10/2008 the applicant sought to be joined as third respondent in Misc. Civil Cause No. 97 of 2007. In the affidavit in support, the applicant deposed among others that, the judicial review of the Minister's decision was likely to affect him in one way or the other. However, the applicant's application was not attended to as per deposition in paragraph 29 of the affidavit in support. This is cemented by what is reflected in the final Ruling of the Judicial Review whereby the applicant was not among the respondents. Ultimately in its decision, apart from making a finding that, the decision by Hon. Kapuya was not genuine at page 203 of the record the High Court Judge concluded as follows:-

"The conciliation board made its decision on 13/10/2003 and reference to the Minister was

made on 19/12/2003, clearly beyond 28 days provided in section 42(3) of the security of Employment Act. The reference was wrongly entertained. Lack or access of jurisdiction is one of the grounds upon which the High Court can investigate a decision rendered by tribunal or public authority. In the present matter, evidence available, which is uncontroverted, is that the reference to the Minister was filed out of time. This means it was wrongly before the Minister. The Minister had no jurisdiction to entertain that reference...

On the foregoing, the prayer for certiorari is granted. The decision of the Minister is hereby quashed..."

It is vivid that, the applicant who was challenging unfair termination of employment was a subject of the Minister's determination of the appeal. However, surprisingly when it came to challenging the decision of the Minister by way of judicial review, the applicant was not pleaded as

one of the respondents. This was regardless of his request and upon having indicated that, he was likely to be affected by the outcome of the decision in question. With respect, this was a violation of the rule of natural justice.

It is settled that, the law that no person shall be condemned without being heard is now legendary. Moreover, it is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. [See - **JOHN MORRIS MPAKI VS THE NBC LTD. AND NGALAGILA NGONYANI,** Civil Appeal No. 95 of 2013 (unreported)].

Similarly in the case of **DEO SHIRIMJA VS TWO OTHERS**, Civil Application No. 34 of 2008 (unreported), the High Court made an unsolicited order without hearing the affected parties. That order was nullified and set aside by the Court having said:-

> *"None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected the plaintiffs in the*

suit and subsequently the current applicants who were the agents/servants of the former. ***It is established law that any judicial order make in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is make in good faith."***

The Court was confronted with similar situation to the present situation in Civil Appeal No. 129 of 2016 between **ONESMO NANGOLE VS DR. STEVEN LEMOMO KIRUSWA** (unreported). It had to ponder on the issue of non-inclusion in appeal the Attorney General and Returning Officer of Longido who were respondents at the trial. As such, the Court ordered the amendment of the record of appeal and that the Attorney General and Returning Officer be impleaded having said thus:-

"...If we decide to deliberate this appeal in their absence, we will offend the audi alteram partem rule of natural justice."

In **MZUMBE UNIVERSITY VS DR. NOORDIN JELA,** Civil Appeal No 23 of 2010 (unreported), this was an appeal relating to a labour dispute. The Court was confronted with a situation whereby the High Court

without hearing the parties, concluded as time barred the mediator's certificate on pecuniary limit of the dispute which was to be referred to the Commission for Mediation and Arbitration (CMA). Having considered that the right of hearing the parties was violated, the Court nullified the decision of the High Court Labor Division and ordered a rehearing.

This Court has on several occasions held that a denial of the right to be heard would vitiate proceedings:- (See **ECO TECH (ZANZIBAR) LIMITED VS GOVERNMENT OF ZANZIBAR, ZNZ CIVIL APPLICATION** No. 1 of 2007 (unreported) **MBEYA RUKWA AUTO PARTS TRANSPORT; LIMITED VS JESTINA GEORGE MWAKYOMA**, (2003) TLR, **DPP VS SABINA TESHA & 2 OTHERS** (1992) TLR 237, to mention a few. In **MBEYA RUKWA** case the Court considered the English Case of **RIDGE VS BALDWIN** (1964) AC and emphasized that:-

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part:*

"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu.""

We hasten to say that, this was unfortunately not observed in the case at hand. Besides before the determination of the judicial review in question, the High Court could have ordered that, the applicant be impleaded as one of the respondents. Again, this never occurred. In this regard, we agree with both the applicant and the learned State Attorney that, the omission to hear the applicant occasioned a fundamental procedural error and occasioned a miscarriage of justice.

In the circumstances, we find the application merited because the applicant was condemned without being heard. We proceed to nullify and set aside the decision of the High Court in Misc. Civil Cause No. 97 of 2007 which quashed the decision of the Minister. We remit the case file to the High Court and order the hearing of the judicial Review after joining the applicant.

In consistence with the constitutional right to be heard we order the applicant to be impleaded as one of the respondents before the determination of the judicial review be it adverse or otherwise. Since this is a labour related matter, we make no order as to costs.

DATED at **MWANZA** this 29th day of September, 2018.

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSITCE OF APPEAL

S. E. A. MUGASHA
JUSITCE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL