

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS LABOUR APPLICATION NO.23 OF 2019

(From the Judgment and Decree of the High Court of Tanzania, Labour Division at Mtwara, Hon. Madam Justice Nyerere, J. dated 10th May 2016 in Labour Revision No.23 of 2015)

MTWARA URBAN WATER SUPPLY

AND SANITATION AUTHORITY.....APPLICANT

VERSUS

KILASARA VICTOR KYARA.....RESPONDENT

RULING

5 Nov. & 8 Dec., 2020

DYANSOBERA, J.:

The applicant, Mtwara Urban Water Supply and Sanitation Authority., is applying for leave to appeal to the Court of Appeal of Tanzania against the Judgment and Decree of Hon. Madam Justice Nyerere, J. (as she then was) in Labour Revision No. 23 of 2015 dated on 10.5.2015. The applicant has moved this court under Rule 24 (1), 24 (a), (b), (d), (e), (f), 24(3), (a), (b), (c), (d), 24(11) and Rule 54 of the Labour Court Rules, GN. No. 106 of

2007, section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 read together with section 57 of the Labour Institution Act, No.7 of 2004 and Rule 45(a) and Rule 46(1) of the Court of Appeal Rules of 2009. This application filed on 11. 10.2019 is brought by way of Notice of Application and Chamber Summons supported by the affidavit sworn by Sauna Keya, the Human Resources Manager of the applicant.

Two reasons have been advanced in support of the application as revealed in paragraph 8 of the affidavit.

The application was, however, challenged by the respondent one Kilasara Victor Kyara through his counter affidavit which disputed the reasons for grant of leave to appeal to the Court of Appeal of Tanzania.

Briefly, the respondent was employed by the applicant in the post of Internal Auditor and signed a four years fixed contract of employment. The contract commenced on 14.05.2010 and it was to come to an end on 13.05.2014. Before the contract came to an end on 08.03.2014 the respondent applied for renewal of his contract of services. The respondent continued working with the applicant till 27.05.2014 when he was officially informed that his contract of employment had expired on 14.05.2014.

On 19.6.2014 the respondent instituted a trade dispute against the applicant on unfair termination and claimed to be re-instated to his former position or to be paid compensation and his remuneration for unexpired period of his contract. After the matter failed to be settled amicably it was referred to arbitration on 22.10.2015.

After the hearing, the learned Arbitrator found in favour of the respondent by declaring him an employee of the applicant through an automatic renewal of the employment contract which was breached by the applicant. Following that award the arbitrator ordered the applicant to pay the respondent remuneration for all unexpired term of four years of a contract which is TZS.37, 923,360/=, entitlement of 15% of gratuity for 48 months the total is TZS.5, 746,104/=, 13% of house rent allowance for four years, annual leave pay for two years which is TZS.1, 596, 1400/= . The Arbitrator, in addition, ordered that the respondent was entitled to receive a certificate of service from the applicant. In general the arbitrator awarded the respondent a sum of TZS.50, 245,560/= from the applicant.

The applicant was aggrieved by the award of the Commission for Mediation and Arbitration for Mtwara hence he filed his labour revision No.23 of 2015 before this court. The matter was heard and determined by the Honourable Madam Nyerere Judge (as she then was) who confirmed the fixed term contract of four years and arbitrator's award of 48 months which is TZS.37, 923,360/= only. In her ruling, the Lady Justice quashed and set aside the house allowance, leave pay and gratuity on the ground that the respondent is not in service. After that decision the applicant intimated his dissatisfaction with the decision of this court. She filed his application for extension of time to apply for leave to appeal to the Court of Appeal and to file a notice of appeal to the Court of Appeal. The application which was made vide Misc. Labour Application No.4 of 2017 was, however, struck out for being incompetent in that the applicant had

cited a wrong and incomplete enabling provisions of the law. On 8.10.2019 the applicant was granted an extension of time to file leave out of time hence this application.

On 14th May, 2020 when this matter was called for hearing both parties defaulted appearance and the court ordered the matter to be disposed of by way of written submissions. It is on record that only the applicant complied with the order of this court. It is a settled principle of law that when the court orders the matter to be heard by way of written submissions and a party defaults to comply with and order, the court shall imply the party to have not entered appearance. This matter is therefore, to be disposed ex parte.

In the written submission in support of the application drafted and filed by the Ms. Mercy Kyamba, the learned Principal State Attorney, it was submitted that, after a thorough scrutiny of the documents filed in this Honourable Court and guidance of several decided legal authorities on this matter with regard to appeal of labour cases, it has been discovered that the present application was brought before this court basing on the old position of the law. She contended that even if the application is granted the same will be a mere academic exercise as the question of obtaining leave when one wants to appeal from the Labour Court Division to the Court of Appeal is no longer a legal requirement. To fortify her argument, the learned Principal State Attorney, cited the case of **Tanzania Teachers Union vs. The Chief Secretary**, Civil Appeal No.96 of 2012 Tanganyika Law Society Report of 2017 Pg.549 where the Court decided on whether

appealing from the High Court Labour Division to the Court of Appeal would require leave of the High Court and the Court observed as follows:

"Having found that the plain meaning of the language section 57 of the LIA envisage no requirement for leave to appeal, henceforth, the debate whether the right of appeal to the Court under Section 5 (1) (c) of the AJA should not take this court or any other court's time. We found no rationale for the Court in some of its earlier decisions, to uplift the requirement of leave to appeal from section 5 (1) (c) and interpolate it into section 57. For avoidance of doubt, the right of Appeal from the labour Court under Section 57 of the Labour Institution Act shall no longer conditioned predicated in obtaining leave to appeal or certification of point of law by the High Court."

Furthermore, the learned principal State Attorney submitted that as officers they owe a duty to assist the Court in the administration of justice by seeing that, justice is administered fairly and without misleading the court. She was of the view that the doctrine of stare decisis requires the subordinate courts to stand to what has already been decided by the superior courts; the doctrine which was well –established in the case of **Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji cha Taifa** [1988] TLR at 1 where at page 46 it was held that all courts and tribunals below the Court of Appeal are bound by decision of the Court of Appeal regardless of their correctness. In view of the present case the learned principal State Attorney submitted that the case of 'Chama cha Waalimu' being a Court of Appeal decision, it goes without saying that the Labour Court cannot depart from the same.

In further elaboration, Ms. Kyamba submitted that the present application was made before the Tanzania Teachers Association case cited above, however, the position would still be the same as the question involved herein is a procedural matter and that it is still an established principle of the law that once matters of procedural law has occurred the same will have a retrospective effect for matter which were pending before the occurrence of the changes, the position which was adopted in the case of **Lala Wino v. Karatu District Council**, Civil Application No.132/02/2018. At last the applicant prayed this Court to grant the application or provide guidance on the matter raised by the applicant.

I have gone through the submission by the learned principal State Attorney for the applicant. I have also perused the records of this court and that of the Commission for Mediation and Arbitration for Mtwara. Following what the learned principal State Attorney has submitted I think it is imperative to address this issue at this point due to the fact this court is the court of records. The issue is whether this application is properly brought before this Court. As already stated above that the applicant has moved this court to entertain this matter by virtue of Rule 24 (1) ,24 (a), (b), (d), (e), (f), 24(3), (a), (b), (c), (d), 24(11) and Rule 54 of the Labour Court Rules, GN. No. 106 of 2007, section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 read together with section 57 of the Labour Institution Act, No.7 of 2004 and Rule 45(a) and Rule 46(1)) of the Court of Appeal Rules of 2009. As pointed out by Ms Kyamba in her submissions that they have brought this application by using the old

position of the law on the requirement of leave to appeal to the Court of Appeal for the case heard by the High Court Labour Division.

The Court of Appeal of Tanzania has dealt with the issue of the requirement of obtaining leave to appeal to the Court from the decision or proceedings of the Labour Court which are appealable. As submitted by the applicant via the case of **Tanzania Teachers Union vs. The Chief Secretary** (supra) the Court interpreted section 57 of LIA to mean to have no requirement for leave to appeal to the Court. In that respect, the Court held that the section 5(1) (c) of the AJA should not take any court's time since you cannot interpolate section 5(1) (c) of AJA into section 57 of LIA. To be precise on this position, the Court in the cited case of the **Tanzania Teachers Union** (supra) stated as follows:

"Where there are provisions of written laws like the LIA which provide the right of appeal that is unfettered by the requirements of leave to appeal, the unfettered provisions should not be made subject of the requirement of leave under sections 5(1)(c) of the AJA."

The Court cited with approval the decision in the case of **Bulyanhulu Gold Mines (T) Ltd v. Nichodemus Kajungu and 1151 Ors**; Civil Application No37 of 2013 (unreported) in the case of **Tanzania Teachers Association** (supra). The Court quoted the passage from that decision which provides as follows:

"we are constrained to emphasize at this stage that a statute should not, in the absence of any express provision, be construed so that it deprives people of their

rights, and that in fact it is the duty of the court to give sensible meaning with the view of promoting the employment of such rights instead of narrowing them down. In other words, we are duty bound to interpret the law accommodately with a view of expanding its frontiers rather than narrowing frontiers, the purpose being to see to it that the procedure is reasonable, air and just. That way, we think, we will have invested the provision with sound reasoning and content."

Likewise, the Court in the case of **Remigious Muganga v. Barrick Bulyanhulu Gold Mine**, Civil Appeal No.47 of 2017 at page 9 stated as follows:

"On the basis of the considerations made above, it is our view that the section allows a party, who is aggrieved by any appealable decision from the proceedings of the Labour Court, to appeal without recourse to the provisions of section 5(1) (c) of the AJA, notwithstanding that the proceeding giving rise to that decision was taken under the CPC."

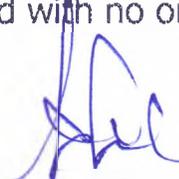
Being guided by those established principles of law as succinctly elaborated by the Court of Appeal and taking into account that this application being a labour matter originated from this court, I am of the settled view that the applicant improperly brought this application for leave before this court as that requirement is already overtaken by event.

With respect to the applicant's argument that the **Tanzania Teachers Association** case came after this application so that this court should apply it with retrospective effect, I think the same is not correct.

This application was registered in this court on 11.10.2019, by the time the decisions of the Court with regard to the interpretation of section 57 of LIA and application of section 5 (1) (c) of AJA was already in existence since 2013. So, the case of **Lala Wino vs. Karatu District Council** (supra) is distinguishable to the present case since in that case the law dealing with administration of land courts was amended hence the Court stated that the applicant's application was overtaken by the amendment of the law. In the light of the above observation the applicant was only required to automatically appeal to Court without bringing this application of leave to this court. For that reason, since this application was filed against the law, it should be and is hereby dismissed with no order as to costs.

Order accordingly



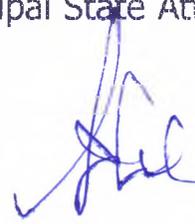

W. P. Dyansobera

Judge

8.12.2020

This ruling is delivered under my hand and the seal of this Court on this 8th day of December, 2020 in the presence of the applicant represented by Ms. Mercy Kyamba, the learned principal State Attorney and in the absence of the respondent.




W. P. Dyansobera

Judge