

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

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

**CIVIL APPEAL NO. 47 OF 2017**

**REMIGIOUS MUGANGA .....APPELLANT**

**VERSUS**

**BARRICK BULYANHULU GOLD MINE .....RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Tanzania  
(Labour Division) at Mwanza)**

**(Nyerere, J.)**

**dated the 24<sup>th</sup> day of July, 2015  
in  
Reference No. 11 of 2015**

**JUDGMENT OF THE COURT**

5<sup>th</sup> & 11<sup>th</sup> October 2018

**MWARIJA, J.A.:**

The appellant, Remigious Muganga has appealed against the decision of the High Court (Labour Division) in Reference No. 11 of 2015 handed down by Nyerere, J. on 24/7/2015. The impugned decision arose from the ruling of the Registrar of that court (hereinafter "the Labour Court"), M. R. Gwae, Registrar (as he then was) dated 18/6/2014 in Application for Execution No. 1 of 2010.

The facts giving rise to the appeal are not complicated. The appellant, a former employee of the respondent, Barrick Bulyanhulu Gold Mine and other 13 employees of the respondent, were terminated from employment. Dissatisfied with the termination, they lodged a labour dispute in the Commission for Mediation and Arbitration (the CMA) at Shinyanga. They complained that they were unfairly terminated and sought to be reinstated and to be paid compensation as a consequence thereof.

The dispute was settled at mediation stage. According to the deed of settlement signed by the representatives of the employees and the respondent, termination of the employees was sustained on agreement that the respondent had to pay them the following terminal benefits:

- "a) Twelve (12) months' Gross salary (subject to tax).*
- b) Salary & overtime earned up to date of termination.*
- c) Leave earned but not taken to the date of termination.*
- d) Fare for self & registered dependants up to place of domicile.*
- e) Transport of belongings up to 1 ton*
- f) Certificate of service."*

After about two months from the date of settlement of the dispute, resulting into the consent decree stated above, the appellant sought to execute the decree and therefore, filed the Application for execution stated above. He initially applied for execution of the decretal sum of TZS 10,885,080.00 as the amount of his entitlements.

Later however, he amended the application and increased the amount to TZS 193,555,714.00 and in the second amended application, to TZS 334,150,084.00. The basis of the continued increase in the amount, subject of the application for execution, is inclusion of what was shown as daily subsistence allowance for the appellant, his wife and a child, costs of transportation of the appellant's personal belongings from Kahama to Bukoba and transit allowance.

Before the application proceeded to hearing, on 11/11/2010, the respondent filed an application, Miscellaneous Application No. 7 of 2010. The application, which was filed under *inter alia*, O.XXI rule 2(2) of the Civil Procedure Code [Cap. 33 R.E.2002], the respondent sought an order that:

*"The decree arising out of the Agreement to resolve the dispute in the Commission for Mediation and Arbitration*

*Dispute number CMA/SHY/26/2010 be certified as satisfied."*

In the affidavit filed in support of that application, the deponent, one John Sopa Nsongoma, the Payroll Administrator of the respondent, annexed among other documents, copies of a petty cash voucher (Exhibit P.2), Loan Movement Record (Exhibit P.3) and Termination Clearance Check List (Exhibit P.4), intending to establish that the appellant was paid the agreed terminal benefits before the dispute was referred to the CMA. That application did not however, proceed to hearing. On 29/7/2013 the same was marked withdrawn with leave to refile it. The order was made by Rweyemamu, J. (as she then was) at the instance of the respondent's counsel (See page 67 of the record). Because the application was withdrawn with leave to file it, the respondent re-instituted it on 12/8/2013 as Application No. 16 of 2013. Again, the same could not be heard. According to the record, that application was struck out by the Registrar on 5/9/2013.

As stated above, in his second amended Application for Execution, the appellant raised the amount of the decree from TZS 10,885,084.00 to TZS 334,150,084.00. The additional amount was meant to cover the stated

daily subsistence allowance from 13/12/2013, transit allowance and costs of transporting the appellant's personal belongings. At the hearing before the Registrar, the appellant submitted that he was entitled to the additional amount because the respondent did not pay him repatriation costs. On its part, the respondent resisted the application. It contended that it had paid the appellant all the entitlements listed by the CMA in the consent decree.

According to the respondent's counsel, since the appellant had obtained a loan of TZS 7,957,000.00 from the respondent and that sum was outstanding at the time of his termination, the amount was deducted from his terminal benefits. That is to say that the respondent paid the appellant by way of a set off. The appellant challenged that mode of satisfying the decree arguing that it breached S. 43(1)-(3) of the Employment and Labour Relations Act, No. 6 of 2004.

In his decision, the Registrar was of the view that the application raised four issues. However, one of the issues related to the affidavit filed in support of the struck out application, Miscellaneous Application No. 7 of 2010. The other three issues which were relevant to the Application for Execution were as follows:

- *Whether the decree holder is entitled to repatriation.*
- *Whether the purported set off of alleged loan was proper and backed by the award.*
- *Reliefs that the parties are entitled."*

With regard to the issue whether or not the appellant was entitled to be paid the costs of repatriation, the Registrar found that the entitlement had already been paid by the respondent. On the recovery of the loan by way of a set-off of TZS 6,953,555.00, the Registrar found that, since existence or otherwise of the loan was not raised in the CMA and because it was not agreed that it should be discharged by deducting the amount due from the appellant's entitlements, the respondent acted wrongly in doing so.

The appellant was aggrieved by the Registrar's decision and thus preferred the reference which gave rise to this appeal. In paragraphs (c) and (e) of the notice of application, he stated the grounds of his dissatisfaction as follows;

*" (c ) That the honourable Court be pleased to give order of payments, to Applicant complaint of not executed, after sifting through the ruling by registrar about the undisputed*

*issues which he omitted to order on them, inter alia, transport to place of engagement (which is also the Applicant's place of domicile) and its entitlements thereto as well as daily subsistence expenses/allowances..."*

In paragraph (e) the appellant states that:

*"(e) The Court be pleased to grant order for Tsh. 334,150,084/= - 6,953,555/- = 327,196,529/- (insufficient amount to be paid to full satisfaction)."*

The application for reference was supported by an affidavit sworn by the appellant in which, he essentially re-iterated his dissatisfaction with the Registrar's decision. In paragraphs 3 and 4 for example, he stated as follows:

*" 3. That the Registrar erred in ignoring, with no stated reasons, claims for daily subsistence allowance/expenses and transport payments the later including: transport allowances, transport of the applicant's personal effects and transport fares for applicant and his family to his place of recruitment which is also his domicile in Bukoba, Kagera region. And that all such claims above are legally deserved and mandated as statutory reliefs...."*

*4. That the Registrar omitted to order, inter alia, for payment of claims of the accrual of daily subsistence expenses which he found it an undisputed issue...."*

Responding to the two paragraphs above, the respondent stated as follows in paragraphs 4 and 5 of the counter affidavit sworn by its counsel, Mr. Silwani Galati Mwantembe.

*" 4. That the contents of para 3 of the applicant's affidavit are vehemently contested. I hereby state that the repatriation/transportation expenses which are claimed by the applicant were paid to him before the dispute was referred to the Commission for Mediation and Arbitration. Therefore the respondent could not pay twice for expenses which had already been paid to the applicant...*

*5. That the contents of para 4 of the applicant's affidavit are strongly contested. I hereby aver that the Registrar was right in not ordering payment of daily subsistence expenses claimed by the applicant. This was because the applicant was paid his repatriation expenses even before the matter was referred to the Commission for mediation and Arbitration..."*



Having heard the reference, the Labour Court upheld the decision of the Registrar. On the respondent's act of deducting the appellant's payment in the sum of TZS 6,953,555.00 on the ground of recovery of the loan, the learned judge agreed that, whereas it was proper to deduct the statutory contributions, that is; PAYE and NSSF which were due from the appellant's salary, deduction of the outstanding loan was rightly found to be improper. Concerning the amount which the appellant added to the sum which was decreed by the CMA, the learned judge held as follows:

*" On the other claim of repatriation allowance and subsistence allowance I find to have no merit as respondent did [pay] applicant on time during the retrenchment process so applicant cannot claim on that again; I confirm the decision made by Hon. Gwae Registrar (as he then was) that the applicant is entitled to Tsh. 6,953,551/= only."*

Aggrieved further, the appellant has appealed to the Court. His memorandum of appeal consisted of five grounds. However, upon the preliminary objection filed on 18/9/2018 and argued on 26/09/2018, the respondent successfully challenged the propriety of the 1<sup>st</sup> – 4<sup>th</sup> grounds of appeal. The Court found that the four grounds were not based on points of

law as required by section 57 of the Labour Institutions Act, Cap. 300. That section provides that:-

*"Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only"*

As a result of disregarding the said four grounds, the appeal centred only on one ground, (the 5<sup>th</sup> ground), which is to the following effect:-

*"That 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."*

At the hearing of the appeal, the appellant appeared in person, unrepresented. On its part, the respondent had the services of Mr. Silwani Galati Mwantembe, learned counsel.

The appellant had complied with Rule 106 of the Rules by filing his written submission in support of the appeal. Submitting on the 5<sup>th</sup> ground of the appeal which, as stated above, forms the basis of the appeal, the appellant contends in his written submission that both decisions of the learned High Court judge and that of the Registrar were procured illegally

through fraud and perjury. He states as follows on page 17 of his written submission:-

*"...to support their perjury, the respondent's employees and counsels have been using fabricated Exhibits P1, P2, P3 and P4... As a result of the foregoing perjured affidavits and the accompanying misleading submissions, the respondent successfully procured both the decision of the High Court Registrar and that of the learned High Court Judge illegally, by fraud and by perjury."*

In his oral submission in Court, the appellant reiterated his contention that the accounting documents (Exhibits P2-P4) which were attached to the affidavits filed in support of the two applications lodged by the respondent, Miscellaneous Applications No. 7 of 2010 and 16 of 2013 were forged documents. When he was asked as to whether or not, he raised that complaint in the Labour Court, the appellant's reply was that, although he did so, his complaint on that matter was not recorded.

The respondent's contention that the decision of the Labour Court was procured by fraud was contested by Mr. Mwantembe. He argued that the complaint was raised by the appellant as an afterthought because the

point did not feature in the proceedings before the Labour Court. Relying on the counter-affidavit filed by the appellant in Miscellaneous Applications No. 7 of 2010 and 16 of 2013, the learned counsel submitted that the appellant did not dispute that he was paid his terminal benefits before the dispute was referred to the CMA.

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 the 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.

It is a settled principle that a matter which did not arise in the lower court cannot be entertained by this Court on appeal. In the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported), for example, the Court stated as follows:

*"It is now settled that as a matter of general principle this Court will only look into the matters which came up 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."*

See also the cases of **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] TLR 90, **Ludger Bernard Nyoni and Harrison Lyombe** (for and on behalf of 369 Tenants) **v. The National Housing Corporation**, Civil Application No. 37 of 2007 and **Juma Manjano v. The DPP**, Criminal Appeal No. 211 of 2009 (both unreported).

On the basis of the foregoing reasons, there is no gainsaying that the ground of appeal raises a new matter which cannot be entertained by the Court. The appeal is therefore devoid of merit. As a consequence, the same is hereby dismissed. Each party shall bear its own costs.


**DATED** at **MWANZA** this 10<sup>th</sup> day of October, 2018.

I. H. JUMA  
**CHIEF JUSTICE**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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

  
S. J. Kainda  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**