IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 114 OF 2016

JOSEPH MAGOMBI..APPELLANT

VERSUS

TANZANIA NATIONAL PARKS (TANAPA)................................RESPONDENT

(Appeal from part of Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Nyerere, Kalombola, Mashaka, JJ.)

dated the 29th day of April, 2016
in
Labour Revision No. 2 of 2013

....

RULING OF THE COURT

20th August & 14th September, 2021

FIKIRINI, J.A.:

This appeal arises from Labour Revision No. 2 of 2013 dated 29th April, 2016. The appellant was terminated from employment by the Board of Trustees of TANAPA (the Board). He instituted a Trade Dispute Enquiry No. 67 of 2002 against the Trustees of National Parks (TANAPA), in the defunct Industrial Court of Tanzania (ICT) at Arusha vide a letter with reference Number KZ/U.10/MG/931/8 of 27th May, 2002. After several twists and turns, finally on 27th May,

2010, Acting Deputy Chairman. E. J. Mkasimongwa (as he then was) delivered his judgment dismissing the complaint and upholding the termination by the Board of Trustees of TANAPA.

Dissatisfied, the appellant filed Labour Revision No. 2 of 2013. In the High Court of Tanzania, Labour Division (the Labour Court). In their decision the three Judges Nyerere, Kalombola and Mashaka (JJs) concluded that the appellant was denied a right to be heard and opportunity to cross-examine the witness who gave evidence against the appellant. However, instead of ordering retrial they ordered the appellant to be compensated twelve months' salary in terms of section 40 of the Security of Employment Act, Cap. 387 R.E. 2002 (the Employment Act).

Disgruntled with that decision, the appellant preferred this appeal with three complaints:

1. *That, the Honourable Justices of the High Court (Labour Division) erred in law for failing to order reinstatement of the appellant to his employment which was found it (sic!) was illegally terminated by the Board of Trustees of TANAPA on 27th June, 1997, as well*

as that of the Appointment and Disciplinary Committee (ADC), and thus (sic!) a nullity decision of the Industrial Court of Tanzania.

2. *That, the Honourable Justices of the High Court (Labour Division) erred in law and fact in not finding that the remedy available in the appellant's circumstances of the case was to order retrial before a competent Disciplinary Committee.*

3. *That, the Honourable Justices of the High Court (Labour Division) erred in law in awarding the appellant twelve months salary in terms of section 40 of the Employment Act, the law which was repealed even before the decision was pronounced and hence not applicable.*

The respondent filed a notice of cross-appeal in terms of Rule 94 (1) (2) & (3) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). This was followed by a notice of preliminary points of objection filed on 6th August, 2021 pursuant to Rule 107 (1) of the Rules, raising two grounds:

i. That, the appeal is incompetent for having preferred against the wrong party (non-existing legal entity)

ii. That, the appeal is incompetent for lack of complete records of appeal contrary to Rule 96 (1) (d) and 2 (c) of the Rules, R.E. 2019.

At the hearing on 20th August, 2021, Mr. John Sikay Umbulla learned counsel appeared for the appellant while the respondent had the services of Mr. Mukama Musalama, learned State Attorney assisted by Mr. Ezra Joshua Mwaluko learned counsel. Prior to commencement of the hearing of the preliminary point of objection Mr. Umbulla, conceded to ground (ii) of preliminary point of objection that the record of appeal is incomplete for missing some documents. He prayed for leave to file supplementary record of appeal, in which all missing documents will be furnished. He made the prayer in terms of Rule 96 (7) of the Rules. Mr. Musalama did not object to the prayer.

As for ground (i) of the preliminary point of objection, Mr. Umbulla opposed the contention that the appeal is incompetent for

having been brought against a non-existing person. To determine that point of the preliminary objection, we proceeded to hear the submissions of the learned counsel for the parties. Getting the ball rolling, it was Mr. Mwaluko's submission that the appeal is incompetent for being brought against a non-existent person who cannot sue or be sued. He referred us to section 8 (1) (a) of the Tanzania National Parks Act, Cap. 282 R.E. 2002 (the National Parks Act), which established TANAPA as a corporate body under the Board of Trustees. The appeal before this Court was against TANAPA and not the Board of Trustees. Elaborating on the point, he contended that there were two categories of legal persons: (a) actual person and (b) legal person created by statute. He contended that the respondent falls in the second category that is created by statute. That said, he referred us to page 8-10 of the record of appeal, in which there was a letter from the defunct Industrial Court of Tanzania dated 27th May, 2002, reporting the Trade Dispute against the Trustees of the National Parks (TANAPA) and not the Board of Trustees of the Tanzania National Parks (TANAPA).

It was his contention that the name Trustees of National Parks (TANAPA) was introduced by the counsel as reflected at page 11 of the record of appeal. After the Enquiry No. 67 of 2002, a revision was preferred which was Revision No. 2 of 2013 against the Tanzania National Parks, a non-entity. The name is also reflected in the notice of appeal which was different from the one in the certificate of delay. In the certificate of delay the name TANAPA features instead of the Trustees of Tanzania National Parks.

Rounding up his submission, in support of his position Mr. Mwaluko cited the cases of **William Godfrey Urassa v TANAPA Arusha, Miscellaneous Civil Appeal No. 12 of 2000** and **The Registered Trustees of the Catholic Diocese of Arusha v The Board of Trustees of Simanjiro Pastoral Education Trust, Civil Case No. 3 of 1998, High Court of Tanzania at Arusha** (both unreported). He thus urged us to strike out the appeal for being incompetent as it was against a non-existent person. He extended his prayers by urging us to nullify the lower court's proceedings as the same were against a non-existent person making them a nullity.

Probed on whether his submission meant that TANAPA and/or Tanzania National Parks never existed. His response was that, in the eyes of the law the Tanzania National Parks did not exist, instead what is in existence in the eyes of the law is the Trustees of the Tanzania National Parks (TANAPA).

Mr. Umbulla's response was that the same preliminary point of objection was raised before the Labour Court in Revision No. 8 of 2018, between **Joseph K. Magombi v The Registered Trustees of the Tanzania National Parks (TANAPA)** as seen at page 2 item 2 of the ruling. On the 17th August, 2012, the objection was overruled as reflected at page 7 thereof. The Judges' position was that what was before the Industrial Court was an enquiry and not a suit in terms of the Industrial Court of Tanzania, Act No. 3 of 1990 [Cap. 60].

The challenge before us is on the change of name. The change of the name introduced at the revision stage is now what is being contested. The appellant cited the respondent as the Registered Trustees of the National Parks (TANAPA) instead of the Trustees of National Parks (TANAPA) the name which was used at the Industrial

Court. Mr. Umbulla contended further that the change of party's name cannot occur without following proper procedure. He argued that since the ruling has not been appealed against, it thus subsists and the raised preliminary point of objection cannot be raised again. As for the cited judgments of the High Court, Mr. Umbulla admitted being aware of them. He however, considered the two decisions as conflicting. He thus urged us to overrule the preliminary point of objection.

Rejoining, Mr. Mwaluko begged to differ with Mr. Umbulla's submission that the 1st preliminary point of objection was also raised in Revision No. 2 of 2013, and overruled. It was Mr. Mwaluko's contention that as per page 8 of the ruling, the objection was not overruled as submitted by Mr. Umbulla. He went on submitting that the Court could only hear on the illegality of the parties had the application been properly before the Court. Challenging Mr. Umbulla's assertion that the name of the party was correct, Mr. Mwaluko wondered why was it changed then to the Registered Trustees of the National Parks (TANAPA) during the filing of the revision while they were not a party at the ICT.

Submitting further disputing on existence of any legal entity in the name of Tanzania National Parks, Mr. Mwaluko referred us to page 365-366 and exhibit P26 (the letter of termination) which in its first paragraph clearly stated the appellant's employment was terminated by the Board of Trustees. As for the existence of TANAPA, he argued that it existed by virtue of the Trustees of the Tanzania National Parks.

On the basis of his submission, Mr. Mwaluko implored upon us to sustain this preliminary point of objection and strike out the appeal as being incompetent for suing a non-existing entity.

Having carefully considered the submission of learned counsel, the issue for our determination is whether the appeal before this Court against the respondent, Tanzania National Parks (TANAPA) was against a wrong party (non-existent person) and thus deserves to be struck out for being incompetent.

Like human beings, companies have names and they are identified by their registered names. The companies with registered names fall in the second category of legal persons. Both learned

counsels are in agreement on that fact. Therefore, it is certainly correct that the Tanzania National Parks (TANAPA) is not a legal person in that sense. The creature of statute, capable of suing and being sued in this instance is the "*Trustees of the Tanzania National Parks*" as provided and governed by Section 8 (1) (a) & (b) of the Tanzania National Parks Act, which provides as follows:

> "*8. -(1) There shall be established for the purposes of this Act a Board of Trustees which shall–*
>
> *(a) be a body corporate by the name of* ***"the Trustees of the Tanzania National Parks",*** *with perpetual succession and a common seal;*
>
> *(b) in their corporate name be capable of suing and being sued;"* [Emphasis Added]

From the above referred provision we are thus in agreement with Mr. Mwaluko in his reference to the case of **The Registered Trustees of the Catholic Diocese of Arusha** (supra), in which the issue of legality of a person suing and the one being sued arose. Mr. Umbulla, in his submission intimated that the two cited decisions were in conflict but did not expound on that. We could not find any

conflict in the two decisions. We say so as in **William Geofrey Urassa** (supra) the High Court did not decide on the issue of legality of parties, in its place, the court only remarked that the appellant ought to have put the name of the respondent as it appeared in the decision intended to be appealed.

Now coming to the issue before us in relation to change of the respondent's name, from the record of appeal, particularly pages 11-27, all the filed documents including the memorandum of complaint filed on 19th August,2002, the written statement of defence filed on 16th December, 2002, and rejoinder to the written statement of defence referred parties as **Joseph K. Magombi** as the complainant and the **Trustees of the National Parks** as the respondent. The effect of that in our view is, aside from the Tanzania National Parks not having a capacity to sue or being sued as it is not a legal person, these were not the parties before the ICT. The name that should have featured in Revision No. 8 of 2011 should have been the same names, that appeared in record at the ICT.

The change of names from those which featured in the record at ICT, to **Joseph K. Magombi v The Registered Trustees of the**

Tanzania National Parks (TANAPA), in Revision No. 8 of 2011, certainly caused an uproar by way of a preliminary point of objection that:

> "*The application for revision is incompetent and not maintainable at law as it has been brought against a non-legal person who was not even a party to the original Trade Dispute No. 67 of 2002.*"

The High court sustained the preliminary point of objection and struck out Revision No. 8 of 2011 for being incompetent before the court. The issue on legality of parties was thus never decided on merit as contended by Mr. Umbulla. It is true that the decision subsists but we do not think it bars the point being raised again. At page 7 of the ruling the High court held:

> "*It suffices to say that the issue of legality of the parties* ***could have been considered <u>if</u>*** *the application was properly before the court by having proper parties who participated at the trial.*" [Emphasis added]

The name changed again at the appeal stage. This time around the parties were **Joseph K. Magombi** and **Tanzania**

National Parks (TANAPA), hence this preliminary point of objection. This was incorrect. We think and agree with the Judges in the case of **William Godfrey Urassa** (supra) that the parties who featured in the initial proceedings should be the same parties featuring before the High Court as well as this Court. We further say, that unless a proper procedure has been followed to change or alter a name, no change of party's name should occur. Nothing convinces us that at any stage of the proceedings in the present situation a change of a party's name was entertained. The change of names in the present appeal is thus unjustified. Based on the change of the respondent's name as illustrated above led Mr. Mwaluko, learned counsel to press upon us that we strike out the appeal.

We have noted the use of the names interchangeably. It is our considered view that the change definitely had an impact on parties' status. Even though we admit that TANAPA as an entity exists, but neither Tanzania National Parks nor TANAPA, can legally be referred as a legal person as provided under section 8 (1) (a) of the Tanzania National Parks Act. Therefore, the respondent's proper title should be the Trustees of the Tanzania National Parks. That said, there is

nevertheless a slight problem in this name. Instead of the Trustees of the Tanzania National Parks, the title reads the Trustees of the National Parks, thus omitting the word "Tanzania"

Taking inspiration from the case of **Christina Mrimi v Coca Cola Kwanza Bottlers Ltd, Civil Application No. 113 of 2011**, in which the Court reviewed its earlier decision in the case of **Christina Mrimi v Coca Cola Kwanza Bottles Ltd, Civil Appeal No. 112 of 2008,** the Court held that:

> *"The confusion of the name of the respondent is not fatal irregularity, counsel for the applicant contended. Such irregularity is minor and it is curable by deleting the word Bottlers from Coca Cola Kwanza Ltd., counsel for the applicant urged, in that Coca Cola Kwanza Ltd, is the only Company which manufactures Sprite, the drink in dispute in the tortuous suit. Hence the correct name of the respondent should be amended to read Coca Cola Kwanza Co. Ltd."*

See also: **Re J & P Sussman Ltd** [1958] 1 All ER 857 and **Evans Construction Co. Ltd v Charrington & Co. Ltd & Another** [1983] 1 All ER 310. We find that the inadvertence did not occasion any injustice or prejudice the parties.

For the purpose of meeting substantive justice, we find it more appropriate to invoke application of Rule 4 (2) (b) of the Rules hand in hand with the overriding objective as per section 3A (1) (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, as amended by The Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, and allow the amendment of the notice and memorandum of appeal rather than striking out the appeal. This is because by striking out it means the appellant has to start all over, the process which might take another number of years. On the same breath, we find Mr. Mwaluko's contention that we nullify all the proceedings below, a bit farfetched initiative from dispensation of substantive justice. We thus decline it and proceed to grant a prayer by Mr. Umbulla for amendment of the record of appeal in terms of Rule 111 of the Rules. Rule 111 provides that:

> *"The Court* ***may at time allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal,*** *as the case may be, or any other part of the record of appeal, on such terms as it thinks fit."* [Emphasis added].

In that regard we order amendment of all the proceedings by stating the proper respondent the way it was in Enquiry No. 67 of 2002. The supplementary record of appeal be prepared and filed within sixty days from the date of this ruling. This being a labour matter we order no costs.

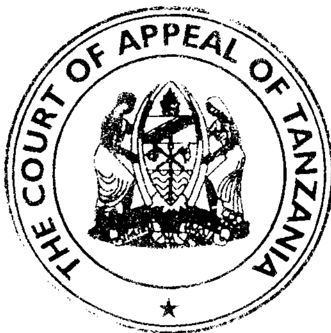
DATED at **DAR ES SALAAM** this 7th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered on this 14th day September, 2021, in the presence of Mr. John Umbulla, learned counsel for the appellant and Mr. Benson Hosea, learned counsel for the respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL