

TANZANIA / JUDGMENT

## 20121212 TZCA Dar es Salaam

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1. The appellants, LUGANO S. KALOMBA & 22 OTHERS, are aggrieved by the decision of the High Court of Tanzania at Dar es Salaam (CORAM: LUANDA, J.A., MASSATI, J.A., And ORIYO, J.A.) CIVIL APPEAL NO. 78 OF 2008. The respondents, THE PERMANENT SECRETARY, MINISTRY OF EDUCATION AND VOCATIONAL TRAINING, and the HONOURABLE ATTORNEY GENERAL, are respondents in the appeal.

2. The appeal arises from the Ruling of the High Court of Tanzania at Dar es Salaam (Mihayo, J.) dated the 28th day of May, 2007 in Miscellaneous Civil Cause No. 50 of 2006 RULING OF THE COURT 3rd & 11th December, 2011. The appellants were granted leave to apply for an order of certiorari to remove into the High Court, so that it may quash the decision of the first respondent dated 1st June, 2006 removing them from their employment with the National Examinations Council of Tanzania and transferring them to various schools and teachers' colleges instead. But, by a ruling dated 28/5/2007, the High Court dismissed their main application. Aggrieved, Mr. Melkizedeck Lutema, learned advocate, filed a Notice of Appeal in this Court on 1st June, 2007 in which the intended appellants are described as "LUGANO S. KALOMBA & 22 OTHERS". When the appeal came up for hearing, Mr. Gabriel Malata, learned Principal State Attorney sought to argue a preliminary objection, notice of which he had earlier on filed. The preliminary objection was that, the High Court was not properly moved to grant leave, because sections 2(2) of the Judicature and Application of Laws Act (Cap 358 R.E 2002) (the JALA) and 17(2) of the Law Reform (Fatal Accidents) Miscellaneous Provisions Act (Cap 310.R.E.

2002) (the Law Reform Act) were not the proper and relevant provisions. He submitted that the correct provisions were sections 2(3) of the JALA and 19(3) of the Law Reform Act. In his view, the omission or wrong citation was fatal, and he referred to us the decisions of this Court in ZUBERI MUSSA v SHINYANGA TOWN COUNCIL, CIVIL APPLICATION No 100 of 2004 and CHAMA CHA WALIMU TANZANIA v ATTORNEY GENERAL, CIVIL APPLICATION NO. 151 of 2008 (both unreported). So he prayed that the appeal be struck out because it seeks 2(2) of the JALA and 17(2) of the Law Reform Act. The court, however, dismissed the preliminary objection and allowed the appeal. The court found that the provisions cited by the appellants were the proper and relevant provisions. The court also found that the appellants were entitled to the relief sought. The court granted an order of certiorari to remove the appeal into the High Court, so that it may quash the decision of the first respondent dated 1st June, 2006 removing them from their employment with the National Examinations Council of Tanzania and transferring them to various schools and teachers' colleges instead. But, by a ruling dated 28/5/2007, the High Court dismissed their main application. Aggrieved, Mr. Melkizedeck Lutema, learned advocate, filed a Notice of Appeal in this Court on 1st June, 2007 in which the intended appellants are described as "LUGANO S. KALOMBA & 22 OTHERS". When the appeal came up for hearing, Mr. Gabriel Malata, learned Principal State Attorney sought to argue a preliminary objection, notice of which he had earlier on filed. The preliminary objection was that, the High Court was not properly moved to grant leave, because sections 2(2) of the Judicature and Application of Laws Act (Cap 358 R.E 2002) (the JALA) and 17(2) of the Law Reform (Fatal Accidents) Miscellaneous Provisions Act (Cap 310.R.E.

- 'll .; , ll. I to challenge a decision based on an incompetent leave, and therefore void ab initio. But Mr. Lutema, had a different view. He submitted that since there is no specific enabling provision (not even the ones cited by the respondent's counsel) the practice has been for the High Court to use its inherent powers under section 95 of the Civil Procedure Code (Cap 33 - RE 2002) which was cited. Besides, once the application for leave was granted, in a separate file, and was not challenged, it could not be challenged at this stage in an appeal against the decision in the main application. So he urged us to dismiss the preliminary objection. Prompted by the Court, the learned counsel also addressed us on whether the Notice of Appeal was proper. They were both of the view that it was not, but that it could be amended under Rule 111 of the Court of Appeal Rules, 2009 by showing the names of all the appellants. We think that the law is now settled that where a wrong provision of the law is cited or where one exists and is not cited in support of an application, the application is liable to be struck out. (See *THE DAR ES SALAAM MOTOR TRANSPORT CO. LTD v THE TRANSPORT LICENSING AUTHORITY OF TANGANYIKA AND ANOTHER* (1959, E.A 403). But we agree with Mrosio (as he then was) in his observation in *MAKULE v THE RPC, KILIMANJARO*, Miscellaneous Civil Application NO 87 of 1979 (Arusha) (unreported) cited by Lugakingira J (as he then was) in *THE REPUBLIC ex parte PETER SHIRIMA v KAMATI YA ULINZI NA USALAMA WILAYA YA SINGIDA AND OTHERS* (1983) TLR 373, that the Crown Office Rules, 1906, do not require an application for prior leave although it is a rule of practice, developed by case law. In England the requirement for leave was introduced by Order 59 r 3(1) of the Rules of the Supreme Court, made under section 120 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which replaced the 1906 Crown Office Rules. The English Rules of the Supreme Court do not apply in this country. So strictly speaking, there are no statutory provisions in Tanzania, requiring that an application for judicial review be preceded by an application for leave. To this extent, we agree with Mr. Lutema. The question of citation or non citation of a relevant provision or provisions of the law in such cases does not therefore arise. So the preliminary objection is misconceived and is accordingly dismissed. But as shown above and as both counsel conceded, the Notice of Appeal in this appeal shows the intended appellants as "LUGANO S. KALOMBA & 22 OTHERS. Such a notice is defective. As we recently held in *ZAKARIA KAMWELA & 126 OTHERS v ATTORNEY GENERAL* Civil Appeal No. 3 of 2012 (unreported)
- t) In *J i l*, i l 'i : J ! I I ' I l l i , , ; : l i i , , I l C l f ! ' i l ' f ; l ' I l ; : l , I l l ' l ' I l ' ! , I I I ' ! l t I J l & l ~ ' I i i ' , ' I j , , - u I i I l i j ; I I u l ' I l , V application, a court before which that application is placed cannot be said to have been properly moved, and so such a matter is said to be incompetent and so liable to be struck out. To that extent, Mr. Malata is correct. The law applicable to judicial review is to be found in the JALA, the Law Reform Act and case law. Since no rules of court have been made by the Chief Justice under section 18(1) of the Law Reform Act to prescribe the procedure for instituting such proceedings they are to be governed by the Crown Office Rules 1906 applicable before the reception date, by virtue of section 2 (3) of the JALA (See *THE DAR ES SALAAM MOTOR TRANSPORT CO. LTD v THE TRANSPORT LICENSING AUTHORITY OF TANGANYIKA AND ANOTHER* (1959, E.A 403). But we agree with Mrosio (as he then was) in his observation in *MAKULE v THE RPC, KILIMANJARO*, Miscellaneous Civil Application NO 87 of 1979 (Arusha) (unreported) cited by Lugakingira J (as he then was) in *THE REPUBLIC ex parte PETER SHIRIMA v KAMATI YA ULINZI NA USALAMA WILAYA YA SINGIDA AND OTHERS* (1983) TLR 373, that the Crown Office Rules, 1906, do not require an application for prior leave although it is a rule of practice, developed by case law. In England the requirement for leave was introduced by Order 59 r 3(1) of the Rules of the Supreme Court, made under section 120 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which replaced the 1906 Crown Office Rules. The English Rules of the Supreme Court do not apply in this country. So strictly speaking, there are no statutory provisions in Tanzania, requiring that an application for judicial review be preceded by an application for leave. To this extent, we agree with Mr. Lutema. The question of citation or non citation of a relevant provision or provisions of the law in such cases does not therefore arise. So the preliminary objection is misconceived and is accordingly dismissed. But as shown above and as both counsel conceded, the Notice of Appeal in this appeal shows the intended appellants as "LUGANO S. KALOMBA & 22 OTHERS. Such a notice is defective. As we recently held in *ZAKARIA KAMWELA & 126 OTHERS v ATTORNEY GENERAL* Civil Appeal No. 3 of 2012 (unreported)

the procedure for representative suit does not obtain in the Court of Appeal under the current Court of Appeal Rules 2009. However, we agree that the defect is curable by amendment 5 under Rule 111 of the Court of Appeal Rules, 2009. We therefore order that the Notice of Appeal be amended, so as to bring on record all the other persons who wish to pursue the appeal, within 21 days from the date of this ruling. Costs shall be in the event. DATED at DAR ES SALAAM this 1th day of December, 2012 B.M. Luanda JUSTICE OF APPEAL S.A. Massati JUSTICE OF APPEAL K.K. Oriya JUSTICE OF APPEAL I certify that this is a true copy of the original. (E.Y.MKWIZU) DEPUTY REGISTRAR COURT OF APPEAL 6

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