IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, VP.; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, JJ.A.)

APPEAL NO. 4 OF 2017

BETWEEN

JOHNSON AKOL OMUNYOKOL.. APPELLANT

AND

ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA..RESPONDENT

[Appeal from "an Order" of the First Instance Division at Arusha, Tanzania, dated 5th September 2017 (Monica K.Mugenyi,PJ.;Isaac Lenaola, DPJ.;Faustin Ntezilyayo, Fakihi Jundu and Audace Ngiye,JJ.) in Reference No.01 of 2015.]

JUDGMENT

A. INTRODUCTION.

1. This Appeal was lodged by Johnson Akol OMUNYOKOL ("the Appellant") purporting to challenge the *"decision/Ruling and orders"* of the First Instance Division [" the Trial Court"] *dated "5th September 2017"* in the Reference No.01 of 2015, in respect of an *"oral Application made by Counsel for the Appellant in court that day of 5th September 2017 to include two pertinent issues for Court's determination one way or the other and conduct of the Scheduling Conference held on 14th of June 2017"*.

2. The Appellant Johnson Akol Omunyokol, is a Ugandan citizen resident in Kampala in the Republic of Uganda. He represented himself in the Appeal. The Respondent is the Attorney General of the Republic of Uganda, represented in the Appeal by Ms Christine Kaahwa (Ag. Director of Civil Litigation), Ms Gorreti Arinaitwe (Senior State Attorney) and Ms Imelda Adong (State Attorney).

B. BACKGROUND

3. As shown in Para 1 above, this Appeal was lodged by Johnson Akol OMUNYOKOL ("the Appellant") purporting to challenge the *"decision/Ruling and orders"* of the First Instance Division ["the Trial Court"] *dated "5th September 2017"* in the Reference No.01 of 2015, in respect of an " *oral Application made by Counsel for the Appellant in court that day of 5th September 2017 to include two pertinent*

issues for Court's determination one way or the other and conduct of the Scheduling Conference held on 14th of June 2017".

4. The Appellant found the alleged refusal by the Trial Court to incorporate his proposed issues in the list of agreed issues for determination to be fatal to his case, hence this Appeal.

5. In his Memorandum of Appeal, the Appellant raised six grounds of complaint. At the Scheduling Conference held on 18th February 2018, the said six grounds were consolidated into 3 main Issues, namely:
   1. **Whether the Appeal is competent.**
   2. **Whether the Trial Court erred in law by not including two issues,** namely; (i): "*whether it was lawful for the Government of Uganda (Supreme Court) to award the Appellant salary arrears using an obsolete salary scale of 1998 when he was dismissed at a salary scale of UGX 247,542/= per month thereby violating Articles 158 (1) and 254(2) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty in Articles 6(d)*" and (ii): "*Whether it was lawful for the Government of Uganda (Supreme Court) to award the Appellant salary or emoluments prospectively up to the year 2024, the year he would officially retire thereby illegally and constructively retiring the Appellant from service without following the Public Service Commission Regulations 45, Articles 257(5) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Articles 6(d) and 7(2).*"

3. **What reliefs are available to the Parties.**

C. THE PARTIES' SUBMISSIONS.

6. Addressing the **First issue** on **whether the Appeal is competent**, the Appellant submitted that it was a misconceived and misplaced issue which was set to digress from the crux of the matter. He added that the Appeal cannot be incompetent because according to him, it was lodged within the time frame prescribed by law. In that regard, the Appellant cited Rule 78 (2) of the East African Court of Justice Rules of Procedure, 2013, ("the Rules") and took the stand that the decision appealed from was dated 5th September 2017 and the fact that he lodged the Notice of Appeal on 19th September 2017 shows, according to him, that both the Notice of Appeal and the Memorandum of Appeal were lodged in time. The Appellant concluded that the Appeal is competent.

7. On the **Second Issue**, the Appellant relied on the provisions of Rule 53 (1) (a) of the Rules and pointed out that *the purpose of a Scheduling Conference before the Trial Court is to ascertain points of agreement and disagreement.* To him, it is a denial of one's rights for a court to lock out a litigant from framing pertinent issues for the Court's resolution and to do so would result in issues that are central to the controversy before court going unattended and thus appellant's rights would remain undetermined.

8. The Appellant cited our decision in **Angella Amudo v. The Secretary General of the East African Community,** Appeal No.4.

of 2004 in support of his argument that the Trial Court committed a procedural irregularity, wherein it was decided that: "*a court of law commits an error of law or procedural error when it: - Acts irregularly in the conduct of proceeding or hearing leading to a denial or failure of due process i.e. fairness, e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc.*"

9. The Appellant in his Rejoinder Submission sought further reliance in the **Angella Amudo case** (supra) by submitting that "*denying the Appellant to frame the two pertinent issues for court consideration made the First Instance Division of this Court to commit an error of law by acting irregularly in conduct of proceeding or hearing leading to a denial or failure of due process ...*" In bolstering his contention, the Appellant referred us to the case of **Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW),** Appeal No.3 of 2011.

10. Although, no point of preliminary objection has been raised as an issue in this Appeal, the Appellant, relying on Rules 41(1), (2) and Rule 53 of the Rules, pointed out that an issue of a preliminary objection should be raised by giving 7 days written notice to the other party and the Court. He further submitted that the Respondent, having failed to comply with this mandatory requirement, he had waived the right to be heard thereon and the matter of time limitation was not pleaded by the Respondent and therefore it should be disallowed. In that regard, the Appellant cited **Reference No. 1 of**

2014, Christopher Mpozayo and The Attorney General of the Republic Rwanda, Reference No. 6 of 2014, Human Awareness and Promotion forum (HRAPF) versus Attorney General of Uganda and the Secretariat of the Joint United Nations Programme in HIV/AID (Amicus Curiae).

11. The Appellant prayed that this Appeal be allowed and "*the orders*" of the Trial Court dated 5th September 2017 disallowing the Appellant's application be set aside and the Appellant also be allowed to frame the two issues for determination by the Trial Court. He further prayed for costs of the Appeal.

12. On **Issue No. 1,** Counsel for Respondent succinctly submitted that there was no judgment or order in Reference No. 1 of 2015 made by the Trial Court on 5th September 2017 from which an appeal could arise and consequently, the instant Appeal was premature and incompetent.

13. Regarding the **Second Issue**, it was Counsel for Respondent's Submission that the Scheduling Conference in the Trial Court was held on 14th June 2017 and the Court fixed the case for hearing on 5th September 2017. However, Counsel for Respondent criticized the Appellant for not proceeding with the hearing as scheduled by the Trial Court, instead of going back to re-open a concluded Scheduling Conference by making proposals to include other issues.

14. Regarding the errors of law and procedural irregularity committed by the Trial Court as alleged by the Appellant, Counsel for Respondent submitted that Trial Court neither erred in law nor committed any procedural irregularity by not including issues proposed by the Appellant. Counsel maintained that there was no need of additional issues to be adopted by the Trial Court as long as the issues for determination were framed and agreed upon by Counsel for both parties at the Scheduling Conference on 14th June 2017 and the said issues were capable of determining conclusively the matter before the Trial Court.

15. Counsel for Respondent further asked the Court to disregard submissions on matters that were not agreed upon as issues for determination at the Scheduling Conference of this Appeal held on 18th February 2018.

16. As regards the **Third Issue** on **Remedies,** Counsel for Respondent invited this Court to strike out the Appeal with costs.

D. COURT'S DETERMINATION

17. It is common ground that what the Appellant brought before us are Scheduling conference notes that he wanted to amend by including what he alleged to be *two pertinent issues for determination*, namely; "(i.) *Whether it was lawful for the government of Uganda (Supreme Court) to award the Appellant salary arrears using an obsolete salary scale of the year 1998 when he (the Appellant) was dismissed from service at a salary scale of UGX*

247,542/= per month instead of the current salary scale of UGX1,177,688/= per month thereby violating articles 158 (1) and 254 (2) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Article 6(d) and 7(2), and (ii.) *Whether it was lawful for the Uganda Government (Supreme Court) to award the appellant salary or emoluments prospectively up to the year 2024 the year when the Appellant would officially retire thereby illegally and constructively retiring the appellant from service without following the Public Service Commission regulation 45, Article 257(5) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Articles 6(d) and 7(2) respectively."*

18. However, as correctly argued by Counsel for the Respondent, in our respectful finding, the Appellant has failed to show which judgment or order of the Trial Court he is appealing from. The sole document he produced and which is deemed to be the basis of the Appeal is the interaction between the Appellant and his Counsel on the one hand and the learned Principal Judge and Deputy Principal Judge on the other hand, on 5th September, 2017 before the trial commenced on how the proposed two issues could be merged with the issues earlier agreed on at the Scheduling Conference on 14th June, 2017.

19. Before we embark on the disposal of this Appeal, we think it necessary to first look at the established jurisprudence governing the right of appeal. *"The right to appeal is wholly statutory"* as it was

reiterated in the case of **Dona Point Safe Harbor Collective v Superior Court (City of Dona Point) (2010**) *51 Cal.4th 1,5)*. This authority holds that *"no appeal can be taken except from an appealable order or judgment, as defined in the Statutes and developed in the case law..."* (See **City of Gardena v Rikuo Corp. (2011)192 Cal.App.4th 595,601,** quoting **Lavine v. Jessup (1957) 43 cal. 2d 611,613).**

20. The above authorities are also relevant in the East African Community context in as far as an appeal has to meet the statutory tests as provided for under **Article 35A** of the Treaty for the Establishment of the East African Community ("the Treaty ") read together with **Rule 77** of the Rules.

21. In order to address properly the above statutory requirements and jurisprudence in relation to a right of appeal, we bear in mind that in the East African Court of Justice, the Appellate Division's mandate is to entertain an appeal from a judgment or an order of the First Instance Division as per Article **35A** of the Treaty which is mirrored in **Rule 77** of the Rules.

22. For ease of reference, Article 35A provides as follows:

"An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on-

(a)Points of law;
(b)Ground of lack of jurisdiction; or

(c) ***Procedural irregularity.***

23. The above Treaty provision as well as **Rule 77** of the Rules clearly indicate what can be appealed against to the Appellate Division, namely:

i. A judgment of the First Instance Division or
ii. Any order of the First Instance Division.

24. Whenever a party is dissatisfied with a judgment or an order of the First Instance Division, he/she is entitled to an appeal before the Appellate Division provided that such judgment, order or ruling is wanting on account of "*points of law, grounds of lack of jurisdiction; or procedural irregularity*" (See **Angella Amudo,** supra).

25. On numerous occasions this Court has determined appeals falling under the provisions of Article 35A. The Court has been clear in all those circumstances that an appellant is bound to include a judgment, an order or a ruling with the reasons of the Trial Court in the Record of Appeal in exercising his right of appeal. (See **Angella Amudo, ANAW** cases **[**supra**], The Secretary General of the East African Community and Rt. Hon. Margaret Zziwa** (Appeal No. 7 of 2015), **Simon Peter Ochieng and John Tusiime v. Attorney General of Uganda (Appeal No.4 of 2015), Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ,** Appeal No. **1 of 2012, independent Medical Legal Unit And Attorney General of the Republic of Kenya, EACJ,** Appeal No.1 of 2011, etc.

26. It follows from the foregoing that it is a condition precedent, for an appellant to exercise a right of appeal before the Appellate Division that ***a judgment or an order*** of the Trial Court must be in existence.

27. The Treaty is so clear that there cannot be any confusion whatsoever between a judgment and a scheduling conference nor an order and a Scheduling conference for the purpose of an appeal. The Treaty in Article 1 defines the word **"judgment"** as follows:

> **"judgment"** *shall* ***where appropriate*** *include a ruling, an opinion, an order, a directive or a decree of the Court".*

28. The Supreme Court of Canada has recognized a common law duty to provide "adequate" reason for judgment and has stated that the giving of reasoned judgment is central to the legitimacy of judicial institutions in the eyes of the public (**see R.V Sheppard,2001 S.C.C.26 at para 5 [2002] 1 S.C.C.R. 869).**

29. Rule 68 (5) of the Rules provides for the contents of a judgment of the Court to include among others the date on which it is read, the names of the judges participating in it, the names of the parties,...the concise statement of the facts, the reasons for such decision,...".

30. Rule 88 (1) of the Rules provides for the content of the Record of Appeal by clarifying unmistakably that the Record of Appeal shall contain, inter alia, the following documents:-

"...

e) the judgment or reasoned order

f) the decree or order",

..."

Rule 2 defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit.

And Rule 69 reads as follows;

> *"(1) Every decision of the Court shall be embodied in an order.*
>
> *(2) An order...shall be dated as of the date the decision was delivered and shall contain the particulars of the case and specify clearly, the relief granted..."*

31. From the above provisions and authorities, the question to be posed is whether taking into account the circumstances of the instant Appeal before us, the verbal exchanges of 5th September 2017 can be appealable under Article 35A of the Treaty. The answer to this pertinent question is un arguably in the Negative because no formal order or ruling was given by the Trial Court on that day. Instead, the trial proceeded as scheduled. In that regard, and remembering that it is trite law that "*He who alleges must prove*", the onus of production of a judgment or an appealable order lies on the Appellant. The Appellant has not discharged that onus for he has not included any such order in the Record of appeal; nor did he show us any such order for our perusal and necessary directions.

32. The circumstances before us have to be distinguished from a scenario where a judgment or an order basically appealable, was made and does exist but is not incorporated in the Record of Appeal because of lack of due diligence of the Appellant and a scenario whereby a judgment has only not been produced but also cannot be obtained at all because it does not exist.

33. In this instant case before us, there is no judgment or order of the Trial Court at all which the Appellant wants to reverse by way of appeal. The hearing notes relied on by the Appellant are neither a judgment nor an order capable of being challenged by way of appeal before the Appellate Division within the contemplation of Article 35A. It follows therefore that there is nothing to warrant the jurisdiction of this Court to entertain this Appeal.

34. We take inspiration from **Griset v Fair Political Practice Com'n (2001) 25 Cal. 4th 688,696)** where it was posited that: "*if a judgment or Order is not Appealable, the Appellate Court has no jurisdiction. Even if the Parties do not raise the issue, if there is any doubt whether the appeal is from an appealable judgment or order, the court is "duty bound" to consider it on its own motion.*" (See **Olson v. Cory (1983) 35 Cal.3d 390,398).**

35. Based on the foregoing authorities, the inference to be drawn in the instant Appeal under scrutiny, is that, although the parties have vehemently dedicated their arguments on the question of the

procedural irregularity or error of law by the Appellant on one hand and incompetent appeal by the Respondent on other hand, the nature of the Appeal before us raises, on the face of it, a fundamental question of jurisdiction.

36. It is the established jurisprudence of this Court that a fundamental question such as that of jurisdiction can be raised at any stage either by the parties or **suo motu** by the court **(see Angella Amudo Supra).**

37. It is obvious that none of the parties raised the issue of jurisdiction. However, this Court considers it appropriate to raise it, in as far as jurisdiction... "*is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting Party from subsequently maintaining that such Court or Tribunal has acted without jurisdiction...*" (See **Angella Amudo case supra**).

38. It is evident in the Appeal under scrutiny, that there is no judgment or an order of the Trial Court. It is so obvious that there is no need for it to be established or demonstrated that as far as the trial hearing notes, strongly relied on by the Appellant in prosecuting this purported appeal cannot be equated to a judgment or an order of the Trial Court which would trigger the requirements set out in Article 35A of the Treaty and Rules 68 (5), 88(1), 69(1) and (2) of the Court Rules of Procedure as demonstrated above for the Appellant to put the house in order to move an appeal before this Division.

39. In this Appeal, it was the duty of the Appellant to include in the Record of Appeal the impugned judgment or order of the Trial Court if one existed in order to clothe this Appellate Division with jurisdiction to entertain the Appeal.

40. We have established that in the East African Community jurisprudence an appeal lies to the Appellate Division only to challenge a judgment or an order of the First Instance Division of this Court and not scheduling conference notes or trial transcripts as it is the case in this Appeal. For that reason, the Appeal is totally misconceived, and wanting on account of lack of jurisdiction of this Division. The Appeal misconceived as it is, ought to be struck out and there is no need to entertain it on merits. The pending Reference in the Trial Court should proceed to its logical conclusion.

41. With regard to costs, since this Appeal is struck out on account of lack of jurisdiction of this Division and that it has been raised suo motu by the Court itself, we find it appropriate and just to order each party to bear its own costs in this Appeal.

F. CONCLUSION

42. The upshot of our consideration of this Appeal is that:

(a) The Appeal is struck out.

(b) Each Party shall bear its own costs of the Appeal.

It is ordered accordingly.

Dated, delivered and signed at Arusha this 24th day of August, 2018.

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Emmanuel Ugirashebuja
PRESIDENT

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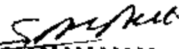
Liboire Nkurunziza
VICE PRESIDENT



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Edward Rutakangwa
JUSTICE OF APPEAL

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Aaron RINGERA
JUSTICE OF APPEAL

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Geoffrey Kiryabwire
JUSTICE OF APPEAL