IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KHAMIS, J.A.)

CIVIL APPEAL NO. 423 OF 2020

JOHN BUTABILE ..... APPELLANT

VERSUS

TANZANIA FISHERIES RESEARCH INSTITUTE ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam)
(Aboud, J.)

dated the 21st day of August, 2020
in
Revision No. 259 of 2019
.....

JUDGMENT OF THE COURT

10th & 26th July, 2023

NDIKA, J.A.:

The appellant, John Butabile, contests the judgment of the High Court, Labour Division at Dar es Salaam (henceforth "the High Court") dated 21st August, 2020 dismissing his application for revision of the decision of the Commission for Mediation and Arbitration (henceforth "the CMA") in Labour Dispute No. CMA/DSM/KIN/R.01/16.

The appeal arises as follows: the appellant was on 1st November, 1985 employed by the respondent, Tanzania Fisheries Research Institute, a parastatal organization established by Act No. 6 of 1980 to promote,

conduct, and coordinate fisheries research in the country. However, on 23rd July, 2008 the respondent terminated the employment. The appellant successfully challenged the termination vide an unfair termination claim lodged in the CMA referenced as CMA/DSM/ILA/598/09. In compliance with a consequential order the CMA had made, the respondent re-engaged the appellant sometime in 2010. Subsequently, the appellant pursued a series of matters in the CMA and the High Court seeking full execution of the award in his favour and or payment of certain outstanding benefits arising from the unfair termination alluded to earlier.

Eventually, the appellant retired from service on 26th November, 2011. According to him, following his retirement the respondent promised to pay him a transport allowance for repatriation of his family and personal effects to Geita, his place of domicile but no payment was forthcoming. The respondent having allegedly reneged on the undertaking, the appellant approached the CMA on 4th January, 2016 and applied vide CMA/DSM/KIN/R.01/16 for condonation of the delay to institute a claim for payment of outstanding transport allowance in the sum of TZS. 106,779,650.00. In accordance with rule 11 of the Labour Institutions (Mediation and Arbitration) Rules, 2007, Government Notice No. 64 of 2007

(henceforth "the CMA Rules"), the said application, made vide Form CMA F7, accompanied the substantive claim for the said outstanding transport allowance, which was lodged through Form CMA F1.

Before the application proceeded to the hearing on the merits, the respondent demurred that, one, the matter was *res judicata*; and two, that the CMA had no jurisdiction over the matter. The CMA sustained the preliminary objection. Its decision in Kiswahili, shown as page 69 of the record of appeal, translates into the following:

> *"The CMA sustains the preliminary objection to the effect that the appellant's claim is res judicata and that he has failed to demonstrate any sufficient cause to warrant a condonation of the delay to institute the claim even if it were assumed to be a claim founded on a new cause of action."*

As mentioned earlier, the appellant sought a revisal of the above decision before the High Court. It is apparent that in dealing with the matter, the said court presumed, rather wrongly, that the CMA had sustained both points of preliminary objection. All the same, in our view the matter before that court turned on whether the appellant's pursuit of condonation was competent.

It is evident from pages 107 and 108 of the record of appeal that the High Court began its deliberations on the preliminary objection by censuring the appellant for failing to state in his substantive claim for transport allowance that the said claim arose following his retirement from service and that it was distinguishable from the previous unfair termination claim referenced as CMA/DSM/ILA/598/09/947/10. In the final analysis, the court dismissed the revision as it endorsed the finding that the CMA could not entertain and decide again on the issue of transport allowance, which was substantially and directly in issue in the previous Complaint No. CMA/DSM/ILA/598/09/947 that had been determined conclusively.

The appellant, who was self-represented, lodged three grounds of grievance, two of which he fully canvassed at the hearing. On the first ground, he criticized the High Court for deciding that his application was *res judicata* vide CMA/DSM/ILA/598/09/947/10. Elaborating, he argued that the two matters arose from two separate causes of action and were of distinct nature. He determinedly contended that the preconditions for the application of the said doctrine, as stated in **Peniel Lotta v. Gabriel Tanaki & Others** [2003] T.L.R. 312, were not met. Regarding the second ground, his essential contention was that the High Court erred in law in not finding that the CMA

wrongly decided the merits of the dispute during disposition of the preliminary objection against the application for condonation.

For the respondent, Mr. Daniel Nyakiha, learned State Attorney, who was accompanied by Mses. Careen Masonda and Amina Mkuya, also learned State Attorneys, firmly opposed the appeal. He submitted that the appellant's claim was not new in the eyes of the law. It was substantially the same matter that the CMA had decided in CMA/DSM/ILA/598/09/947/10. He supported the High Court's application of the position in **Peniel Lotta** (*supra*) to the dispute, contending that the preconditions stated therein were fully met. The learned state counsel bolstered his submission by citing the case of **Jadva Karsan v. Harman Singh Bhogal** (1953) 20 EACA 74 for the principle that the subject matter of the subsequent suit must be covered by the previously instituted suit for *res judicata* to apply. As regards the second complaint, Mr. Nyakiha supported the High Court's approach, contending that the court did not determine any issue beyond what was before it and that the court rightly upheld the CMA's finding that the application was *res judicata*.

We have studiously scanned the record of appeal in the light of the contending arguments of the parties. It is common cause that on 4th January,

2016 the appellant lodged a claim vide Form CMA F1 for payment of TZS. 106,779,650.00 being outstanding transport allowance consequent to his retirement on 26th November, 2011. Being aware that the claim was out of time, he duly applied vide CMA/DSM/KIN/R.01/16 for condonation of the delay in accordance with rule 11 of the CMA Rules. Before the application proceeded to the hearing on the merits, the respondent raised a preliminary objection to the effect that the matter was not only *res judicata* but also that the CMA had no jurisdiction over it. Apart from sustaining the *res judicata* claim, the CMA went an extra mile holding that the application demonstrated no sufficient cause for condonation. The High Court fell for that hook, line, and sinker as it held in its judgment shown at pages 107 and 108 of the record of appeal as follows:

> "... ***[the CMA] could not entertain and decide again on the issue of transport allowance which was substantially and directly in issue at the CMA in Complaint No. CMA/DSM/ILA/598/09/947.*** *In other words, the application stems from the fact that an action was previously instituted in the CMA under No. CMA/DSM/ILA/598/09/947/10, [which was decided] on 31/10/2013. It is also on record that the said*

dispute was already executed. Thus, the applicant had no further claims arising from such dispute. In my observation, ***the payment of his retirement benefits had nothing to do with his former ciaims; therefore, he ought to have instituted such claim [in] time.*** *As rightly submitted by the respondent's counsel, the applicant did not state any sufficient reasons for his failure to refer his dispute [in] time since the record reveals that he retired on 04/01/2016 (sic). Thus, the arbitrator was right to dismiss the claim in question."* [Emphasis added]

The above reasoning and holding are plainly erroneous. It cannot be gainsaid that what was before the CMA for hearing and determination at the initial stage was the respondent's preliminary objection against the application for condonation. As rightly contended by the appellant, the CMA had to hear and determine the competence of the application at that preliminary phase. The CMA could not deal with the merits of the application, nor could it pronounce itself on the substance of the appellant's claim for which condonation was sought.

Since it was contended by the respondent that the application was *res judicata* and that the CMA could not take cognizance over it, the respondent

ought to have demonstrated and established that argument. No submissions were made to that effect. Indeed, it was not suggested that the CMA had dealt with and decided a previous application by the appellant for condonation to render CMA/DSM/KIN/R.01/16 *res judicata*. Equally hollow, on the face of it, was the argument that the CMA had no jurisdiction over the matter. For in terms of rules 11 and 29 of the CMA Rules, the CMA is sanctioned to hear and determine any application for condonation.

By way of emphasis, we would state that neither CMA/DSM/ILA/598/09/947 nor CMA/DSM/ILA/598/09/947/10 had any bearing on the application for condonation (CMA/DSM/KIN/R.01/16). For none of them determined the question of condonation, which was the essence of CMA/DSM/KIN/R.01/16. Besides, both the CMA and the High Court slipped into error by holding that the said application demonstrated no sufficient cause for the delay. As the parties were only heard on the competence of the application, but not its substance, the aforesaid concurrent finding was legally unfounded.

In conclusion, we find merit in the two grounds of appeal. In consequence, we allow the appeal and proceed to quash the High Court's judgment and restore the application for condonation, which we hereby

remit to the CMA for hearing according to the law. We make no order as to costs given that labour matters like this one mostly do not attract such orders.

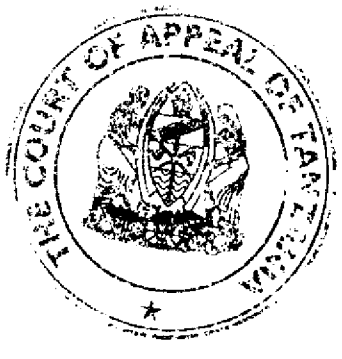
DATED at **DAR ES SALAAM** this 25th day of July, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 26th day of July, 2023 in the presence of appellant in person and Mr. Daniel Nyakiha, learned State Attorney for the respondent is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL