

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA LABOUR DIVISION
AT DAR ES SALAAM**

LABOUR DISPUTE NO. 4 OF 2014

BETWEEN

FRANCISCA K. MUINDI..... COMPLAINANT

VERSUS

TANZANIA PORTS AUTHORITY (TPA) & 2 OTHERS..RESPONDENTS

R U L I N G

26/03/2015 & 04/12/2015

Mipawa, J.

The notice of preliminary objection raised by the Respondents Tanzania Ports Authority, Madeni Juma Kipande and Peter David Gawile hereinafter nomenclature to as the first, second and third respondents respectfully, raised the following preliminary objection on points of law ***in limine*** (at the outset) as against the Applicant Francisa Kajumulo Muindi ***videlis:-***

- 1. That the complaint is misconceived for having been lodged in a forum **non-conveniens**.*
- 2. That the suit is pre-mature and the allegations therein are such as do not constitute any cause of action whatsoever against the 1st Respondent but more so against the 2nd and 3rd Respondents, who have never engaged with the applicant in their individual capacities.*

3. *That the application against the 2nd and 3^d Respondents is bad and unmaintainable in law. At all times 2nd and 3^d Respondents have always engaged with the applicant in their official not individual capacities.*
4. *That the suit is further bad and unmaintainable in law for being speculative based on substantiated street talk wholly without basis, particularly in its paragraph 3 (iv), (xviii), (xix), (xx), (xxi) and (xxviii).*
5. *That suit is further bad and unmaintainable in law for want of exhaustion of administrative channels available to the applicant. The suit is **malafide** whose sole intention is to circumvent the respondent's administrative procedures¹.*

Submitting on the grounds of the preliminary objections, the respondents argued on the first point that the complaint is misconceived for having been lodged in a forum **non-conveniens** because the mere fact that this is a labour matter does not in itself form the basis for every labour dispute to be lodged to before this Honourable Court.

They submitted that the powers of this Honourable Court are well spelt under section 94 of the Employment and Labour Relations Act 2004² which includes powers to hear and determine appeals from the decision of the registrar of trade unions, employers association and federations

¹ Respondents written submission in Labour Dispute Mgogoro wa Kikazi Na. 4 of 2014 between Francisca Muindi V. Tanzania Ports Authority and two others

² Act No. 6 of 2004 Cap 366 RE. 2009 the Employment and Labour Relations Act

reviews and revisions of the arbitrators awards and decisions of the essential service committee. Review of the decision, codes, guidelines or regulation by the Minister, complaints other than those of the Labour Court, Applications including for the declaratory orders in respect of any provision of the Employment and Labour Relations Act or an injunction³.

That the Courts have held that section 94⁴ was never intended to be an enabling provision for instituting any proceedings before the Labour Court. The Respondents referred to the case of **Chama cha Walimu Tanzania V. The Attorney General**⁵, a case originating from the Labour Court as a relevant case. That this Court has always been consistent in enforcing the rule that all labour dispute must first be referred to the CMA for Mediation⁶ and that in the case of **Hector Sequeiraa V. Serengeti Breweries Ltd.** [2009]⁷ the Court dismissed the labour complaint which was filed directly to the Labour Court without first pursuing the mandatory CMA mediation. The applicant has chosen to ignore this important procedure. Hence the matter be dismissed for having been instituted in the wrong forum.

³ *op. cit* not 2

⁴ S. 94 of Act No. 6 of 2004 *op. cit* note 3

⁵ Civil Application No. 151 of 2008 (CAT) Rutakangwa, JA., Kimaro, JA. and Luanda, JA. (unreported) at pp. 19, 20 and 21

⁶ CMA refers to the Commission for Mediation and Arbitration established under section 12 of the Labour Institutions Act No. 7 of 2004 RE 2009

⁷ Complaint No. 20 of 2009 LCDH (unreported)

As regard to the 2nd and 3rd points of preliminary objection the respondents submitted that; (collectively):-

...The Applicant has filed this application (sic) ...challenging normal administrative procedure commenced by the 1st Respondent acting through its management to investigate the allegations against the applicant...that this is a normal procedure provided under the law i.e. Rule 27 of the Employment and Labour Relations (Code of Good Practice) and therefore challenging it at this stage renders the application premature...⁸ That the applicant has lodged the complaint against the 2nd and 3rd Respondents without good cause as they have never engaged with the applicant in their individual capacity... The 2nd and 3rd Respondents are the employees of the 1st Respondent...⁹

The Respondents further submitted that by instituting an application against the 2nd and 3rd Respondent in their individual capacity places the applicant with no cause of action whatsoever against the 2nd and 3rd Respondents. Doing so places the 2nd and 3rd Respondent with ***no locus*** in this application and the rationale is well founded in law so as to disable busy bodies from wasting precious time of legal entities by dragging its management to Court more so in their individual capacities¹⁰.

⁸ *op. cit* note 2 at p. 6

⁹ *ibid*

¹⁰ *ibid* p. 6

On the fourth point of preliminary objection the Respondents submitted that, some of the purported statements of "*facts*" to be relied by the applicant to establish her claims offends Court Rules to wit Order xix Rule 3 of the Civil Procedure Code¹¹ which are clear that statement in support of the claim should not be vexatious and speculative as they offend the law. Para 3 (xv), (xviii), (xix), (xxviii) and 5 (iii) are mostly baseless and drawn from road side gossip, for example the claim to payment from the date of the "*premature*" retirements to dates of compulsory retirement are based on the assumption that the plaintiff had to work up to the dates of her compulsory retirement... no one can know what the future holds for her. One can die before reaching the age of compulsory retirement or he can be dismissed from employment or he can even resign...¹². The Respondents conclude that:-

...The Applicant claimed to be an employee of the Respondent for over a long period (over twenty years) and to buttress it she has even vied for the post of Director General of the 1st Respondent...How does she claim to be a potential candidate and posed a threat to other aspirants to the top position of the Director General if such simple administrative procedure falls short of her reach as a senior officer...¹³

That the applicant an employee of the 1st Respondent for over twenty years rising from Junior Staff to the position of the Director of Marketing,

¹¹ Civil Procedure Code Cap 33 RE. 2002

¹² *ibid* at p. 7

¹³ *ibid* at p. 8

the top most senior position of the 1st Respondent therefore (applicant) very well conversant with the administrative channels to be followed to advance any grievances against the management...turning herself into a busy body is just an attempt to circumvent administrative procedure initiated by the Respondent...¹⁴

In reply the applicant Francisca Muindi submitted that, as regard to the first point that, the Learned Counsel for the Respondents has rightly quoted the mandate of this Honourable Court as specifically stated under the particular section, but not limited to the power to hear and determine complaints other than those that are to be decided by arbitration, applications including for declaratory orders in respect of any provision of the Employment and Labour Relations Act or an injunction. On relied two cases the counsel for the Respondent did not provide for a copy of ruling¹⁵:-

*...That the main dispute in this Court are basically to challenge the suspension and the constructive termination of employment by the respondents. It is the applicant contention that the suspension was illegal and did not follow the procedure...*¹⁶

The Applicant further submitted that every suspension should state reasons for that suspension and allow the person (employee) an opportunity to be heard and know the allegations facing her.

¹⁴ *ibid* at p. 9

¹⁵ *ibid* at p. 6

¹⁶ CPC Cap 33 RE 2002

Unfortunately the allegations against the applicant have remained undetermined for the whole period ever since April, 2014 until today contrary to law¹⁷.

The Applicant further submitted that she has nowhere to seek her rights except before the Court. She is not yet terminated as of now, but her claims are based on issues involving **discrimination** at work place **unfair treatment and constructive termination** and rendering uncomfortable working conditions all of which are to be determined by this Court¹⁸.

As regard to points number 2 and 3 of the preliminary objection the applicant submitted that while the 1st Respondent is a body corporate, the 2nd and 3rd Respondents are individuals employed by the 1st Respondent. There is no resolution of the Board of Tanzania Ports Authority directing the suspension or anything against the applicant which has ever been disclosed to the applicant. The 2nd and 3rd Respondents conducts were personal and based on discrimination and malicious motive to bar the applicant from being appointed as the Director General of the 1st Respondent. This discloses a sufficient cause of action:-

...Regarding the allegation that the application is premature, it is our humble submission that this is again an abuse of Court process. The suspension is not termination but is conducted in a manner that does not guarantee the proper access to justice by the affected

¹⁷ *ibid* at p. 2

¹⁸ *ibid* at p. 3

*person; it is only the power of this Court to intervene ...this is the main focus of section 94 of the Employment and Labour Relations Act 2004...*¹⁹

As regard to Respondents reference to the Civil Procedure Code on points No. 4 and 5 the applicant submitted that the procedure in this Court is founded under the Labour Court Rules GN. No. 106 of 2007 and not the Civil Procedure Code Cap 33 RE 2002. The Respondents attach on applicant's background as an employee of the 1st Respondent for over twenty years is a point of fact and not a point of law. That the applicant should not be punished for approaching this Court on the grounds that there is an alternative procedure which is not disclosed to her²⁰.

I have duly considered the submission of both parties ***in ex-abandunt cautela*** (with eyes of caution or extreme caution) despite the submission at lengthy (***or in extenso***) suffice it to say here that of the five preliminary objection points raised by the respondent, the ***premiere*** (first) point of objection may dispose of this legal wrangle inter-parties.

In limine (at the outset) it is a condition precedent in Tanzania Labour Law jurisprudence that all disputes of labour (labour disputes) must be referred to the Commission for Mediation and Arbitration styled the "CMA" in a prescribed form²¹ and according to the Act, Employment and Labour Relations Act, a dispute means a dispute of interest if the parties

¹⁹ *ibid* at p. 4

²⁰ *ibid* at p. 5

²¹ See section 88 of the Employment and Labour Relations Act No. 6 of 2004 Cap 366 RE 2009

are engaged in a essential services²² and a complaint over the fairness or lawfulness of an employee's termination of employment²³. Or any other contravention of the Act or any other labour law or breach of contract²⁴.

The Employment and Labour Relations Act is also clear that where a dispute is not resolved at mediation it can be referred to arbitration before the commission or be referred to this Court for adjudication²⁵. The Act has an exceptionality however in line with this, where some of the labour matters can be referred to the Labour Court (in the exercise of its original and exclusive jurisdiction) as per section 94 (1) (a) of the Act No. 6 of 2004 for example part iv of the Act: **notebien** S. 53, 55, 56:-

*S. 53 where a federation or a registered organization fails to comply with its constitution the registrar or member of the federation or registered organization may apply to the Labour Court for any appropriate order...*²⁶

*55 (1) The Registrar may apply to the Labour Court for an order to cancel the registration of a registered organization or federation if that organization or federation fails to comply with.....*²⁷

²² *ibid* S. 88 (1) (a)

²³ *ibid* S. 88 (1) (b) (i)

²⁴ *ibid* S. 88 (1) (b)

²⁵ *ibid* S. 88 (2)

²⁶ *ibid* Part iv of the Act S. 53, the Labour Court may set aside any decision agreement or election, require the organization or federation or an official to comply with the constitution restrain any person from any action not in compliance with the constitution

²⁷ *ibid* Part iv of the Act S. 55...where the organization or federation fails to comply with the requirement for registration or the provision of this part the Labour Court cancel any registration

56 (2) The Registrar may apply to the Labour Court for the dissolution of any organization that contravenes the provision of section 45...²⁸

The exceptionality also includes reviews of decision, codes, guidelines or regulations made by the minister application including declaratory orders and injunctions as per section 94 (1) of the Employment and Labour Relations Act No. 6 of 2004 Cap 366 RE 2009.

In the case at hand a cursory glance on the record appears that the applicant was suspended from work, though not known for how long the suspension was to last, however the applicant is still in the employment of the first respondent but claimed to be constructively terminated after she was suspended for misuse of the office by and large.

The present matter or case is almost an employment dispute which can be mediated by the Commission for Mediation and Arbitration. Furthermore, the time for referral of labour disputes relating to unfair termination and other disputes is only prescribed under item 10 (1) and (2) of the Labour Institution (Mediation and Arbitration) Guidelines Government Notice No. 64 of 2007 which embodies the "take off" and resolutions of Labour Dispute by the CMA (Commission for Mediation and Arbitration) making the disputes (except those indicated above) a domain

²⁸Registration within 6 months of establishment. Registration to meet the requirements for registration of a federation etc

of the Commission and hence has to start for mediation in the CMA. Item 10 (1) (2) of GN. 64/2007 reads:-

- (1) *Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate and uphold the decision to terminate.*
- (2) *All other dispute must be referred to the Commission within sixty days from the date when the dispute arised...²⁹*

I entirely and respectfully agree with the learned counsel for the respondents that this matter or complaint has been lodged in a forum **non-conveniens** so to speak. The position of this Court remains that all dispute with a "*smell*" of unfair termination must first be referred to the Commission for Mediation and Arbitration. It is only when mediation fails the same may be arbitrated or referred to this Court and follow the procedure under Rule 10 of the Labour Court Rules GN. No. 106 of 2007. This Court in **Beaty Mmari and others V. Celtel Tanzania Limited** [2009]³⁰ quoted with approval its own decision in **Salum Kitojo V. Vodacom (T) Ltd.** [2008]³¹ that:-

...It is only after mediation has failed that the complain (sic) has a choice either to go for arbitration under

²⁹ Labour Institutions (Mediation and Arbitration) Rules No. 64 of 2007

³⁰ Labour Dispute No. 34 of 2009 [LCDH] unreported

³¹ Complaint No. 4 of 2008 [LCDH] unreported

section 86 (7) (b) (1) or to come to this Court under section 86 (7) (b) (ii) until this is done the complaint is prematurely before this Court...

The Court in **Beaty Mmari and others**³² (supra) which had faced a similar case as in **Kitojo's case**³³ above and indeed this Court has also confirmed a similar nagging issue in the instant case of **Francisca Muindi V. Tanzania Ports Authority and two others**³⁴. The Learned Judge in **Beaty Mmari's case**³⁵ concluded that:-

*...I agree with the holding of my brother Judge (as he then was) in **Kitojo**, that all labour disputes must commence at the CMA that is all disputes except those specifically ordered to be referred straight to the Labour Curt under the Act...*³⁶

In the event of the above detailed discussion as regard to the first preliminary objection on point of law that the present labour dispute or complaint is misconceived for it being lodged in a forum **non-conveniens** I hold that and thence entirely and respectfully agree with the counsel for the respondent that the complaint is pre-maturely filed in this Court and therefore in a forum **non-conveniens**.

³² *op. cit* note 31

³³ *op. cit* note 32

³⁴ Labour Dispute No. 4 of 2014

³⁵ *op. cit* note 31

³⁶ *ibid* per Rweyemamu, J.

I will not trek or venture to discuss the four preliminary objections on points of law raised by the respondent as they lack importance in so far as the preliminary objection on the point of forum **non-conveniens** is concerned. Suffice it to say here that this marks the end of the present matter at hand which consequently is dismissed therefore.

I.S. Mipawa
JUDGE
04/12/2015

Appearance:-

1. Applicant: Mr. Mohamed Tibanyendera, Advocate - Present
2. Respondents: Absent

Court: This ruling has been read to the party as shown above in the absence of the Respondents.

I.S. Mipawa
JUDGE
04/12/2015