IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION APPLICATION NO. 6 OF 2021

(Originating from Labour Dispute No. CMA/IR/03/2021)

MLENGA KALUNDE MIROBO.....APPLICANT

VERSUS

THE TRUSTEES OF THE TANZANIA

NATIONAL PARKS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last Order: *30/11/2021*
Date of Ruling: *30/12/2021*

MLYAMBINA, J.

This Labour Revisional application brings forth seven controversial issues requiring determination by the Court, to wit: *First*, whether The Commission for Mediation and Arbitration [hereinafter referred to as CMA] falls under the meaning of a Court under *The Government Proceeding Act.*[1] *Second*, whether "a Labour Dispute" is "a Civil Suit". *Third*, whether the Government and the Attorney General can be sued in the CMA. *Fourth*, whether 90 days' notice is an automatic extension of time from 30 days' specific notice given under *Rule 10.*[2] *Fifth*, what is the remedy of filing an application out of time before the CMA? *Sixth*, who is a Public Servant in the light of *Public Service Act.*[3] *Seventh*, what

[1] Cap 5 [R.E. 2019] as Amended by Act No. 01 of 2020.

[2] GN No. 64 of 2007.

[3] Cap 298 [R.E. 2019] as amended.

is the effect of non- filing notice of intention to file revision.[4] At the outset, I do observe that; with an exception of the second issue, none of these issues admits of straightforward answers. Two explanations occur for such analogy. *One*, modern labour law (statutory and case law) has triumphantly brought various schools of thoughts on the issues. *Two*, the conflicting decisions on the issues are yet to be challenged in "one set" before the Court of Appeal.

The brief facts of the application are that; the Applicant was terminated on 24th September, 2020 after his appeal was rejected by the Director General. At that time, the Government Proceedings Act was already amended by the *Written Laws Miscellaneous Amendment Act,*[5] which required any person who is seeking to institute a suit against Public Parastatals and Public Corporations to follow the Procedure under *the Government Proceedings Act.*[6] One of the requirements was to issue 90 days' notice prior instituting a suit.

On 8th October, 2020, the Applicant submitted a 90 days' notice of intention to sue the Respondent. The said notice expired on 13th January, 2021. Thereafter, the Applicant preferred his dispute to the Commission for Mediation and Arbitration (CMA). The Respondent successfully raised a preliminary objection to the effect that; the matter was filed out of 30 days. It was argued by the Respondent and seconded by the CMA that; there was no any necessity to issue 90 days' notice because that was an employment case.

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[4] GN No. 47 of 2017.

[5] Act No. 01 of 2020.

[6] Cap 5 [R.E. 2019] *op cit.*

Upon striking out of the application, the Applicant preferred this application by way of Notice of Application and Chamber Summons made under *Section 94 (1) (f) of the Employment and Labour Relations Act,*[7] *read together with Rule 24 (1), (2) (a-f),(3) (a-d), 56 (1) and 28 (1) (c-e) of the Labour Court Rules of 2007,*[8] supported with the affidavit sworn by the Applicant.

During the hearing, both parties enjoyed their right of legal representation. The Applicant was competently represented by Mr. Evance Nzowa, learned Counsel and the Respondent was judiciously represented by Mr. Bryson Ngulo and George Dalali both learned State Attorney. The application was argued orally.

1. **Whether the CMA falls under the meaning of a Court under The Government Proceeding Act**[9]

The Applicant through Counsel Nzowa was of the affirmative answer. He anchored his argument under *Section 6 (3) of the Government Proceedings Act.*[10] In view of Counsel Nzowa, if it is the suit against the Government, a notice has to be issued. Counsel Nzowa considers Commission for Mediation and Arbitration as a Court.

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[7] Cap 366 [R.E 2019].

[8] GN No 106 of 2007.

[9] Cap 5 [R.E. 2019] *op cit.*

[10] *Ibid.*

In response, Counsel Bryson Ngulo and George Dalali were of firm view that; if one is to consider that CMA is also a Court, that has to be read with *Section 7 of the Government Proceedings Act*[11] which states:

> *Notwithstanding any other Written Law, no Civil Proceedings may be instituted in any Court other than the High Court.*

Further, State Counsel Bryson and Dalali submitted that; since the Applicant's interpretation was that the complaint at CMA is the same as in other Ordinary Courts, the Applicant was supposed to comply with *Section 7* and institute the same at the High Court.[12]

Moreover, Counsel Bryson and Dalali appeared to be aware that; there was a decision of this Court by Hon. Mandia, J. (as he then was) where he reasoned that; the Government can be sued at CMA. However, in their view, such position is not correct. Three reasons were stated: *One*, if the legislature had intended to vest the CMA with jurisdiction in Labour matter to which the Government is a party, there could be an express provision both in *Employment and Labour Relations Act*[13] *and Labour Institutions Act*[14] which provides an exception to the provisions of *Section 7 of the Government Proceedings Act.*[15] Thus, matters of jurisdiction can never be assumed and never be implied especially when there is a clear provision of the law.

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[11] *Ibid.*

[12] *Ibid.*

[13] Cap 366 [R.E. 2019] *op cit.*

[14] Cap 300 (R.E. 2019] *op cit.*

[15] Cap 5 *op cit.*

Two, filing matters against the Government in CMA is against *Section 32A of the Public Service Act*[16] which requires a Public Servant to exhaust Local Remedies. More so, Public Servants are governed by *Public Service Act.*[17]

Three, Section 22 of the Employment and Labour Laws Miscellaneous Amendment Act of 2015[18] gives supremacy to *the Public Service Act.*[19] It provides:

> Where there are inconsistences between Labour Laws and Public Service Act, the Public Service Act shall prevail.

From the afore arguments of the parties, the point on whether CMA is a Court in terms of *the Government Proceedings Act,* is significant.[20] The reason being that; the later demonstrates quite clearly that the said amendment was not intended to amend the labour laws regime. It is true, as pointed out by State Counsel Dalali, my brethren Mandia J. (as he then was) in the case of **The Attorney General v. Maria Mselemu,**[21] interpreted *Rule 23 (2) of the Labour Court Rules 2007*[22] to mean that; the Government can be a party to a dispute before CMA.

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[16] Cap 298 *op cit.*

[17] *Ibid.*

[18] Act No. 24 of 2015.

[19] Cap 298 *op cit.*

[20] Cap 5 *op cit.*

[21] Labour Revision No. 270 of 2008, High Court of Tanzania Labour Division (unreported).

[22] G. N. 106 of 2007.

However, I have seven observation. *First*, there is neither express provision in the *Government Proceedings Act*[23] or *Employment and Labour Relations Act*[24] *and Labour Institutions Act*[25] that empowers the CMA with jurisdiction in Labour matter to which the Government is a party. As properly submitted by the Respondent's Counsel, matters of jurisdiction can never be assumed and never be implied especially when there is a clear provision of the law.[26]

Second, *Section 4 of the Employment and Labour Relations Act,*[27] defines Labour Court to mean the Labour Division of the High Court established under *Section 50 of the Labour and Institutions Act.*[28] Such definition does not encompass CMA.

Third, this Court through her Ladyship Rweyemamu, J. (as she then was) has consistently maintained that; CMA are quasi judicial bodies. They are not Courts in strict senso. In the case of **Morogoro Canvas Mills (1998) Limited v. Jacob Mwansumbi,**[29] her Ladyship Rweyemamu, J. (as she then was) was of the observation that; the Referral Form No. 1 is not to be compared to pleadings in ordinary civil suit because under labour law resolution of disputes by CMA, a Tribunal is different from adjudication by the Court. In the case of **China**

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[23] Cap 5 *op cit.*

[24] Cap 366, *op cit.*

[25] Cap 300 *op cit.*

[26] Also, See a paper by Frank Mwalongo: Labour Disputes Handling Procedure In Tanzania" at p.14-15 available at https://www.apex.co.tz [lastly accessed on 29th December, 2021 at 0030hrs].

[27] Cap 366 *op cit.*

[28] Cap 300 *op cit.*

[29] Labour Revision No. 42 of 2009, High Court Labour Division at Dar es Salaam (unreported).

Railway Jiang Engineering Company Limited v. Abdallah Ibadi and Salum Mtengevu,[30] the Court held that CMA is a quasi judicial body.

Again, in the case of **Edna Pendael Tenga v. Parokia of Bugando,**[31] the Court observed that; CMA is a quasi judicial body. In the case of **Antony Mulungu v. Bora Industries limited,**[32] the Court observed that CMA is a quasi judicial statutory body.

Fourth, Rule 23 (1) of the Labour Court Rules provides very categorically that a statement of complaint shall be presented straight to the Labour Court for matters within the pecuniary jurisdiction of the High Court.[33]

Fifth, as properly submitted by the State Counsel, filing matters against the Government in CMA is against *Section 32A of the Public Service Act* which requires a Public Servant to exhaust local remedies.[34] Public Servants are governed by *Public Service Act.*[35] I shall later come to discuss the absurdity of *Section 24 (d) of the Teachers Service Commission Act,*[36] that repealed *Section 30 (1) and (2) of the Public Service Act.*[37]

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[30] Labour Revision No. 61 of 2008, High Court Labour Division at Dar es Salaam.

[31] Labour Revision No. 19 of 2007, High Court Labour Division.

[32] Labour Disputes No. 51 of 2008, High Court Labour Division at Dar es Salaam.

[33] G. N. 106 of 2007.

[34] Cap 298 [R.E. 2019].

[35] *Ibid.*

[36] Act No. 25 of 2015.

[37] No. 8 of 2002 *op cit*

Sixth, as properly argued by the State Counsel, *Section 22 of the Employment and Labour Laws Miscellaneous Amendment Act*[38] gives supremacy to the Public Service Act.[39]

Seventh, it is the requirement of law that, any civil proceedings against the Government shall be instituted in the High Court. *Section 6 (4) of the Government Proceedings Act* states that:[40]

> *All suits against the Government shall be instituted in the High Court by delivering a claim in the Registry of the High Court within the area where the claim arose.*

When one reads between the line, there are no doubts that CMA is not the High Court or even the Registry or Division of the High Court, so to say.

I can therefore hold with certainty that CMA is not a Court in terms of *The Government Proceeding Act.*[41]

2. Whether "a Labour Dispute" is "a Civil Suit"

Mr. Nzowa for the Applicant insisted that; labour disputes are Civil suits because *Section 22 of the Civil Procedure Code (supra)* provides on how to initiate civil suit. It reads:

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[38] Act No. 24 of 2015 *op cit.*

[39] Cap 298 *op cit.*

[40] Cap 5 *op cit.*

[41] Cap 5 [R.E. 2019] as amended by Act No. 01 of 2020.

Every suit shall be instituted by presentation of a plaint or in such other manner as may be prescribed.

As regards labour dispute, Mr. Nzowa maintained that; *Section 86 (1)* of the *Employment and Labour Relations Act (supra)* prescribes how disputes should be referred to CMA. It shall be in the prescribed form which is the CMA Form No. 01 which is the same as a Plaint in normal civil suit. In order to show the uniformity of these two creatures, Mr. Nzowa reminded this Court that; the Civil Procedure Code is applicable in Labour Court under the provisions of *Rule 55 (1) and (2) of the Labour Court Rules.*[42]

Besides, *Section 7 of the Government Proceedings Act* requires every civil suit against the Government should be instituted before the High Court.[43] However, *Rule 23 (2) of the Labour Court Rules* requires where the dispute or complaint is against the Government shall be instituted in the Court and a copy of complaint shall be served to the Attorney General.[44]

Counsel Nzowa added two arguments. *One, Section 86 (1) of the Employment and Labour Relations Act* has prescribed how disputes should be referred to CMA. It shall be in the prescribed form which is the CMA Form No. 01. It acts as the Plaint in normal Courts.

Two, Rule 6 (1) of the Labour Court Rules, requires a party initialing a Referral Proceedings to the Court to file a statement of complaint as

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[42] G. N. No. 106 of 2007.

[43] Cap 5 *op cit.*

[44] G. N. 106 of 2007 *op cit.*

prescribed in Form No. 01 of the schedule of this Rules. Thus, in Labour Court one has to file Statement of Complaint instead of a Plaint.

State Counsel Dalali on his part, started to define the term suit by citing the case of **MSK Refinary Limited v. TIB Development Bank Limited and Yono Auction Mart and Co. Limited**, in which, the Court adopted the definition in **Black's Law Dictionary** at p. 5 and stated:[45]

> *Suit is any proceeding by a party or parties against another in a Court of Law or* competent Tribunal.

Moreover, he invited this Court to the case of **Burafex Limited v. Registrar of Titles,** in which I defined the term suit to mean:[46]

> Any proceedings of a civil nature in a Court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon to determine or declare the rights of the disputing parties.

In view of the foregoing, I do subscribe to both parties' position that; the term "suit" should not be given a technical or narrow definition. As such, the complaint filed at CMA follows within the term suit because it is the proceedings which determine the rights and duties of the parties.

3. Whether the Government and The Attorney General can be sued in the CMA.

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[45] Miscellaneous Civil Application No. 307 of 2020, High Court of Tanzania at Dar es Salaam Registry (unreported).

[46] Civil Appeal No. 235 of 2019, High Court of Tanzania at Dar es Salaam District Registry (unreported).

It was the submission of Counsel Nzowa that; the Government and the Attorney General may be sued before the CMA.

On the other hand, the State Counsel Ngulo and Dalali were of stringent view that; there is no law that authorises the Attorney General and the Government to be sued before CMA.

I have carefully considered the brave arguments of both parties. I do understand that *Section 3 (1) of the Government Proceedings Act* provides that a Government may be liable as any other person of full age.[47] It states that:

> *Subject to the provisions of this Act and any other written law, the Government shall be subject to all those liabilities in contract, quasi-contract, detinue, tort and in other respects to which it would be subject if it were a private person of full age and capacity and, subject as aforesaid, any claim arising therefrom may be enforced against the Government in accordance with the provisions of this Act.*

However, as properly argued by the State Counsel Bryson and Dalali, there is neither express provision in *the Government Proceedings Act,*[48] or *Employment and Labour Relations Act*[49] *and Labour Institutions Act* that empowers the CMA with jurisdiction in Labour matter to which the Government is a party.

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[47] Cap 5 [R.E. 2019].

[48] As amended by Act No. 01 of 2020, op cit.

[49] Cap 366 *op cit.*

Further, *Section 6 (4) of the Government Proceedings Act* mandatorily requires all suits against the Government to be instituted in the High Court.[50]

Even the purported *Section 6 (2) and (3) of the Government Proceedings Act (supra)* does not express require the Attorney General and the Government be sued before the CMA.

4. Whether 90 Days' Notice is an automatic extension of time from 30 days' specific notice given under Rule 10.[51]

Mr. Nzowa argued that; the findings of CMA was wrong and made in disregard of the *Written Laws Miscellaneous Amendment Act*[52] because the Applicant filed his dispute before CMA within the prescribed time as per *Rule 10 of the Employment and Labour Relations Mediation and Arbitration Rules*.[53]

It was further submitted that; the afore mentioned rule has put a condition that; a dispute can be referred to CMA within 30 days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate. At the same time, it is the requirement of *Section 6 (2)* of the *Government Proceedings Act* to give a notice of not less than 90 days before a person instituting a suit

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[50] *Ibid.*

[51] GN No. 64 of 2007 *op cit.*

[52] Act No. 01 of 2020.

[53] G. N. No. 64 of 2007.

against a Government or her Institution or Agencies and the copy of such notice be served to the Attorney General and Solicitor General.[54]

Moreover, Counsel Nzowa argued that; a Labour matter is also a civil suit because it is a private matter between employer and employee. As such, the essence of the requirement of 90 days' notice is to give the public corporation time to rethink and resolve the dispute before the matter goes to the Court or Tribunal or to the CMA.

Therefore, in view of Counsel Nzowa, when the 90 days expires, it means the employer has decided to uphold his decision to terminate. Hence, the complainant under *Section 6 (3)* can now refer his dispute to Commission for Mediation and Arbitration.[55]

Counsel Nzowa argued that; the Applicant referred his dispute within the prescribed time because time started to run after the expiry of 90 days' notice. Therefore, Counsel Nzowa prayed for this Court to revise the decision of CMA and order the matter be heard afresh before another Mediator.

In reply, Counsel Bryson and Dalali argued that; even if the Court finds the issue of 90 days' notice at CMA is compulsory when the Government or Attorney General is sued, it should find further that; compliance with 90 days' notice is not an automatic extension of time from the statutory and specific law given under *Rule 10* which requires complaint be filed within 30 days.[56] In their view, the proper procedure for the Applicant

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[54] Cap 5 [R.E. 2019] *op cit.*

[65] *Ibid.*

[56] G.N. No. 64 of 2007.

was to file an application for condonation at CMA. The reason for delay to issuing a 90 days' notice could be one of the reasons for application of extension of time.

In addition, the Respondent submitted that; Miscellaneous *Amendment Act No. 01 of 2020* did not affect any Labour law. Therefore, the *Provisions of Rule 10 (1)*[57] was not affected by that amendment. The Respondent insisted that; the Applicant was supposed to refer his dispute to CMA within 30 days from the date he was terminated. It was still wrong for the Applicant to invoke *Section 6 (2) of the Government Proceedings Act* which required him to issue a 90 days' notice because that provision does not apply in Labour matters.[58]

Moreover, in view of the Respondent, *the Government Proceedings Act (supra)* is the Principal Legislation. *The Employment and Labour Relations Act* is also a Principal Legislation.[59] However, *Rule 10 (1)* emanates from the Labour Relations Act, which is Specific Act, has to be applied in labour matters.[60]

In the light of the above arguments, at earliest stage of this Ruling, I noted, the Applicant has moved this Court to determine the application through various provisions of the Labour *Court Rules G. N. No. 106 of 2007* and *the Employment and Labour Relations Act Cap 366 [R. E. 2019].* Therefore, it does not appeal to the logic and horizon of thinking that the present matter is a normal Civil Suit to abandon Labour Laws. If

[57] *Ibid.*

[58] Cap 5 [R.E. 2019] *op cit.*

[59] Cap 366 [R.E. 2019] *op cit.*

[60] G. N. No. 64.

the Applicant was late to refer the dispute at the CMA, he had an avenue of applying extension of time stating the grounds of delay under *Rule 11(1),*[61] if at all the CMA had jurisdiction to entertain a Labour matter involving the Attorney General.

I do agree with Counsel Nzowa that the spirit of the requirement of 90 days' notice serves various purposes. *First,* it gives the public corporation time to rethink and resolve the dispute before the matter goes to the Court. *Second,* it makes the Government aware of the claim and a chance to respond to the claim before the lawsuit is filed against it. *Third,* it serves time and costs of the parties as the dispute can be settled prior been lodged to the Court. However, the illegal notice issued to the Government adds no value in law. The same effect applies with a legal notice issued and the claim thereto being preferred in a wrong avenue.

In the premises of the afore arguments, it is the considered view of this Court that; the Applicant in the case at hand could not apply the requirement of *the Government Proceedings Act*[62] in the labour matter which is the creature of its own nature. If the CMA had jurisdiction on the matter, the Applicant was supposed to file his labour dispute in not more than 30 days after it arose as it is required under *Rule 10 of the Labour Institution (Mediation and Arbitration) Rules ,2007, GN No. 64 of 2007.* That being the case, the CMA was supposed to dismiss the dispute for being time bared as per *Section 3 of the Law of Limitation Act (supra).* The same position was reached in the case of **Abdallah**

[61] *Ibid.*

[62] Cap 5 [R.E. 2019] *op cit.*

Athumani Masuruli v. Rubondo Island National Park and the Trustees of the Tanzania National Parks.[63] It was not proper to struck out. Since, the Applicant was terminated on 24th September, 2020, he was supposed to lodge his complaint not more than 23rd October, 2020. Therefore, 90 days' notice cannot act as an automatic extension of time from specific law given under *Rule 10.*[64]

Further, it is the findings of this Court that; where there is a conflict between "Specific Law" in one hand and "General Law" on the other, then "Lex Specialis Doctrine" chips in to resolve the conflict. "Lex Specialis Doctrine" provides that if two laws which regulate the similar subject matter are in conflict, then specific law that regulates specific subject matter "lex specialis" overrides or prevails over "general law" that regulates the matter generally "lex generalis". It should be noted that "Lex Specialis Doctrine" is derived from Latin Maxim: *"Lex specialis derogat legi generali"* which laterally means that "the general does not detract from the specific." This maxim enjoins the Courts of law to prefer specific law over general law where there is a conflict on the similar subject matter.

In Tanzania "Lex specialis Doctrine" finds legal refuge in the decision of the Court of Appeal in the case of **the Permanent Secretary (Establishments) for Home Affairs & the Attorney General v. Hilal Hamed Rashid and 4 Others.**[65] In that case, the Court of Appeal confirmed the decision of the trial Judge Kyando (as he then

[63] Civil Case No 07 of 2019, High Court at Mwanza (unreported).

[64] GN No. 64 of 2007.

[65] [2005] TLR 121.

was) who applied "Lex specialis Doctrine" in which he took a legal stance that *the Police Force and Prisons Service Commission Act,*[66] being a specific law regulating affairs of police force was applicable to police officers rather than *the Civil Service Act,*[67] which was a general law applicable to all public servants.

Further, the Court would think of applying the *Doctrine of Implied Repeal* as enunciated by Court of Appeal in the case of **Julius Ishengoma Ndyanabo v. Attorney General.**[68] Under the Doctrine of Implied Repeal, it is settled principle of law that; where a later legislation is in conflict with or is inconsistent with, or repugnant to, an earlier legislation to the existent that the two cannot co-exist, then the latter legislation overrides or prevails over the earlier legislation thereby the later legislation in law is taken to have repealed the earlier legislation by necessary legal implication.

However, as properly argued by the Respondent, *the Government Proceedings Act Miscellaneous Amendment Act*[69] is a distinct legislation and did not affect any Labour law including the *Provisions of Rule 10 (1).*[70] My learned sister Mnyukwa J. in the case of **Simon Josephat v. Dar es Salaam Water and Sewerage Corporation** while faced with

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[66] Act No. 8 of 1990.

[67] Act No. 16 of 1989.

[68] Civil Appeal No 64 of 2001, High Court of Tanzania at Dar es Salaam (unreported).

[69] Act No. 01 of 2020.

[70] G. N. No. 64 of 2007.

similar issue held at page 7 of the Ruling that; the principles in statutory interpretation is that the specific law overrides the general law.[71]

Thus, it is the firm view of this Court that; the Applicant's application is unmerited based on the fourth issue and it deserved the whip of being dismissed.

5. What is the remedy of filing an application out of time before the CMA?

The Respondent while making reference to among of the attachments to the Applicant's application, informed the Court that; one of the attachments is the ruling of CMA in which page 3 states that:

> *Kwa mantiki hiyo basi Tume inaliondoa shauri hili (struck out) Mlalamikaji akiona bado ana haki zake za msingi afungue kwa kufuata misingi ya kisheria kwa mashauri ambayo yako nje ya muda.*

The Respondent, therefore, argued that; it is clear the application before the CMA was struck out and not dismissed. As such, it was an interlocutory order which cannot be appealed against. To cement on the issue of interlocutory issue, the Respondent cited the case of **Sheheza Moez Karmali v. Noorkurim Diamond Karmali**;[72] acknowledging that Labour Laws does not provide explicit on what is interlocutory and not. The Respondent borrowed the definition of interlocutory from

[71] Revision No. 941 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[72] Primary Court Civil Appeal No. 55 of 2020, High Court of Tanzania at Dar es Salaam (unreported) at page 3-4.

Section 74 (2) of Civil Procedure Code, which prohibit appeal against interlocutory orders.[73]

It was the submission of the Respondent that; Civil Procedure Code is applicable in Labour Courts in case of lacuna. The Respondent maintained that; at page 4 of the **case of Sheheza,**[74] this Court cited the Court of Appeal decision in the case of **Peter Noel Kingamkono v. Tropical Pesticides Research,** and stated:[75]

> *In view of above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply the nature of the order test. That is to ask oneself whether the Judgement or order complained of finally disposed of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not it is then an interlocutory order.*

The Respondent insisted that; the rights pursued at the CMA was whether the Applicant was fairly or not fairly terminated. That issue was not submitted or discussed and determined at CMA. That by itself makes it interlocutory. In view of the Respondent, what the Applicant was

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[73] Cap 33 [R.E. 2019].

[74] Primary Court Civil Appeal No. 55 of 2020 *op cit.*

[75] Civil Application No. 02 of 2009.

supposed to do, was to file an application for condonation under *Rule 11 (1).*[76]

It was maintained by the Respondent that; if at all the Applicant's application for condonation could have been dismissed, that could be the time and reason for him to apply application for revision stating the reasons which he deems proper. One of them could be the issue of 90 days' notice.

The Respondent concluded that; if this Court finds that the order of striking out the application by CMA was not interlocutory, then CMA erred to strike out the time barred application. It was supposed to dismiss it. To back up the argument, the Respondent cited the decision of this Court in the case of **Abdallah Athumani Masuruli v. Rubondo Island National Park and the Trustees of the Tanzania National Parks** in which the Court observed that:[77]

> *As Civil Case No. 07 of 2019 was filed out of time, the provisions of Section 3 (1) of the Law of Limitation Act*[78] *have only one remedy that is to dismiss the said suit.*

Due to lack of clear provision in Labour law which addresses the consequences of the time barred suits application and complaints, the Respondent invited this Court to deploy *Section 3 (1) of the Law of*

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[76] G. N. No. 64 of 2007.

[77] Civil Case No 07 of 2019, High Court at Mwanza (unreported), p. 6

[78] Cap 89 [R.E. 2019].

Limitation Act[79] and find that CMA was supposed to dismiss the application. The Respondent cited several authorities including the case of **Hamis Ramadhani Chuma v. The Registered Board of Trustees of Tanzania National Parks Authority (TANAPA);**[80] **Mary Agnes Mpelumbe (in her capacity as Administratix of the estates of the late Isaya Simon Mpelumbe) v. Shekha Nasser Hamad,**[81] and the case of **MM Worldwide Trading Company Limited, Jacob Fredrick Msaki and Annette Jacob Msaki v. National Bank of Commerce Limited.**[82] For instance, in the case of **MM Worldwide Trading Company Limited, Jacob Fredrick Msaki and Annette Jacob Msaki v. National Bank of Commerce Limited,** the Court of Appeal observed that:[83]

> Next, we deal with the crux of the matter. Fortunately, we are not traversing in a virgin territory. This Court has had occasion to deal with somewhat similar issue in some of its previous decisions. In **Olam Uganga Limited suing through its Attorney United Youth Shipping Company Limited v. Tanzania Harbors Authority,**[84] a suit against the Respondent's authority was dismissed for being

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[79] *Ibid.*

[80] Civil Case No. 3 of 2020 High Court of Tanzania at Musoma District Registry (un reported).

[81] Civil Appeal No. 136 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[82] Civil Appeal No. 258 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[83] Ibid at pp. 7-8.

[84] Civil Appeal No. 57 of 2002 (unreported).

instituted beyond 12 months contrary to provisions of *Section 67 (b) of the Tanzania Habours Authority Act.*[85]

The Applicant on his part argued that; the matter was found to be time barred. Therefore, the door was closed to re-open the matter before CMA regardless the word used was "struck out" by the Mediator. The effect is the same.

In view of the Applicant, it is the substance of the matter which should be looked at rather than the words used. On that position, the Applicant cited case of **MM worldwide Trading Company Limited.**[86] As such, the Applicant had no any other option than coming to this Court by way of revision.

I have considered the rival arguments of the parties, recently, I had an opportunity to address the point of interlocutory decision of the Court in the case of **Christian Kalinga v. Paul Ngwembe.**[87] In that decision, I maintained and I still maintain that; whatever preferred by the Applicant in this Court as against interlocutory order is nothing than episode in a long line of delaying tactics and pure deliberate abuse of the Court process. Indeed, such application has to be dismissed as there cannot be an appeal or revision against interlocutory order. This was the position by my brethren Tiganga J. in the case of **South Nyanza**

[85] Act No. 12 of 1977.

[86] Civil Appeal No. 258 of 2017, *op cit* at page 10 para 2.

[87] Misc. Land Application No 26 of 2020, High Court of Tanzania at Iringa (unreported).

Conference (Kanisa la Waadventista Wasabato) v. Samson Kimume.[88]

I do agree with the Applicant, however, that the CMA having found the matter to be time barred, the door was closed to re-open the matter before CMA regardless the word used was "struck out" by the Mediator. Once the matter is dismissed, one cannot file an application for extension of time within the same Court or Commission or Tribunal. As such, the CMA committed two errors. *First*, it was not proper to struck out a matter hopelessly filed out of time in terms of *Section 3 of the Law of Limitation Act (supra). Second*, it was not proper to give opportunity for the Applicant to file an application for extension of time within the same CMA. In the case of **Hashim Madongo and Two Others v. Minister for Industry and Trade, Attorney General and Dar es Salaam Regional Trading Company Limited**, speaking through Lubuva J.A, Msofe J.A and Mbarouk J.A (as they were); had an opportunity to address among other issues similar issue and it recorded its position at page 9 of its decision to the effect that:[89]

> Under Section 3 of the Law of Limitation Act, a proceeding which is instituted after the prescribed period has to be dismissed.

Indeed, at page 10 and 11 of the decision in the case of **Hashim Madongo and Two Others** *(supra)*, the Court of Appeal of Tanzania insisted that; once the matter is dismissed for being time barred, the

[88] Labour Revision No. 43 of 2020, High Court of Tanzania at Mwanza District Registry (unreported).

[89] Civil Appeal No. 27 of 2003, Court of Appeal of Tanzania at Dar es Salaam.

aggrieved party cannot file application for extension of time in the same Court. The only remedy is to appeal. The same position was maintained by this Court through my brethren Magoiga J. in the case of **Habiba Abdallah Edha v. Africarriers Limited.**[90]

In any event, the Applicant has not preferred an appeal. It is an application for revision. In my humble view, the application ought to be preferred by the Respondent herein on ground of illegality of the decision for want of jurisdiction. As observed earlier, the CMA had no jurisdiction to entertain a matter involving the Attorney General. If the Applicant could have complied with the decision of CMA of seeking extension of time to file the application out of time, it could be wastage of time and resources because whatever done could be a nullity. Therefore, filing of this application by the Applicant appears to be a blessing in disguise for this Court to nullify the said decision which welcomed filing another application for extension of time.

6. Who is a Public Servant in the light of Public Service Act?[91]

The Respondent was of submission that; Public Servants are governed by *Public Service Act.*[92] *Section 22 of the Employment and Labour Laws Miscellaneous Amendment Act* provides:[93]

> *Where there are inconsistences between Labour Laws and Public Service Act, the Public Service Act shall prevail.*

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[90] Miscellaneous Commercial Application No. 254 of 2018, High Court of Tanzania, Commercial Division (unreported).

[91] Cap 298 [R.E. 2019].

[92] *Ibid.*

[93] Cap 366 *op cit.*

To back up their arguments, State Counsel Ngulo and Dalali made reference to the case of **Dar es Salaam City Council v. Generose Gaspar Chambi**, where the Court observed that:[94]

> *It is therefore settled that servants in the Executive Agencies and Government Institutions shall be governed by the laws establishing the Executive Agencies or Institutions and where there are inconsistences between the two, the Public Services Act shall prevail.*

The Respondent went on to note that; there is no dispute between the parties that the amendment of *Public Services Act* mandatorily requires Public Servant to exhaust all local remedies provided under *the Public Service Act.*[95] This mandatory requirement is captured under *Section 26 of the Written Laws (Miscellaneous Amendments) Act No. 03 of 2016.*

Thus, prior seeking a remedy from other established bodies, a Public Servant must comply with the directives provided in the *Public Service Act.* They cited the case of **Tanzania National Roads Agency v. Brighton Kazoba and Julius Charles**, in which the Court stated that:[96]

> For the above reasons, I am convinced and I get the conviction that indeed the Commission for Mediation and Arbitration was not seized with the requisite

[94] Revision No. 584 of 2018 High Court of Tanzania Labour Division at Dar es Salaam (unreported) at p 6.

[95] Cap 298.

[96] Labour Revision No. 16 of 2018 at p. 6.

jurisdiction to entertain this matter. I thus allow this application and quash the proceedings before the Commission for Mediation and Arbitration and set aside the awards arising there from. If the Respondents are still desirous of pursuing their rights, they are at liberty to refer their grievances to the Public Service Commission.

Counsel Ngulo and Dalali noted on the conflicting decision in which Hon. Matuma, J. reasoned in **Jeremia Mwandi v. Tanzania Posts Corporation,** that; employees of Tanzania Posts Corporation are not Public Servant within the meaning of *Public Services Act.*[97] However, they distinguished the decision in the case of **Dar es Salaam City Council** and **TANROAD** on the point that the latter is a latest decision than that of Matuma J.[98] To back up such point, they cited the case of **Absa Bank Tanzania Limited (formerly known as Barclays Bank Tanzania Limited and Joseph John Nanyaro v. Hjordrs Faminested**[99] in which the Court quoted with approval the case of **Geita Gold Mining Limited and CRDB Bank PLC** where the holding in the case of **Arcopar (O.M.) S.A. v. Habert Marwa and Family and 3 Others,** was cited with approval where the Court held:[100]

...where the Court is faced with conflicting decisions of its own, the better practice is to follow the more

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[97] Labour Revision No. 06 of 2019.

[98] Revision No. 584 of 2018 High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[99] Civil Appeal No.30 of 2020.

[100] Civil Application No. 94 of 2013 (unreported).

recent of its conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above.

The Applicant, on his part, contended that; employees of the Public Corporation or Parastatals are not Public Servants. He cited *Section 3 of the Public Service Act (supra)* which provides:

A Public Servant for the purpose of this Act means a person holding or acting in a Public Service Office.

According to the Applicant, a Public Service Office is defined as (a) A paid Public Office in the United Republic charged with the formulation of Government Policy and delivery of Public Service other than;

i. Parliamentary Office.
ii. An office of a member of a Council, Board, Panel, Committee or Other Similar body whether or not corporate, established by or by any written law.

Therefore, in view of the Applicant, a Public Corporation like the Respondent are established by their own law as the Body Corporate capable of being sued and suing in their own name. Based on that definition, the Applicant maintained to be not a Public Servant. He submitted that; even if someone may argue that the Applicant is a Public Servant, being in lower cadre (driver) still the law applicable for him is *the Employment and Labour Relations Act*[101] when it comes to matter of discipline. Thus, under *Section 32 of Public Services Act,*[102] a

[101] Cap 366 *op cit.*

[102] Cap 298 *op cit.*

Public Servant in the operational service shall apart from being governed by *the Public Service Act,*[103] continue to be governed by *the Employment and Labour Relations Act.*[104]

The Applicant went on to argue that; according to *Rule 59 of the Public Service Regulations;*[105] the procedures in the Disciplinary proceedings for the Public Servants in the operational service shall be as laid down in *the Security of Employment Act.*[106] As such, following the repeal of *the Security of Employment Act,*[107] the procedure will be as stipulated *under the Employment and Labour Relations Act*[108] *read together with Employment Labour Relations (Code of Good Practice/Rules of 2007).*[109]

The Applicant distinguished, the case of **Dar es Salaam City Council v. Generose Gaspar Chambi**[110] and the case of **TANROADS v. Brighton Kazoba**[111] with the case at hand based on facts that Dar es Salaam City Council is a Local Government. Therefore, it is a Government while TANROAD is Executive Agency. The law applicable to

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[103] *Ibid.*

[104] Cap 366 *op cit.*

[105] G.N. No. 168 of 2003.

[106] Act No. 62 of 1964.

[107] *Ibid.*

[108] Cap 366 *op cit.*

[109] GN. No. 42 of 2007

[110] Revision No. 584 of 2018 High Court of Tanzania Labour Division *op cit.*

[111] Labour Revision No. 16 of 2018 *op cit.*

TANROAD is the law establishing TANROAD and *the Public Service Act* as per *Section 31 (2) of the Public Service Act* which provides:[112]

> *Without prejudice to the provision of subsection 1, Public Servants referred to under this provision shall also be governed by the provisions of this Act.*

In view of the Applicant, *Subsection I of Section 31 (supra)* refers the servants in the Executive Agencies and Government Institution shall be governed by the provisions of the Laws establishing the executive Agencies or Institutions. The Trustees of *TANAPA* is the Public Corporation like Tanzania Posts Corporation. Thus, the position of this Court in the case of **Jeremia Mwandi v. Tanzania Posts Corporation** is the proper position.[113]

Moreover, the Applicant contended to be not a public servant in the light of *the Public Service Act.*[114] The reason being that; the Respondent is the corporate body established under a principle legislation and therefore not covered under *the Public Service Act.*[115] *Section 3 of the Public Service Act* provides that:[116]

> "public servant" for the purpose of this Act means a person holding or acting in a public service office; "public service office" for the purpose of

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113 Labour Revision No. 06 of 2019 *op cit.*

114 Cap 298 [R.E. 2019].

115 *Ibid.*

116 *Ibid.*

this Act means- (a) a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than-

(i) a parliamentary office.

(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law.

(iii) an office the emoluments of which are payable at an hourly rate, daily rate or term contract.

(iv) an office of a judge or other judicial office.

(v) an office in the police force or prisons service *(Emphasis is added)*

In the circumstance, the Applicant maintained that; he was not a public servant because he was employed by the Respondent. Hence, he was not bound by *Section 32 of the Public Service Act* in which a public servant is required to exhaust local remedies within the Institution.[117] As such, the Applicant was of view that; he was correct to institute the labour dispute before CMA regardless his lateness. Hence, the position in

[117] *Ibid.*

correct and applicable in the case at hand.[118]

In consideration of the afore arguments by both parties, I need not comment on the issue of conflicting decisions and on the position to follow the most recent decision issued by the Court of Appeal. There are two reasons. First, I'm bound with such position. Second, I made my opinion on the way forward through my ruling dated 8th October, 2021 in the case of **Republic v. Shaibu Putika and Christopher Kawehanga.**[119] However, I need re-emphasis here that; on the eminence of time, in a situation where Benches are many, there is a likelihood of having various decisions on the same issue at different stations with different stand on the same day. It applies the same to the High Court decisions from one station to another on similar issues, even among Judges of the same station.

Further, I do agree with Counsel Nzowa that; the Applicant is a Public Servant, being in lower cadre (driver) still the law applicable for him is *the Employment and Labour Relations Act* when it comes to disciplinary matters.[120] But that has to be read in tandem with the *Public Service Act.* More so, the appeal by all employees including employees of lower cadre in all matters including disciplinary matters from their employers, as it stands now, lays to Public Service Commission ending to the

[118] Labour Revision No. 06 of 2019 *op cit.*

[119] Criminal Sessions No. 56 of 2017, High Court of Tanzania at Njombe (unreported).

[120] Cap 366 *op cit.*

President as per *Section 32A of the Written Law (Miscellaneous Amendments Act.*[121]

I do find and agree with the Respondent that; the *Trustees of Tanzania National Parks* is the Government as per interpretation of *Section 26 of the Written Laws Miscellaneous Amendment Act,*[122] which has amended *Section 16 of the Government Proceedings Act by adding subsection 4 Immediately after subsection 3 that; for the purpose of the Act, the word "Government" shall include Government Ministry, Local Government, Independent Department, Executive Agency, Public Corporations Parastatal Organizations or Public Company established under any written law to which a Government is a Majority shareholder.*

Needless the above general observation, this Court has already developed five theories of which I term them as five schools of thought as regards to the doctrine of exhausting local remedies. Indeed, this Ruling marks an impetus to the sixth school of thought. The theories are: *One*, Non Restrictive Theory. *Two*, Restrictive Theory. *Three*, Absolute Theory. *Four*, Extra-Labour Fora Theory. *Five*, Finality Theory. *Six,* Inherent Powers Theory

1. Non Restrictive Theory

Profounder of nonrestrictive theory advances a legal proposition that; employee in public service sector and in private sector has a right to resort to dispute settlement mechanism and remedies available under

[121] (No. 3) Act, 2016.

[122] Act No 01 of 2020.

the Employment and Labour Relations Act,[123] *the Labour Institutions Act,*[124] and subsidiary legislation made thereunder without exhaustion of Internal or Local Remedies available under dispute settlement machinery or framework of his employer in public service sector or private sector.

In other words, this theory advances a legal proposition that; the doctrine of exhaustion of local remedies does not apply in labour dispute settlement mechanism in Tanzania, be it for employee in public service sector or be it employee in private sector. Under this theory, employee can institute legal proceeding arising out of employment and labour matters against his employer directly in CMA or Labour Court without exhausting local remedies available under dispute Settlement framework of his employer. For private employee, CMA will not entertain matters concerning Collective Bargaining Agreement once mediation fails. It is in the domain of the High Court. Non restrictive theory is evident in among other cases, the case of **James Leonidas Ngonge v. Dawasco,**[125] and the case of **NBC Limited v. Stima Suleiman Hassan.**[126]

In the case of **Attorney General v. Maria Mselemu,**[127] consolidated with **Attorney General v. Allan Mulla**, the High Court (Labour Division) held that:[128] CMA has jurisdiction in all labour disputes irrespective of whether the Government is a party or not. Consequently,

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[123] Cap 366 *op cit.*

[124] Cap 300 *op cit.*

[125] Labour Revision No. 382 of 2013 (unreported).

[126] Revision Application No. 298 of 2019, High Court Labour Division at Dar es Salaam (unreported).

[127] Revision No. 270 of 2008. High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[128] Revision No. 271 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

the Court proceeded to overrule objection raised by employers on basis that employees in public service or public institutions must exhaust local remedies or internal remedies available under public service dispute settlement framework prescribed by public service legal regime prior employee seeks remedies in CMA and Labour Court under *the Employment and Labour Relations Act,*[129] *and the Labour Institutions Act,*[130] and subsidiary legislation made thereunder.

2. Restrictive Theory

Profounder of Restrictive School of Thought have laid a supposition that; employees in public service must exhaust local remedies available under public service dispute settlement machinery prior resorting to remedies outside public service under general labour law. However, the doctrine of exhaustion of local remedies is not absolute rather it admits several exceptions which permit public servants or employee in public institution to resort to general labour laws by seeking legal remedies in CMA and Labour Court without exhausting internal or local remedies available under public service legal regime. This School of Thought firmly believes in the following four (4) exceptions which are admitted by doctrine of exhaustion of local remedies namely:

a) Persons employed by Public Parastatal Organizations, Public Corporations and other Autonomous Public Institutions of similar nature are not subject to the provisions of the *Public Service Act,*[131] and subsidiary legislation made thereunder. As such, genus

[129] Cap 366 *op cit.*

[130] Cap 300 *op cit.*

[131] Cap 298 *op cit.*

of employees are excluded in the definition of the term public servant as defined by *Section 3 of the Public Service Act.*[132]

b) The doctrine of exhaustion of local remedies does not apply to Public Servants whose disputes against public bodies or statutory authorities arose before provisions of *Section 32 A of Public Service Act,* came into force.[133] The doctrine of exhaustion of local remedies was incorporated into the provisions of *the Written Laws (Miscellaneous Amendments) Act*[134] which came into force on 18 November, 2016 when the same was published.[135]

c) A Public Servant after exhausting all internal or local remedies available under public service legal regime is permitted to seek legal remedies in other labour forum such as CMA and High Court (Labour Division) outside the public service under provisions of *Section 32A of Public Service Act,*[136] *as amended by provisions of Section 26 of the Written Laws (Miscellaneous Amendments) Act.*[137]

d) The doctrine of exhaustion of local remedies does not apply to "Excluded Employees" i.e Servants, employees or persons whom the law delist from category of public servants namely:

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[132] *Ibid.*

[133] *Ibid.*

[134] Act No. 13 of 2016.

[135] Government Gazette No. 48, Vol. 97, dated 18th November, 2016.

[136] Cap 298 *op cit.*

[137] Act No. 3 of 2016.

i. Employee whose contract of Employment is not permanent i.e a person or employee with temporary or fixed term contract.

ii. Judicial officer.

iii. A person employed in Office of Parliament.

iv. A member of incorporated or incorporated public or statutory bodies or entities established by or under Written Laws such as Board, Committee, Panel, Council and other bodies of similar nature.

The Restrictive Theory of exhaustion of local remedies is embodied in the following judicial decisions namely:

i. **Salehe Komba & Revocatus Rukonge v. Tanzania Posts Corporation**, as per my brethren Matupa, J (as he then was).[138]

ii. **Jeremiah Mwandi v. Tanzania Posts Corporation**, as per my brethren Matuma, J.[139]

iii. **Deogratus John Lyakuipa & Another v. Tanzania Zambia Railway Authority,** as per my learned sister, her Ladyship Mruke, J.[140]

[138] Revision No. 12 of 2018, High Court of Tanzania at Mwanza (unreported).

[139] Labour Revision No. 6 of 2019, High Court of Tanzania at Kigoma.

[140] Revision Application No. 68 of 2019, High Court of Tanzania at Dar es Salaam Labour Division (unreported).

iv. **John Joseph Mwakyoma & 3 Others v. Tanzania Ports Authority,** as per my brethren Mwaipopo, J.[141]

v. **Faima Siraji v. Mbeya Urban Water and Sawage Authority,** as per my brethren Ngwembe, J.[142]

vi. **Musoma Ubarn Water Supply and Sanitation Authority v. Raphael Ologi Andrea,** as per my brethren Kisanya, J.[143]

vii. **Ghati Nyamhanga Waryuba & Mkami Wangubo Magesa v. TANROADS,** Consolidated Labour Revision No. 2 & 6 of 2018 as per my brethren Mkeha, J.

3. **Extra-Labour Regime Theory.**

This theory advances a legal proposition that; once a public servant exhausts all internal or local remedies available under public service legal regime up to last ladder of appeal he cannot resort to remedies available under general labour laws by seeking legal remedies in CMA and Labour Court save that he can resort to extra-Labour legal regime remedies available under judicial review framework by seeking prerogative orders against appellate authority of last resort in public service. In other words, the decision of President of United Republic as appellate authority of last resort in public service in respect of labour disputes can be challenged by way of judicial review under provisions of

[141] Revision No. 711 of 2019, High Court of Tanzania at Dar es Salaam Labour Division (unreported).

[142] Labour Revision No. 47 of 2017, High Court of Tanzania at Mbeya, (unreported).

[143] Labour Revision No. 21 of 2019, High Court of Tanzania at Musoma, (unreported).

the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310.

The Extra-Labour Legal Regime Theory of exhaustion of local remedies is embodied in the following judicial decisions namely:

i. **Asseli Shewally v. Muheza District Council,** as per my brethren Mkasimongwa, J.[144]

ii. **Benezer David Mwang'ombe v. Board of Trustees of Marine Parks and Reserves Unit,** as per my learned sister, her Ladyship Aboud, J.[145]

iii. **Simon Josephat v. Dar es Salaam Water and Sewarage Corporation,** as per my learned sister, her Ladyship M. Mnyukwa, J.[146]

iv. **Alex Gabriel Kazungu and Two Others v. Tanzania Eletric Supply Company Limited,** as per my brethren Mdemu, J.[147]

v. **Tanzania Electric Supply Company Limited v. Mrisho Abdallah and Four Others,** as per my learned Sister Bahati, J.[148]

4. Absolute Theory

[144] Revision No. 6 of 2018, High Court of Tanzania at Tanga, (unreported).

[145] Misc. Labour Application No. 380 of 2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[146] Revision No. 941 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[147] Labour Revision No. 40 of 2020, High Court of Tanzania at Shinyanga (unreported).

[148] Labour Revision No. 27 of 2020, High Court of Tanzania at Tabora (unreported).

This theory advances a legal proposition that; public servant cannot resort to remedies available under general labour laws by seeking legal remedies in CMA and Labour Court unless and until he exhausts all internal or local remedies available under public service legal regime including to lodge appeal to the appellate authority of last resort in public service sector namely His Excellency the President of United Republic. This theory treats the doctrine of exhaustion of local remedies to be absolute in sense that it does not admit any exception for employee in public sector including persons employed by autonomous public institutions and entities such public corporations, parastatal organizations and executive agencies. Absolute Theory of exhaustion of local remedies is embodied in the following judicial decisions namely:

i. **Dar es Salaam City Council v. Generose Gaspar Chambi,** as per my learned sister, her Ladyship Mruke, J.[149]

ii. **Meshack L.N. Kagya v. Tanzania Petroleum Development Corporation,** as per my learned sister, her Ladyship Mruke, J. [150]

iii. **Tanzania National Road Agency v. Brighton Kazoba & Julius Charles,** as per my brethren Kente, J (as he then was).[151]

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[149] Revision No. 584 of 2018, High Court of Tanzania at Dar es Salaam Labour Division (unreported).

[150] Labour Disputes No. 4 of 2018, High Court of Tanzania at Dar es Salaam Labour Division (unreported).

[151] Labour Revision No. 16 of 2018, High Court of Tanzania at Iringa District Registry (unreported).

iv. **Bariadi Town Council v. Donald Ndaki,** as per my learned sister, her Ladyship Mkwizu, J.[152]

v. **Lusajo Watson Mwakasege v. Njombe District Council,** as per my brethren Matogolo, J.[153]

vi. **Tanzania National Roads Agency v. Godo Ramadhan Biwi,** as per my learned sister, her Ladyship Mruke, J.[154]

5. Finality Theory

This theory advances a legal proposition that; public servant must exhaust all internal or local remedies available under public service legal regime and once public servant exhausts all internal or local remedies available under public service legal regime he cannot resort to remedies available under general labour laws by seeking legal remedies in CMA and Labour Court as decision of the President as appellate authority of last resort in public service is final and conclusive. Hence, it cannot be challenged in CMA and Labour Court. The Finality Theory of exhaustion of local remedies is embodied in the case of **Mkurugenzi Halmashauri ya Sengerema v. Masumbuko Alphonce Mathias,** as per my brethren Rumanyika, J. (as he then was).[155]

6. Inherent Power Theory

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[152] Application for Revision No. 3 of 2020, High Court of Tanzania at Shinyanga District Registry (unreported).

[153] Labour Revision No. 06 of 2020, High Court of Tanzania at Iringa District Registry (unreported).

[154] Revision No. 501 of 2018, High Court of Tanzania at Dar es Salaam Labour Division (unreported).

[155] Labour Revision No. 17 of 2020, High Court of Tanzania at Mwanza (unreported).

This is a new theory that I intend to register. I note that; *Article 13 of the Constitution* gives right of fair hearing.[156] However, the High Court of the United Republic of Tanzania through Judicial Review process, deals with illegality point only. It is my argument that; all people are equal before the law under *Articles 12 and 13 of the Constitution.*[157] Indeed, *Article 13 (5) of the Constitution* prohibits discrimination by nature or by its effect.[158] Employees under private sectors have the right to challenge the decision of their employer before CMA or High Court Labour Division. However, for public servants they have only one right of challenging decision of the President to the High Court by way of judicial review. In so doing, public servants are denied to challenge the decision of the President on factual issues. They can only challenge the decision on illegality point.

It is the supposition in this theory that; *Article 107A (1) of the Constitution* empowers the Court to have final say on dispensation of justice.[159] It has not limited such power on points of law or on points of facts. Therefore, in this theory, I advance a legal supposition that; once public servant exhausts all internal or local remedies available under public service legal regime up to last ladder of appeal (Presidential stage), he cannot resort to remedies available under general labour laws by seeking legal remedies in CMA. Rather, he can resort either to judicial review framework by seeking prerogative orders against appellate

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[156] The Constitution of 1977 as amended.

[157] *Ibid.*

[158] *Ibid.*

[159] *Ibid.*

authority of last resort in public service or challenge such decision on both point of law and fact before the High Court Labour Division. In other words, the decision of the President of United Republic of Tanzania as appellate authority of last resort in public service in respect of labour disputes can be challenged by way of judicial review under provisions of *the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,*[160] or *Articles 13 6 (a) and 108 (2) of the Constitution.* However, since I'm not seating as a Constitutional Court, I can only reason by way of orbiter and bring a view that; the judicial review before the High Court should be on both point of fact and law. The later remedy will be beneficial to the public servant as both points of facts and law will be addressed. The High Court Labour Division shall have such power of entertaining a matter on both point of fact and law. By virtue of *Article 107A (1) of the Constitution,* the Judiciary has been given final say on dispensation of justice on both points of law and facts.[161] On that note, the point that the High Court's power in judicial review is limited on points of law and does not extend on points of facts was legally valid until 2002 and ceased after coming into enactment of 13th constitutional amendment.

Indeed, even if there could be another avenue before CMA by way of appeal or application, that cannot be a bar for the Public Servant to challenge the decision of the President to the High Court by way of Judicial review. My brethren Khalfan, J. in the case of **Bageni Okeya Elijah and 3 Others v. The Judicial Service Commission and Two**

[160] Cap 310.

[161] Constitution of the United republic of Tanzania of 1977 as amended in 2002.

Others,[162] quoted with approval the decision in the case of **Republic Ex-parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General** where it was stated:[163]

> The existence of the right to appeal and even the existence of an appeal itself, is not necessarily a bar to the issuance of prerogative order; the matter is one of judicial discretion to be exercised by the Court in the light of the circumstances of each particular case.

In the case of **Thadeus Medukenya v. Urambo District Council,** my learned sister Bahati, J. concluded her Ruling with the following findings and order:[164]

> It is clearly stated that the decision of the President is final. Since the Appellant is a Public Servant he has to apply for prerogative orders before the High Court; the Court which has jurisdiction to harmonise the conflicts that appear between the laws. That being the case, a proper channel available for the Applicant is to seek judicial review before the High Court.

Apart from the afore schools of thoughts, I will discuss in nutshell on the important provisions of the law most of which have been referred by the

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[162] Miscellaneous Civil Cause No. 14 of 2018, High Court of Tanzania, Main Registry (unreported).

[163] [1983] TLR 375.

[164] Labour Revision No. 3 of 2020, High Court of Tanzania labour Division at Tabora (unreported).

parties in their submissions, in as far, as the issue of exhausting local remedies is concerned.

a) **Section 34A of Employment and Labour Laws (Miscellaneous Amendments) Act, 2015**[165]

b) *Section 34A (supra)* gives supremacy to the Public Service Act.[166] It provides:

> Where there is any inconsistency between the provisions of this Act and any other law governing executive agencies, *public institutions or such other public service offices,* the provisions of this Act shall prevail. [Emphasis added)

b. Section 26 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016.

As submitted by State Counsel Dalali, *Section 26 of the Written Laws amended Public Service Act by adding Section 32A* which mandatorily requires exhaustion of internal or local remedies prior resorting to labour remedy.

c. Section 12 of the Public Service (Amendments) Act, 2007[167]

Initially, *Section 30 of the Public Service Act, 2002,* stated that:[168]

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[165] Act No. 24 of 2015.

[166] *Ibid.*

[167] Act No. 18 of 2007.

[168] Act No. 8 of 2002.

> Servants in executive agencies, government institutions shall be governed by provisions of law establishing the respective executive agency or institution.

In the year 2007, *Public Service Act* was amended. It introduced subsection 1 and added subsection 2 which subjected employees of Executive Agencies and Public Institutions to be governed by Public Service Act.[169]

d. Section 24 (d) of the Teachers' Service Commission Act, 2015[170]

Section 24 (d) of the Teachers Service Commission Act, 2015 repealed *Section 30 (1) and (2) of the Public Service Act.*[171] The legal effect is that; *Public Service Act* does not apply to employees in Executive Agency and Public Institutions. It is my profound view that; the repeal of *Section 30 (1) and (2)* had no logic.[172] At large, it was erroneously made. On that basis, I reason that; the object of the construction of a statute is to ascertain the will of the legislature. Therefore, it may be presumed that the repeal of *subsection 1 and 2* was not intended.[173] Indeed, neither injustice nor absurdity was intended. If a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may

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[169] Cap 298 *op cit.*

[170] Act No. 25 of 2015.

[171] No. 8 of 2002 *op cit.*

[172] Cap 298 *op cit.*

[173] *Ibid.*

be adopted. On that note, I hold that; employees of Executive Agencies and Public Institutions are governed by *Public Service Act.*[174]

e. Sections 4, 14, 51 and 94 of the Employment and Labour Relations Act.[175]

These provisions discuss the jurisdiction of the High Court Labour Division. *Section 4 of the Employment and Labour Relations Act,*[176] defines Labour Court to mean; the Labour Division of the High Court established under *Section 50 of the Labour and Institutions Act.*[177]

Section 94 provides:[178]

> Subject to the Constitution of the United Republic of Tanzania, labour Court shall have exclusive jurisdiction of application, interpretation and implementation of the provisions of this act and over any employment or labour matter following under common law, to tortious liability, vicarious liability or breach of contract...

Section 14 of the Labour Institutions Act, gives powers to CMA to mediate and arbitrate employment and labour disputes to both private

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[174] *Ibid.*

[175] Cap 366 *op cit.*

[176] *Ibid.*

[177] Cap 300 *op cit.*

[178] Cap 366 *op cit.*

and public employees.[179] The same powers are conferred under *Sections 86 and 88 of the Employment and Labour Relations Act.*[180]

f. The provisions of Section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act.[181]

Under *section 17 of the Law Reform (fatal Accidents and Miscellaneous provisions) Act* whoever aggrieved with the decision of the President has the right to file judicial review before the High Court.[182] The High Court is empowered to exercise prerogative writs (orders) by issuing certiorari, mandamus and prohibition.

Besides, in the case of **James Gwagilo v. Attorney General,** the Court of Appeal held that;[183] the legal basis of judicial review is *Article 108 (2) of the Constitution.*[184]

g. Section 25 of the Public Service Act,[185] and Regulation 60 of the Public Service Regulations, 2003[186]

Section 25 of the Public Service Act[187] and *Regulation 60*[188] requires a Public Servant to exhaust the available local remedy. Under this Regulation:

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[179] Cap 300 *op cit.*

[180] Cap *366 op cit.*

[181] Cap 310 *op cit.*

[182] *Ibid.*

[183] [1994] TLR 73.

[184] Constitution of the United Republic of Tanzania of 1977 as amended.

[185] Cap 298 *op cit.*

[186] G.N. No. 168 of 2003.

(1) Where the Chief Secretary exercises disciplinary authority in accordance with Part V of the regulations, that Public Servant may appeal to the President against the decision of the disciplinary authority and the President shall consider the appeal, and may confirm, vary or rescind the decision of that disciplinary authority.

(2) Where the Minister responsible for Local Government, a Permanent Secretary, Head of Independent Department, Regional Administrative Secretary, or a Director of the Local Government Authority exercises disciplinary authority in accordance with the provisions of Part V of these Regulations, that Public Servant may appeal to the Commission against the decisions of the Disciplinary Authority and the Commission may confirm, vary or rescind the decision of that disciplinary authority.

(3) The last local remedy resort for all Public Servants is the President of the United Republic.

h. Sections 3, 30, 32 A of Public Service Act[189]

As per *Public Service Management and Employment Policy, 1998 as amended in 2008,* the Public Service Commission caters for the following service:

(i) The Civil Service;

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[187] Cap 298 *op cit.*

[188] G.N. No. 168 of 2003 *op cit.*

[189] Cap 298 *op cit.*

(ii) The Local Government Service;

(iii) The Health Service;

(iv) The Teachers Service;

(v) (Repealed);

(vi) The Executive agencies and the Public Institutions Service;

(vii) The Operational Service.

Section 30 (1) and (2) of the Public Service Act[190] read:

> (1) Public Servants in the Executive Agencies and Government Institutions shall be governed by provisions of the Laws establishing the respective executive agency or institutions.
>
> (2) Without prejudice to subsection (1), public servants referred to under this Section shall also be governed by the provisions of this Act.

Section 32A of the Written Law (Miscellaneous Amendments), Act[191] puts categorically that all public servants cannot resort to use of labour Laws without exhausting local remedies provided for under the *Public Service Act.*[192] *Section 32A (supra)* provides:[193]

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[190] as amended by Act No. 18 of 2007 Cap 298.

[191] Act No. 3 of 2016.

[192] Cap 298 *op cit.*

[193] Act No. 3 of 2016 *op cit.*

> A Public Servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act.

The above being the case, it is a conditional precedent prior enjoying other remedies in labour law, a public servant must exhaust all the internal available remedies. However, I'm of firm view that, it is high opportune time for the Legislature to make an amendment in the Public Service Act, especially Section 32A by adding an express proviso to the effect that:

> Provided that remedy sought under labour law in respect of the decision of the President shall be pursued in the High Court Labour Division by way of judicial review on both points of law and fact.

If the opinion is accepted, I'm of a settled view that; a Public Servant having exhausted all available local remedies, the proper legal remedy is challenge the decision of the President before the High Court Labour Division by way of Judicial Review through the Inherent Powers Theory that I have earlier on expounded. I have nine reasons:

i. Legal Tradition requirement of suing the President before the High Court

By legal tradition, the President cannot be sued before CMA. *Article 108 (2) of the Constitution,* empowers the High Court with jurisdiction to deal with any matter which is in accordance to legal traditions obtaining in

Tanzania.[194] The tradition has been suing the President in the High Court for Judicial review writs.

ii. Inspiration from the Presidential Affairs Act[195]

There is an inspiration from *the Presidential Affairs Act,*[196] which provides for certain matters relating to the functions and offices of the President be referred to the High Court only. This inspiration is common in all commonwealth countries.

iii. The Commission for Arbitration and Mediation is an executive organ which cannot competently review the decision of the President:

It is evident that: *One*, the CMA is established under *Section 12 of the Labour Institutions Act.*[197] *Section 13 (1) (a) (b) and (c)* states that:[198]

> The Commission shall be not, in the performance of its functions, be subjected to the direction or control of any person or authority; and shall be independent of any political party, trade union, employers' association, federation of trade unions or employers' associations.

However, the Government, public authorities and other registered organisations and federations are mandatorily required to provide such

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[194] Constitution of the United Republic of Tanzania, 1977 as amended

[195] Act No. 4 of 1962.

[196] *Ibid.*

[197] Cap 300 *op cit.*

[198] *Ibid.*

assistance and cooperation as may be required to ensure the effectiveness of the function of the CMA.

The Provisions of *Section 13 (3)* states that: [199]

> Subject to the provisions of this Act, the *provisions of any written law relating to public departments shall apply to the Commission and the office of the Commission and any office established under the Commission shall be a public office. [Emphasis added]*

Two, Section 16 (3) (a) (supra) mandates the President to appoint the Chairperson of the CMA, from a list of three persons recommended by the Council and upon the recommendation of the Minister responsible for labour matters.

Three, Section 17 (4)[200] empowers the President, on the recommendations of the Minister to remove a Commissioner from office, the Commissioner if among others (a) no longer represents the interest in respect of which the member was appointed in terms of *Section 16 (3).*[201]

Four, Section 18 caters for Director of the Commission. It provides:

> (1) There shall be appointed a Director and Deputy Director of the Commission-

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[199] *Ibid.*

[200] *Ibid.*

[201] *Ibid.*

(2) The Commission, after consultation with the Minister shall, appoint a Director and a Deputy Director from among persons who are knowledgeable, skilled and experienced in labour relations and dispute prevention and resolution.

(3) The Director shall be the chief executive of the Commission and subject to the general directions and control of the Commission; (a) be responsible for carrying out the policy decisions of the Commission and the day to day administration and management of the affairs of the Commission; (b) perform the functions that are conferred on the Director by any labour law or delegated to the Director by the Commission; (c) may mediate and arbitrate disputes referred to the Commission under the Employment and Labour Relations act.

(4) The Director shall, unless in any particular case the Commission otherwise directs in writing, attend all meetings of the Commission but shall have no vote.

(5) The Director, in consultation with the Commission, may delegate any of his functions or the function of the Commission to any mediator, arbitrator or member of staff.

(6) Notwithstanding any provisions in this Act, the Director may refer any dispute referred to the

Commission to the Labour Court for its decision if it is in the public interest to do so.

Five, Section 19 (1) (2) mandates the Commission to appoint as many mediators and arbitrators as it considers necessary to perform the functions of the Commission.[202] The Commission may appoint mediators and arbitrators on either a full-time or part-time basis and on terms and conditions determined by it, in consultation with the Office of the Public Service Management.

Under *Subsection (5) of Section 19,*[203] it is stated that; the Commission shall be responsible for the control and discipline of mediators and arbitrators provided that the control or discipline does not amount to interference with the independence of the mediator or arbitrator in any dispute.

By virtue of *Section 19 (6),*[204] the Commission may remove a mediator or arbitrator from office only for (a) serious misconduct relating to the functions of a mediator or arbitrator; (b) incapacity relating to the functions of a mediator or arbitrator; (c) a material violation of the code of conduct referred to in *Subsection (4).*[205]

Six, it is stated under *Section 22 (1) (2) (supra)* that the Director of the Commission may appoint staff after consulting the Commission. The

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[202] *Ibid.*

[203] *Ibid.*

[204] *Ibid.*

[205] *Ibid.*

Commission, in consultation with the Office of the Public Service Management, shall determine the remuneration of staff members.

iv. The President's and Commission for Mediation and Arbitration perform equally same mandates:

Rule 3 (1) of the Labour Institution (Mediation and Arbitration) Guidelines Rules,[206] defines Mediation as "A process in which a person independent of the parties is appointed as a mediator and attempts to assist them to resolve a dispute and meet with parties either jointly or separately, and through discussion and facilitation, attempt to help the parties settle their dispute' and *Rule 18 (1)* also defines "Arbitration" *as a process in which a person appointed as an arbitrator for resolving a dispute determines the dispute for the parties.*[207]

Under *Section 14 (1) b) of the Labour Institution Act,*[208] CMA is responsible to mediate any dispute referred to it under labour laws and to arbitrate any dispute if (i) a labour law requires the dispute to be determined by arbitration and parties to the dispute agree to it being determined by arbitration. Also, CMA may have jurisdiction where the Labour Court refers the dispute to the Commission to be determined by arbitration in terms of *Section 94 (3) (a) (ii) of the Employment and Labour Relations Act.*[209]

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[206] GN No. 67 of 2007 *op cit.*

[207] GN. No. 67 of 2007 *op cit.*

[208] Cap 300 *op cit.*

[209] Cap 366 *op cit.*

On the basis of the above definitions, it is quite obvious that arbitration and mediation with CMA do not differ from any other normal Alternative Dispute Resolution (ADR). As part of ADR, Mediation and Arbitration by CMA entail that all disputes referred to CMA carry the same features of normal ADR whereby, disputes are required to be settled through impartial person called a "mediator" or "arbitrator" in which a resolution is reached timely without any costs to the parties' dispute. In the mediation, the mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves and the process leaves control of the outcome with the parties. As the procedure, in the Mediation, if the parties agree with the outcome of mediation, then the mediator drafts a Certificate of Settlement (CMA F6) and Settlement Agreement (CMA F.7) in which the terms of agreement are stated. If parties do not agree, mediator drafts Certificate of Non-Settlement (CMA F.6) and on the failure of mediation, a party may, within 30 days from conclusion of non settlement, refer the dispute for arbitration via a prescribed referral form (CMA.F8).

In arbitration, the Arbitrator has to decide the outcome of their dispute for the parties but with avoidance of the formality, time, and expense of a trial. The arbitrator may issue an award upon finalization of the dispute. The law requires under *Section 88 (9) of the Employment and Labour Relations Act*[210] that an award must be issued within 30 days from the date parties closed their respective cases unless there was a justifiable reason for which the award can be issued out of statutory period.

[210] Cap 366 *op cit.*

In view of the above legal position, it is quite clear that; the nature of roles of CMA are more of quasi- judicial bodies like that of executives mandated under the Public Service legislation to deal with settling grievance involving public servants. In this case, in determining disputes referred to him under the Public Service legislation by way of an appeal, the President decision on the matter is final. Hence, to subject his decision to CMA will not be belittling the Office of the President and defeating the whole jurisprudence or logic behind settling labor disputes through Public Service legislation.

It must be well understood that; under *Article 35 (1) and (2) of the Constitution,*[211] *all executive functions of the Government of the United Republic of Tanzania are discharged by officers of the Government shall be so done on behalf of the President. Orders and other directives issued for the purposes of this Article shall be signified in such manner as may be specified in regulations issued by the President* in conformity with the provisions of the Constitution.[212]

Furthermore, under *Article 36 (1) of the Constitution (supra)* the President shall have authority to constitute and to abolish any office in the service of the Government of the United Republic. Under *Sub Article (4),* the provisions of *Sub Articles (2) and (3)* shall not be construed to prohibit the President to take steps of maintaining discipline of the public

[211] Constitution of the United Republic of Tanzania of 1977 as amended *op cit.*

[212] *Ibid.*

servants and the public service of the Government of the United Republic.[213]

The President's decision on appeal from grievances involving a public servant is like an executive order by the President in the management of all operations of the government. The ability or mandates of the President to make such orders is express or implied in the Constitution or written laws.

Like both Legislative statutes or Regulations promulgated by government agencies, executive orders are subject only to judicial review and may be overturned if the orders lack support by statute or the Constitution.

As the head of state and head of government of the United Republic of Tanzania, as well as commander-in-chief of the United Republic, the President is entitled under *Article 33 (1)* to issue an executive order.[214]

Presidential executive orders, once issued, remain in force until they are canceled, revoked, adjudicated unlawful, or expire on their terms. At any time, the President may revoke, modify or make exceptions from any executive order, whether the order was made by the current President or a predecessor.

CMA being an executive organ of the State or Government and its officers being appointees or employees under the control of the Government is not entitled to review in anyway the directive of the

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[213] *Ibid.*

[214] *Ibid.*

President who is the head of the Executive. Allowing the President's declension to be reviewed by CMA is to subject the directives of the President to his subordinates' determination which it is not fair in the exist of rule of law or good governance.

v. Easy execution of the Court Decree

Execution of the decision of the Court will be easily handled. The reason being that some Mediators and Arbitrators are not vested with execution powers though have unlimited pecuniary jurisdiction.

vi. Costs effective

It will reduce costs to the Public servants. Instead of resorting to CMA as a matter of first instance, they will be supposed to prefer their aggravation to the High Court Labour Division by way of judicial review on both points of law and facts through the doctrine of Inherent Power well preserved under *Article 107A (1) of the Constitution.*[215]

vii. Requirement of the Government Proceedings Act[216]

Under *the Government Proceedings Act, Cap 5* the President is sued through the Attorney General. The later cannot be sued before the CMA. Indeed, there is no express provision in any law that compels the Attorney General to be sued before CMA.

viii. Avoiding confusion on the Labour Legal Remedy to Public Servants

[215] *Ibid.*

[216] Cap 5 *op cit.*

It will unveil confusion on the available labour legal remedy for the public employee who is aggrieved with the decision of the President.

ix. Supremacy of the Constitution

It is only the High Court which enjoys limited pecuniary jurisdiction in terms of *Article 108 of the Constitution.*[217] Such supremacy cannot be left to CMA.

7. What is the effect of Non- Filing Notice of intention to file Revision?[218]

On the issue of lodging revision without filing the notice of intention to file the revision, the Respondent was of position that; it was contrary to *Regulation 34 (1) of the Employment and Labour Relations (General Regulations).*[219] To buttress the point, the Respondent cited to this Court the case of **Arafat Benjamin Mbilikila v. NMB Bank PLC**, in which this Court observed that:[220]

> *As far as the records are and taking from the submissions of Mr. Seka, it has not been disputed that the said form No. CMA F.10 was not lodged at the Commission for Mediation and Arbitration prior to the filing of this revision application. Since the word "shall" has been used in the Regulation*

[217] Constitution of the United Republic of Tanzania as amended *op cit.*

[218] GN No. 47 of 2017

[219] *Ibid.*

[220] Revision No. 438 of 2020 High Court of Tanzania Labour Revision at Dar es Salaam (unreported) at p. 9

that created the Forms, the omission to do so is a fatal defect that cannot be cured by a simple argument. Owing to that I find the application before me to be fatally defective for failing to comply with the mandatory provisions of the Regulation 34 (1) of the Regulation, and consequently, the application is hereby struck out.

Further, on the same position, the Respondent cited the case of **Unilever Tea Tanzania Limited v. Paul Basondole.**[221] The Respondent, pointed to the Court that; they are aware of the two-conflicting decision on the issue of notice. *One* is of my brethren Mzuna J, in the case of **Adam Lengai Masangwa and Alphonce Manyama v. Mount Meru Hotel**, where he observed that:[222]

I agree with the Applicant's Counsel who is of the view that even if the same is lacking still there is no harm. That even the cited cases refer to Notice of Appeal at the Court of Appeal and therefore are distinguishable. I would say that the raised preliminary objection is more of formalism not substantive one and therefore is defeated by the overriding principle that Courts should deal with substantive justice and not to be tied with procedural rules.

[221] Labour Revision No. 14 of 2020 High Court of Tanzania Labour Division at Iringa at p. 12 (unreported).

[222] Labour Revision No. 01 of 2018 High Court of Tanzania at Arusha District Registry at p. 05 to 06 (unreported).

The other school of thought is expressed through the decision by my brethren Hon. Judge Matogolo in the case of **Frednand Nsakuzi v. Director General PCCB,**[223] where the Court after been confronted with the application of *Regulation 34 (1) of the Employment and Labour Relations (General Regulations)*[224] and the application of Form No. 10 under the same Regulation, the Hon. Judge reasoned at page 6 and 7 that:

> *Usually Notice of application in the Labour Court is made under Rule 24 of the Labour Court Rules G.N. No. 106 of 2007...*

The Respondent called upon this Court be persuaded to follow the decision in the case of **Unilever Tea Tanzania Limited v. Paul Basondole,** where Mlyambina, J. held:[225]

> *In the premises of the above I hereby sustain the 3rd ground of objection and mark the application struck out for contravening the mandatory requirement of notice required under the provision of Regulation 34 (1) of the Employment and Labour Relations (General) Regulation.*[226]

The reasons advanced by the Respondent were as follows:

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[223] Revision No. 07 of 2018 High Court of Tanzania Labour Division at Iringa at p. 7 (unreported).

[224] G. N. No. 47 of 2017 *op cit.*

[225] Labour Revision No. 14 of 2020 High Court of Tanzania Labour Division at Iringa at p. 12 (unreported).

[226] *Ibid.*

One, the principle of last recent decision favours those two decisions against the decision in **Adam Lengai Masangwa and Ferdinand Msakuzi.**[227]

Two, the sense of notice of intention to file Revision. The content of the notice speaks for itself (Form No. 10). It informs the intention to file a revision to the other party and to the CMA different from the notice of application which inform only the other party not the CMA that the application for revision has been filed. It is this notice which formally informs the CMA to forward as expeditiously as possible to furnish certified copies of proceedings and award to the High Court of Tanzania.

This notice is very essential even in cases where the Applicant has failed to file application within time on ground that he was not furnished with the copies of proceedings and award. The High Court may interpret the filing of the notice as the proper move to file revision.

Third, it is this notice which gives the other party a right to apply for this notice to be struck out if the Applicant has not taken essential steps to institute Application for revision. The Respondent invited this Court to be inspired by the procedure of striking out notice of intention to appeal in the Court of Appeal.

Four, not to take the other party by surprise.

Five, G.N. No. 47 of 2017 is different from *G. N. No. 106 of 2007.* Considering that *G. N. No. 47 of 2017* was gazetted in 2017 later after *G. N. No. 106 of 2007;* it is clear that the law intended *CMA Form No.*

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[227] Labour Revision No. 01 of 2018 High Court of Tanzania at Arusha District Registry at p. 05 to 06 (unreported).

10, the notice of intention to file revision to be different with the form of Application for revision which is under *Rule 24 (1) (2).*[228] Notice of Application and Notice of intention to file Revision are two different forms.

In rejoinder, Mr. Nzowa submitted that; non-filing of the Notice of intention to seek revision of the Award is not fatal due to the hereinafter reasons:

First, it is not a pre-condition to file revision before this Court as it is a notice of intention to file appeal to the Court of Appeal. The contents of that notice are meant to inform the CMA that they are intending to file revision so that they can prepare the file proceedings waiting for the High Court to call the records. *Second,* the notice is filed after one is served with the award or decision. *Three,* the time to file revision starts to run after one is served with the award. *Fourth,* the records are called by the High Court after the revision has been filed.

In view of the Applicant, the notice does not serve any other purpose than alerting the CMA to prepare the records. That is why even the copy of such notice is not brought to the High Court. It is an internal arrangement of CMA.

Having considered the arguments of two sides with regard to the filing of notice, I'm of a settled view that, the filing of notice of intention to file application for revision is mandatory. The reason being that; such requirement is coached with the word "shall" which means no way the

[228] G. N. No. 106 of 2007.

same can be avoided. I agree with the decision of this Court in the case of **Arafat Benjamin Mbilikila.**[229]

I hold that; the filing of notice is very important due to the fact that the content of the notice speaks for itself (Form No. 10). It informs the intention to file a revision to the other party and to the CMA different from the notice of application which inform only the other party not the CMA that the application for revision has been filed. It is this notice which formally informs the CMA to furnish certified copies of proceedings and award to the High Court of Tanzania and to forward the record as expeditiously as possible.

This notice is very essential even in cases where the Applicant has failed to file application within time on ground that he was not furnished with the copies of proceedings and award because the High Court may interpret the filing of the notice as the proper move to file revision.

Therefore, even if the Applicant was properly before the CMA, this Application has to be marked incompetent for failure to comply with the mandatory notice for revision contrary to *Regulation 34 (1) of the Employment and Labour Relations (General) Regulation.*[230]

For the above reasons, I find that the application for revision preferred by the Applicant has no merits. However, by *suo motto* invoking revisionary powers bestowed to this Court under *Rule 28 (1) of the*

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[229] Revision No. 438 of 2020 *op cit.*

[230] G.N. No. 47 of 2017 *op cit.*

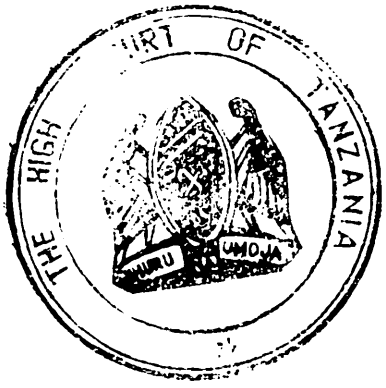
Labour Court Rules, 2007,[231] the CMA decision and proceedings are nullified for entertaining a matter out of its jurisdiction as it involved the Attorney General. Being a labour matter, I award no costs.

Y.J. MLYAMBINA

JUDGE

30/12/2021

Ruling delivered and dated this 30th day of December, 2021 in the presence of Counsel Evance Nzowa for the Applicant and learned State Attorney Bryson Ngulo for the Respondents. Right of Appeal explained.



Y.J. MLYAMBINA

JUDGE

30/12/2021

[231] G. N. 106 of 2007 *op cit.*