

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MJASIRI, J. A., MASSATI, J. A. And MUGASHA, J. A.)

CIVIL APPEAL NO. 23 OF 2010

MZUMBE UNIVERSITY.....APPELLANT

VERSUS

DR. NOORDIN JELLARESPONDENT

**(Appeal from the ruling and drawn order of the High Court of Tanzania
Labour Division, at Dar-es-Salaam)**

(Rweyemamu, J.)

Dated the 6th day of November, 2009

in

Complaint No 47 of 2008

.....

JUDGMENT OF THE COURT

18th & 24th May, 2016

MUGASHA, J.A.:

The respondent was the employee of the appellant as a lecturer at the University. On 5th March, 2008, the appellant terminated the respondent's employment. The respondent referred a complaint on unfair termination to the Commission for Mediation and Arbitration (CMA) claiming a sum of Tshs. 500,000,000/=. On 20/6/2003, the mediator issued a certificate of non-settlement on the ground that he could not mediate the dispute because the CMA lacked the pecuniary jurisdiction. On

6/10/2008 vide letter **REF.CMA/DSM/KIN- ILA/2832/08** the Director of CMA submitted the matter to High Court (Labour Division) and it was registered as Complaint No. 47 of 2008. On 11/3/2009, the respondent also filed a complaint which was treated to be similar to that filed by CMA because it was registered as Complaint No. 47 of 2008.

The appellant raised preliminary objections which were to the effect that:

- (1) The complaint is hopelessly time barred; and
- (2) The complaint is not properly before the High Court having been submitted by the Director of CMA.

The preliminary objections were dismissed. However, the Judge proceeded to determine that, since the sum of Tshs. 500,000,000/= claimed by the respondent is based on general damages, the mediator was wrong to conclude that the CMA lacked pecuniary jurisdiction. As such, the Judge revised the mediator's action, quashed the non-settlement certificate and ordered CMA to summon parties and issue a fresh certificate.

Aggrieved, the appellant has preferred an appeal to this Court. In the Memorandum of appeal there are four grounds of appeal:-

- i. The learned Trial Judge erred in law when she proceeded to determine other issues after making a finding that the complaint was time barred;*
- ii. The learned Trial Judge erred in law in holding that the sum of Tshs. 500,000,000/= pegged on the complaint as the amount owed in the nature of general damages;*
- iii. The learned Trial Judge erred in law when she held that the complaint was properly in Court as the letter from the commissioner of CMA dated 6th October, 2008 referring the dispute to the High Court in terms of (Nicomedes Case) section 18 (6) of the Labour Institution Act No. 7 of 2004 but simply forwarded the file to the High Court Labour Division; and*
- iv. The learned Trial Judge erred in law in suo motu revising the CMA mediator's certificate of non-settlement and quashed it without calling the parties to address and or be heard on the same.*

At the hearing of the appeal, the appellant was represented by Mr. Odhiambo Kobas, learned counsel while the respondent appeared in person.

Addressing the first ground of appeal, Mr. Odhiambo submitted that the appellant faults the High Court for not dismissing the time barred complaint and instead, proceeding to determine the legality of the certificate issued by CMA. He argued that, the proper remedy was to dismiss the time barred complaint and end there. To support his argument he cited to us the case of **HASHIM MADONGO & 2 OTHERS, Civil Appeal No. 27 OF 2003.**

Addressing the 2nd and 4th grounds together, Mr. Odhiambo submitted that, the High Court judge erred to conclude that the respondent's claim of Tshs. 500 million is based on general damages. He argued that the pecuniary limit of the dispute to be referred to CMA is that which is below the pecuniary jurisdiction of the High Court in terms of section 88 (1) (b) (ii) of the Employment and Labour Relations Act as amended by Misc. Written Laws No. 8 of 2008. However, Mr. Odhiambo complained that, the parties were not given an opportunity to be heard on the aspect of pecuniary jurisdiction but the mediator who prepared the certificate was given a right of hearing. He reiterated that since the judge had found the complaint to be time barred she should not have proceeded to look into the legality of the certificate and without hearing the parties.

In the 3rd ground of appeal Mr. Odhiambo argued that, the complaint was not competent because it was submitted by the CMA instead of any of the parties as required under section 86 (7) (b) (ii) of the Employment and Labour Relations Act [CAP 366. RE.2002] which states:

"Where the mediator fails to resolve a dispute within the period prescribed in subsection (4), any party to the dispute may, if a dispute is a complaint refer the complaint to the Labour Court"

Relying on the cited section, he argued that since the complaint was not properly before the Labour Court, the Judge ought to have struck it out. Mr. Odhiambo urged the Court to allow the appeal and determine the propriety of costs.

On the other hand, the respondent who was a lay person initially he had no grudge with the Ruling of the High Court. However, on reflection he agreed that the parties were not afforded a right of hearing and urged the Court to return the matter to the CMA to enable parties to be heard on the substantive dispute. The respondent pleaded to be spared costs.

The fourth ground of appeal concerns the fundamental right of being heard. Since this ground is sufficient to dispose of this appeal we shall not

dwell on the other grounds. Parties are in agreement that they were not afforded a right of hearing on what constitutes the pecuniary jurisdiction of the CMA which ultimately culminated into the quashing of the certificate by the High Court. This is reflected in the Ruling of the High Court at page 117 of the record as follows:-

" In view of that, the CMA mediator was wrong in stating on the certificate that the CMA had no pecuniary jurisdiction based on the amount of general damages quantified as shillings 500 million. I accordingly find that the mediator exercised jurisdiction not vested in him by law, and for that reason, the same is revisable on the court's own motion under Rule 28 (a) of the Rules. I revise the mediator's action; quash the certificate and consequently every other action taken by the parties following the issue of the impugned certificate. In consequence of that, the dispute remains at the position it was at the date mediation failed. The CMA is ordered to summon parties; issue a fresh certificate of non- settlement according to law, and the parties are advised to take appropriate action thereafter. The period of Limitation will begin to count from the date CMA issues the certificate to the parties".

It is imperative to point out that, what was before the High Court and a subject for determination was the preliminary objection on the complaint being time barred and the competency of the complaint filed by CMA. These are the two aspects which the parties had opportunity to address the Labour Court in their respective written submissions. Parties were not heard on the issue of the pecuniary jurisdiction of CMA which culminated into the quashing of the non-settlement certificate.

This Court has on several occasions held that a denial of the right to be heard would vitiate proceedings. (See **ECO TECH (ZANZIBAR) LIMITED vs GOVERNMENT OF ZANZIBAR, ZNZ CIVIL APPLICATION** No. 1 of 2007 (Unreported) **MBEYA RUKWA AUTO PARTS TRANSPORT; LIMITED vs JESTINA GEORGE MWAKYOMA**, (2003) TLR, **DPP vs SABINA TESHU & 2 OTHERS** (1992) TLR 237, to mention a few. In **MBEYA RUKWA** case the Court considered the English Case of **RIDGE vs BALDWIN** (1964) AC and emphasized that:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part:

***"Wakati haki na wajibu wa mtu yeyote
vinahitaji kufanyiwa uamuzi na Mahakama au
chombo kinginecho kinachohusika, basi mtu
huyo atakuwa na haki ya kupewa fursa ya
kusikilizwa kwa ukamilifu."***

We hasten to say that, this was unfortunately not observed in the case under scrutiny. In this regard we are constrained to find and hold that, this was a fundamental procedural error and occasioned a miscarriage of justice.

What are the consequential effects? In **PETER NG'HOMANGO vs THE ATTORNEY GENERAL, CIVIL APPEAL NO. 114 OF 2011 (unreported)**, the Court faced with a similar situation nullified the decision of the trial court having found that the issue of jurisdiction was unilaterally raised and determined without hearing the parties. The Court declared the judgment of the High Court a nullity and set aside the dismissal order.

In the case at hand, the parties were denied the right to be heard on the questions which were raised and determined by the Judge *suo motu*. As such, we are satisfied that, in the circumstances of this case, the denial of the right to be heard on the issue of what constitutes the pecuniary

jurisdiction of CMA culminating into the quashing of the certificate of non-settlement vitiates the decision of the High Court. We find the fourth ground of appeal to have merit and it is accordingly allowed.

We also nullify the Ruling of the High Court Labour Division dated 6/11/2009 and subsequent orders for violation of the right to be heard. We accordingly invoke section 4 (2) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**] quash and set aside both the Ruling and the respective order. Parties are advised to take necessary steps in terms of the requisite Labour Laws subject to law of limitation.

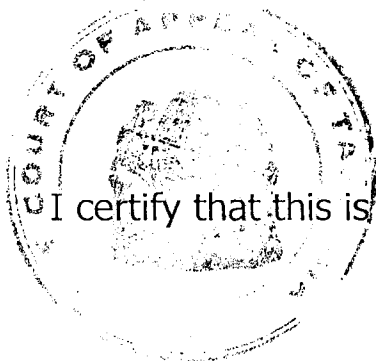
Since this is a Labour dispute we make no order as to costs.

DATED at **DAR ES SALAAM** this 20th day of May, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL