

**IN THE COURT OF APPEAL OF TANZANIA  
AT TANGA**

**(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 572 OF 2022**

**M/S ANJARI SODA FACTORY LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH TULO SHEMBILU.....1<sup>ST</sup> RESPONDENT**

**MARTIN LEONARD MKABENGA.....2<sup>ND</sup> RESPONDENT**

**SAID MUSA KILIMA.....3<sup>RD</sup> RESPONDENT**

**RICHARD ERNEST MSAGATI.....4<sup>TH</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Tanga)**

**(Mansoor, J.)**

**dated 24<sup>th</sup> day of May, 2022**

**in**

**Labour Revision No. 27 of 2019**

\*\*\*\*\*

**RULING OF THE COURT**

28<sup>th</sup> April & 2<sup>nd</sup> June, 2023

**KITUSI, J.A.:**

The respondents were employees of the appellant until 3<sup>rd</sup> April, 2018 when their employment contracts were terminated. They challenged the termination before the Commission for Mediation and Arbitration (CMA) which awarded them reliefs, totaling Tshs. 12,777,600, having

- concluded that the termination was both substantially and procedurally unfair. On revision the High Court upheld this decision.

Still aggrieved, the appellant a limited liability company has come to us, on three grounds namely;

1. *That, the Hon. Judge of the High Court grossly erred in law in failing to find that, the Respondents were illegally represented in the original trial by a trade union (TUICO) which had no legal rights and mandate to exercise such organizational rights.*
2. *That, the Hon. Judge of the High Court greatly erred in law for failing to find that the Appellant in their revision proceedings did clearly point the specific provisions of the laws contravened by the trade union in representing the Respondents.*
3. *That, the Hon. Judge of the High Court erred in law for failure to conclude that, the Respondents were illegally represented at the trial which resulted to illegal decision in their favour thus accordingly to revise, quash and set aside the same.*

It is appreciated from the above grounds that they all attack the involvement of TUICO in the trial before CMA. Where has all this come

from, while involvement of TUICO was initially not one of the issues raised before the CMA for its determination?

Mr. Henry John Mlang'a a Public Relations Manager of the appellant entered appearance on behalf of that appellant company. Before he could address the merit of the appeal, Mr. Mlang'a raised an issue concerning a Point of Preliminary Objection (PO) that was raised before the CMA but never was addressed and determined. It is at page 70 of the record and raised issue with TUICO's involvement in the trial.

Referring to the relevant pages, Mr. Mlang'a submitted that the CMA took cognizance of that PO on 24<sup>th</sup> October, 2018 by observing:

*"Commission: Since the respondent's representative is not in appearance, the concern raised cannot be responded and ruled out. **However, I have seen in record, a notice of Po which need be addressed first as a matter of procedure under rule 23 (8) of GN No. 67/2007**" (Emphasis ours).*

He went on to point out that despite the above, the CMA subsequently proceeded with the hearing of the application to finality without addressing and disposing of that PO. He submitted that the

· course taken by the CMA contravened rule 23 (8) of GN No. 67 of 2007.

He prayed that we should, under our revisional powers, be enjoined to rectify the anomaly in the proceedings and remit the record to the High Court for it to proceed according to law.

Mr. Elibahati Thomas Akyoo, learned advocate representing the respondents, though taken by surprise, agreed with Mr. Mlang'a on both the anomaly, and the way forward.

We have given this matter a keen thought. While we would desire the parties to come to the end of this long-standing litigation, it is also our duty to tidy up the proceedings that have given rise to this appeal if we get satisfied that there is that need. We begin by appreciating that the requirement for the CMA to dispose of a point of preliminary objection first is, unlike in the High Court and this Court, a rule of law, not a rule of practice.

As pointed out by Mr. Mlang'a the relevant provision is rule 23 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN No.67 of 2007, hereinafter the Rules.

• We consider sub rules (8), (9) and (10) of rule 23 pertinent and reproduce them as under:

*"(8) In the event of preliminary issues being raised, **each party shall be given the opportunity to present evidence and arguments.***

*(9) The Arbitrator may elect to decide the preliminary point before proceeding with the arbitration or to conduct the arbitration and decide the preliminary point at the time of considering all the evidence in the matter.*

*(10) In some instances, it may be necessary to determine the preliminary points before proceeding with the arbitration."*

The CMA's remarks quoted a while ago take cognizance of the PO and the requirement under rule 23 of the Rules to deal with it first. We note that under sub rule (8) of rule 23 the parties shall be given an opportunity to present evidence and arguments after which, the Arbitrator may decide whether to determine the point right there or defer it for determination at the end, in terms of sub rule (9) of the Rules.

Our interpretation of the above three sub rules is that whether the Arbitrator determines the preliminary objection before or after conducting

· arbitration is a matter at the Arbitrator's discretion but the same should be exercised after receiving evidence and arguments as per sub rule (8). In this case, no evidence or arguments on the PO were received by the Arbitrator as required, so it cannot be said that the arbitrator's decision was deferred to the end.

The appellant has prayed that we should be pleased to remit the record to the CMA with directives for it to hear the parties on the PO and get it determined. Mr. Akyoo, as earlier indicated, did not object. The Court has previously been called upon to consider a more or less similar point, like in **Thabit Ramadhan Maziku & Another v. Amina Khamis Tyela & Another**, Civil Appeal No. 98 of 2011 and; **Salmin Ali Jaffar v. Fatma Tangawizi Ngura & Another**, Civil Appeal No. 299 of 2019 (both unreported). In those two cases, the Court had to remit the records to the trial courts in order for them to consider the PO first.

Considering the nature of the case and the time it has stood pending, the decision whether to remit the record to the CMA for it to consider the PO or not, is not an easy one. However, in this case we have taken into account the fact that the issue of TUICO's participation raised

in the PO is the same as that featuring in the three grounds of appeal before us which means that the appeal is on an issue that was raised as a PO but which was not decided upon by the CMA. Since as pointed out earlier, under sub rule (8) of rule 23 of the Rules the Arbitrator must receive evidence and arguments on the PO, which was not done, and since we, at this stage cannot take that evidence and arguments, remitting the record to the CMA is, regrettably, inevitable.

We are also conscious of our duty, spelt out in many cases, of ensuring proper application of the laws by the courts below. In **Adelina Koku Anifa & Another v. Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported), we reiterated this position by saying: -

*"It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has a duty to ensure proper application of the laws by the subordinate courts and/or tribunals".*

For those reasons, we are constrained to quash the decisions of the CMA and that of the High Court and set aside the orders arising therefrom.

We remit the record to the CMA with an order that it should hear the parties first on the PO before proceeding with hearing and determining the complaint on merit.

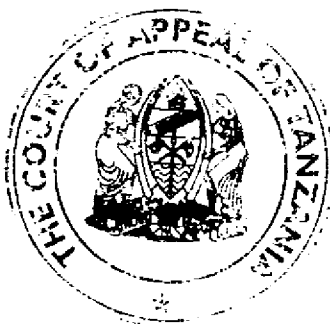
**DATED at DAR ES SALAAM this 1<sup>st</sup> day of June, 2023.**

S. A. LILA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

The Ruling delivered this 2<sup>nd</sup> day of June, 2023 in the presence of Mr. Henry John Mlang'a, Public Relations Manager of the Appellant Company linked through Video Conference from Tanga, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents present in person and in the absence of the 3<sup>rd</sup> Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**