

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

APPLICATION FOR LABOUR REVISION No. 9 OF 2018

(Originating from the Commission for Mediation and Arbitration of
Tabora in Labour Disputes Nos. CMA/TBA/DISP/24/2015)

KELLO RASHID KARADENGAAPPLICANT

VERSUS

ASSOCIATION OF TANZANIA TOBACCO

TRADERS LTD RESPONDENT

RULING

Date of Last Order: 29/05/2020

Date of Delivery: 5/06/2020

AMOUR S. KHAMIS, J.:

Kello Rashid Karadinga was terminated from employment as a Chief accountant for the Association of Tanzania Tobacco Traders Ltd on 5th October, 2010.

He filed Labour Dispute No. CMA/TAB/DISP/61/2010 in the Commission for Mediation and Arbitration at Tabora for payment of terminal benefits totalling Tshs. 302, 384, 123/10, made up of:

- 1) Haki za kuachishwa kazi.
- a) Notisi ya kuachishwa kazi Tshs. 1, 284, 000/=.
- b) Likizo ya mwaka 2010 Tshs. 1, 284, 000/=.
- c) Posho ya likizo ya mwaka 2010 Tshs. 50, 000/=.
- d) Kiinua mgongo Tshs. 3, 456, 923/=.
- e) Gharama ya kujikimu tangu tarehe 1/10/2010 hadi tarehe 10/11/2010 siku 21 Tshs. 2, 870, 000/= na watoto wanne Tshs. 2, 870, 000/=.
- 2) Fidha ya kuvunja mkataba Tshs. 15, 408, 000/=.
- 3) Mishahara iliyobaki miaka 17 kwa mshahara wa Tshs. 1, 284, 000/= kwa mwezi Tshs. 261, 936, 000/=.
- 4) Kutokana na mkataba wa hiyari:
 - a) Bonesi Tshs. 1, 027, 000/=.
 - b) Mkono wa heri Tshs. 12, 199, 000/=.

The dispute was subjected to a trial which terminated partly in favour of Kello Rashid Karadenga. He was awarded a three (3) months compensation for unfair termination as reflected in the Arbitrations Award dated 5/02/2012 thus:

"Ninatoa tuzo mlalamikaji Kello Rashidi Karadenga alipwe fidia ya mshahara wa miezi mitatu sawa na Tshs. 3, 852, 000/= (Milionni tatu mia nane hamsini na mbili elfu). Mlalamikiwa Association of Tanzania Tobacco traders Ltd (ATTT) anaamliwa

kumlipa mlalamikaji katika muda wa siku 21 tokea tarehe Tuzo hii ilipotolewa”

Subsequent to payment of the arbitral award's sum, Kello Rashid Karadenga and one Santos D/o Amos Mmari were discharged under Section 98 (a) of the Criminal Procedure Act, Cap. 20, R.E. 2002, from Criminal Case No. 479 of 2020 instituted in the District Court of Kahama.

In the said Criminal Case, the duo were charged with one Count of conspiracy to commit an offence contrary to Section 384 of the Penal Code and with 34 counts of Stealing by Servant contrary to Section 271 of the Penal Code, Cap. 16, R.E. 2002.

Upon conclusion of the Criminal Case, Kello Rashid Karadenga and Santos Amos Mmari lodged a fresh labour dispute, referred to as Misc. Application No. CMA/TAB/DISP/24/2015 against their former employer, each claiming reinstatement and payment of some statutory sums due to them.

On his part, Kello Rashid Karadenga sought an order for payment of Tshs. 86, 156, 400/= on the ground stated in the referral form, thus:

“Kwa sababu niliachishwa kazi kwa tuhuma ya wizi wa pesa, tuhuma ambayo mwajiri (ATTT) ameshindwa kuithibitisha kwenye kesi ya jinai number 479/2010.”

Simultaneous with that dispute, Kello Rashid Karadenga and Santos Amos Mmari filed in the Commission for Mediation and

Arbitration an application for condonation in order to refer the dispute out of time.

The application for condonation was made by a notice of application under Rule 29 (2), (3), (4) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007.

The notice of application was supported by a joint affidavit deposed by Santos Mmari and Kello Rashid Karadenga.

Upon being served with the application for condonation, the Association of Tanzania Tobacco Traders Limited filed a *"Notice of Application"* under Rule 29 (1) (c) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2017 accompanied by an affidavit sworn by one Godfrey Rusimbi, its principal officer.

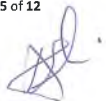
The notice of application, taken at the instance of Matto & Co. Advocates, a law firm handling ATTT's brief, referred to the Association of Tanzania Tobacco Traders Limited as the *"applicant/employer and Santos Amos Mmari and Kelo Rashid Karadenga as respondents/employees."*

The notice of application moved the CMA for an order to strike out the application for condonation and the dispute by Santos Amos Mmari and Kelo Rashid Karadenga for being res – judicata.

On 3/05/2016, the Commission for Mediation and Arbitration delivered its ruling upholding the *"preliminary objection"* raised by ATTT to the effect that the application was res – judicata.

Aggrieved by the said decision of 3/05/2016, Kello Rashid Karadenga moved this Court to call for the records of the Commission for Mediation and Arbitration and revise the proceedings and the ruling therein on six (6) grounds, namely:

- i) *That the Commission was incorrectly moved by the notice of application instead of a preliminary objection on a point of Law.*
- ii) *That the finding by the Commission that the applicant application is res judicata was illegally and incorrectly arrived at as the applicant was denied an opportunity to be heard.*
- iii) *That the Commission finding that Labour Dispute referenced CMA/TAB/DISP./61/2010 conclusively determined and brought to an end the dispute between the applicant and the respondent was illegally and incorrectly arrived at.*
- iv) *That the applicant who was terminated by the respondent on ground of theft was (un) fairly terminated from his employment upon the respondent's failure to prove the guiltiness of the applicant in Criminal Case No. 479/2010 of Kahama District Court.*
- v) *That payment of compensation in respect of unprocedural acts is not a bar to compensation for unfair termination.*
- vi) *That the trial arbitrator's act in the circumstances amounts to serious misdirection.*



The application was through a notice of application made under Sections 91(1) (b) 91 (2) (a), (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rules 24(1), 24(2) (a), (b), (c), (d), (e), (f) and 24 (3) (a), (b), (c), (d) and 23 (1), (c), (d) and (e) of the Labour Court Rules, G. N. No. 106 of 2007 and supported by an affidavit of Masendeka Anania Ndayanse, learned advocate.

In Paragraph 7 of the affidavit, Mr. Ndayanse disclosed a legal issue for consideration by this Court arising out of the impugned ruling of the Commission for Mediation and Arbitration, namely:

"a) whether the trial Commission was correctly moved by the notice of application instead of a preliminary objection on point of law.

b) whether the finding by the Commission that the applicant's application is resjudicata is legal and was correctly arrived at in the circumstance in which the applicant was denied opportunity to be heard.

c) whether the Commission's findings that Labour Dispute referred CMA/TAB/DISP./61/2010 conclusively determined, and the dispute between the applicant and the respondent was legally and correctly arrived at.

d) whether the applicant who was terminated by the respondent on ground of theft was (un) fairly terminated from his employment upon the respondent's failure to prove the guiltiness of the

applicant in Criminal Case No. 479 of 2010 of Kahama District Court.

e) whether payment of compensation in respect of un procedural acts by the respondent is a bar to compensation for unfair termination.

f) whether the trial arbitrator's act in the circumstances amounts to serious misdirection."

At the instance of RMK Advocates Chambers, the Association of Tanzania Tobacco Traders Ltd, filed a notice of opposition and a, notice of representation as per Section 56 (c) of the Labour Institution Act No. 7 of 2004 and Rule 43 (1), (b) of the Labour Court Rules, G. N. No. 106 of 2007.

The company also filed a counter affidavit affirmed by Mr. Musa Kassim, learned advocate.

Mr.Kassim stated that the respondent company ceased to exist on 28/02/2018 and no longer operated its business in Tanzania.

He deposed that the issues proposed by the applicant were misconceived on the ground that the Commission rightly determined Dispute No. CMA/TAB/DIS/24/2015 as res judicata.

On a criminal charge against the applicant, Mr. Kassim averred that the respondent company had nothing to do on its proof as that duty was vested on the Republic.



Before me, Kello Rashid Karadenga, the applicant herein, enjoyed legal representation of Mr. Masendeka Anania Ndayanse, learned advocate.

The Association of Tanzania Tobacco Traders Ltd, the respondent Company, was ably represented by Mr. Musa Kassim and Ms. Edna Aloyce, learned advocates.

The application was canvassed by written submissions and parties dutifully adhered to the timeline set by the Court.

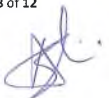
I have read, examined and digested the rival submissions filed by Mr. Masendeka Anania Ndayanse and Mr. Musa Kassim, respective legal counsel for the parties herein.

In my view, the first legal issue proposed by the applicant sufficiently dispose of the matter.

The issue is whether the Commission was incorrectly moved by a notice of application instead of a preliminary objection on point of law.

In addressing this issue, Mr. Ndayanse did not readily cite any authority but implored the Court to address itself on the law as it deems appropriate.

On his part, Mr. Kassim asserted that the applicant failed to substantiate the grounds of revision as set out in the notice of application.



Whereas, no dauntless submissions were advanced by parties in respect of this issue, I cannot shy away from determining it as it arose from pleaded facts.

On that position, I am inspired by the Kenyan Court of Appeal in **GALAXY PAINTS COMPANY LTD V FALCON GUARDS LTD, CIVIL APPEAL NO. 219 OF 1999** (unreported), wherein it was of served that:

"It is trite law that issues for determination in a suit generally flow from the pleadings"

Records show that immediately upon service of a notice of application filed by Santos Amos Mmari and Kello Rashid Karadenga in the Commission for Mediation and Arbitration, the Association of Tanzania Tobacco Traders Ltd, lodged a notice of application and an affidavit sworn by Godfrey Rusimbi.

These two documents, were heavily relied upon by the trial arbitrator to determine a "preliminary objection" in favour of the respondent.

The question is whether the procedure adapted by the respondent and the trial Commission was legally correct.

My answer to the question is no in view of Rule 29 (5) of the **LABOUR INSTITUTIONS (MEDIATIONS AND ARBITRATION) RULES, G. N. NO. 64 OF 2007** which provides that:

"29 (5) Any party opposing the application may deliver:



- a) a notice of opposition and a counter affidavit within fourteen days from the day on served on that party, and
- b) a notice of opposition and a counter affidavit shall contain the information required by subrule (3) and (4) respectively.”

Contrary to the above stated rule, the Association of Tanzania Tobacco Traders Limited filed in the Commission, a “notice of application” instead of a notice of opposition and an affidavit instead of a counter affidavit.

Further, the notice of application filed by the respondent company in the Commission did not conform to the requirements of Rule 29 (3) (a) – (g) of the **LABOUR INSTITUTIONS (MEDIATION AND ARBITRATION) RULES** (supra).

In a typed ruling dated 3/05/2016, the trial arbitrator (Adolf K. Anosisye) observed that the respondent had raised a preliminary objection in a “counter affidavit” alleging that the dispute was res judicata.

Whereas affidavits and counter affidavits are not required to contain legal issues and or arguments, as a matter of fact, there was no counter affidavit filed by the respondent company in the Commission, a fact that inadvertently escaped the trial arbitrator’s attention.

Even assuming that such an objection was raised in a notice of opposition, which is not the case, the same could not be true because

no notice of opposition to the application was filed by the respondent company.

In my view, had the trial arbitrator addressed himself on these factual and legal issues, he would have come to a different conclusion.

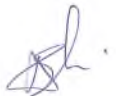
However, by overlooking the mandatory procedural aspects, the trial arbitrator at page 5 of the typed ruling concluded that:

“In the final result I join hands with the respondent and uphold the Preliminary Objection which is to the effect that this application is res judicata.”

Adherence to procedural requirements was emphasised by the Court of Appeal in **MOHAMED ENTERPRISES (T) LTD V CMA CGM TANZANIA LTD, CIVIL APPEAL NO. 69 OF 2013** (unreported), thus:

“Dr. Lamwai asked us to invoke Rule 2 of the Court Rules to grant his prayer for extension of time to file the written submission. We think to yield to Dr. Lamwai’s suggestion in the circumstances of the particular case would be dangerous as it water down the mandatory duty Rule 106 (1) imposes on applicants and appellants, to file their written submissions within sixty days after lodging the record of appeal or filing the notice of motion.”

In the present case, as can be gleaned from the analysis made herein before, there was no preliminary objection properly raised in





the Commission to entitle the arbitrator to hold that the application for condonation was res – judicata.

Having been satisfied that the trial Commission was not properly moved by a valid notice of preliminary objection, I grant the application.

Consequently, ruling of the Commission for Mediation and Arbitration dated 3/05/2016 is hereby quashed and set aside. The Commission for Mediation and Arbitration is ordered to preside over, adjudicate upon and determine Labour Dispute No. CMA/TAB/DISP.24/2015 in accordance to law and procedures.



It is so ordered.

AMOUR S. KHAMIS
JUDGE
05/6/2020

Order: Ruling delivered in the open Court in presence of the applicants in person and in presence of Mr. Musa Kassim, advocate for the respondents.

Right of Appeal explained.

B.R. NYAKI
DEPUTY REGISTRAR
5/6/2020