IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
HIGH COURT LABOUR DIVISION SHINYANGA

AT SHINYANGA

REVISION APPLICATION NO. 12 OF 2020

(Arising from an award of the Commission for Mediation and Arbitration of Shinyanga in Misc. Labour Application No. CMA/SHY/191/2019)

MASWI MASERO..... APPLICANT

VERSUS

KAHAMA OIL MILLS LIMITED.....RESPONDENT

JUDGMENT

Date of the last Order: - 30th June, 2020
Date of the Judgement: -28th August, 2020

MKWIZU, J.:

The applicant was on 1st February, 2019 entered into an employment contract with the respondent. Unknown to the applicant, respondent suspended that contract on 18th September, 2019 pending investigation against the allegation levelled against him. The said contract was officially terminated on 5th October, 2019 without affording the applicant a right to know the reasons for the termination. Aggrieved , applicant refereed the complaint to the Commission for Mediation and Arbitration (CMA) Shinyanga via CMA Form No. 1 and the disputed was registered as

CMA/SHY/191/2019.In that dispute, applicant sought for declaration that the termination was both procedurally and substantially unlawful, he prayed for reinstatement, payment of his dues from the date of termination to the date of the CMA award and his 6 months' salary which was due but not paid.

The respondent raised preliminary objections against the lodged labour dispute that, the referral is prematurely filed, applicant has no cause of action against the respondent and lastly that the CMA had no jurisdiction to entertain the matter. Having argued the preliminary objections above, the arbitrator found that the CMA lacked requisite jurisdiction to entertain the matter as parties had agreed in their own binding contract to refer the matter to arbitration in accordance to Arbitration Ordinance of Tanzania, Chapter 15 of the Laws.

Dissatisfied with the above decision, applicant filed revision in this court under the provisions of section 91 (1) (a) and (b), 2 (b) and (c),91 (4) (a) and (b) , 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, Rules 24 (1) (2) (3)and (11) (b) and Rule 28 (1) (b) (c) (d) and (e) of the Labour Court Rules, 2007. The application is supported by an affidavit sworn

by the Applicant on 16th March 2020. The Respondent contest the Application, hence the counter affidavit sworn by George Bahati Ndege an office of the respondent's company duly authorized to swear the affidavit on 14th April, 2020.

This revision was disposed of by way of written submissions, applicant enjoyed the services of Mr.Samwel Kazenga advocate whereas the respondent had the services of Mr.Roman Selasini Lamwai, also learned counsel. I thank both parties for their detailed submissions.

Paragraph 5 of the applicant's affidavit raised three grounds for the revision that:

> *"5. That, having been seriously aggrieved by the Ruling and the Order thereon, basing on above events and facts which establish several legal issues thus I have decided to seek revision of the said award on the following ground:-*
>
> *a. That, the Honourable trial Arbitrator immensely failed to consider that once the Court raises the issue suo motu should grant the right*

of being heard to the parties to address on the said issue and not determine the same suo motu too.

b. *That, the Honourable Trial Arbitrator failed to consider that the raised objection suo motu, grounded on the clause of the contract of employment not yet tendered in court to form party of the court records and which agreement was yet to be ascertained and interpreted by parties to the trial proceedings as evidence, and just before the respondent had yet to file the opening statement as ordered by the Commission, was a point of law to be capable of disposing the case.*

c. *That, the Honourable Trial Arbitrator misdirected himself in entertaining the object and proceeding with other trial Commissions proceedings involving the respondent, the objections inclusive instead of making default orders against the respondent for failure to file the opening statements.*

On the first ground that the arbitrator raised the issue *suo moto* and decided it conclusively without affording parties an opportunity to be heard, applicant

said, though the issue relating to the Commission's jurisdiction over the matter was raised by the respondent, applicant's submissions on the issue were not considered, to the contrary, the arbitrator raised another issue of jurisdiction from the contract of employment which was attached on the opening statement without parties submitting on it. He faulted the arbitrator for raising, at a preliminary stage, a point from the pleadings and decide them without hearing the parties. He cited the case of **Kluane drilling (T) LTD vs Salvatory Kimboka**, Civil Appeal No. 75 of 2006 CAT (Unreported), **Margwe ERRO and 2 Others V. Moshi Mohalulu**, Civil appeal No. 111 pf 2014 (Unreported), **Scan-Tan Tours Ltd V. the Registerefd Trustees of Catholic Dioces of Mbulu**, Civil Appeal No 78 of 2012 and that of **Mire Artan Ismail and ANR V. Sofia Njati,** Civil Appeal No 75 of 2008, **Mbeya – Rukwa auto Parts and Transport Limited V Jestina George Mwakyoma**, civil Appeal No. 45 of 2000 (all unreported) to bolster his argument.

On the second grounds, Applicant faulted the arbitrator for considering the clause of the employment contract which was just an attachment contrary to labour rules. He referred the court to the case of **Tanzania Leaf Tobacco**

company ltd vs said Mgemwa, Labour revison no. 16 of 2016 (unreported) and **Mukisa Biscuits Manufacturing Co LTd V. West End Distributors LTD** (1969) EA 696 the guiding principles of raising and determination of the preliminary objections.

In addition, applicant attacked the counter affidavit for containing untruth information which he said, was contrary to the law and invited this court to disregard its content. He supported his line of argument by the case of **Ignazio Mesina V. Willow investment SPR**, Civil Application No. 21 of 2001 (unreported).

On his third ground, applicant's counsel also faulted the arbitrator for determining the preliminary objection raise in disregard to the fact that the respondent had not filled the requisite opening statement in accordance with the CMA order. On this, the applicant's counsel was of the view that, the proper procedure was for the arbitrator to enter a default judgement against the respondent.

In response to the application, respondent's counsel stated that, the issue on the Commission jurisdiction to entertain the matter was not raised by the Arbitrator *suo moto*, it was a point raised by the respondent and parties were all afforded an opportunity to submit on the raised objections before the composition of the decision by the arbitrator. He said, the cases cited on this point by the applicant are distinguishable.

On the blame thrown to the arbitrator that he went to consider documents attached in an opening statement before they were tendered as exhibit in court is a misconception, Mr Roman said, the principle enunciated in the **Mukisa Biscuit's** case (Supra) explains that preliminary objection presupposes that all the pleadings are correct and therefore the arbitrator was justified in considering the annextures.

Having considered the application, affidavits for and against the application and the rival submissions, I think my task is limited to the following issues.

i. *Whether the jurisdiction issue adjudicated upon by the arbitrator was raised suo moto and without affording parties an aooprtunity to be heard or otherwise.*

ii. Whether the arbitrator made an error for not *entering default orders against the respondent for failure to file the opening statements*

My starting point will be at the stage when Labourt Disoute No CMA/SHY/191/2019 was attacked with preliminary objections. The essence here is to see whether the issues or rather grounds raised by the applicant in challenging the arbitrators decision emanating from the raise preliminary objections are tenable.

It is an agreed fact that respondent in this matter raised three preliminary objections before the Commission one of them touching on the Commission's jurisdiction to entertain the matter. It is also uncontroverted fact that parties were all heard on the presented preliminary objection. In reaching its decision, the arbitrator took into consideration among other things, parties pleadings .It is on that bases, that he considered the clause of the employment contract between the parties to arrive into a decision that the Commission had no jurisdiction to entertain the dispute as parties had agreed to refer the matter to Arbitration under Chapter 15 of the Laws in

case of any dispute. This is the center of the complaint by the applicant's counsel.

Making reference to the CMA's decision applicant argued that the reference to the employment contract was without justification and contrary to the law as the contract was yet to be tendered as evidence. I think this point should not take much of the court's precious time. Rules as to the raising and determination of the preliminary points of objection were well pronounced in the celebrated case of **Mukisa Biscuit** (Supra) cited by the applicant's counsel. In that case the court said inter alia that:

> *"A preliminary objection is in the nature of what used to be a demurrer.* ***It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained*** *or if what is sought is the exercise of judicial discretion . . . "(Emphasis added).*

In the above context, it is clear that in determining a preliminary objection, the factual allegations in the pleadings are taken as correct and no extrinsic the point raised being on the jurisdiction of the Commission, its determination could not be possible without the pleadings. In other words, what is pleaded by a party is crucial in guiding the court or tribunal to establish whether it has jurisdiction over the matter or not. This is what the arbitrator did on the present case. Having being prompted by the respondent via the preliminary objection, the arbitrator went into the details of the pleadings by the parties to see whether he was clothed with necessary jurisdiction over the matter. On this, pages 6 and 7 of the CMA's decision, sys, I quote:

> *"The question of jurisdiction for the Commission is basic it goes to the very root of the authority of the commission to arbitrate upon disputes of different nature..*
>
> *... It is on records that both parues referred to the alleged contract of employment as filed by the applicant. Whether the alleged contract of employment is valid or not is forged or not is not within my jurisdiction but I take facts as I found them.*

Whether the Commission has jurisdiction or not to hear and determine the dispute, it is sufficient together the facts from the pleadings and in the labour arena the pleadings consists but not limited only to the CMA F-1. Opening statement and the annextures to. The information mentioned above when scrutinized either after the alert from either party or suo motu are sufficentl to determine whether the commission is competent to determine the matter...

Both parties cited the case of MUKISA (Supra) and one of the tests which will oust the jurisdiction of the court or tribunal is the presence of the submission clause in the alleged contract to submit the matter to the arbitration which is very clear in the alleged contract of employment"

So, guided by the **Mukisa biscuit's** case, the arbitrator took into account the pleadings by the parties. There was nothing wrong with the arbitrators approach. As rightly argued by Mr. Roman, counsel for the respondent, ***the*** jurisdictional issue was pointed out by the respondent, and *that* parties were both given chance to submit on the raised preliminary objection before the

decision was made. The arbitrators visit to the pleadings was the only right way of assessing the facts pleaded to see whether he had jurisdiction. It is an established principle of the law that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit e.g. an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration. See the cited **Mukisa Biscuit's** case (supra).

Reading carefully the provisions of rule 20 (4), 22 (1) and (2), 24 of the Labour institution (Mediation and Arbitration guidelines) Rules, Government Notice no. 67 of 2007 it is clear that the CMA form No 1 plus the opening statements forms part of the pleadings in labour dispute. On this matter, the employment contract was part of the pleadings and it goes without saying that the arbitrator was bound to see the terms and satisfy himself to what was being asserted to by the parties.

The 1st and 2nd grounds are therefore baseless.

On the third issue as to whether the arbitrator was wrong to consider the preliminary objection and disregard the non-filing by the respondent the opening statements, I revisited Rule 22 (1) and (2) of Labour Institutions (Mediation and Arbitration Guidelines) Rules Government Notice No. 67/2007 which provides for the stages of arbitration. The provisions state:

> *2"2(1) subject to the discretion of the arbitrator as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question witnesses and present arguments*
>
> *22 (2) the arbitration process involve the following five stages-*
>
> *a) introduction,*
>
> *b) opening statements and narrowing of issues;*
>
> *c) evidence;*
>
> *d) Arguments; and*
>
> *e) award. "*

Reading the above provisions, the non-filling of the opening statement is not fatal, the parties may opt to give evidence. This is so because, under rule 24 (2) the contents of the opening statements are not evidence unless admitted by the parties. The statement however, helps the arbitrator under rule 24 (4) to ascertain the issues in dispute. The rule say:

> *"Rule 24(4) at the conclusion of the opening statements, the Arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain to the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes."*

As alluded to above, the applicant's complaint at the Commission was decided based on the preliminary objection raised by the respondent. The applicant is complaining that the arbitrator decided the matter instead of entering a default judgement for failure by the respondent to file an opening statement. This point is a misconception. The Arbitrator, under Rule 23 (6) is mandated to dealing with the preliminary objections even prior to the commencement of the opening statement. This is what the arbitrator did on this matter. In its decision (see the quoted part above) the arbitrator noted

that anomaly but proceeded to deal with the preliminary objection, rightly so because the law so permit.

The second issue is also baseless.

All said and done, the unmerited revision is dismissed. Being a labour matter I make no order as to costs.

It is so ordered.

DATED at **Shinyanga** this 28th **day** of **August,** 2020.

E.Y.MKWIZU
JUDGE
28/08/2020

COURT: Right of appeal explained.

E.Y.MKWIZU
JUDGE
28/08/2020