

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**[LABOUR DIVISION]**  
**AT ARUSHA**

**REVISION APPLICATION NO. 42 OF 2019**

*(C/F Commission for Mediation and Arbitration for Arusha, Labour Dispute No.  
CMA/ARS/ARB/116/2018)*

**AGNESS MREFU LUCUMAY ..... APPLICANT**

***Versus***

**THE BOARD OF TRUSTEES ELTC- NOTH**

**CENTRAL DIOCESE ..... 1<sup>ST</sup> RESPONDENT**

**THE SECRETARY GENERAL ELTC- NOTH**

**CENTRAL DIOCESE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*6<sup>th</sup> October & 3<sup>d</sup> November, 2020*

**Masara, J.**

The Applicant, **Agness Mrefu Lucumay**, has filed the instant revision application after being dissatisfied by the Award passed by the Commission for Mediation and Arbitration (CMA) on 1<sup>st</sup> February, 2019. The Applicant has filed this application moving the Court to revise and set aside the said Award. The application is supported by the affidavit sworn by Mr. Sylivester Kahunduka, advocate for the Applicant. The Respondents challenged the application through a counter affidavit sworn by Ms Edith Mkisi, the principal officer of the Respondents. It appears from the record that the Applicant was employed by the Respondent as an Internal Auditor from 19/6/2014 and

her employment was terminated by the Respondents on 1/4/2018 for the reasons of insubordination and absenteeism.

The Applicant's claim is that she was terminated unfairly without adhering to the legal procedures. The Applicant claims to be paid outstanding salary arrears to the tune of Tshs 57,236,062/=. After hearing the parties, the CMA found that the Applicant was unfairly terminated both procedurally and substantively. The Respondents were ordered to reinstate the Applicant to the position of auditing officer since she had not acquired the qualification of being an Internal Auditor. Further, the Respondents were also ordered to pay the Respondent salary arrears from the date of termination to the tune of Tshs 9,980,782/=. The Applicant was dissatisfied hence this revision.

The Applicant appeared in Court represented by Mr. Sylvester Kahunduka, learned advocate, while the Respondents were represented by Mr. Gospel Sanava, learned advocate. Hearing proceeded by way of written submissions, a schedule of which was complied with by both parties.

Submitting in support of the Application, Mr. Kahunduka sought to adopt the affidavit in support of the application. Mr. Kahunduka contended that the arbitrator erred in law by raising an issue whether the Applicant was an internal auditor without affording the parties the right to address on it. The learned counsel fortified that it is on this issue that the CMA reached a conclusion that the Applicant had no valid salary arrears as she was not an internal auditor. The learned counsel argued that the said issue was not

among the framed issues for the parties to argue on. He cited the Court of Appeal decisions in ***Jamali Ahmed Vs. CRDB Bank Ltd***, Civil Appeal No. 52 of 2010; [2016] TLS LR 106 and ***EX8.8356 S/SGT Sylvester S. Nyanda Vs. Inspector General of Police and Another***, Civil Appeal No. 64 of 2014; [2016] TLS LR at page 401 to reinforce his argument. Mr. Kahunduka contended that the issue was raised by the Commission *suo moto* and the Applicant was not given an opportunity to be heard on it, she was therefore condemned unheard.

Mr. Kahunduka stated that all the exhibits tendered by the Applicant prove that she was employed as an internal auditor of the Respondent. This fact was also not denied by the Respondents. According to Mr. Kahunduka, all the auditing reports prepared by the Applicant were approved by the Respondents and she was regarded as their internal auditor. Her contract with the Respondent was never rescinded, it remained in the terms she was employed. In that regard, the Commission had no mandate to alter the terms of the contract as agreed by the parties. To support his argument, he cited the case of ***Uniliver Tanzania Ltd Vs. Benedict Mkasa trading as BEMA Enterprises***, Civil Appeal No. 41 of 2009 (unreported).

The other issue raised relates to the salary arrears claimed by the Applicant. In this issue, Mr. Kahunduka stated that the Applicant's salary was raised on 26<sup>th</sup> May, 2015, as per exhibit D3. Therefore, her claim of salary arrears to the tune of Tshs 57,802,319/= was justified. Regarding the variation of signature and font size of the letter that confirmed salary increment to the

Applicant, the learned arbitrator stated that the Commission acted *ultra vires* as it had no such powers since the admission of that document was not objected to by the Respondents.

Contesting the application, Mr. Sanava aligned himself with the Award contending that the Applicant admitted before the Commission that her level of education is an advanced diploma which under the laws of Tanzania, she could not hold a position of an internal Auditor. For him, an argument that the Applicant was employed as an internal Auditor is baseless and flimsy since matters relating to auditors are regulated by law. The learned advocate cited the Accountants and Auditors (Regulation) Act, Cap. 286 [R.E 2002] as the law that regulates the conduct of the auditors. He underscored that the agreement of the parties cannot defeat statutes, citing section 2(2)(g) of the Law of Contract Act. He concluded that the Commission was justified to hold that the Applicant was an *Auditing Officer* and not an *internal Auditor*.

Submitting on the second issue, Mr. Sanava stated that the parties were given opportunity to argue on the issue of the Applicant's salary arrears, and the same was found to be an afterthought. From 2014 when the Applicant was employed by the Respondents to 28<sup>th</sup> March, 2018 when she was terminated, there were no complaints about salary arrears, therefore that complaint came after her termination. Also, after being reinstated, the Applicant was paid the same salary of Tshs 831,731.84 per month.

Regarding the complaint on the documents, Mr. Sanava stated that the Applicant failed to prove existence of salary arrears by presenting before the Commission scrupulous and unauthentic documents. He concluded that the letters tendered by the Applicant were forged with intent to defraud the Respondents after the Applicant's employment was terminated. For those reasons, the learned advocate implored the Court to dismiss the application for lack of merits.

Having reiterated the submissions made, I have given considerable weight both to the parties' affidavit and counter affidavit as well as the rival submissions of the advocates for the parties. The only issue that calls for determination is whether the Applicant was condemned unheard regarding her post.

It is Mr. Kahunduka's submissions that the issue whether the Applicant was an internal Auditor was not one of the issues framed in the Commission and that in the course of composing the judgment the arbitrator raised it and concluded that the Applicant was not an internal Auditor rather she was an auditing officer. In Mr. Kahunduka's view, this is against the rules of natural justice as the parties were not given opportunity to address on the issue. On his part, Mr. Sanava contested that allegation stating that the Applicant testified in the Commission that her level of education was Advanced Diploma. He averred that auditors and accountants are regulated by the law; therefore, the Commission was justified to find that the Applicant is an

auditing officer as she does not have the requisite qualifications to be an internal Auditor.

I have gone through the CMA records, the learned arbitrator's finding regarding this issue is discussed at pages 5, 6 and 7 of the Award. It was the arbitrator's finding that the Applicant possessed an advanced diploma and did not possess a CPA, which is a mandatory requirement for a person to be an internal auditor. The learned arbitrator was guided by sections 29 and 30 of the Accountants and Auditors (Registration) Act, Cap. 286 [R.E 2002]. He found the letter that employed and titled the Applicant 'Mkaguzi wa Ndani' meaning internal Auditor to be a nullity. Basing on that issue, the Applicant was found to be an Auditing Officer and not an internal auditor as employed.

Having revisited the CMA record, I agree with the Applicant's counsel that the issue whether the Applicant was an internal auditor was not among the issues framed for determination at the hearing of the case. This, as rightly submitted by Mr. Kahunduka, was raised by the Commission *suo moto* in the course of composing the Award. As noted above, this issue to a great had great bearing on the final Award. Seemingly, the Applicant who had been employed as an internal auditor was ordered to be reinstated in a new position as the auditing officer and not as the internal auditor. Also, the Applicant's claims that she had salary arrears were found baseless due to the fact that she was not an internal auditor.

Bearing in mind the effect that was brought forth after the CMA ruled that the Applicant was not an internal auditor but an auditing officer, I am inclined to agree with Mr. Kahunduka that this issue needed to be discussed by the parties. The Commission was duty bound to call the parties to address the Commission on that issue. I am guided by the Court of Appeal decision in the case of ***The Registered Trustees of Arusha Muslim Union Vs. The Registered Trustees of National Muslim Council of Tanzania alias BAKWATA***, Civil Appeal No. 300 of 2017 (unreported) which was faced with the same scenario, and had this to say;

*"It is evident in the present case that the parties were not heard on the issue whether the appellant is an unlawful society with no capacity to own land which was raised and determined by the High Court when composing the judgment. The Judge, therefore, arrived at the **finding that the appellant was an unlawful society with no capacity to own land in flagrant violation of the fundamental right to be heard. Consistent with the settled law, the resultant effect is that such finding cannot be allowed to stand. It was a nullity.**"* (emphasis added)

See also ***Scan-Tan Tours Ltd Vs. The Registered Trustees of The Catholic Diocese of Mbulu***, Civil Appeal No. 78 of 2012 (unreported).

In the instant application, the issue whether the Applicant was an internal auditor was not canvassed by the parties. The Commission raised it *suo moto*, and the Applicant was labelled an auditing officer without being heard. This contravenes the rules of natural justice as enshrined by Article 13(6)(a) of URT Constitution, 1977. It is the requirement of the law and the Constitution that the right to be heard is both elementary and fundamental.

Its violation will lead to nullification of the decision arrived at. In the case of ***Mbeya-Rukwa Auto Parts & Transport Limited Vs. Jestina George Mwakyoma***, Civil Appeal No. 45 of 2000 (unreported), the Court held that:

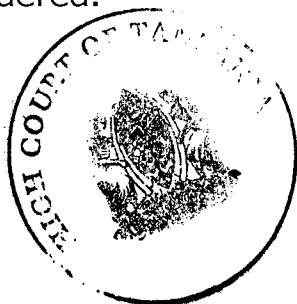
*"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of the equality before the law..."*

See also ***Abbas Sherally & Another Vs. Abdul S. H. M. Fazalboy***, Civil Application No. 33 of 2002 (unreported).

As stated, the right to be heard is fundamental, abrogating it renders the proceedings a nullity. This issue alone sufficiently disposes the application. I see no reasons to deal with the other issues.

The award of the Commission for Mediation and Arbitration is hereby quashed and set aside. I hereby remit back the record to the Commission for it to hear and determine the issue whether the Applicant was an internal auditor and compose a new Award in which all the issues that were framed as well as the above one shall be considered in accordance with the evidence and the law. Since this is a labour dispute, and since this issue was raised by the Court *suo moto* I make no orders as to costs.

It is so ordered.



  
Y. B. Masara

**JUDGE**

3<sup>rd</sup> November, 2020