

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(LABOUR DIVISION)**  
**AT MBEYA**

**REVISION NO. 38 OF 2017**

(Originating from the Complaint Ref. CMA/MBY/82/2016 of the  
Commission for Mediation and Arbitration for Mbeya at Mbeya)

**BOSCO STEPHEN.....APPLICANT**

**VERSUS**

**NG'AMBA SECONDARY SCHOOL.....RESPONDENT**

**RULING**

Date of Hearing: 06/03/2020  
Date of Ruling : 20/03/2020

**MONGELLA, J.**

Through Mr. Samson Suwi as a personal representative, the Applicant filed in this Court an application under section 91 (1) (a) and (2) (c), and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA); Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d); Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. In this application he prayed for the Court to call for and examine the records and proceedings of the Commission for Mediation and Arbitration for Mbeya (CMA) in Labour Dispute No. CMA/MBY/82/2016 in order to satisfy

itself on the legality, propriety, rationality, logic and correctness of the same and thereafter set aside the award issued thereof.

Before the matter could proceed to hearing, however, the Respondent's Advocate, Mr. Baraka Mbwilo raised a concern that he has discovered a legal issue which has an effect of nullifying the records of the CMA. He thus prayed for another date of hearing to be fixed so that counsels for both sides could address the Court on the said issue. The matter was hence fixed for hearing on 06<sup>th</sup> March 2020.

During the hearing, Mr. Isaya Mwanry, learned Advocate appeared for the Respondent and started addressing the Court. He said that when they were preparing for hearing they noted legal issues relating to the procedure invoked in determining this matter before the CMA. He said that the issues are on the way the CMA Form No. 1 was filled compared to the proceedings and the award. He contended that under section 88 (1) of the ELRA the complaint to the CMA must be on prescribed form, which is CMA Form No. 1. That when filling it to be submitted to the CMA the complainant is supposed to show the type of complaint he is taking before the CMA. He argued that the Applicant/complainant while filling the CMA Form No. 1, at page 4 stated that the complaint was breach of employment contract and not unfair termination. He added that the form directs that if the complaint is on termination of employment contract then Part B must be filled as well. That surprisingly, the Applicant/complainant filled the said Part B which does not concern his claim on breach of employment contract.

Mr. Mwanry further argued that the CMA also misdirected itself and determined a complaint of unfair termination while the complaint was on breach of contract. He referred the Court to page 1 of the Award whereby the Hon. Arbitrator was reproducing the framed issues and stated one of the issues to be "*whether the termination was fair.*" He added that the issue of unfair termination was improper and is seen in several pages of the Award and the proceedings. He further contended that the proceedings were also improper as they indicate that the employer started to adduce evidence instead of the complainant who was the first to file the opening statement.

He argued that as per Rule 23 and the proviso thereto of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 67 of 2007, the employer is to start adducing evidence if the complaint is on termination of employment. He argued that under the circumstances, it is clear that the CMA determined a dispute that was not placed before it. That the same creates confusion even at this appeal stage as it is not clear whether the complaint is on breach of contract or unfair termination of employment. He cited the case of **Judicature Rulishael Show & 64 Others v. The Guardian Ltd** [2011/2012] LCCD 20 in which the Labour Court (Rweyemamu, J.) insisted that CMA Form No. 1 is not a sample but a pleading and all reliefs must come from the said form and it forms part of the court records.

Mr. Mwanry further argued that the two are distinct kinds of disputes giving rise to different kinds of reliefs. That while on termination of employment the reliefs are reinstatement, re-engagement and

compensation as provided under section 40 of the ELRA; on breach of contract the reliefs include compensation for the remaining months of the contract. He concluded that, basing on the mistakes committed in the CMA and the Applicant in filling CMA Form No. 1, justice will not be done to either of the parties if the matter is let to proceed. He thus prayed for CMA Form No. 1, the proceedings and the Award to be quashed for being defective and cannot be rectified; or that shall the Court find that the CMA Form No. 1 is correct then the judgment and proceedings be quashed and the matter should be remitted to CMA for a fresh determination before another arbitrator.

In reply, Mr. Suwi agreed to Mr. Mwanry's submission but disputed the reliefs claimed. He argued that the Applicant/complainant was under a fixed term contract of three years. He contended that under G.N. 42 of 2007 an employee under a fixed term contract or specific task cannot claim under unfair termination, but can claim under breach of contract and claim for the remaining period and not for compensation for the remaining period as argued by Mr. Mwanry. He contended that by the nature of the Applicant's contract, the Applicant properly chose breach of contract. However, the CMA misdirected itself and determined a claim of unfair termination instead of breach of contract. In support of his argument he cited the case of **Mtambua Shamte & 64 Others v. Care Sanitation & Suppliers**, Revision No. 154 of 2010 (HC Lab. Div. at DSM, unreported) in which the Court interpreted the types of contracts and reliefs each contract bearer should claim for. He challenged Mr. Mwanry's prayer that CMA Form No. 1 be quashed and argued that the said form,

was properly filled. He prayed for only the proceedings and Award to be quashed.

Mr. Mwanry made a very short rejoinder. He contended that the CMA Form No. 1 is not 100% correct because the complainant filled Part B which he was not supposed to fill. Having done that the matter proceeded wrongly.


I have considered the arguments by both sides and keenly gone through the CMA record. It is undisputed that the Applicant/complainant filed a complaint in the CMA on breach of contract. It is also undisputed that the Hon. Arbitrator entertained a claim of unfair termination instead of a claim on breach of contract thereby rendering the whole proceedings and Award a nullity. The only point of controversy between the parties is therefore whether the CMA Form No. 1 was properly filled by the complainant for it to remain standing.

I have gone through CMA Form 1 particularly Part B which is the centre of the contention between the learned counsels. This part is an additional form for disputes based on termination of employment contract only. In Kiswahili, the heading of Part B specifically states: "**FOMU YA ZIADA KWA AJILI YA MIGOGORO YA KUACHISHWA KAZI TU.**" In plain meaning this part is to be filled by an employee where the claim is on termination of employment and nothing else. Looking at this part, it is crystal clear that the Applicant/complainant filled this part of the form as well. I thus agree with Mr. Mwanry's stance that by filling this part, the form becomes

defective. This is because it has the effect of combining two distinct claims which cannot happen at the same time.


Under the circumstances, as much as the proceedings and Award of the CMA are a nullity for deliberating on a matter not formally placed before the CMA, they are also founded under a nullity for being initiated by a defective pleading, that is, CMA Form No. 1. Basing on this observation I quash the Award, proceedings and CMA Form No. 1 in Complaint No. CMA/MBY/82/2016. The Applicant may wish to institute fresh proceedings in the CMA subject to limitation rules.

Dated at Mbeya on this 20<sup>th</sup> day of March 2020.

  
**L. M. MONGELLA**  
**JUDGE**  
**20/03/2020**

**Court:** Judgment delivered in Mbeya in Chambers on this 20<sup>th</sup> day of March 2020 in the presence of Mr. Steward Ngwale for the Respondent.



  
**L. M. MONGELLA**  
**JUDGE**  
**20/03/2020**