

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CIVIL APPEAL NO. 29 OF 2020

*(Arising from the Ruling and Decree of the District Court of
Musoma at Musoma in Civil Case No. 4 of 2020)*

STEPHEN KIKARE APPELLANT

VERSUS

**TANZANIA INDUSTRIAL FISHING
PROCESSORS ASSOCIATION RESPONDENT**

JUDGMENT

2nd February and 19th March, 2021

KISANYA, J.:

At the District Court of Musoma at Musoma, the appellant sued the respondent for breach of employment contract. He claimed for specific damages of eight million nine hundred ninety-three thousand, three hundred and thirty three shillings (TZS 8,993,333) being the loss and costs incurred by the plaintiff due to the breach of contract, failure to pay salaries and other allowances. The trial court upheld the notice of preliminary objection raised by the respondent that, it had no jurisdiction to entertain and determine the matter. It went on to strike out the appellant's case.

Dissatisfied, the appellant filed the present appeal. He raised the following grounds of appeal:

- 1. That, the trial court erred in law and in fact by deciding that the trial court had no jurisdiction to entertain the matter while it had jurisdiction.*
- 2. That, the trial court erred in law and in fact by disregarding section 61 of the Labour Institution Act, which define who is an employee.*
- 3. That, the trial court erred in law and in fact by entertaining objection which was not based on pure point of law.*

The brief background of this matter is reflected in the plaint. On 1st December, 2012, the appellant was employed by the respondent in the position of inspector. His salary was five hundred thousand shillings (Tsh. 500,000) per month. It appears that he was employed after completing the probation period for three months. He worked with the respondent until 17th February, 2018, when the respondent terminated the employment contract. The appellant claimed before the Court that the respondent had breached the employment contract by failing to issue him prior notice and reasons for termination. The trial court gave the above stated decision which led to this appeal.

When this matter was called on for hearing, the appellant was represented by Mr. Ostack Mligo, learned advocate while Mr. William Muyumbu, learned advocate appeared for the respondent.

At the outset, Mr. Mligo prayed to drop the third ground of appeal. As to the remaining grounds of appeal, the learned counsel faulted the trial court for holding that the matter before it was related to employment. He argued that the appellant and respondent had no employment relationship. His argument was based on the reason that the appellant did not fall in any of the factors for presumption of employment specified in section 61 of the Labour Institutions Act [Cap. 300, R.E. 2019] (the LIA).

It was submitted further that, prior to instituting the suit, the appellant had instituted Labour Dispute No. CMA/MUS/80/2018 before the Commission for Mediation and Arbitration (CMA) at Musoma, which held that the appellant's matter was not related to labour. When probed by the Court as to whether the appellant challenged the said decision, Mr. Mligo replied that, an application for revision of the said decision was withdrawn by the applicant.

The learned counsel went on to submit that the appellant and respondent entered into contract for service which was breached by the respondent. Therefore, it was Mr. Mligo's argument that, the appellant was entitled to

institute a civil suit. For that reason, he urged the Court to quash and set aside the ruling of the trial court and order the case to proceed on merit.

Mr. Muyumbu replied that the employer and employee relationship is governed by the Employment and Labour Relations Act [Cap. 366, R.E. 2019] (the ELRA) and not the Labour Institutions Act (supra) referred to by the appellant's counsel. He submitted further that, the appellant had an employment contract for a specified period of time predicated under section 14(1)(b) of the ELRA.

The learned counsel went on to submit that, the contents of the letter of appointment appended to plaint, the relief sought and the fact that the applicant was under probation period suggest that the appellant was employed by the respondent. Thus, he moved this Court to dismiss the appeal with costs.

In his rejoinder submission, Mr. Mligo argued that there was no contract of employment governed under section 14 of the ELRA. He went on to reply that, annexures appended to the plaint, indicate the terms of contract for service and not contract of service whereby, paragraph 9 of the plaint is in relation to breach of contract of service. He was of the view that the trial Court ought to have heard the parties on merit before disposing of the matter on preliminary objection on point of law.

I have carefully considered the pleadings filed in the trial court, the grounds of appeal and the submission by the parties. It is not disputed that the trial court dismissed the appellant's case for want of jurisdiction. Its decision was based on the fact that the matter before it was based on employment of contract and that the jurisdiction to determine dispute arising thereto is vested in the Commission for Mediation and Arbitration. Did the trial court error in its decision? In my view, this issue suffices to dispose of this appeal.

The question of jurisdiction raised before the trial court is fundamental. It can be raised at any stage of the suit. A trial proceeding conducted by the court or tribunal which lacks jurisdiction is a nullity. The law is settled that jurisdiction of the court or tribunal is created by the statute and that parties cannot agree to confer jurisdiction to a court which has no jurisdiction. This stance finds support in the case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017, CAT at Mwanza (unreported) when the Court of Appeal cited with approval the decision of the erstwhile East African Court of Appeal in **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199 at 202 that:

*"All the courts in Tanzania are created by statute and **their jurisdiction is purely statutory**. It is an elementary*

principle of law that parties cannot by consent give a court jurisdiction which it does not possess. "[Emphasis added]"

Now, what was the nature of case filed before the trial court? While Mr. Mligo is of the view that it was not related to employment contract, Mr. Muyundu holds the opinion that, it was based on the employment contract. The said rival argument prompted me to examine the pleading filed before the trial court due to the settled law that, parties are bound by their own pleadings. The nature of claim or suit subject to this appeal is reflected in paragraphs 3, 4 and 9 of the plaint which are reproduced hereunder:

- 3. That, the plaintiff claims against the Defendant special damages to the tune of Tshs. 8, 933,333/= to say Eight million nine hundred and thirty three thousands, three hundred and thirty three Tanzania shillings only from the defendant as specific damages for the loss incurred by the plaintiff due to the breach of contract failure to pay salaries and other allowances.*
- 4. That, on 18/8/2012 the plaintiff was given an appointment letter in relation with the application for job he applied for, and he was informed to report to his employer on 13/8/2012 the plaintiff signed the employment contract with the defendant; Whereas they agreed payment salary of Tshs. 500,000/ (Five Hundred Thousand Shillings*

Only) per month and that, the contract will be renewed every time after the collapse of two years.

9. That, the Defendant decided to terminate the Plaintiff without prior notice and without any reason and by failing to adhering to the procedures of breaching the contract which was set out by the parties...

Reading from the above paragraphs of the plaint, it is apparent that the appellant pleaded the following facts. **One**, that he had an employment contract with the respondent. **Two**, he was terminated from employment without notice and reasons. **Three**, he claimed, among others, for salary and other allowances. Hence, it is common ground that the matter before the trial court was a dispute arising from application or implementation of a contract of employment. In other words, it was a labour matter or complaint. Mr. Mligo's argument that the appellant had contract of service and not contract for service is devoid of merit due to the fact that the same is not supported by what was pleaded in the plaint.

Now, pursuant to section 3 of the ELRA, the term "labour matter" means any matter relating to employment or labour relations while the word "complaint" is defined to mean dispute arising from the application,

interpretation or implementation of an agreement or contract with an employee.

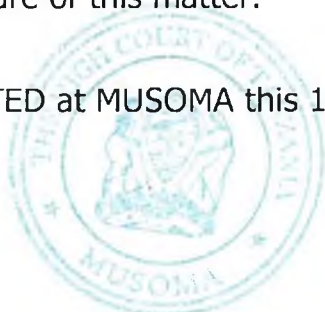
This brings us to another question whether the trial court had jurisdiction to try matters based on employment contract. In terms of section 94 (1) of the ELRA and section 51 of the LIA, jurisdiction over the application, interpretation and implementation of the provisions of the ELRA and over any employment or labour matter falling under common law, tortious liability, vicarious liability or breach of contract is exclusively vested in the Labour Court. According to section 91(3)(b) (i) of the ELRA, the Labour Court may decide to refer the matter filed before it to the CMA. Likewise, the provision of sections 86 and 88(1) (b) of the ELRA empowers the CMA to mediate and/or arbitrate complaint over breach of contract or any employment or labour matter falling under common law, tortious liability and vicarious liability. The arbitration award made by the CMA is challenged by way revision under section 91 of the ELRA.


The appellant in the case at hand decided to institute a case premised on employment contract in the District Court. However, District Court is not one of the institutions mandated to resolve labour disputes. Mr. Mligo contended that, the appellant's dispute before the CMA on this matter was struck out for want of jurisdiction. In my opinion, that decision if any, was

not final. It was subject to revision by the Labour Court. As rightly held by the trial court, there is no evidence to show that, this Court made a decision on the issue whether the appellant was not employed by the respondent and directed the appellant to institute a civil case.

All said, I am satisfied that, in view of what was pleaded in the plaint, the matter before the trial court was founded on employment contract. In that regard, the trial court was right in upholding the preliminary objection because it lacked jurisdiction to try the matter. Consequently, I find the appeal meritless and dismiss it but, with no order as to costs due to the nature of this matter.

DATED at MUSOMA this 19th day of March, 2021.




E.S. Kisanya
JUDGE

Court: Judgment delivered through virtual court this 19th day of March, 2021 in the presence of Mr. Ostack Mligo, learned advocate for the appellant and Mr. William Muyumba, learned advocate for the respondent.
B/C Simon- RMA present.


E. S. Kisanya
JUDGE
19/03/2021