IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION 35 OF 2020

(Originating from Labour Dispute No. CMA/ARS/MED/332/2010)

1. KAPISTRANT CHALE
2. JONAS SIMBA
3. ROSE M. AUGUSTINO
4. MICHAEL MOSH
5. HABIBU ISSA
6. SAFIEL R. MSHANA
7. WHITESON SIMFUKWE
8. WILLIAMSON MUNISI
9. HAPIFANYA MGOLE
10. GRACE SHANI
11. MADINA PALLANGYO
12. LUCY Z. MOLLEL
13. OBEDI ISSACK
14. SASATI NYASIBORA
15. HAMISI SALUM
16. SALUM ALLY
17. MARY MBAWALA
18. AUGUSTINO LEKULE
19. ROCKY CLEMENCE
20. EVELINE LAIZER
21. JULIUS KILASARA
22. GRACE WILSON
23. JUMA MAFANO
24. CHRISTOPHER KIHOMWE
25. MARIAM MPOMBWE
26. ROBINSON C. MARUWA
27. NSAJIGWA MNDEMELE

APPLICANTS

28.	LEMBRIS MOLLEL	
29.	JOYCE NYANGE	
30.	AGNES SINGA	
31.	ABUTWALI ALLY	
32.	ATHANAS ALLY	
33.	JOHN MHALA	
34.	EVARIST MOLLEL	
35.	HOPE MNYIKA	
36.	JOVITA COSTAS	
37.	ELIWAERA ASSEY	
38.	JULIUS LOY	
39.	TWAHA S. MUSHI	
40.	JUMA NDJEMBI	APPLICANTS
41.	HAWA MGAYA	
42.	VENERANDA ALOYCE	
43.	RICHARD KIMEI	
44.	ROBERT SALIJA	
45.	STEVEN S. LYMO	
46.	ANDREA SUMMARY	
47.	NAFTALI MABARUKU	
48.	WILDA OMARI	
49.	DAVID MASAWE	
50.	NICHOLAUS NGAMILA	
51.	VINCENT UTUOH	

VERSUS

NEW SAFARI HOTEL (1967) LTD ..... RESPONDENT

JUDGMENT

24/3/2021 & 5/5/2021

ROBERT, J:-

Aggrieved by the award of the Commission for Mediation and Arbitration [hereinafter referred to as the CMA] in Labour Dispute No.

CMA/ARS/MED/332/2010 dated 22/3/2011, the Applicants filed this application seeking to revise and set aside the CMA award. The application is supported by a sworn affidavit of Mr. **Kapistrant Chale**, one of the Applicants who is appointed to represent and swear affidavits on behalf of the others.

In brief, the details relevant to the background of this application dates back in 1998 when the Applicants who were the employees of the Respondent (New Safari Hotel (1967) Ltd) were retrenched from their respective services. In November, 2000 the Applicants instituted Employment Cause No. 57 of 2000 at the District Court of Arusha claiming underpayment of terminal benefits and allowances. The District Court decided in favour of the Applicants. The Respondent appealed successfully to the High Court vide Civil Appeal No. 19 of 2004. The High Court made a finding that the proceedings at the District Court were flawed and advised the Applicants herein to commence appropriate proceedings in a court of competent jurisdiction. However, the Applicants decided to lodge a Notice of Appeal to the Court of Appeal of Tanzania which was later withdrawn. After withdrawal of the Notice of Appeal, the Applicants filed Labour Dispute No. CMA/ARS/MED/332/2010 at the CMA. The CMA award declared that the Commission had no jurisdiction to entertain the matter

since the cause of action took place before its inception and further that the dispute was already decided by the High Court therefore the proper forum to determine the matter would be the High Court, Labour Division and not the CMA. Aggrieved, the Applicants filed this application seeking to revise the CMA decision.

Parties in this matter were represented by Messrs Geoffrey Mollel and Alute Mughwai, learned counsel for the Applicants and Respondent respectively. Hearing proceeded by way of written submissions as desired by the learned counsel for both parties and ordered by the court.

Submitting in support of the application, counsel for the Applicants made reference to the reasons in support of the revision as stated in the supporting affidavit. He revealed the reasons to be:

(a) That the Mediator erred in law and fact by ordering that the commission lacks jurisdiction to entertain the complaint which has been in the High Court;

(b) That the Mediator erred in law and fact for deciding that it lacked jurisdiction for a matter that occurred before its inception without determining the Condonation Application (CMA F7) which was filed as part of the application;

(c) That at the time of filing the application CMA – Commission for Mediation and Arbitration was proper forum for filing the application according to the coming into being of the new labour laws;

(d) That the Mediator erred in law and fact by deciding to dismiss the matter for wants of representative suit instead of striking out the complaint;

(e) That the Mediator erred in law and fact by deciding that the Applicants if wish to persuade the complainant can file the complaint can file the matter with High Court Labour division.

Amplifying on the listed grounds for revision, he decided to drop ground (d) above and opted to argue ground (b) and (c) together as well as ground (a) and (e) together.

Highlighting on ground (b) and (c) above, he submitted that the CMA was the proper forum for filing the Applicants' complaint after the enactment of the new labour laws. He argued that the Applicants' complaint was filed together with the application for condonation but the Commission dismissed/rejected their complaint without determining the reasons why the complaint was filed late. He maintained that the Commission was supposed to determine the application for condonation

before establishing whether it had jurisdiction to entertain the dispute filed before it or not. To buttress his argument he cited the case of **Moshi University College of Cooperative and Business Studies (MUCCOBS) vs Christina M. Mahundu**, Lab Div. MTR Rev. No 21 of 2013, 05/06/15 LCCD Part I of 2015.

He faulted the Mediator for ordering that the Applicants' dispute was supposed to be referred to the High Court Labour Division. He argued that, it is a requirement of the law that before taking a dispute to the High Court Labour Division, it must first be filed before the commission for Mediation and Arbitration under section 86 of the Employment and Labour Relations Act, No. 6 of 2004 read together with section 94(2) (a) (b) of the Act.

Coming to grounds (a) and (e) above, he submitted that after establishment of the CMA under **Labour Institution Act** No. 7 of 2004 and Employment and Labour Relations Act, No. 6 of 2004 and its Rules particularly the GN No. 42, 64, 65, 66 and 67 all of 2007, the CMA had proper jurisdiction to entertain the matter at the time.

He maintained that, in the Judgment of the High Court, Arusha registry in Civil Appeal No. 19 of 2004, at page 12 the Court directed the Respondents (Applicants herein) that they were at liberty to com nence

appropriate proceedings at a court of competent Jurisdiction. He argued that the court with competent jurisdiction to entertain the matter in the year 2009 was the CMA and the laws applicable were Employment and labour Relations Act No. 6 of 2004 and Labour Institutions Act No. 7 of 2004 as well as the Regulations of 2007.

He argued that the Applicants were right to file their complaint with the CMA because if they would go directly to the labour court their complaint could be dismissed for failure to abide with section 94 (2) of the Act. He submitted further that, the Mediator was misconceived to think that the complaint was brought under section 42(2)(3) of Written Laws (miscellaneous Amendments) No. 2 of 2010 while the matter was brought as a fresh complaint by filing CMA F1 accompanied with CMA Form No. 7.

Thus, he submitted that CMA had jurisdiction to entertain the complaint after determination of the application for condonation. He prayed for the court to quash the ruling of the Commission and order the file be remitted before the commission for proper hearing of the complaint.

Opposing the revision, Counsel for the Respondents began his submissions by pointing out a clerical error in the title to the Applicants'

Written submissions which indicates this application as Revision No. 143 of 2017 instead of Revision No. 35 of 2020.

Coming to the substance of this application, the learned counsel started with grounds (b) and (c) above which appears in paragraph 12(b) and (c) of the supporting affidavit. He submitted that the two grounds do not have any merit. He argued that the issue of jurisdiction was a condition precedent to the CMA becoming seized of the application for condonation and of the substantive labour dispute itself. He observed that any labour dispute commenced in the CMA is processed in two stages. It must first go through the process of mediation and, if not successful, then go through arbitration.

He submitted that since there was an application for condonation due to the delay in filing the complaint, the Mediator had to determine the question of jurisdiction first. To support this argument he made reference to Rule 15 of the **Labour Institutions (Mediation and Arbitration)** Rules 2007, GN No. 64 of 2007 which provides that:

> "Where it appears during mediation proceedings that a jurisdictional issue relating to mediation has not been determined, the Mediator shall require the referring party to prove that the Commission has the Jurisdiction to mediate the dispute"

He maintained that, since the Respondent had raised the issue of Jurisdiction before the commencement of mediation, the Mediator had to dispose the issue of jurisdiction before he could continue with the hearing of condonation. He submitted that according to rule 29 of the cited Rules, the issue of jurisdiction can be raised in any application including application for condonation filed at the CMA.

On the question whether the CMA had the requisite jurisdiction to entertain a labour dispute where the cause of action arose before the commencement of the new labour laws he submitted that, the Employment and Labour Relations Act, No. 6 of 2004 repealed the old labour laws with significant savings and transitional provisions, under the 3rd schedule to the Act sub paragraph (2) of paragraph 11 provides that;

> "Any claim arising under the repealed laws before the commencement of this Act shall be dealt with as if the repealed laws had not been repealed"

He submitted that, since the dispute between the parties arose in 1998 and was finally decided by the High Court in March, 2009 the Applicants had to commence fresh proceedings as "if the repealed laws had not been repealed". He maintained that the Applicants were at liberty to institute a fresh labour matter in the District Court under section 130

of the Employment Ordinance Cap. 366 or they could have filed a trade dispute in the industrial court of Tanzania under the relevant provisions of the Industrial court of Tanzania Act No. 41 of 1967 (as amended).

Expounding further, he maintained that the CMA had no jurisdiction on labour disputes that had matured before the new labour laws which established the CMA came into force. He observed that when the Judge in Civil Appeal No. 19/2004 said that the Applicants were free to commence fresh proceedings she deliberately said the proceedings were to be instituted in a "court" of competent jurisdiction. While the Judge was aware of the existence of the CMA, she did not use the word "Commission".

Coming to the last ground stated in paragraph 12(e) that the Mediator erred in law and fact by deciding that if the Applicants wish to pursue the complaint they can file the complaint with the High Court Labour Division. He merely advised the Applicants on what he believed was a proper course to take. However, he maintained that, since the Applicants did not heed to the advice given this could not be a legitimate ground for revision because the Applicants did not suffer any injustice.

Coming to the question whether the Mediator was wrong to advice that the Applicants could have applied the provisions of section 42(2)(3)

of the Written Laws (Miscellaneous Amendments) No.2 Act No. 11 of 2010 to vindicate their rights. He submitted that, the Mediator got himself mixed up when he made reference to the provisions of section 42(2)(3) because section 42 referred above does not contain subsection (2) and (3) referred to. He clarified that, section 42 of the cited Act amended the 3rd Schedule to the Employment and Labour Relations Act, No.6 of 2004 by deleting paragraph 13 and substituting for it a new paragraph 13. Thus, reference to section 42(2)(3) of the Act No. 11 of 2010 was a reference to paragraph 13(2)(3) of the third schedule to the Act No. 6 of 2004.

He submitted further that, if the Applicants wanted their labour dispute to be dealt with by the Commission they had to engage the provisions of paragraph 13(5) of the 3rd Schedule to the Act No. 6 of 2004 as amended by section 42 of the said Act No. 11 of 2010 which provides that:

> *"The Commission shall have powers to mediate and Arbitrate all disputes originating from the repealed laws brought before the Commission by the Labour Commission and all such disputes shall be deemed to have been dully instituted under section 86 of the Act."*

He maintained that, since the present matter was not instituted by the Labour commissioner on behalf of the Applicants the Commission was

not a proper forum to entertain the matter as it was not clothed with the necessary jurisdiction. That said he refrained from submitting on the ground raised in paragraph 12(a) of the Applicant's affidavit on want of jurisdiction on the reason he had exhausted the subject of jurisdiction. Accordingly, he prayed for this application to be dismissed.

In a brief rejoinder, counsel for the Applicants reiterated that since Civil Appeal No. 19 of 2004 was decided on 5th March, 2009, the question for determination is which court had competent jurisdiction to determine this dispute on 5th March, 2009 or thereafter. He submitted that since the Employment and Labour Relations Act No. 6 of 2004 and its Regulations came into effect in 2007 before the decision in 2009, the implication is that the Law applicable is Employment and Labour Relations Act No. 6 of 2004. He argued that the 3rd schedule of the Act is of no relevance in this dispute because the matter was never filed before conciliation board under paragraph 8(2) and (3) of the 3rd schedule to the Act or industrial court as required under paragraph 7(2), 11(2) and (3) of the third schedule to the Act.

He submitted further that since this dispute had never been before the conciliation board or the commissioner, the argument that the CMA could have jurisdiction if the dispute was brought before it by the

commissioner under section 42 of Written Laws (Miscellaneous Amendments No.2) Act No. 11 of 2010 is of no relevance and misleading because the dispute had not passed the test of section 86 of the Employment and Labour Relations Act, No. 6 of 2004. That is the reason the matter was filed under section 86(1) of the Act.

In the light of the above, he prayed for this court to quash the ruling of the CMA and order for the matter to be remitted back to the CMA for hearing of the complaint and condonation.

Having swotted the records and submissions of both parties, I find the central question for determination to be whether the CMA was right for deciding that it lacked jurisdiction to entertain Labour Dispute No. CMA/ARS/MED/332/2010 for the reason that the matter in dispute arose before the enactment of the Employment and Labour Relations Act, No. 6 of 2004.

It is important to note that prior to the filing of Labour Dispute No. CMA/ARS/MED/332/2010 the Applicants had instituted Employment Cause No. 57 of 2000 against the Respondent at the District Court of Arusha claiming underpayment of their terminal benefits and allowances following termination of their employment contracts on 29/5/1998. Although the District Court had decided in the Applicants' favour, the High

Court (R. Sheikh, J) in Civil Appeal No. 19 of 2004 made a finding that the proceedings of the District Court were flawed and decided that the Applicants herein were at liberty to commence appropriate proceedings in a court of competent jurisdiction. Hence, the Applicants herein decided to file Labour Dispute No. CMA/ARS/MED/332/2010 at the CMA.

The CMA decided that since the cause of action in this dispute arose four years prior to the enactment and commencement of the Employment and Labour Relations Act, No. 6 of 2004 and Labour Institutions Act, No.7 of 2004 which established the CMA, then CMA had no jurisdiction to entertain this dispute.

As rightly argued by the learned counsel for the Respondent, the Employment and Labour Relations Act, No. 6 of 2004 repealed the old labour laws with significant savings and transitional provisions. Paragraph 11 subparagraph (2) of the 3rd schedule to the Act stipulates that, any claim arising under the repealed laws before the commencement of the Act had to be dealt with as if the repealed laws had not been repealed. It is obvious that the cause of action in this dispute arose prior to the enactment of the new labour laws. Hence, guided by the cited provision, the Applicants were required to institute a labour dispute by using the repealed laws applicable when the cause of action arose.

The argument by the learned counsel for the Applicant that CMA had jurisdiction to entertain the matter because the Employment and Labour Relations Act No. 6 of 2004 and its Regulations came into effect before the decision of the High Court in Civil Appeal No. 19 of 2004 which was decided on 5th March, 2009 is not tenable because the Applicants' claim did not arise after the determination of Civil Appeal No. 19 of 2004, it arose prior to the enactment of the Employment and Labour Relations Act, 2004 and therefore should have been dealt with as if the repealed laws had not been repealed.

However, this Court is aware that in May, 2010 paragraph 13 of the 3rd Schedule to the Employment and Labour Relations Act was deleted by section 42 of the **Written laws (Miscellaneous Amendment)** No. 2 of 2010 and substituted with the new paragraph. Subparagraph (5) of the new paragraph provides that:

> "The Commission shall have powers to mediate and arbitrate all disputes originating from the repealed laws brought befcre the Commission by the Labour Commissioner and all such disputes shall be deemed to have been dully instituted under Section 86 of the Act"

The quoted provision conferred jurisdiction to the CMA to entertain labour disputes originating from the repealed laws brought to it by the Labour Commissioner.

CMA records indicate that, the Applicants filed their dispute at the CMA on 18/11/2010. This was six months after the enactment of the **Written laws (Miscellaneous Amendment)** No. 2 of 2010 which gave jurisdiction to the CMA to entertain disputes originating from the repealed laws which are brought before it by the Labour Commissioner. Accordingly, the Applicants' complaint could only be entertained by the CMA if it was referred to the CMA by the Labour Commissioner.

This court is equally aware that, in 2016 paragraph 13(5) of the 3rd Schedule to the Employment and Labour Relations Act, No.6 of 2004 was amended by the Written Laws (Miscellaneous Amendment) Act, No. 4 of 2016 which deleted the words "by the Labour Commissioner". The new amendment had the effect of conferring jurisdiction to the CMA to hear and determine disputes originating from the repealed labour laws without being referred to it by the Labour Commissioner. However, this amendment took place more than five years after the CMA decision and therefore not applicable in this case.

In the light of the foregoing, this court finds and holds that the CMA was right in holding that it lacked jurisdiction to entertain Labour Dispute No. CMA/ARS/MED/332/2010. However, given the legal position described above, the Mediator was mistaken by advising that the Applicants could pursue their right by filing a complaint directly to the High Court Labour Division. Nonetheless, this Court is in agreement with the learned counsel for the Respondent that the Applicants were not prejudiced by this advice because they did not act on it.

The Applicants also faulted the CMA for determining the issue of jurisdiction without deciding first on the application for condonation. I have noted from the CMA records that the issue of jurisdiction was raised by the Respondent prior to the commencement of mediation. This court finds that it was for the issue of jurisdiction to be raised and taken up at the earliest opportunity, in order to save time, costs and nullity of the proceedings in the event the objection is sustained.

Rule 15 of the **Labour Institutions (Mediation and Arbitration)** Rules, G.N No. 64 of 2007. It provides that;

"Where it appears during mediation proceedings that a jurisdictional issue relating to mediation has not been determined, the Mediator

shall require the referring party to prove that the Commission has the Jurisdiction to mediate the dispute"

On the foregoing, I find no reason to fault the decision of the CMA. Consequently, I dismiss this application for lack of merit.

It is so ordered.

K.N.ROBERT
JUDGE
5/5/2021