

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

**AT SHINYANGA**

**CIVIL APPEAL NO. 6 OF 2021**

*(Arising from the Judgment and Decree of the District Court of Kahama in Civil Case No 15 of 2018 dated 27/11/2020)*

**CLEMENT GEORGE MWAKIBINGA.....APPLICANT**

**VERSUS**

**CRDB BRANCH MANAGER-KAHAMA.....RESPONDENT**

**GENERAL MANAGER .....RESPONDENT**

*(PANGEA MINERALS LTD-BUZWAGI GOLD MINE)*

**JUDGEMENT**

*30/06/2021 & 30/07/2021*

**MKWIZU, J.:**

On 4/4/2011 second respondent employed the appellant as a security officer. The contract between the two was however terminated on 24/11/2016. Aggrieved with the termination, appellant referred the matter to the Commission for Mediation and Arbitration (CMA) Shinyanga. The CMA found for the appellant, it on 18/9/2017 declared the appellant's termination unfair and ordered reinstatement without loss of earning. 2<sup>nd</sup> respondent opted to exercise his legal option to pay the appellant compensation in lieu of reinstatement and all his entitlement as per the CMA award. On

17/11/2017, 2<sup>nd</sup> respondent deposited into the appellant account initial amount of 15,441,857.45.

Appellant went back to the CMA for the interpretation of the award. On its order dated 24/1/2018 (exhibit P2) the Commission ordered the 2<sup>nd</sup> respondent to pay in addition to the amount earlier on paid to the appellant subsistence allowance from 24/10/2017 to the tune of 611,577.55; unpaid leave to the tune of 183, 530.95 and Transportation allowances to the turn of 40,000/= and one month salary in lieu of notice, 42 days severance allowance, 27 days earned as repatriation costs from Kahama to Mwadui Shinyanga.

On 27/11/2017, 2<sup>nd</sup> respondent deposited in the appellants' account no. 0152361609600 a total sum of 28,408,374.62 through transfer via its CITI Bank account the transaction which was later on reversed. On 11/12/2017 appellant noticed the said reversal of the transaction by the 1st respondent. Unhappy, appellant instituted a suit against the respondents at the Kahama District Court for;

- i. Payment of Tsh 10,556,142.55 being outstanding balance of his entitlements by the defendants*
- ii. Payment of Tshs 5,000,000/= or as may be assessed by the court as general damages*
- iii. Interest of the decretal amount at 17% till payment in full*
- iv. Costs of the suit be provided*

*v. Any other order or relief may this court deem fit and just to grant"*

The district court dismissed the entire suit for lacking in merit. It granted the respondents costs of the suit. Dissatisfied, appellant has come to this court with two grounds of appeal that;

- 1. That the Honourable trial Magistrate erred in law and fact when he dismissed the appellant's suit without considering that the appellant has proved his case at a legal required standard in civil suit*
- 2. That the trial Resident magistrate decision was biased because he failed to consider the evidence adduced by the appellant.*

At the instance of the parties, the appeal was heard by way of written submissions. Both parties complied with the submissions filling schedule.

In support of the appeal appellant submitted that after the CMA's award, 2<sup>nd</sup> respondent paid him Tsh. 15, 441,857.45 by 17/11/2017. Thereafter, the appellant received a drawn order from the CMA (exhibit P2) in which 2<sup>nd</sup> respondent was ordered to pay him all his entitlements. 2<sup>nd</sup> respondent agreed to pay the appellant a total sum of 28,408,374.62 as per final salary slip dated 20/1/2017. The said amount were credited into his CRDB account No 0152361609600 at Kahama Branch but the transaction was reversed without his consent. His query to the 1<sup>st</sup> respondent on the whereabouts of his money was without answers.

Appellant submitted further that, he in total received a sum of 18,551.356.81 from the 2<sup>nd</sup> respondent out of 28,408,374.62 and therefore his claim is for specific damages of 9,857,017.81 being an outstanding balance of his entitlements and general damages to the turn of Tsh. 5,000,000/=.

In his reply submission, 1<sup>st</sup> respondent urged that first respondent had received a swift message from City bank ordering them to deposit TZS. 28,408,374.62 to account number 0152361609600 owned by the Appellant and the said cash was deposited as instructed on 28/11/2017. The confirmation of payment was communicated to City bank with immediate effect. Later, 2<sup>nd</sup> respondent instructed the first respondent to reverse the transaction via exhibit D-2 as it was erroneously made, whereas; instead of ordering the deposit of TZs. 2,400,000.00 they ordered the deposit of TZs. 28,000,000.00, and the same was accordingly reversed on 11/12/2017.

1<sup>st</sup> respondent was of the view that, the reversal of the said transaction of TZs. 28,000,000.00, was justified since it was acted upon the instruction of the sender of the money, and the appellant was advised to contact the sender who had full mandate over the said cash. They prayed for the dismissal of the appeal with costs.

On her party, 2<sup>nd</sup> respondent's counsel submitted that Appellant was paid the awarded sum in 3 instalments, and this was so because the CMA did not compute the sum payable to the Appellant and therefore the parties found themselves seeking classifications every now and then. He elaborated further

that 2<sup>nd</sup> Respondent intended to pay the Appellant the sum of Tshs. 2,410,574 only but mistakenly instructed the 1<sup>st</sup> Respondent through his banker CITI Bank for the deposit of Tshs. 28,408,374.62. On reconciliation and having noted the mistake, the 2<sup>nd</sup> respondent requested the reversal of the same through the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent complied and thus, the money was returned to its lawful owner, the 2<sup>nd</sup> Respondent in order for her to make a transfer of the proper amount of Tshs. 2,410,574 which was deposited on 3/1/2018, and another amount of Tshs. 699,162.74 deposited on 25/1/2018 to complete payment of appellant's entitlements.

Submitting on the claim by the appellant that 2<sup>nd</sup> respondent had agreed to pay the appellant entitlements amounting to Tshs 28,408,374.62. 2<sup>nd</sup> respondent's counsel said Appellant failed to prove that such agreement ever existed at the trial court. If anything, the Appellant's base of claiming such amount is because it was deposited into his account.

In addition to that, 2<sup>nd</sup> respondent's counsel stated that Exhibit P3, a salary slip which appellant claims to be the base of his claim, contains the payment of his initial entitlements of Tshs. 15,441,857.45. It does not have any admission by the 2<sup>nd</sup> Respondent to pay the claimed sum of TZs 28,408,374.62. Citing the cases of **Daniel Apael Urio V. Exim (T) Bank**, Civil Appeal No. 185 of 2019 and **Barelia Karangirangi V. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017, (all unreported), the counsel stressed that Appellant has failed to discharge his burden of proving the existence of such agreement, and therefore the Trial Court cannot be faulted

for making a finding in favour of the respondents. His contention was that if the basis of the appellant's claim was on breach of bank-customer relationship, stated the 2<sup>nd</sup> respondents counsel, the Appellant could have maintained a claim of Tshs. 28,408,374.62 deposited in his account but instead, appellant claim is pegged at Tsh. 9,857,462.81 part of his employment entitlement which was to be claimed by way of an application for Execution before the High Court Labour Division in terms of **Section 88 (1) and (2) the Employment and Labour Relations Act Cap 366 RE 2019** and not by filing a fresh suit.

Alternatively, the counsel submitted, since the Appellant did not dispute the legality of reversal of the amount at the trial court, he ought to have proved that per the CMA award he was actually entitled to the said Tshs. 28,498,374.62 and that after different payments made to him, he was left with the balance that he is now claiming. Citing the case of **Zuberi Augustino V. Anicet Mugabe (1992) T.L.R 137** stating that ***"specific damages must be specifically pleaded and proved"***. Appellant failed to prove the specific damages allegedly incurred, and therefore the trial court was justified to dismiss the suit, he stressed.

In relation to a general damage claims by the appellant, counsel for the 2<sup>nd</sup> respondent submitted that Appellant failed to establish to the required evidential standard that he had suffered loss, and to what position he ought to be restored to. He, while relying on the decision of **Dharamshi V. Karsan**

[1974] 1 EA 41, the learned advocate prayed for the dismissal of the appeal with costs.

Re-joining, appellant submitted that, issuance of a salary slip after the crediting of his account by the 2<sup>nd</sup> respondent is a proof that he was entitled to such sum of money. Appellant invited the court to see exhibit P3 for clarification. On the applicability of section 88 (2) of the Employment and Labour Relations Act in his claim, appellant said, the section does not apply because 2<sup>nd</sup> respondent had already paid him his dues except that he reversed the transaction.

Appellant submitted further that; issues of general damages fall under discretion powers of the court. He insisted that he had incurred economic loss due to the respondent's illegal act and therefore the claim should be allowed. The rest of his rejoinder submissions are reiterations of his submission in chief.

I have carefully examined the grounds of appeal, the records of the proceedings from the trial court as well as the parties' submissions. The issue for consideration is on whether the case at the trial court was proved to the required standard. But before I go into that, I wish to state here that appellant's claim together with his written submissions filed in this court has exercised my mind greatly particularly on whether the claim by the appellant was filed in a proper court or not. This took me to the consideration of an issue raised by the respondent and argued by both parties in respect

of the applicability of section 88 (2) of the ELRA on the appellant's claim which tends to challenge on how appellant's claim landed into the District Court as a normal civil suit. This discussion at this level of the proceeding is supported by the decision in Tanzania **revenue authority V Kotra Company Limited**, Civil appeal No 12 of 2009 CAT (Unreported) where it was stated inter alia that:-

*"Before an appeal is determined on the merits on issues not touching on the jurisdiction(s) of the court (s) below, **it must first be certain that the proceedings giving rise to the appeal were competently before that court or those courts. This is because a judgement in an appeal from proceedings which were a nullity is also a nullity.**"*  
(Emphasis added).

It is clear from the appellant own plaint, that his claim as stated herein above arose out of the CMA award. This is vividly established by the particulars of the claim as described in paragraph 5 and 6 of the plaints. It is evident that plaintiff claims of 9,857,017.81 is an outstanding amount of his entitlements from the CMA award. My scrutiny of the pleadings is fortified by the directives of the Court of Appeal in the decision of The **Honourable Attorney General V. Reverend Christopher Mtikila**, Civil Appeal No. 45 Of 2009, Cat [Unreported], where in defining the word jurisdiction the Court said:

*"What is Jurisdiction? - According to STROUD'S JUDICIAL  
DICTIONARY OF WORDS AND PHRASES:*



*“In the narrow and strict sense the jurisdiction of validity constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference.*

- 1) To the subject matter of the issue or*
- 2) To the persons between whom the issue is joined*
- 3) To the kind of reliefs sought or to any combination of these factors.”*

As stated above, going by the issues raised, parties to the suit and the reliefs sought by the appellant at the district Court all suggests that the claim is a labour claim arising out of the CMA award. It is also not in dispute that parties were at the execution process at the institution of this suit. Appellant had stated in his plaint that he has received a total of 17,852,232.07/ out of the awarded amount by the CMA. Paragraph 6 of his plaint partly reads:

*“That from the particulars as stated in paragraph 5 (i) to 5(VI) above the plaintiff has received a total sum of Tshs. **17, 852, 232.07** from the 2<sup>nd</sup> respondent out of Tshs. 28, 408,374.62...”*

That being the case therefore, there is no doubt that the issue between the appellant and 2<sup>nd</sup> respondent was purely execution of the CMA award issue of which execution proceedings would have served the purpose. The labour court would have evaluated the awarded sum, the settled portion and the

remaining sum if any and give an appropriate order. As rightly stated by the 2<sup>nd</sup> respondent's counsel, CMA awards are executed under section 88 (2) of the Employment and Labour relations Act which reads;

*"(1) N/A.*

*(2) An arbitration award made under this Act may be served and executed in the Labour Court as if it were a decree of a court of law"*

Responding to whether the above section is applicable in his claim or not, appellant said in paragraph 2 of the second page of his rejoinder written submissions: -

*"... with regards to proper manner for claiming deducted termination benefits by way of application for Execution to CMA as per section 88 (2) of the employment and Labour Relations Act the said section does not apply because the 2<sup>nd</sup> respondent had already complied to pay the appellant all his entitlements but later on unlawfully decided to reverse the said amount in collaboration with the 1<sup>st</sup> respondent".*

I do not buy the appellant's submissions above. The fact that 2<sup>nd</sup> respondent, was yet to finalize the payment as per the CMA award, the unpaid amount if any, remained amount could have only be realized through execution proceedings. A mere fact that the respondents reversed the bank transaction, under the circumstances of this case does not change the claim

to a normal civil suit determinable by a normal civil courts. In the Indian case of **RAM SINGH vs. GRAM PANCHAYAT** (1986) 4 SCC 364; AIR 1986 Sc 2197 the Supreme Court of India, held that in cases where the civil court's jurisdiction is excluded, ***the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint.***

It should be stressed here that, the court's or tribunal's power and competency to adjudicate over a matter is a jurisdictional issue. It is conferred by a statute and not by the wishes or willingness of the parties. Neither can the parties, magistrate, judge or even the court or tribunal can cloth itself with. Capitalizing on this issue, Court of Appeal in **Fanuel Mantiri Ng'unda Vs Herman Mantiri Ng'unda & 20 Others**, (CAT) Civil Appeal No. 8 of 1995 (unreported) had held thus:-

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

In **Zanzibar Insurance Limited vs. Rudolf Temba**, Commercial Appeal No. 1 of 2006, High Court Commercial Division, Dar es Salaam (unreported) was held *inter*.

*"the issue of jurisdiction is so fundamental as it goes to the roots of justice, the court must always be satisfied that it has jurisdiction to determine the matter before it, the court may raise it **suo moto** whenever appropriate".*

Deliberating on a similar issue, the court in Attorney **General V. Loha Y Akonaa Y & Another** (1995) TLR 80 observed thus at page 92:-

*"... courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum..."*

For the foregoing reasons, I am of the considered view that the Civil suit filed at the District Court was a misconception. The District Court lacked jurisdiction to entertain the appellant's suit. The Trial for that reason was a nullity. This ground alone suffices to dispose of the appeal and for that reason I will not venture in to the grounds of appeal raised.

I accordingly under the provisions of section 43 (3) of the Magistrates Court Act, Cap 11 (R.E 2019), nullify, quash and set aside the entire proceedings,

judgment and the decree emanating from Civil Suit No 15 of 2018. Appellant may lodge his claim (if any) before the proper executing court with jurisdiction to entertain the matter. Respondents are awarded the costs of this appeal. Order accordingly.

**DATED** at **SHINYANGA** this 30<sup>th</sup> day of **JULY**, 2021.

  
**E.Y MKWIZU**  
**JUDGE**  
**30/7/2021**

**COURT:** Right of appeal explained.

  
**E.Y MKWIZU**  
**JUDGE**  
**30/7/2021**

