

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LABOUR REVISION No. 41 OF 2020

*(C/f Labour Dispute No. MOS/CMA/ARB/39/2017 Commission
for Mediation and Arbitration at Moshi)*

ATTORNEY GENERALAPPLICANT

VERSUS

GREGORY KIVUYO.....1st RESPONDENT

DASTON ELIAMULISI MSENDA.....2nd RESPONDENT

CHACHA MASANA MARWA.....3rd RESPONDENT

JUMA SAID MDAA.....4th RESPONDENT

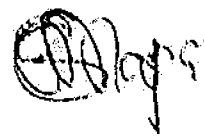
TUME YA TAIFA YA UMWAGILIAJI.....5th RESPONDENT

30th July & 27th August, 2021.

JUDGMENT

MKAPA, J.

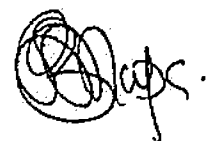
The applicant the Attorney General, challenges an award made by the Commission for Mediation and Arbitration of Moshi ("the CMA") in favour of the respondents in **Labour Dispute No. MOS/CMA/ARB/39/2017** delivered on 3rd January, 2017. The applicant seeks this Court to examine the records and proceeding of the CMA with a view to satisfying itself as to its legality, propriety and correctness and finally set aside the said Award.



The application is brought under Rules 24(1), (2) (a), (b), (c), (d), (f), (3) (a), (b), (c), (d), 11(c), 28(1) (a) (c), (d), (e) and Rule 55 (1) of the **Labour Court Rules, G.N. No. 106 of 2007** (Labour Court Rules) Sections 91 (1)(a), (2)(b) and 94(1)(b)(i) of the **Employment and Labour Relations Act, No. 6 of 2004**, as amended (ELRA), section 3 (4) (a) and (b) of the **National Irrigation Act, 2013** (National Irrigation Act) and section 17 (1) (a), (2), (6)(a), (8)(1)(f) of the **Office of the Attorney General (Discharge of Duties) Act, 2005**.

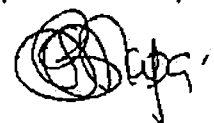
The application is supported by sworn affidavit of Ms. Edith Shekidele, Legal Officer of the National Irrigation Commission, the respondents opposed and filed a counter affidavit. The background facts are that the 1st, 2nd 3rd and 4th respondents were employed by the 5th respondent in different positions between 2008 and 2009. During this period they were being paid their salaries by the 5th respondent for a while later their salaries were suspended allegedly due to financial constraints. That, the respondents continued working with the 5th defendant until later when the director instructed the management to terminate the respondents as the Commission was unable to pay the respondents their salaries due to financial constraints. Aggrieved, the 1st 2nd 3rd and 4th respondents filed complaint to the CMA claiming for 17 months' salary arrears, severance allowances, leave dues, one month salary in lieu of notice and twelve months salaries as compensation for unfair termination.

The CMA decision was in favour of the respondents having being satisfied that the termination was unfair. Dissatisfied, the applicant who was not a party to a labour dispute at the CMA filed this revision on the following grounds;

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- (a) That the Hon. Arbitrator had no original jurisdiction to entertain the dispute before exhausting remedies provided for under the Public Service Act.
- (i) That the 1st, 2nd, 3rd and 4th Respondents proceeded with the dispute against the 5th Respondent without the 5th Respondent's notification to the Attorney General as required by section 3(4) (a) and (b) of the National Irrigation Act, 2013.
- (ii) That the Commission for Mediation and Arbitration did not have Jurisdiction to entertain this matter as per section 32A of the Public Service Act, Cap. 298 as amended by section 26 of the Written Laws (Miscellaneous Amendment) (No.3) Act No. 16 of 2016 read together with Section 3(2) of the National Irrigation Act, 2013.
- (iii) The Commission for Mediation and Arbitration improperly awarded the 1st Respondent one month salary in lieu of notice, annual leave and twelve months salary as compensation for termination while Clause (9) of their contracts does not allow.
- (iv) The Arbitrator erred in awarding the 1st Respondents subsistence allowance, extra duty allowance, annual leave, negotiated severance allowance and one month salary in lieu of notice while the same were not claimed/referred in the Form No. 1.
- (v) The Arbitrator illegally entertained the claims for unpaid salaries which were out of time without an application for condonation.

The hearing of this application proceeded by way of filing written submission. The applicant was represented by Ms. Jacqueline Kinyasi



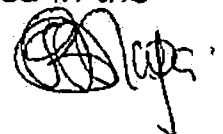
learned State Attorney, while the 1st to 4th respondents appeared in person and unrepresented. The 5th respondent did not submit.

Ms. Kinyasi submitted jointly on grounds one two and three that, the 5th respondent is a Government institution under the Ministry of Water and Irrigation. That, the law requires under section 3 (4) (a) of the Nation Irrigation Act, 2013 for the 5th respondent to inform the Attorney General (applicant) on any matter instituted by or against the Commission. That the Attorney General was never informed about the same thus denied his statutory right of intervening and protecting Government interest.

Arguing on the 6th ground, the learned State Attorney argued that, all proceedings at the CMA are initiated vide referral CMA Form No.1. That, in the said form, the 1st to 4th respondents claimed 18 months salary terminal benefits and compensation for unfair termination. However, in the course of hearing new claims of subsistence allowance, extra duty allowance, annual leave, negotiated severance allowances and one month salary in lieu of notice were introduced and the same were granted.

It was Ms. Kinyasi's argument that this was contrary to the principle that parties are bound by their pleadings thus the respondents were not allowed to raise new matters at the hearing. In support of her argument she placed reliance on the case of **Barclays Bank (T) V Jacob Muro, Civil Appeal No. 357 of 2019 CAT Mbeya** (unreported). She also referred this Court to the case of **Shirika la Usafirishaji Dar es Salaam V Victor Alfred Milanzi, Labour Revision No. 674 of 2019**, High Court of Tanzania, Dar es Salaam in which the court observed;

"... the Arbitrator misdirected himself to award the general damages to the Respondent because they were relief not sought by him in the referral form. The Arbitrator powers on the award of remedies is limited to the prayers stated in the



referral form save for statutory entitlements which are specifically provided by the law"

Ms. Kinyasi asserted as regards to ground 7 that, Rule 10 (2) of the Labor Institution (Mediation and) Rules G.N 64/2007 provides for time limitation of 60 days in referring to CMA other disputes, than termination. That, the 1st to 4th Respondents' salary claims were time barred as the same were brought beyond the statutory time. She relied on the case of **Aizack Adam Malya V Willy Mlinga, Labor Revision No. 443/2019, High Court of Tanzania, DSM** (Unreported) in support of her argument.

She finally prayed for the Court to quash and set aside the CMA's Award Responding to submission by the learned State Attorney, Mr. Kivuyo submitted that, the 5th respondent was capable of suing and being sued as provided for under section 3 (1) (2) (3) (a) (b) (c) (d) of the National Irrigation Act, No. 5 of 2013. That, according to section 3 (4) of the same Act, it was the duty of the 5th respondent to notify the applicant herein on any pending suit instituted against them. In the circumstances, the 1st, 2nd, 3rd and 4th respondents were not associated with the gross negligence of the intergovernmental departments instead he prayed for the respondents to be paid their statutory entitlement in accordance with the law as per the CMA's Award.

Regarding the 6th ground, Mr. Kivuyo argued that, the Arbitrator did not error in awarding the respondents the reliefs sought in accordance with section 40 (1) (c) and 44 (1) (a) (b) (c) (d) (e) and (2) of ELRA. It was his further argument that the said provisions allow the CMA to award compensation of not less than 12 months, any remuneration due before termination, annual leave, notice, severance pay and certificate of service once it is satisfied that termination was unfair.



As to the 7th ground, Mr. Kivuyo argued that, all claims by 1st to 4th respondents were conceded/admitted by the 5th respondent at the hearing thus the issue of time limit cannot be raised now. He referred the Court to the decision in the case of **Noel Nhanguka V Institute of Accountant Arusha, Consolidated Revision No.53 of 48 of 2015 Labour Division Arusha, Nyerere J.** (as she then was) held *inter alia* that;

"(ix) ... In my understanding the remedies for unfair termination are provided under section 40(i) of the E.L.R.A which provides that, Arbitrator or Court after finding termination is unfair, an Arbitrator or Court has discretion in deciding the issue of award or remedies ... That means the Arbitrator or Court has discretion to order or not to order, there is no law that requires the Arbitrator to be guided by pleading as the law has already set the standards (x) ... In practice, a decision makers' exercise of such discretion is guided by peculiar facts of each case..."

Finally, the respondents prayed for this Court to uphold the CMA's Award and grant any order which deemed fit and appropriate.

Having heard parties submission and carefully perused the CMA record before I get on determining the merits and demerits of the application I spotted something that caught my attention that **first**, the applicant submitted on the grounds stated in the chamber summons instead of those stated in the affidavit specifically paragraph 13. Although some carry the same substance. **Second**, the applicant opted not to submit on all grounds of revision namely ground (a) (ii) I will therefore not consider it in my analysis. **Third**, the applicant in this case was not a party to this



dispute at the CMA as the parties were the 1st to 4th respondents against the 5th respondent.

To begin with the 1st ground, the applicant had raised the issue that, the present application was filed for the purposes of safeguarding Government interest, under section 3 (4) (a) and (b) of the National Irrigation Act as was not joined as a party at the mediation hearing at the CMA. The said section states;

"Notwithstanding the preceding provision of this section-

- (a) The Commission shall have a **duty of notifying** the Attorney General of any impending suit or intention to institute a suit or matter for or against the Commission;*
- (b) The Attorney General shall have the **right to intervene** in any suit or matter instituted by or against the Commission." (emphasis added)*

A reading from the aforementioned provisions it is plain clear that the right of the Attorney General to intervene in any suit or matter involving the Commission is upon notification by the Commission. As rightly argued by the 1st, 2nd, 3rd and 4th respondents the respondents were not to blame for failure by the Commission to notify the Attorney General on the existed labour dispute involving the Commission.

It is my considered view that since it was sufficiently established the fact there was a labour dispute which interest of justice demanded the same to be determined on merit it was appropriate for the Respondents to invoke section 3 (1), (3) (a) of the National Irrigation Act in filing their complaint before the CMA. The said sections which read;



"3.-(1) There is hereby established a Commission to be known as the National Irrigation Commission.

(3) The Commission shall be a body corporate with perpetual succession and a common seal and shall in its own corporate name, be capable of-

(a)suing and be sued;

In the light of the above provisions, there can be no doubt that the 5th respondent could be sued as an independent department of the Government despite there being Government interest. Thus, the Commission neither erred nor lacked jurisdiction in entertaining the dispute. I found this ground is without merit and I dismiss it.

Turning to the 3rd and 4th grounds jointly on the issue that the Arbitrator awarded reliefs that were not claimed, the applicant throughout his affidavit and submissions did not dispute that the 1st to the 4th respondent were unfairly terminated. What he disputed is the fact that the reliefs granted were more than what they claimed. However, he failed to substantiate the same with any legal authority that requires the Arbitrator to be bound by the pleadings especially on reliefs that are statutory.

Rule 32 (1) and (5) of the Labour Institution (Mediation and Arbitration Guidelines) GN. No. 67 of 2007 vests the Arbitrator with the discretion to award appropriate reliefs based on the circumstances of each case. Since in the present dispute the CMA found the termination was unfair, the reliefs which are prescribed under section 40 (1) (c) and 44 of the ELRA were the respondent's entitlement irrespective of whether they claimed for or otherwise. These grounds are also meritless.

Turning to the last ground that the CMA entertained claims of unpaid salaries which were out of time without an application for condonation, on perusal of CMA's record I found that the respondents were officially



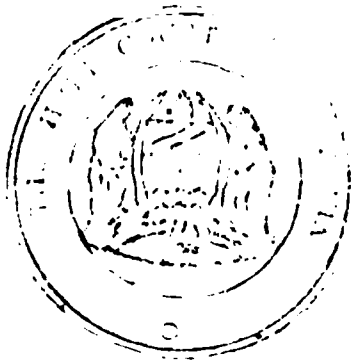
terminated on the 6th June 2017. However, the Arbitrator awarded them salary arrears and unpaid salaries for 17 months, beginning February 2016 to June 2017 when they were terminated. I am in agreement with the learned State Attorney the fact that the said claims were out of time as the respondents ought to have claimed them within 60 days from when they were unpaid as required under Rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N No 64 of 2007. Thus the Arbitrator erred in awarding the respondents salary arrears and unpaid salary amounting shillings five million one hundred thousand (Tshs 5,100,000/=) each from February 2016 to April 2017 as they were time barred.

In the event, the CMA Award on the unpaid salaries and salary arrears amounting shillings 5,100,000/= is hereby revised downwards substituted by two months of May and June 2017 which are within 60 days from the day the dispute was referred to CMA. Consequently, the respondents are entitled to be paid shillings six hundred thousand only being unpaid salary and salary arrears. Other reliefs remained unchanged.

This application is partly merited and allowed to extent hereinabove.

It is so ordered.

Dated and Delivered at Moshi this 27th day of August, 2021.




S.B. MKAPA
JUDGE
27/08/2021