IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 12 OF 2021

EDWARD GWIMO, IDDI BALOZI AND JAMILA MGALUSI FOR THEMSELVES AND ON BEHALF OF 97 OTHERS

.....APPLICANTS

THE CHAIRMAN INDUSTRIAL COURT OF TANZANIA

.....1st RESPONDENT.

THE HONORABLE ATTORNEY GENERAL

.....2nd RESPONDENT.

TANZANIA BREWERIES LTD..... 3RD RESPONDENT.

RULING.

Date of last 9.11.2021

Date of Ruling 23.11.2021

MARUMA, J.

Mr. Edward G. Lugua, Mr. Iddi Balozi, Ms. Jamila Mgalusi and 97 others have been in different avenues since 2009, seeking redress against the decision of the Industrial Court of Tanzania in Application No. 406 of 2008 delivered on 12th May 2008 before Mwipopo J (Retied Judge). The dispute originated from the Trade Dispute No. 144 of 2006 following termination of the their employment by the Tanzania Breweries LTD on 30th April 1999.

The applicants aggrieved with the decision, they started to pursue their rights since then by a representative suit before the High Court of Tanzania in Miscellaneous Civil Application No. 44 of 2014.The application was granted on 8th April 2015. The applicants took a step further and filed a Miscellaneous Civil Application No. 60 of 2008 seeking an extension of time to file an application for leave to file an application for prerogative orders against the decision of Mwipopo, J. The application was granted on 27th September 2019 whereby the Court enlarged time for the applicants to file an application within 30 days from the date of the ruling.

The applicants filed an application for leave vide Miscellaneous Civil Application No.19 of 2020, which was rejected as the application was not fit for judicial review rather an appeal to the Court of Appeal. The applicants preferred an application for the appointment of representatives to challenge the decision of the Industrial Court of Tanzania at the Court of Appeal. The application was rejected as the current representatives were found to be competent to move the court. The applicants made efforts to trace the representatives who were not found by then due to various grounds of healthy problems hence further delays till 16th September 2021 when they filed this application.

The applicants before this Court are seeking;

1. This court be pleased to enlarge time for the applicants to file an appeal against the decision of Mwipopo J, dated 12th May, 2008 in the Industrial Court of Tanzania Revision application no. 406 of 2008, original Trade Dispute No. 144 of 2006.
2. Any other and further reliefs this honorable court may deem fit to grant.

Replying to this application, the respondents raised preliminary objections that,

1. The High Court has no original jurisdiction to entertain labour dispute.
2. The Application is bad in law for joining non-existence parties without leave of the court.
3. That, the applicants have no cause of action against the 1st and 2nd respondents.

In arguing the preliminary objections raised, the applicants were represented by Mr. Barnaba Lugua, Advocate and the 1st and 2nd respondents were represented by Ms. Rehema Mtulya, State Attorney.

Mr. Lugua on the sport conceded to the 2nd and 3rd preliminary objections raised. However, he objected the 1st point of preliminary of objection as he was not clear of it and preferred to be argued before the Court. Ms. Mtulya submitted on the 1st preliminary objection on the issue of jurisdiction. She pointed out that, the nature of the matter is of an employment cause therefore, it should be referred to the Labour Court as per The Employment and Labour Relation Act No.41 of 2004 which provides a room for the applicant to file an application for extension of time and not before this Court as the nature of the dispute is termination. She further submitted that there are other channels for challenging the decisions of Industrial Court as per section 28 (4) of the Industrial Court Act of Tanzania, provided that the matter will come before the High Court by the full bench of three Judges of the high Court. So, the two options above can be used to challenge the decision of the Industrial Court. Also, the Industrial Court Act was repealed by The Employment and Labour Relations Act No.41 of 2004 as per 3rd Schedule. Currently, there is no Chairman of Industrial Court as it ceased operation by law. She argued that is purely preliminary on point of law as decided in the Mukisa Biscuit's case at 696. The court held that a preliminary objection must be on purely point of law that is capable of disposing the suit

or applications once and for all like jurisdiction of the Court. Therefore, she prayed for the point of objection to be sustained and the application be dismissed.

Addressing to the point of objection raised, Mr. Lugua counsel for the applicants argued that, it is true that the decision of the Industrial Court formally was not appealable. However, he submitted that the constitutionality of the section 27 (1) was tested in the case of **LEO K. LEKULE VS J.V LIMITED**, in Civil Appeal No. 3 of 1998 by Justice Nsekela as he then was. Subsequently, after the decision section 27 (1) was amended and capital **"C"** was introduced read as subject to the provision of section 27(1) of the Industrial Court Act, that every award and decision of the Industrial Court shall be called and challenged on any ground. He further submitted that there is also a decision of Court of Appeal which has interpreted the word "any ground". He pointed out that section 27(1) said the decision to be challenged should be determined by the panel of three judges meaning it is the High Court Main registry. According to him, the Main Registry is registry for all courts of the remaining registry. He also argued that there is no any law that changed the position of challenging the decision of the Industrial Court. Thus, the

State Attorney proposed the application be filed at the Labour Court, that is not the position as the matters CMA are only subject for extension of time at the Labour Court and not from the Industrial Court of Tanzania. He submitted further that the law still stands that the decision of the Industrial Court of Tanzania can be challenged at the high Court of Tanzania before a panel of the three judges. He insisted that the panel has to be constituted from the judges of the main registry. He concluded his submission that, the application is an application for extension of time. Save if there is any specific law providing otherwise, this matter is properly before this court. He further pointed to the court that the applicants are striving to locate the right venue for the hearing of this application. However, he agreed that the point raised by the State Attorney is a pure point of law but he argued that, the law itself has directed the matter to be determined by a full bench of three judges.

In her rejoinder, Ms. Mtulya submitted that the case cited by the appellants' counsel was irrelevant and even that section 27(1) C was also irrelevant because the decision was given before the Act was repealed. She also insisted that the law does not state whether the application should be determined by the full bench at the main registry or at High Court Labour -

Division. The law is very clear that the Industrial Court Act was repealed by the Employment and Labour Relations Act No.41 of 2004. So automatically the Industrial Court Act,1967 ceased since the new Act was enacted and the 3rd Schedule repealed the whole Act, so the preliminary objection still maintained as purely point of law and the application should be dismissed.

As pointed out clearly by submissions for and against the preliminary objection rests on the issue of jurisdiction of the Court. Before proceeding with this application it is prudent for this court to determine whether or not it is seized with the powers to entertain the application as explained by the Court of Appeal at Zanzibar in the case of **MENEJA MKUU, SHIRIKA LA UMEME, ZANZIBAR VERSUS JUMA SIMAI MKUMBINI & 4 OTHERS**, in Civil Appeals Nos. 41,42,43,44 and 45 of 2011. At pg 9 it was held that, "*..it is elementary that prudence demands that before a magistrate or a judge sets out to determine a case the first and fundamental question that he has to ask and satisfy himself is whether or not he is seized with the requisite jurisdiction to dispose it of.*"

Going by the nature of the application brought under section 14 (1) of the Law of Limitation Act Cap. 89 R.E of 2019, there is no doubt that this court can entertain the application for extension of time under section

14 (1) of Law the Law of Limitation Act Cap. 89 R.E of 2019. However, the main issue as clarified by the counsel for the 1st and 2nd respondents on the preliminary point of objection is centered on whether or not this court can entertain the application since is in the nature of labour dispute.

Looking at the preliminary point of objection and the arguments raised on the legal issue, the matter is of employment nature concerning the termination of the applicant's employment. Therefore, it should be referred to the Labour Court as per The Employment and Labour Relation Act No.41 of 2004 which provides a room for the applicants to file an application for extension of time and not before this court due to the nature of the dispute. The learned State Attorney's argument is that the Industrial Court Act ceased operation by law, the Employment and Labour Relations Act No.41 of 2004 as per 3rd Schedule repealed the whole Act. Her further argument is that there are other channels for challenging the decisions of Industrial Court as per section 28 (4) of the Industrial Court Act of Tanzania, provided that the matter will come before the High Court by the full bench of three Judges of the high Court. Therefore, as the applicants wish to challenge the decision of the Industrial Court, they could opt for the two mentioned options above.

On the other hand, responding to the argument made, the counsel for the applicants argued that the decision is from the Industrial Court of Tanzania which does not fall under the Employment and Labour Relations Act, cited above. The matters from the Commission for Mediation and Arbitration are only subject for extension of time at the Labour Court and not those from the Industrial Court of Tanzania. He also argued that, the law still stands that the decision of the Industrial Court of Tanzania can be challenged at the High Court of Tanzania before a panel of three judges constituted from the judges of the main registry. He agreed that the State Attorney argued on the issue of a pure point of law save the law itself directes the matter to be determined by a full bench of three judges. Though he pointed out that since the application before this court is an application for extension of time, save if there is any specific law that provides otherwise, this matter is properly before this court.

Going by the affidavit filed by the applicants there is no dispute that the matter in dispute is of employment nature resulting from the decision of Industrial Court as it then was delivered on 12th May, 2008 before Mwipopo, J.

Determining the powers of this court to entertain the matter coming from the Industrial Court, I prudently go through the Employment and Labour Relations Act, 2017 which repealed the Industrial Court Act. Section 94 (1) of the Act provides for jurisdiction of the Labour Court. Reading quickly the contents of the section, the argument made by the applicant's counsel could be water tight that the matter from the Industrial Court cannot be entertained by the Labour Court. However, that is not the position. Reading section 103 (1) of the act, on repeal and amendment of laws and savings provisions, the guidance is very clear that, the repealed laws specified under the Second Schedule, Industrial Court of Tanzania Act, 1967 (Act No.41 of 1967) is one among the list are subject to the savings and transitional provisions set out in the third schedule. The third schedule is purposely set to govern the transition from the administration of the laws repealed under paragraph **(1)** to the administration of the matters in the new Act. Going through the referred 3rd schedule, under paragraph 7 (1) it is also plainly clear that ***"Subject to sub-paragraph (3), any trade dispute stipulated in the repealed laws that arose before the commencement of this Act shall be death with as if those laws had not been repealed."***

Going by the definition of the term "trade dispute" under section 3 of the Industrial Court Act (supra). It is defined as "***any dispute between an employer and employees or an employee in the employment of that employer connected with the employment or non – employment, the terms of the employment, or with the conditions of labour of any of those employee or such employee".***

Giving an interpretation of section 3 of the Industrial Court Act No.41 of 1967 and the nature of dispute in that decision subject to be challenged by the applicants at the Court of appeal, there is no doubt that the nature of the dispute falls under the ambit of interpretation of a trade dispute of which the jurisdiction is vested on the Labour Court.

Moreover, taking into consideration the lacuna left on the way forward after the transition period on how to handle disputes which originated from the Industrial Court, and giving the definition of the jurisdiction of the Labour Court under section 94 (1) of the Employment and Labour Relations Act,2004 which is ***mutandis mutandis*** to section 51 of the Labour Institutions Act Cap.300 R.E 2019. The Labour Court has jurisdiction over the application, interpretation and implementation of the provisions of this Act and over any employment or labour matters falling

under common law, tortious liability, vicarious liability or breach of contract. I am of the settled view that, for the matter of convenient and consistency the Labour Court still has the power to entertain the application in hand given the fact that the cause of action and prayers therein do fall under the common law as well as are of the nature of breach of contract. The gap left by the Act is an oversight which should not jeopardize the rights of the applicants who have been subjected to the barriers of access to justice as submitted by their counsel that they are striving to locate the right venue for the hearing of an application of that nature since 2009.

Regarding to the issue of application of section 27(1) **C** of the Industrial Court Act,1967, I agree with Mr. Lugua that was the position which expanded the scope on the powers of the court to determine the appeal from the decision of the Industrial Court. However, the said section is irrelevant to the matter before this court as the application is for extension of time to file an appeal to the Court of Appeal. The mode of determining the application could be different from what is submitted by the both counsels. The full bench of three judges is referred to the issue of jurisdiction as stated in the case of **Lekule** (supra).

For the aforesaid reasons and findings, I find that the preliminary objection has merit and I agree with the learned State Attorney that, if the applicants wish to challenge the decision of the Industrial Court dated on 12th May 2008, they should do so by obtaining an extension of time at the Labour Court. I uphold the preliminary objection raised and struck out application accordingly.

Z.A.Maruma, J

23/11/2021

Ruling delivered today 23rd November in Chamber in the presence of Mr. Edward Gwimo, Ms. Jamila Mgalusi and Mr. Iddi Balozi the applicants, Mr. Barnaba Lugua, Advocate for the applicants and Mr. Baraka Nyambita, State Attorney for the 1st and 2nd Respondents and Ms. Nsangi Zilahulula Advocate for the 3rd Respondent.

Z.A.Maruma, J

23/11/2021