

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION**

AT MOSHI

LABOUR REVISION NO. 26 OF 2021

(Originating from Labour Dispute No. CMA/KLM/MOS/RMB/M/59/2021)

JOHN E. LYARO.....APPLICANT

VERSUS

MACHARE INVESTMENT LTD.....RESPONDENT

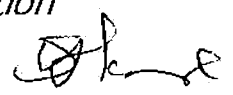
JUDGMENT

28/03/2022 & 20/05/2022

SIMFUKWE, J.

John E. Lyaro hereinafter referred to as the Applicant filed this application after being aggrieved with the ruling of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/KLM/MOS/RMB/M/59/2021 of Moshi dated 28th day of June, 2021. The application was brought under **section 91 (1)(a), Section 91 (2) (b) (c) and Section 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366 R E 2019 (ELRA); read together with Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), 24(3) (a) (b) (c) and (d) and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007** and any other enabling provision of law. The Applicant prayed for the following orders:

- a. That, this Honourable Court be pleased to call for, examine and revise the record of Commission for Mediation and Arbitration*



at Moshi on (sic) Labor Dispute No. CMA/KLM/RMB/M/59/2021 and satisfy as to the correctness, legality or propriety of the records and orders made therein.

- b. That, this Honourable Court be pleased to revise, quash and set aside the ruling of Commission and Arbitration (sic) at Moshi in the Labor dispute No. CMA/KLM/RMB/M/59/2021 delivered by Hon. Massawe Mediator on 28th June 2021.*
- c. Any other relief(s) and/or Order(s) as this Honorable Court may deem fit and just to grant in the premises thereof.*

The application was supported by an affidavit sworn by Mr. Lucas Nyagawa learned counsel for the Applicant, which was contested by the counter affidavit sworn by Mr. Jackson Henry Mosha Principal Officer of the Respondent.

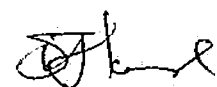
The factual background of the dispute is to the effect that, the applicant herein instituted labour dispute before the CMA over the breach of employment contract. Before mediation, the respondent herein raised a preliminary objection to the effect that:

"Kesi hii haina sababu ya kuwepo mbele ya Tume hii kwa sababu mlalamikaji ameshalipwa stahiki zake na amekiri kupokea malipo yake yote na kutamka kuwa hana madai mengine. Tamko lake ni kama ifuatavyo;

"Nakiri kupokea malipo haya na sina madai mengine, ieo tarehe 01/04//2021

John Egbert Lyaro

sahlhi (.....)"



The Mediator sustained the Preliminary Objection and proceeded to dismiss the applicant's application. Aggrieved with the Mediator's ruling, the Applicant preferred to file the instant application for revision against the CMA award on the following grounds:

- 1. That the mediator erred in law and facts by upholding the preliminary objection without considering that it is a mixture of law and facts.*
- 2. That, the mediator erred in law and facts by holding that by acceptance of terminal benefits by applicants bars the applicant to claim for unfair termination/breach of contract.*

The application was argued by way of written submissions. The applicant was represented by Mr. Lucas Nyagawa learned counsel while Emanuel Antony, learned counsel opposed the application for the respondent.

Supporting the first ground of revision in respect of the allegations that the said preliminary objection contains mixture of law and facts, the applicant's advocate submitted to the effect that, it is a settled principle that any preliminary objection raised by a party should be purely on point of law free from facts. He argued that such objection must be raised from the pleadings of parties filed to the court.

In respect of their labour dispute before the CMA, it was stated that the preliminary objection raised by Respondent was not raised from CMA Form No 1 which was the only pleading filed by the Applicant, but from other extraneous facts (document) which required proof.

He further argued that the notice of preliminary objection which was served contained the facts and on the day of hearing it, the respondent



tendered the letter to prove his objection. That, the said letter was neither part of applicant's pleadings nor of the Respondent.

He also faulted the raised preliminary objection by the Respondent for not being purely on point of law but contains facts hence the same disqualified it to be preliminary objection.

The learned counsel made reference to the case of **Shose Sinare vs Stanbic Bank Tanzania Ltd & Another, Civil Appeal No. 89 of 2020 CAT at Dar es Salaam** at page 12 it was held that:

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertain (sic) application for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed point of facts or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

On the strength of the cited authority, it was the learned counsel's comment that in the present application what was termed as "Preliminary objection on point of law" raised by the Respondent does not qualify as preliminary objection on point of law as it was held in the case of **Shose Sinare** (supra).

He also argued that the basis and foundation of the Respondent's objection relied on what the Respondent's purported letter of acceptance



signed by the Applicant which was tendered during the hearing, which amounted to piece of evidence and therefore it is the fact.

Basing on the above arguments, the applicant's counsel concluded that the Preliminary objection raised before the CMA is not a pure question of law only but mixture of fact and law. He added that there is nowhere in the pleadings of the Complainant where he pleaded the same.

Mr. Nyagawa was of the view that in such situation where the objection is a mixture of law and fact, then the Arbitrator/Mediator ought to proceed to arbitrate/mediate the dispute and not to uphold the objection. He cited the case of **Jonathan Mwangonda & 10 others vs Asher's Industries Ltd Labour Revision No. 76 of 2010** High Court, Labour Division (unreported), at page 10 it was held that: -

"...where an Arbitrator is faced with an issue of mixed law and fact, he should proceed to arbitrate the dispute on merit after getting the whole evidence..."

It was Mr. Nyagawa's opinion that the Mediator erred in law and facts for upholding the preliminary objection without considering that it was a mixture of law and facts.

In respect of the 2nd ground of revision, the applicant faulted the mediator for holding that the applicant's acceptance to terminal benefits bars him from claiming unfair termination/breach of contract. The learned counsel argued that such acceptance does not bar the Applicant to knock doors of the CMA to claim for unfair termination/breach of contract when he wishes and the same does not ouster jurisdiction of the CMA to entertain the matter. To substantiate his position, Mr. Nyagawa made reference to the case of **Ally Linus & 11 Others vs Tanzania Harbours Authority**

& Labour Conciliation Board of Temeke [1998] TLR 5, in which it was held that accepting payment of terminal benefits bars Applicants claim in future the infringement of their rights in competent authority. (sic)

Mr. Nyagawa concluded his submission by stating that the Mediator erred to rule out that acceptance of terminal benefits waived right of Applicant to claim for unfair termination/breach of contract.

Oposing the application, the learned advocate for the respondent started by narrating the background of the matter and argued that the applicant skipped the same knowing that such disclosure will expose the weakness of his case. As far as the gist of the application is concerned, it was the respondent's narration that the Applicant was employed by the Respondent as Depot Manager from 15/1/2020 to 31/12/2020. After expiry of the Contract the Applicant continued with service of Employment up to 1/4/2021 when the Applicant and the Respondent decided mutually to terminate their Employer -Employee relationship.

It was further narrated that the Applicant was paid his terminal benefits and signed a declaration that he had no any further claims against the Respondent. The respondent's counsel quoted the words of the applicant: ***"Nakiri kupokea malipo haya na sina madaí mengine, Leo tarehe 01/04/2021."***

It was stated further that despite such declaration, the applicant on the same day thus on 1/4/2021 filed Labour Dispute No. CMA/ KLM/ RMB/ M/ 59/ 2021 before the CMA at Moshi complaining of unfair termination of his Employment. The complaint under CMA F1 against the Respondent was that the respondent had breached contract and without good reasons

and any agreement terminated the employment contract. Upon being served the copy of the Applicant's CMA F1 and summons to appear before the CMA; they filed the Preliminary Objection on 27th April 2021 to the effect that the Applicant's complaint before the Commission was bad in law for the reason that the Applicant was already paid all his terminal benefits and made the declaration that he had no any further claims against the Respondent. The CMA decided in favour of the respondent and dismissed the Applicant's Complaint. The Applicant being aggrieved filed the instant revision.

Having established the gist of revision, the respondent's counsel adopted the counter Affidavit in opposition to the Application to form part and parcel of their reply submission. He challenged the applicant's submission in chief by arguing that the same lacks focus and particularity of issues intended to be addressed, full of misleading information and lack proper articulation of the legal principles intended to be relied on.

In reply to the 1st ground of revision in respect of allegation that the Mediator erroneously upheld the Preliminary Objection without considering that it was a mixture of law and facts. He contested the applicant is submission that *"a Preliminary objection on point of law shall be abstract from facts of the case."*

In that respect, the respondent's advocate was of the view that the Applicant's submission in chief made the two settled principles of preliminary objection. **One**, he said 'any preliminary objection raised by a party should be purely on point of law free from facts"; and **second** the applicant's counsel submitted that; 'the objection must be raised from the pleadings of parties filed in court.'" The respondent's advocate thus



condemned applicant's submissions by stating that the same lacked focus particularly on the issues intended to be addressed.

In that regard, the respondent's advocate opined and suggested that the key issues before the Commission for Mediation and Arbitration and now before this Honourable court on this ground are: -

***One,** Whether the signed declaration made by the Applicant on 1/4/2021 that he has no any further claims against the Respondent barred the Applicant cause of action to bring /file the Labour Dispute in the Commission for Mediation and Arbitration.*

***Two,** Whether the signed declaration made by the Applicant on 1/4/2021 constitute the preliminary objection on point of law against the Applicant's Labour dispute in the CMA?*

Mr. Emmanuel opted to focus on these two issues to respond to the Applicant's submission in chief.

Replying the 1st ground of revision in respect of the declaration made by the applicant that he has no any further claims against the Respondent barred the Applicant's cause of action to file a dispute before the CMA, it was submitted to the effect that the Applicant ousted the jurisdiction of the CMA as per the case of **Bulyanhulu Gold Mine Ltd Vs Chama Stanslaus Ngeleja, Revision No.12/2011**, High Court Labour Division. He added that the applicant barred his cause of action against the Respondent under the Doctrine of Estoppel since the Applicant made a firm declaration in the said agreement that he has no any further claims against the Respondent hence put into the finality issues of the employment relationship between the Applicant and the Respondent. It was Mr. Emmanuel's opinion that the applicant's claims against the

Respondent before the CMA was only an afterthought and as good as trial hook in the bucket of water while knowing there is no any more fish to catch. He made reference to **section 123 of the Evidence Act, Cap 6 R.E 2019** which is in respect of the doctrine of Estoppel that:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person nor his representative, to deny the truth of that thing."

The respondent learned advocate insisted that the applicant made a firm declaration intentionally which caused and permitted the respondent to believe that it was true. Thus, the applicant does not have any further claims which made the respondent to pay him his terminal employment benefits.

Mr. Emmanuel thus implored the court to find that the Applicant was estopped to file complaint before the CMA. He concluded the first ground by submitting that the Applicant compromised /lost his cause of action by making a firm undisputed declaration that he had no any further claims against the Respondent. He also called upon the court to find that, upon signing a form that he has no any further claims against the Respondent, it barred the applicant's cause of action to file Dispute No. CMA/KLM/RMB/M/59/2021 against the Respondent.

In addition, the respondent's advocate argued that the applicant compromised his cause of action against the Respondent after he dully signed the declaration that he had no any further claims against the

Respondent. That the Applicant's declaration shut down doors of the CMA against himself.

Submitting in respect of the 2nd ground of revision on Whether the signed declaration made by the Applicant on 1/4/2021 constitute the preliminary objection on point of law, Mr. Emmanuel challenged the applicant's views that the raised Preliminary objection by the Respondent did not qualify as it contains mixture of points of law and facts. That, the applicant failed to demonstrate which part of the preliminary objection contains pure matters of law and which part contains matter of facts which required proof/ calling of evidence.

Concerning the applicant's annexed two cases of **Shose Sinare vs Stanbic Bank Tanzania Limited**;(supra) and the case of **Jonathan Mwangonda & 10 others vs Asher Industries Ltd**;(supra) the learned advocate for the respondent subscribed to the principles established in both authorities cited by Applicant. However, he condemned the applicant for failure to properly articulate the legal principles referred in those two cases.

The learned advocate referred at page 2 paragraph 2 of the CMA's ruling which held that: -

"The Applicant did not object the Respondent's averment that the Applicant agreed with the Respondent that there would be no more claims

Basing on the quotation above, it was submitted that it is not in dispute that the Applicant signed a declaration that he has no any further claims against the Respondent. Even on the Applicant's Affidavit in support the Application and his submission nowhere the Applicant disputed the

existence of the duly signed letter by him which is to the effect that he has no any further claims against the Respondent. Also, nowhere the Applicant denied either expressly or impliedly that he made a signed declaration that upon being paid the final terminal benefits he had no any further claims against the Respondent. Thus, the point of preliminary objection raised by the Respondent necessitates calling of evidence to prove that position.

In addition, it was Mr. Emmanuel's contention that the preliminary objection filed before the CMA on 27/4/2021 was so elaborative to the extent that; it made the Applicant fully aware of the preliminary objection, the case laws relied upon and nature of prayers which the Respondent intended to move the Commission to grant. Page 2 paragraph 2 of the CMA ruling shows that the Applicant during hearing of Preliminary objection did not object existence of the signed declaration that he received the terminal benefit and that he had no any claims to the Respondent.

It was stated further by the respondent's counsel that the Applicant is trying to mislead this court that the only pleading filed in the CMA was CMA- F1 and the Respondent was only supposed to base his preliminary objection on that document. That, the applicant simply wants the court to brush off the Preliminary objection filed on 27/4/2021 on the fact that it was not part of the pleadings filed in the Commission while it forms part and parcel of pleadings. He argued that the contents of the applicant's declaration letter were duly contained in the Preliminary objection document filed before the Commission on 27/4/2021 and the Applicant during the hearing of the preliminary objection did not object that he did not make the signed declaration which is to the effect that he had no any

further claims against the Respondent. He stated that the applicant ought to object that he has never signed the said declaration which could have attracted call of evidence and thus the facts could have not taken as ascertained facts which the Preliminary points of objection can be hinged. He continued to argue that it is a settled principle of the law made in the case of **Bulyanhululu Gold Mine Vs Chama Stanslaus Ngeleja**, Revision No 12 /2011, High Court Labour Division, (Unreported) that:

"However, I have noted that in the letter for termination the Respondent acknowledged that the payment made was his final terminal payments and that he will not make no further claims against the Applicants. If he was not satisfied, he should not have accepted the payment and proceeds to file complaint CMA". (sic)

He went on to argue that the applicant's argument that the Preliminary objection raised by Respondent do not meet the test of being point of law as decided in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO.LTD Vs WEST AND DISTRIBUTORS LIMITED (1969) EA 696** are not true.

Mr. Emanuel for the respondent continued to aver that there are ascertained facts which are not disputed by the Applicant. That, it is not disputed fact that the applicant signed the declaration that he has no any further claims against the Respondent which negate the arguments that there is a requirement of evidence. In that respect the respondent's advocate was of the view that a point of law can successfully be raised from such ascertained facts that means the facts which need no proof and are correct as pleaded by the parties.



The learned advocate invited the Court to dismiss the first ground of revision by finding that the point of preliminary objection raised by the Respondent was pure point of law based on ascertained facts with no objection from neither party.

Submitting on the 2nd ground of revision in respect of the findings that acceptance of terminal benefits by the Applicant bars the applicants to claims for unfair termination/breach of contract; it was stated that the applicant is trying to mislead the Court on the fact that the mediator after determining the preliminary point of objection proceeded to determine the Applicant's complaint of unfair termination. Mr. Emmanuel stated that he tried to read the CMA ruling but nowhere the Mediator discussed issues of unfair termination. To support his argument, the learned advocate quoted page 3, 3rd and 4th paragraph of the ruling which reads that: -

"I respectfully and entirely subscribe the position as provided in the case of Bulyanhulu Gold Mine Vs Chama Stansiaus Ngeleja, (supra). Indeed, where employee has signed an agreement that there would be no further claims, this Commission has no jurisdiction to entertain dispute from parties.

Therefore, it is the Commission's firm position that dispute has been wrongly filed to this Commission. Since the Applicant agreed each other that there would be no further claim, it was wrong for the applicant to refer it to this commission. Henceforth this application is hereby dismissed."

Basing on the above findings of the CMA, the respondent's advocate argued that in this ground of revision, the applicant deliberately tried to

mislead the court to matters which were not discussed or featured in the ruling of the Commission. He thus invited the court to dismiss this ground of revision and find that all two grounds of Applicant's Application have no merit and proceed to dismiss the Application with costs.

I have considered the submissions of the learned counsels of both parties as well as their respective affidavits and the CMA record. The issue for determination in this case is *Whether what was raised before the CMA deserves to be Preliminary objection.*

It is trite law that a preliminary point of objection must be purely point of law. The Preliminary Point of objection is the legal issue raised by the party to the case which requires court's determination before proceeding to the main case. The one who raised such Preliminary Objection ought to tell the court his/her problem based on the point of law which must be decided. There are numerous decisions to that effect. For instance, the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi (The Administrator of the Estate of the late Hamisi Abdallah)**, Civil Appeal No.314 of 2020 at page 9, the Court of Appeal stated that:

"It is settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence."

At page 10 of the case of **Ibrahim Abdallah** (supra) it was stated that:

...the emphasis is that a preliminary objection may only be raised on a pure question of law which can be discerned if the court is satisfied that the pleaded facts are not



contentious or if any of the facts has to be ascertained in a proper trial."

I subscribe fully to the above decision. It goes without saying that the Preliminary point of Objection cannot stand if any fact has to be ascertained through evidence.

Coming to the respondent's Preliminary Objection, the raised Preliminary Objection before the CMA was that:

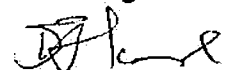
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*"Nakiri kupokea malipo haya na sina madaí mengine,
leo tarehe 01/04//2021*

John Egbert Lyaro sahihi (.....)"

From the above raised Preliminary Objection, it is my considered view that the same is a mixture of law and facts. It is the law since the respondent argued that the applicant was estopped from filing the dispute to the CMA. Also, it is the fact since the respondent alleged that the applicant declared that he has no any claim after receiving the benefits. These facts indeed have to be ascertained through evidence. Therefore, since those facts had to be ascertained by producing evidence, then it lacks the criteria of being a preliminary objection.

I am of the considered view that the raised Preliminary Objection was not on a pure question of law only but mixed law and fact. Therefore, it is my firm opinion that the Mediator erred to dismiss the application basing on



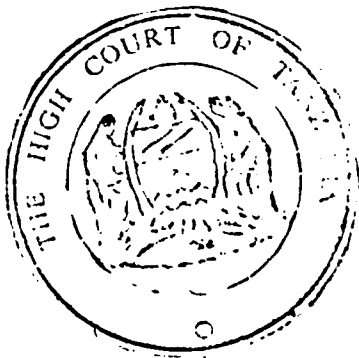
such raised Preliminary Objection which contains mixture of law and facts. In those circumstances, the Mediator was supposed to proceed with receiving evidence from both parties in order to ascertain those facts and not to dismiss the application.


Therefore, since the raised Preliminary Objection lacked the criteria of being Preliminary Objection, I allow the first ground of revision. The second ground of revision is subject to proof of the alleged declaration of the applicant after adducing evidence in respect of the same by both parties.

In the circumstances, I hereby quash the whole proceedings, decision and order of the CMA. I thus order the dispute to be determined afresh before another Mediator/Arbitrator according to the law. This being a labour dispute, no order as to costs

It is so ordered

Dated and delivered at Moshi, this 20th day of May, 2022.




S. H. SIMFUKWE
JUDGE
20/5/2022