IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR APPLICATION NO. 43 OF 2020

(ARISING FROM CMA/KLM/MOS/ARB/59/2019**)**

NOKIA SOLUTIONS & NETWORKS

TANZANIA LIMITED ..... APPLICANT

Versus

HONEST MANGALE..... RESPONDENT

Last Order: 15th March, 2022

Date of Judgment: 21st April, 2022

JUDGMENT

MWENEMPAZI, J.

The applicant Nokia Solutions & Network Tanzania Limited is aggrieved by the award of Commission for Mediation and Arbitration (CMA) at Moshi in Employment Dispute No. CMA/KLM/MOS/ARB/59/2019; is now applying for an order of Revision to this Court. The application is preferred under Sections 91(1)(a) and 2(c), 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 and Rules 24 (1) (2) (a) (b) (c) (d) (e)

and (f) (3) (a) (b) (c) and (d), 28(1) (a) (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007. The application is supported by the affidavit of Amelye Nyembe, applicant's Country Human Resource Manager. The respondent on the other hand filed a counter affidavit contesting the application which was also replied by the applicant.

The background of the matter, based on the records, suggests that the respondent was employed by the applicant as a field operation engineer in February 2010. That in the year 2019 the applicant informed her employees including the respondent that due to transformation in her operating mode there were going to be organizational changes in the management and field force operations department and that the impacted individuals would be individually informed. This was followed by a letter to the respondent informing him that his position had been impacted by the organizational changes and further that there was going to be a consultation meeting with him to further discuss the matter. The respondent was later informed that there were alternative internal vacancies which he could apply for if he so wished. That in March 2019 the applicant sent a retrenchment agreement to the respondent but the respondent refused to accept the package offered.

That following the respondent's refusal of the retrenchment package offered the applicant referred the dispute to the CMA at Moshi. The CMA conducted a mediation which was unsuccessful. The Applicant then referred the matter for arbitration hearing which did not proceed as it was struck out for being premature, the arbitrator was of the view that since

the retrenchment had not yet been done then it was premature. The Applicant was ordered to comply with the law particularly section 38 of the ELRA, Cap 366 R.E 2019.

From that point in October 2019, the applicant proceeded to issue the Respondent with a letter of termination of his employment on operational grounds. The respondent was unsatisfied with the termination and decided to refer the matter to CMA complaining to have been unfairly terminated. Following the hearing of the dispute by the CMA, an award was delivered on the 30th September 2020 in favor of the respondent. The CMA declared the termination of the Respondents' employment to be unfair and ordered the Applicant to pay the respondent a sum of Tshs. 127,178, 494.20 as compensation. Aggrieved by the decision the applicant preferred this revision application contending that the Arbitrator erred in law and in fact in reaching an erroneous finding that the termination was unfair and disregarding the evidence adduced during the hearing.

On 16th November, 2021 when the matter was set for hearing, parties prayed to proceed by way of written submissions; leave was granted to the parties to dispose the application by filing written submission according to the scheduling order. Mr. Thomas Sipemba learned advocate from East African Law Chambers drew and filed submission for the applicant and Ms. Jane James learned advocate from Ethia Attorneys prepared and filed submission for the respondent.

In their submission Mr. Sipemba submitted to the five issues as raised in the applicant's affidavit. Submitting in length on the first issue as to whether it was correct for the arbitrator to hear and determine the Labour Dispute No. CMA/KLM/MOS/ARB/59/2019 while she had no jurisdiction to do so. Mr. Sipemba began by stating that where the issue of jurisdiction of the court is in question, the same could be raised even at the appellate stage. His authority was based on an unreported case of **Commissioner General Tanzania Revenue Authority vs. JSC Atomredmetzoloto (ARMZ)**, Consolidated Civil Appeals No. 78 and 79 of 2019, Court of Appeal of Tanzania at Dodoma. He then submitted that following the operational changes that took place in the Applicant's business, the Applicant in compliance to section 38(1) of the Employment and Labour Relations Act, Cap 366 R.E of 2019 (ELRA) commenced retrenchment process and that after failing to reach consensus with the respondent during consultation process, the applicant in compliance with section 38(2) of the ELRA referred the matter to CMA which was registered as Labour dispute No. CMA/KLM/ARB/32/2019. That following unsuccessful mediation the applicant referred the dispute to arbitration for further determination in accordance with the provision of section 38(3) of the ELRA. He submitted further that in the arbitration the Arbitrator ruled that the matter was premature because there was no retrenchment or termination and proceeded to strike out the matter.

It was Mr. Sipemba's further submission that the Arbitrator had erred by failing to understand section 38(3) of the ELRA. He submitted that

according to the said provision after the Arbitrator had issued her ruling striking out the matter, the arbitration stage had been completed and that the applicant was justified to proceed with retrenchment process of which she did and completed it. Mr. Sipemba went on submitting that after the applicant had proceeded with the retrenchment process the Respondent went back to the CMA and field a fresh suit registered as CMA/KLM/ARB/59/2019 involving the same parties and the same subject matter which is retrenchment claiming that the applicant did not comply with the ruling of the CMA and therefore alleged that the retrenchment was unfair. It was Mr. Sipemba's argument that after the CMA had mediated and arbitrated the Labour dispute No. CMA/KLM/ARB/32/2019 which involved the same parties, it had no jurisdiction to entertain again the labour dispute No. CMA/KLM/ARB/59/2019 that involved the same parties, on the same facts and cause of action that is retrenchment as the dispute was ***res judicata***. Mr. Sipemba argued further that the doctrine of ***res judicata*** does apply even where the former suit was determined on a point of law. In that regard, he cited an authority in the case of **Kotak Ltd vs. Kooverji and Another** [1969]1 EA 295 at page 296.

Mr. Sipemba further argued that according to section 38(3) of the ELRA, if the respondent was not satisfied with the decision of the arbitrator, he ought to have filed an application for revision to this court in accordance with section 91(1) of the ELRA and not instituting the matter before the CMA for the second time involving the same parties, same facts and same subject matter. He contended that the matter was ***res judicata*** as it was

already determined by the CMA from mediation to arbitration. Citing the authority in the unreported case of **Athnasia T Massinde T/A Abet Primary School vs. National Bank of Commerce**, Commercial Case No. 34 of 2016, High Court Commercial at Dar es Salaam. Mr. Sipemba prayed that the CMA award be revised as the Arbitrator acted without jurisdiction.

Moving on to the second issue as to whether the Arbitrator had erred in law and in fact by ruling that the reason for retrenchment was not substantively fair, Mr. Sipemba submitted that the Arbitrator ignored to analyze the evidence tendered by the Applicant and referred to the previous ruling of the CMA in Labour Dispute No. CMA/KLM/ARB/32/2019 and concluded that the retrenchment was without valid reasons. He argued that according to rule 23(2) of the Code of Good Practice restructuring needs geared towards achieving efficiency is an acceptable and legitimate reason for the retrenchment. He stated further that through Exhibit D2, D3 and D4 the Applicant notified the Respondent of the reasons for retrenchment and disclosed all the relevant information therefore it was Mr. Sipemba's submission that the Applicant had an acceptable reason to conduct the retrenchment.

On the third issue as to whether the Arbitrator erred in holding that the audio evidence produced at the CMA as evidence did not amount to proper consultation envisaged in law. Mr. Sipemba submitted that the Arbitrator erred when she discredited the audio recordings (exhibit D3) by contending that in those audios the Applicant then Respondent was communicating to

her employees the decision reached to restructure the department which according to her it appeared that the decision had already been unilaterally made by the applicant. Mr. Sipemba was of the view that the Arbitrator contradicted himself because the law does not require the employer to consult and agree with his employees before restructuring of the business but according to section 38(1) of the ELRA, the employer is required to consult with the employee before retrenchment process. He went on submitting that what matters are to be discussed and agreed in consultation meetings are provided for under section 38(1) (c) of the ELRA and that the decision whether or not to restructure the business is not one of them as the Arbitrator argued.

Furthermore, the learned counsel submitted that Section 38(1) (c) of the ELRA requires consultation to be conducted but it does not say the form in which it must be conducted. He stated further that the consultation meetings were held via teleconference and minutes recorded as per exhibit D3. It was therefore his submission that the consultation process was properly conducted as envisaged by the law. He was of the view that the Arbitrator had misdirected herself for failing to appreciate the development of technology.

Finally, the fourth issue was whether the Arbitrator erred in law and in fact by ruling that there was no evidence that employee was paid terminal benefits after admitting the pay slip as exhibit during the hearing. Mr. Sipemba submitted that DW1 had informed the Commission that after the retrenchment the respondent was paid his terminal benefit and tendered in

evidence exhibit D12 which was a pay slip. The learned advocate questioned the reasoning of the Arbitrator in his award when held that there was no evidence tendered to prove that the Respondent was paid terminal benefit. The learned advocate submitted that the Arbitrator erred by not saying anything regarding exhibit D12 despite having acknowledged its presence. He argued that the Arbitrator ought to have analyzed exhibit D12, assess its credibility and make a finding and not to just abandon it the way he did without giving reasons. He further submitted that exhibit D12 clearly showed that the respondent was paid terminal benefits therefore he argued that the applicant did discharge her duty of proving that the Respondent was paid his terminal benefits. Mr. Sipemba concluded that the arbitrator had acted erroneously as he disregarded exhibit D12 with no reason and ordered the Applicant to repay again the terminal benefits.

Still on the same point Mr. Sipemba submitted that the Arbitrator also erred by awarding terminal benefits with an inflated and unjustifiable figure. He pointed out on the amount awarded as severance pay and said that the amount was not justifiable as the law provides for the way the amount should be calculated. He also submitted that the amount awarded as leave allowance was also not justified. It was also his submission that there was no justification for the Arbitrator to order 24 months compensation because the applicant had valid reasons to conduct retrenchment. In the end Mr. Sipemba prayed for this court to revise and set aside the unjustifiable award.

On the other hand, the learned advocate for the respondent Ms. Jane James made a brief submission in reply. With respect to the issue of jurisdiction it was her submission that to determine whether the Labour Dispute No. CMA/KLM/ARB/59/2019 was barred by the doctrine of ***res judicata***, the law is very clear on the applicability of the principle. She cited section 9 of the Civil Procedure Code, Cap 33 R.E 2019 (the Code) and the cases of the **Registered Trustees of Chama Cha Mapinduzi vs. Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No.16 of 2008 Court of Appeal of Tanzania at Zanzibar and another case of **Peniel Lotta vs. Gabriel Tanaki and Others** (2003) TLR 312. She then submitted that for the doctrine of ***res judicata*** to apply the following conditions must be proved which are; (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim. (ii) The subject matter directly and substantially in issue in the subsequent suit must be the same matter directly and substantially in issue in the former suit either actually or constructively, (iii) the party in the subsequent suit must have litigated under the same title in the former suit, (iv) the matter must have been heard and finally decided, (v) that the former suit must have been decided by a court of competent jurisdiction. The learned counsel gave a brief back ground of the matter from where it originated and stated that during the arbitration hearing of the Labour Dispute No. CMA/KLM/ARB/32/2019 which was preferred by the applicant both parties agreed that the matter was premature and the Arbitrator had ordered the applicant to comply with the provision of section 38 of the ELRA regarding the procedure for retrenchment. Ms. James submitted that

the applicant however ignored the order given by the CMA an act which she regarded as an abuse of court process. The learned counsel also cited a number of cases to show the position of the court regarding non-compliance with court orders. In the end the Ms. James submitted that the CMA had all the jurisdiction to entertain Labour Dispute No. CMA/KLM/ARB/59/2019 and that the same was not a ***res judicata*** as the elements of ***res judicata*** did not apply.

Responding to the second and third issues together Ms. Jane James submitted that one could rule out if the reason for retrenchment was substantively fair or not if the procedure for retrenchment was complied with. The learned counsel further submitted that the procedure for retrenchment were not complied with by the applicant as ordered instead the Applicant unfairly terminated the employment contract of the Respondent as seen in the testimony of DW1 at page 15 of the typed proceedings. She thus concluded that since the Applicant did not comply with the procedures as provided by the law hence the issue of whether the reason for retrenchment was substantively fair or not was not worth discussing.

Ms. Jane James further submitted that DW1 had failed to prove the authenticity of all the electronic evidence tendered. She stated that in all the testimony of DW1 there was no where he proved that the electronic evidence, he relied upon were original perhaps with a verified provenance. She added that DW1 testified that he was never part of the evidence but claimed to be a custodian of Exhibits D1 to D10 and failed to establish the

fact that he was the custodian. The learned counsel concluded that the Arbitrator did not error in holding that the audio evidence produced at the CMA did not amount to proper consultation envisaged in law.

On the last issue the learned counsel submitted that DW1 who was the only witness of the Applicant did not tender any evidence to prove that the Respondent received his terminal benefits. She argued that what was admitted in evidence was the slip which showed how much the Respondent was supposed to be paid. Ms. James referred to page 11 of the typed proceedings to show that when DW1 was being cross-examined he admitted that exhibit D12 only showed the number of terminal benefits which the Respondent was supposed to be paid. She added that worse enough DW1 did testify that he had no evidence to prove that the Respondent was paid his terminal benefits on page 17 of the typed proceedings.

Concluding her submission Ms. James stated that the revision was of no merit rather it only delayed the rights of the respondent who had been unfairly terminated since 7th October ,2019 and has not to date been paid a single cent.

Rejoining the submission Mr. Sipemba reiterated his submission in chief and added that the Applicant did comply with the ruling and proceeded with retrenchment in accordance with section 38 of the ELRA. He argued that the respondent has failed to show what was not complied with rather he alleged generally with no proof that the Applicant ignored CMA order.

He submitted that according to section 38(3) of ELRA the Applicant was entitled to proceed with retrenchment process. That it was upon termination of the Respondent that he went back to CMA and field a new labour dispute involving the same parties and same subject matter that is retrenchment while claiming to be unfairly retrenched. The learned counsel insisted it was a serious error and that the new dispute was ***res judicata.***

With respect to the issue of authenticity of electronic records tendered as evidence by DW1, Mr. Sipemba submitted that questioning the authenticity of the electronic evidence at this stage was absurd and an afterthought. He also submitted that DW1 did file at CMA an affidavit of authenticity which stated how the electronic records were retrieved and stored without being tempered with. He further submitted that the Respondent never objected to the tendering of the electronic records therefore he can not complain at this stage. To buttress his point the learned counsel referred to the case of **Japan International Corporation Agency vs. Khaki Complex Ltd** [2006] TLR 34. He maintained that the electronic records were authentic and were properly tendered and admitted in evidence.

Finally, Mr. Sipemba submitted that the Arbitrator exercised his powers arbitrarily and contrary to the law in entertaining the matter that she had no jurisdiction. He then prayed for the award to be quashed and set aside.

From the application, affidavits and written submissions the only issue for determination is whether the application for revision has merit. In determining the merit or otherwise of this application I will be responding

to each ground for revision or issues as raised by the applicant in the affidavit supporting the application.

On the first ground, the applicant questioned the jurisdiction of the Arbitrator to hear and determine the Labour dispute No. **CMA/KLM/ARB/59/2019**. He contended that the dispute was ***res judicata*** so the Arbitrator had no jurisdiction to determine the same. The question to be answered here is whether the dispute No. **CMA/KLM/ARB/59/2019** is prohibited by the doctrine of ***res judicata.*** The doctrine of *res judicata* has its meaning provided by the law under the provision of section 9 of the Civil Procedure Code, Cap 33 R.E 2019. The section reads;

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

From the above provision, in order for the principle of *res judicata* to successfully operate, the following conditions must be proved, namely;

i. there must be two suits, the former suit and the subsequent suit;

ii. the former suit must have been between the same litigating parties or between parties under whom they or any of them claim;

iii. the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;

iv. the party in the subsequent suit must have litigated under the same title in the former suit;

v. the matter must have been heard and finally decided;

vi. that the former suit must have been decided by a court of competent jurisdiction;

Basically, the principle of ***res- judicata*** bars Courts from entertaining any suit or issue which involves the same parties on the same subject matter and has been determined to its finality by a court of competent jurisdiction. It seeks to prevent a matter which has been adjudicated by a competent court to be persuaded further by the same parties in the same court. The rationale behind this principle is to ensure finality in litigation and protect an individual from endless litigations.

In the present scenario Labour Dispute No. **CMA/KLM/ARB/32/2019** was instituted at CMA in Moshi by the Applicant following the refusal by the Respondent to accept the retrenchment package agreement offered by the Applicant. The dispute went through mediation stage and later was

referred to arbitration stage where it was struck out for being prematurely instituted and the Applicant was advised to comply with the provision of section 38 of the ELRA regarding retrenchment. The Applicant proceeded by issuing the Respondent with a letter of termination of employment which resulted into another dispute instituted at CMA in Moshi by the Respondent after being dissatisfied with the termination of his employment. The dispute was registered as labour dispute No. **CMA/KLM/MOS/ARB/59/2019**.

I have examined the two disputes in relation to the principle of res judicata and noted as follows. From the outset it is clear that the former dispute and the subsequent one involved same parties, same subject matter that is retrenchment and both were instituted at CMA. The question is whether the Former dispute was heard and finally determined. As noted from the ruling exhibit D8, the former dispute which was instituted by the applicant was not conclusively determined. It was struck out for being prematurely instituted. This means the parties' rights and liabilities were not decided on the merits. When the matter is struck out, it normally implies that the right to reopen the matter survives subject to time limitation. If the dispute was not resolved, it means either of the parties could still pursue the matter for it to be determined. Based on the explanation above, the principle of res judicata does not apply in the present case and therefore this ground lacks merit and it is dismissed.

Moving on to the second ground, the applicant has challenged the decision of the Arbitrator which held that the audio evidence produced did not

amount to proper consultation envisaged in law. In order to determine this issue, I was guided by the provision of section 38(1) (c) of the ELRA. This provision reads;

> ***38***.*-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall; - (a) ...(b) ...*
>
> *(c) consult prior to retrenchment or redundancy on –*
>
> *(i) the reasons for the intended retrenchment;*
>
> *(ii) any measures to avoid or minimize the intended retrenchment;*
>
> *(iii) the method of selection of the employees to be retrenched'*
>
> *(iv) the timing of the retrenchments; and*
>
> *(v) severance pay in respect of the retrenchments*

From the foregoing provision the law has stated clearly what consultation entails. Therefore, to determine if the consultation was done in accordance with the law one has to examine it based on this provision. I have had a chance to listen to the audio recording which was tendered during the hearing and admitted as Exhibit D3. The recording was about the meetings which were conducted between the employer and the employees who were subjected to the retrenchment process. In the recording the employees

including the respondent herein were consulted as a group and later another meeting was conducted at the individual level. I was able to listen to the whole consultation meetings which were held through teleconference. Matters which were discussed during the meetings covered all the items as provided by the law under section 38(1) (c) of the ELRA above quoted. What I was able to grasp from the evidence of the audio recording is that the intended employees were initially notified by being given a written notice of the company's intention to retrench. This was done before the meeting was held. During the meeting they were informed about the reasons for the retrenchment which was business requirements. They were also informed of the measures the company had taken to minimize the intended retrenchment which was the two available positions which were advertised internally first so that the impacted employees could apply. They were also informed of the timing on which the termination was to take place. Not only that but also the employees were consulted on the severance pay and other terminal benefits that were to be given on their exit. In the end the employees were also allowed to ask questions and give comments or their recommendations on the subject. I also noted that the respondent refused to engage himself in the discussion but that does not mean that he was denied his right. The employer did everything to the letter and did not violate any provision of the law. The Arbitrator misinterpreted the law by thinking that the law requires the employer to consult the employee regarding the decision to restructure his business. Everything the law requires to be discussed during consultation was accordingly discussed. Given the circumstance I am convinced that the

consultation was done according to the law and for this reason, I find that the honorable arbitrator did error by holding that the Respondent was not consulted in accordance to the law. This ground has merit and it is allowed.

Now, on to the third ground in which the applicant challenged the Arbitrator's award which decided that the reason for retrenchment was not substantively fair. When deciding on this aspect the Arbitrator held on page 11 of the ruling that the Commission found that the Respondent now the Applicant used restructuring as a pretext to terminate the Complainant. In Arbitrator's views the reason of restructuring business was not a genuine one to justify termination. He ruled so after going through the Applicant's termination letter to the Respondent and argued that the letter only stated the background leading into termination then proceeded to termination without further consultation or other alternative to avoid retrenchment. It was the Arbitrator's opinion that the Respondents' rights were overlooked or not given any consideration because there was no evidence that the complainant was given opportunity to be taken by the new company which the applicant was subcontracting to outsource the service. In the upfront I think the Arbitrator misinterpreted the law to think that the employer was required to ensure the employee secured a job from the subcontracted companies. This is not a legal requirement and the Applicant did not violate any provision of the law by not doing so.

In determining whether or not there was fairness in the reason for termination, the law has provided guidance under its rules GN. No. 42 of 2007 at Rule 23(2) where it has listed the circumstances which may

legitimately form basis of a termination. One of the circumstances listed is structural need that arise from the restructuring of the business. The Applicant was very clear with regards to the reasons for termination of the Respondent's employment contract which was exhibited by first a letter addressed to all its staff exhibit D2 which was followed by Individual Notice of Organization Changes exhibit D4. In this notice the employees including the respondent were individually notified of a transformation in the Applicant's operating mode that impacted its organizational structure. The reasons for the changes were also explained in the notice including timing when the implementation was to take place. The notice also informed the respondent of the consultation meetings which were to take place in the days ahead and the subjects that were to be discussed during consultation meetings. To me this is clear evidence that the Applicant had a genuine reason for termination of the employment of the respondent and his colleagues. The genuineness of the reason for termination is apparent and the applicant was transparent in handling the matter in accordance with the law. Having stated so I find merit on this ground and it is therefore allowed.

Moving on to the fourth ground where the applicant argued that the Arbitrator erred by ruling that there was no evidence that the respondent was paid terminal benefits. After going through the records, I noted that the Applicant through its witness testified that the applicant was paid all his terminal benefits as indicated on Exhibit D12. However, during his testimony, the Applicant's witness Stanley Nshange explained that Exhibit

D12 only outlined the benefits that the respondent was entitled to. See page 11 of the typed proceedings. Looking at Exhibit D12, I also find it lacking because it is simply a print out which does not bare any stamp, signature or any official seal of the Applicant that is why it can not be said to be proof of payment. Section 112 of the Evidence, Cap 6 R.E 2019 provides that;

> ***"112.*** *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".*

Based on the above provision and the records, I find that the Applicant failed to discharge his burden of proof as required by the law. There is no evidence on record that the Respondent was paid his terminal benefits as appears on Exhibit D12. Consequently, the fourth ground lacks merit and it is hereby dismissed.

Finally on the fifth ground the applicant alleged that the Arbitrator erred by awarding the Respondent payments of claims which were time barred. This ground was not explained by the Applicant in their submission therefore it is difficult to understand exactly which payments they were referring to as being time barred. Therefore, this ground lacks merit and it is dismissed forthwith.

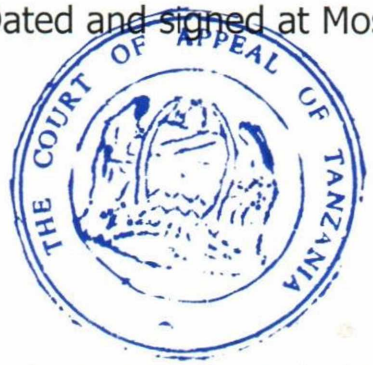
To conclude this matter based on what has been discussed above, this court finds that the termination of the respondent's contract of

employment was not unfairly done therefore the Arbitrator erred by awarding compensation to the Respondent.

For the foregoing reasons the application is allowed to the extent above explained. The decision of the Arbitrator is hereby quashed and set aside. The Applicant is therefore ordered to pay the Respondent all his terminal befits in accordance to the law.

For the foregoing reasons the application is allowed to the extent above explained. It is so ordered.

Dated and signed at Moshi this 21st day of April, 2022.



T. M. MWENEMPAZI

JUDGE

Judgment delivered this 21st day of April, 2022 in the presence of Ms. Saudia Kabora, learned advocate for the applicant and Ms. Jane James, learned advocate for the respondent

T. M. MWENEMPAZI

JUDGE