

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

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**LABOUR REVISION NO. 02 OF 2019**

*(Originating from Labour Dispute No. CMAI/IR/60/2018)*

**NEW FOREST COMPANY (T) LIMITED ..... APPLICANT**

**VERSUS**

**JOHN CHEKULE ..... RESPONDENT**

**RULING**

Date of Last Order: 22/03/2022

Date of Ruling: 27/07/2022

**MLYAMBINA, J.**

The Court in this application will deal with the issue of jurisdiction of the Commission for Mediation and Arbitration (hereinafter referred as the CMA) on matters where Parties agreed to the instrument used when there is a dispute in relation to their contract. The Court will provide answers to the four issues deduced from the Applicant's affidavit sworn by her Counsel Moses Ambindwile:

- 1. Whether the learned Arbitrator was justified to dismiss the notice of preliminary objection by relying on the reply written submission filed in the Commission contrary to the law and practice.*
- 2. Whether the learned Arbitrator was right to hold that the Commission has jurisdiction over the dispute while the contested*

*agreement has specifically provided for a proper forum for dispute resolution.*

*3. Whether the learned Arbitrator was right to hold that the same agreement was based on employee and employer relationship despite the fact that there is a clause which is specifically governing the relationship of the disputants; and*

*4. Whether the learned Arbitrator was right to hold that the Respondent had been paid salaries, supervised, given working tool and working hours and controlled by the Applicant's Party in absence of proof of the same facts.*

Both Parties were represented. The Applicant was represented by Mr. Moses Ambindwile, learned Advocate while the Respondent was enjoying the service of Dr. Ashery Fred Utamwa, learned Advocate. By consent of the Parties this application was heard by way of written submission.

As regards the first issue, the Applicant submitted that; on the first date of hearing scheduled by the Commission, the Parties were to submit orally as it was done by the Applicant herein. Unfortunately, after the Applicant's submission, on another date without leave of the Commission, the Respondent filed his reply written submission. The

same Commission acted upon such submission and delivered Ruling against the Applicant.

On the second issue, the Counsel for the Applicant submitted that CMA lacked perquisite jurisdiction over the matters. He averred that; according to their agreement which was the cornerstone of their dispute before the CMA, at the fore page, the same agreement was for independent consulting Agreement. Moreover, under items 3.1 and 3.2 it is expressly stated that the relationship of Parties to the agreement is an independent Consultant and neither Consultant/Respondent nor/ its members, partners, directors, employees or agents was deemed an employee of the Applicant. Also, at item 16.1 provided that any dispute arising had to be finally resolved in accordance with the rules of Private Arbitration in Tanzania by an Arbitrator(s) appointed by mutual agreement.

Further, the Applicant's Counsel submitted that Parties are bound by their choice. Hence, this Court lacks jurisdiction. He supported his argument by the case of **Sunshine Furniture Co. Ltd v. Maesk (China) Shipping Co. Ltd and Another**, Civil Appeal No. 98 of 2016, Court of Appeal of Tanzania at Dar es Salaam, specifically page 16 and 17 of the judgement in which the Court held that:



*Subject to this act the Courts shall have jurisdiction to try all suit of the civil nature excepting suit of which their cognizance is either expressly or impliedly barred.*

Also, in the same case, the Court had this to say:

*When the attention of the Court, in which the suit is instituted, is drawn to the contractual stipulation to seek relief in a particular (foreign) forum, the Court may in the exercise of its discretion stay to try a suit. The prima facie learning of the Court is that the contract should be enforced and the Parties should be kept to their bargain.*

From the above holding, the Counsel for the Applicant insisted that the Respondent was obliged to comply with what was enshrined in their contractual agreement for claiming his right (if any) instead of knocking doors of the CMA.

As for the third issue, the Counsel averred that the Parties are bound by their contract. In regard to the fourth issue, the Counsel prayed to this Court to disregard the Arbitrator findings that there was employment relationship between the disputant simply because the Respondent herein was provided for working tools, supervision, working

hours and controlled by the Applicant. It was an Arbitrator opinion and no evidence which was submitted to substantiate the finding. He prayed this Court to allow this application.

In reply, the Respondent's Counsel prayed his counter affidavit to be adopted and form party to his submission. He started from the last issue. Thus, on the material date, when the matter came for hearing of the preliminary objection, after the objector finished to submit, the Arbitrator received a phone call which required him to leave immediately before he argued the Respondent to put his submission into writing and file to CMA. The Applicant did not object. The Arbitrator made its ruling based on both the recorded oral submission and the written submission of the Respondent. It is from this duality submission that the Applicant is irritated. It was the view of the Respondent that the Applicant was supposed to raise his objection on the same day. Also, he did not say which law was contravened or how she was affected by the said duality. Moreover, on point whether there was any employment agreement between the two, the Respondent's Counsel answered it in the affirmative. *Section 61(a), (b), (e) and (g) of the Labour Institution Act [Cap 300 R. E. 2019]* provides that:

- a) The Respondent worked under total control of the Applicant.

- b) The Respondent hours of work were subject to the control and direction of the Applicant.
- c) The Respondent was economically dependent on the Applicant because he was a foreigner and he come to Tanzania by virtual of being employed by the Applicant.
- d) The Respondent was provided by all working tools by the Applicant.
- e) The Respondent only worked for the Applicant and had no any side income works or activities.

With all the above, the Respondent contended, when tallied with the gist of *section 61 (supra)*, the Respondent was legally an employee of the Applicant. This dispute was correctly brought before the attention of the CMA.

On the point of jurisdiction, the Respondent's Counsel submitted that the CMA has a jurisdiction to hear and determine this matter. He believed that the jurisdiction of the Court is established by the law enacted by the Parliament. He supported his assertion with the case of **Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Limited (IPTL)[2000]** TLR 324. Thus, jurisdiction of the High Court of Tanzania is established by *Article 108 (1) of the*



*Constitution*, whereas jurisdiction of subordinate Court is established by *the Magistrate Court Act [Cap 11 R. E. 2019]*.

On other side, jurisdiction for Labour Courts (Commissions) is established by *the Labour Institutions Act [Cap 300 R. E. 2019]*. Therefore, Parties cannot by agreement or otherwise confer or oust the jurisdiction of the Court. He backed up his statement with the case of **William Sabuka v. Safari Sipembo**, Land Appeal No. 31 of 2018, High Court at Shinyanga, in which Mkwizu J. quoted the case of **Sospeter Kahindi v. Mbeshi Mashini**, Civil Appeal No. 56 of 2017 in which the Court of Appeal of Tanzania has this to say:

*...Parties cannot confer jurisdiction to a Court or Tribunal that lacks that jurisdiction.*

In the same case of **William Sabuka** (*supra*) the Court quoted the case of **Shyam Thanki and Others v. New Palace Hotel** [1971] 1EA 199 at page 202 that:

*All the Court in Tanzania are created by the statute and their jurisdiction is purely statutory. It is an elementary principle of law that, Parties can not by consent give a Court jurisdiction which it does not possess.*

Furthermore, the Respondent's Counsel averred that all dispute on Labour and Employment matters shall be manned by the Commission for Mediation and Arbitration (CMA). It is an independent Commission of the Government as per *section 13 (1) of the Labour Institution Act (supra)*. Its function includes mediation and arbitration of Labour disputes in line with *section 14 (1) of the LIA*, which allows Parties to refer their dispute to the arbitration including private arbitration. The reference does not mean that CMA lack jurisdiction to hear and determine the subject dispute as the Applicant contended. He supported his argument with *rules 4(2) and 20(1) of the LIA*.

According to the Respondent's Counsel, the principle is that; when the Parties wants to submit their dispute to another forum of their choice, if the matter is on labour issues, then the process to attain must commence with mediation after which the Parties may bring their proposal of using another forum and the Mediator will assess it and decide.

The Respondent's Counsel conceded with the Appellant's submission then there is a clause under their agreement which require the dispute to be transferred to private Arbitrator but that cannot make the CMA lack jurisdiction as it was misconceived in the case of **Sunshine Furniture** (*supra*) but later was rectified in the case of



**Scova Engineering S. P. A. and Another v. Mtibwa Sugar Estate Ltd and 3 Others**, Civil Appeal No. 133 of 2017 at Dar es Salaam (unreported) the Court made the following principle:

*The jurisdiction of the high Court or any Court for that matter, having been conferred by statutes, is not capable of being ousted by any agreement of Parties except by statute in explicit terms.*

From the above holding, the Respondent was of the opinion that, even if the Parties resorted to private Arbitrator, the procedure for the same was not observed and followed. The procedure has to be under *Civil Procedure (Arbitration) Rules in Second Schedule to the Civil Procedure Code, Cap 33 RE 2019*. Thus, since it was a Labour matter, the dispute had to be referred to the CMA through CMA Form No. 1. Thereafter, the matter could be referred to Private Arbitrator in writing. *Rule 1(1) and (2) of the afore said Arbitration Rule* provides:

1. (1) Where in any suit all the Parties interested agree that any matte in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the Court for an order of reference.
- (2) Every such application shall be in writing and shall state the matter sought to be referred.

The Respondent's Counsel added that the jurisdiction of the Court is statutory. It cannot be ousted by the agreement of the Parties. As such, CMA has jurisdiction to hear and determine the matter at hand. He therefore prayed this application be dismissed.

After carefully consideration of the submissions by both Parties, I will like to start with the issue of jurisdiction due to its crucialness. Jurisdiction as per Black Law Dictionary means: A Courts power to decide a case or issue a decree. Also, in the case of **The Honourable Attorney General v. Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania at Dar es Salaam (unreported), the Court has this to say concerning the meaning of the word Jurisdiction:

*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 to the subject matter of the issue or to the person between whom the issue is joined or to the kind of relief sought or to any combination of these combination of these factors.*

From the quoted findings, the issue of jurisdiction is fundamental. If the Court acts on the matter in which it has no jurisdiction to deal with, the whole procedure and its order are nullity because it goes to the root of the matter. This was also insisted by the Court of Appeal in the case of **Fanuel Mantiri Ngúnda v. Herman Mantiri Ngúnda and 20 others**, Civil Appeal No. 8 of 1995, (unreported).

Also, it is well known that the jurisdiction of the Court is created by the statutes. In the case of **Sospeter Kahindi v. Mbeshi Mahini**, Court of Appeal of Tanzania at Mwanza (unreported), the Court of Appeal quoted with approval the case of **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199 at page 202 that:

*All the Court in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that Parties cannot by consent give a Court jurisdiction which it does not possess.*

The Commission for Mediation and Arbitration was established under the provision of *section 12 of the Labour Institution Act [Cap 300 RE 2019]*, and its function are stipulated at *section 14* of the same law as follows:



*(1) the function of the Commission shall be to- (a) mediate any dispute referred to it in terms of any labour law, (b) determine any dispute referred to it by arbitration if, (i) a labour law requires the dispute to be determined by arbitration, (ii) the Parties to the dispute agree to it being determined by arbitration, 2 (iii) the Labour Court refers the dispute to the Commission to be determined by2 arbitration in terms of section 94 (3)(a)(ii) of the Employment and Labour Relation Act.4 (2) The Commission may offer to mediate a dispute that has not referred to it.*

From the quoted provision of the law, the CMA deals with all matters which originates from labour issues. The question to ask is; *whether labour dispute based on an agreement in which the forum is already agreed upon can be dealt by the CMA.* It is a cardinal rule that the jurisdiction of any Court has been conferred by statute and is not capable of being ousted by agreement of the Parties except by statute in explicit terms as stated in the case of **Scova Engineering** (*supra*). Item 16.1 of the disputed agreement provide that:

*Should any dispute of any nature whatever arise from  
or in connection with this agreement, then at the*

*election of any party, such dispute shall be finally resolved in accordance with the rules of private arbitration in Tanzania, by an Arbitrator or Arbitrators appointed by mutual agreement.*

Notwithstanding the aforementioned item, the jurisdiction of the CMA cannot be ousted easily by the party's agreement. The Applicant told the CMA that they agreed to use the private Arbitrator under the rules of Arbitration of Tanzania. However, in Tanzania, it is the CMA which has been vested with the mandate to deal with the disputes arising from labour matters. According to the laws, the jurisdiction can only be ousted by the statute in explicit terms. The Applicant herein did not explain which law did the Respondent contravene in which the CMA jurisdiction was ousted. The clear procedure was first to file the dispute to the CMA, then the Parties could apply for arbitration in writing and the Mediator would refer the dispute direct to the Arbitrator(s) as per *item E of the CMA Form No. 1*. Therefore, the second issue has no merit.

As for the first issue, this Court went through the ruling delivered before the CMA and discovered, as rightly submitted by the Counsel for the Respondent, the Arbitrator when writing its ruling, he relied on the Applicant's oral submission and the written submission filed by the

Respondent contrary to the Applicant allegation that the Respondent without Arbitrator's permission filed his written submission and the Arbitrator used it to rule against the Applicant. It is the findings of this Court that it was wise if the Applicant could have taken the initiative to bring the CMA proceedings to prove his allegation, as the law require. The one who alleges the facts and wants the Court to believe on that allegation has to prove the existence of the fact, as per *section 110 of the Law of Evidence [Cap 6 RE. 2019]*. For easy of reference *section 110 (supra)* provides that:

- (1) whoever desire any Court to give judgment  
as to any legal right or liability depend on the  
existence of facts which he asserts must prove that  
those facts exist,*
- (2) when a person is bound to prove the existence of  
any facts, it is said that the burden of proof lies  
on that person.*

From the record, the Applicant failed to prove his allegation. This Court cannot conclude the allegation or work on it without sufficient evidence. The Respondent submitted that the Arbitrator ordered him to file his reply in written form before the Applicant but he never objects from the beginning while he was present and nothing restricted him to



act. This is the Applicant's afterthought after the ruling being delivered in favour of the Respondent.

Moreover, as regards the third and fourth issue, the Applicant contended that their agreement was for independent consultant. The Arbitrator's assertion that the Respondent being provided with working tools, supervision, working hours and he was controlled by the Applicant, it means there was employment relationship between the disputants. The Applicant refutes on existence of the employment relationship based on the ground that there is no evidence adduced by the Respondent to proof his allegation, even though their agreement stated clearly at item 3.1 that the independent Consultant, nor its member, partners, directors, employees, or agents will never be deemed as an employee of the company.

Further, the Applicant insisted that Parties are bound by their contract. The Arbitrator based on provision of *section 61 (a) (b) (e) (f) and (g) of the LIA*. For the easy of reference, the aforementioned sections provide:

*61.- for the purpose of Labour Law, a person who works for, or renders services to, any other person is assumed, until the contrary is proved, to be an*

*employee, regardless of the form of the contract, if any one or more of the following factors is present:*

- a) the manner in which the person works is subject to the control or direction of another person,*
- b) the persons hours of work are subject to the control or direction of another person,*
- c) N/A*
- d) N/A*
- e) the person is economically dependent on the other person for whom that person works or rendered services,*
- f) the person is provided with tools of trade or work equipment by the other person, and*
- g) the person only works for or render service to one person.*

From the record, according to their agreement, the Respondent was the independent Consultant but he had to report to the Country CEO and Group Head of Operation. That means, the Respondent was working under direction of another person. Upon termination, he was supposed to return company properties. That means, he was been provided with the tools and the like. Therefore, in the context of *section*

61 (1) of the LIA, the Respondent was an employee of the Respondent, to wit there was employment relationship between the disputants.

In the end result, I hereby dismiss the application for want of merit. It is so ordered.



**J. J. MLYAMBINA**

**JUDGE**

**27/07/2022**

Ruling delivered and dated 27<sup>th</sup> day of July, 2022 through Virtual Court in the presence of Counsel Theresia Charles for the Applicant and Dr. Ashery Utamwa for the Respondent. Both Parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



**J. J. MLYAMBINA**

**JUDGE**

**27/07/2022**