

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

**LABOUR DIVISION**

**(MOROGORO DISTRICT REGISTRY)**

**AT MOROGORO**

**LABOUR REVISION NO. 18 OF 2021**

**MUSTAPHA KHALFANI.....APPLICANT**

**VERSUS**

**CASHEWNUT BOARD OF TANZANIA.....RESPONDENT**

**R U L I N G**

**25<sup>th</sup> & 29<sup>th</sup> April, 2022**

**CHABA, J.**

The applicant, Mustapha Khalfani filed this application for revision under section 94 (1) of the Employment and Labour Relations Act No. 6 of 2004 (As amended by Written Laws Amendment Act No. 3 of 2010) and Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) & (f) and 24 (3) (a) (b) (c) (d), 24 (11) (b) and 44 (1) and (2) of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provision of the law.

In his application, the applicant calls upon this court to revise the proceedings and ruling passed by the Commission for Mediation and Arbitration (the CMA), at Morogoro dated 8/6/2021 and 30/7/2021. In essence, the applicant is praying for the following orders which I rephrase:

- 1. That, this honorable Court be pleased to call, examine and revise the ruling of the CMA dated 8/6/2021 and 30/7/2021 issued by Honorable Kayugwa H. (Mediator) in Complainant No. CMA/MORO/032021.*



2. *That, the respondent filed counter affidavit out of time without any justifiable reasons against the relevant procedure.*
3. *That, the honorable mediator erred in law by not considering the evidence by applicant was filed a case against the respondent at CMA out of time with application for condonation.*
4. *Any other relief this court may deem fit and just grant.*

The application is supported by an affidavit deposed by the applicant, As shown in his affidavit in particular paragraphs 4, 5 and 6 respectively, the applicant states that he filed a case against the respondent Cashewnut Board of Tanzania, a legal person at the CMA out of time with an application for condonation and the respondent filed her counter affidavit out of time without any justifiable reasons against the procedure of the law, and due to that the application does not objected. That, the CMA provides for two ruling different ruling of preliminary objection in the same parties and the same subject matter. Basing on these grounds the applicant's prayed the two rulings issued by the CMA dated 08/06/2021 and 30/07/2021 be revised.

Upon served with the notice of application, coupled with the chamber summons in support of the affidavit, the respondent, Cashewnut Board of Tanzania, a legal person through the legal service of Mr. Xavier Ndalaha, State Attorney from the office of the Solicitor General, filed a counter affidavit and a notice of preliminary objections on points of law to the effect that.

1. *That, the rulings dated 8<sup>th</sup> June, 2021 and 30<sup>th</sup> July, 2021 issued by the CMA are interlocutory orders which are not subject to appeal or revision.*
2. *That, this application was overtaken by event when the application for condonation was heard and being determined by the CMA.*



At the hearing of this application on 5/4/2022, parties were ordered and consented to argue the raised preliminary objections by way of written submissions. All parties adhered to the scheduled orders.

Arguing in support of the raised preliminary objections, Mr. Ndalaha submitted that, in the course of preparing his written submissions, he noticed that there are other points of law which are very important to be determined by this court. These points are:

- 1. This court has no jurisdiction to determine this matter, and*
- 2. Non-joinder of the Attorney General as the respondent.*

The learned State Attorney preferred to commence with the question of jurisdiction of this court in determining labour matters. Building his argument, he began by submitting that the respondent, Cashewnut Board of Tanzania is a body corporate established by Section 3 of The Cashewnut Industry Act No 18 of 2009, He emphasized that by this establishment, it follows therefore that, the respondent is a Government corporation which is under supervision of the Minister responsible as per Section 6 of the The Cashewnut Industry Act No 18 of 2009. He emphasized that being the Government corporation, all labour matters between an employee and the respondent (employer) are governed by the Public Service Act [Cap. 298 R.E. 2019]. The law clearly states that, any disciplinary matter between an employee and the employer in public service shall be referred to the Commission as per Section 32A of the Public Service Act (supra). The law directs further that, any aggrieved party before the Commission may appeal to the President of the United Republic of Tanzania on which the appeal will be final. To back up his position, Mr. Ndalaha referred this court to the case of **Tanzania Posts Corporation vs. Dominic A. Kalangi**, Civil

Appeal No. 12 of 2022; CAT -Mtwara (unreported). Upon determining the appeal Court of Appeal of Tanzania held: the CMA had no jurisdiction to hear and determine labour disputes between an employee against the appellant/Government.

It was Mr. Ndalaha's contention that since the applicant, Mustapha Khalfani is pursuing a labour matter which originates from the CMA contrary to section 32A of the Public Service Act (supra), in the circumstances, this application has nothing and it qualifies to be struck out for being incompetent before this court.

As regards to the point of non-joinder of the Attorney General, Mr. Ndalaha accentuated that the respondent herein ought to be sued together with the Attorney General as the respondents. This requirement is provided for by section 26 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 which amended section 6 of the Government Proceedings Act [Cap. 5 R.E. 2019] by adding subsection as follows:

*"All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, Ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party".*

From the above position of the law, the learned State Attorney underlined that with the aforesaid omission, this application cannot be pursued before this court in the absence of the Attorney General as the necessary party (respondent).

In respect of the 1<sup>st</sup> ground of preliminary objection, the applicant

complained that the rulings dated 8<sup>th</sup> June, 2021 and 30<sup>th</sup> July, 2021 issued by the CMA are interlocutory orders which are not subject to appeal/revision. He averred that the applicant is complaining against rulings which were delivered in two different days but in fact it was one ruling on preliminary objection which was raised by the respondent to the effect that the CMA had no jurisdiction to hear and determine labour matter filed by the applicant against the respondent which is part of the Government. Nevertheless, both rulings ended in favour of the applicant and paved way for hearing of condonation application which was decided on 19<sup>th</sup> August, 2021. On this point, Mr. Ndalawa highlighted that determination of rulings on preliminary objections at the CMA was an interlocutory order which did not deter determination of the applicant's right at the CMA. The applicant's main application at the CMA (application for condonation) was heard and determined on merits on which the matter was dismissed for lack of merits.

He contended that, it is not acceptable in law to appeal or file revision against interlocutory decisions otherwise it finalizes the matter. He said, the reason behind is to enable matters to come to an end. If this situation is allowed it may make difficult to complete cases because it would attract endless appeals and revisions as well. To buttress his averment, he cited the case of **Vodacom Tanzania Public Ltd Company vs. Planetel Communications Ltd**, Civil Appeal No. 43 of 2018 decided on 26<sup>th</sup> June, 2019 by the Court of Appeal of Tanzania (unreported). In this case, the Court of Appeal of Tanzania held: the entire appeal was incompetent before the court for being emanating from an interlocutory order which is not appealable or subject for revision. He averred that, the rulings delivered on 8<sup>th</sup> June and 30<sup>th</sup> July, 2021 were an interlocutory order which are not subject for revision.

The applicant's application was also hammered by the learned State



Attorney to the effect that this application was overtaken by event when the application for condonation was heard and being determined by the CMA. Substantiating his argument, Mr. Ndalaha submitted that the applicant knocked the CMA door for order of an extension of time to file his grievances against his employer upon filed an application for condonation. However, before hearing could take place, the applicant's application was confronted with a preliminary objection from the respondent to the effect that, the CMA had no jurisdiction to determine the matter between the applicant against the Government. The preliminary objection was overruled on 8<sup>th</sup> June and 30<sup>th</sup> July, 2021 and hearing of condonation application proceeded and accordingly was determined on 19<sup>th</sup> August, 2021. In that view, the learned State Attorney submitted that when the main application was heard and determined by the CMA, obviously the applicant's application was overtaken by event. In that regard, there is nothing to be reversed by this court. To buttress his argument, he cited the case of **Separatus Tryphone Katambula vs. Salum Mohamed Said**, Misc. Civil Application No. 170 of 2017; HC - Land Division in Dar es Salaam (unreported) where during hearing of the matter fronted by Separatus Tryphone Katambula, this court revealed that the sought order was overtaken by event because the subject matter, a house in dispute was already demolished by the respondent hence the order could not serve anything. The court declined to issue the said order and in turn dismissed the application.

In conclusion, Mr. Ndalaha prayed this court to struck out the entire application for lack of merit.

In reply, the applicant speaking through Mr. Basesa opted to abandon crucial two points added by the respondent relating to the questions of jurisdiction and non-joinder though he had an opportunity to reply and address this court. He jumped to cite section 79 (2) of Civil Procedure Code

[Cap. 33 R.E. 2019] (the CPC) and stated that this provision is of paramount importance. It provides that:

*"Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the court unless such decision or order has the effect of finally determining the suit".*

To back up his argument, he referred this court to the case **Manoni Malawi Manando v. Chacha Mwita Wambura**, Land Case Revision No. 02 of 2021, HC – Mwanza (unreported). He contended that it is not true that the application for condonation was heard and determined on merit. He said, the applicant was not afforded with the right to be heard and the matter was dismissed by the Mediator hence violated the principle of natural justice as enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1997, (as amended from time to time). He further cited the case of **M/s Darsh Industries Limited v. M/s Mount Meru Mills Limited**, Civil Appeal No. 114 of 2015 where the CAT – Arusha.

Having considered the parties rival submissions and carefully gone through the instant application and the court record as well, the central issue for consideration, determination and decision thereon is whether this application has merit or not.

At the outset, I would like to point out that this application is devoid of merit. It is apparent from the court record that the respondent, Cashewnut Board of Tanzania is a body corporate established by Section 3 of the Cashewnut Industry Act No. 18 of 2009 and therefore a Government corporation. Being the Government corporation, any disputes over a labour matter between employee and the employer, the governing law is Public Service Act [Cap. 298 R.E. 2019]. It is trite law that any disciplinary matter



between an employee and the employer in as much as public service is concerned, shall be referred to the Commission for Mediation and Arbitration in line with the provision of the law under section 32A of the Public Service Act (supra). As correctly submitted by the learned State Attorney, the law directs further that, any party who is aggrieved by the decision of the CMA may appeal to the President of the United Republic of Tanzania on which the appeal will be final.

In the present application, when the applicant became unhappy with the decision of the CMA he rushed before this court filed a revision matter which is contrary to the requirement of the governing law of employee and employer. The case of **Tanzania Posts Corporation vs. Dominic A. Kalangi**, Civil Appeal No. 12 of 2022, CAT – Mtwara, which is among the best principles in this facet. The Court of Appeal of Tanzania held that the CMA had no jurisdiction to hear and determine labour disputes between an employee and the Government corporation. I am in agreement with the learned State Attorney that the applicant wrongly filed this case while having into his knowledge that matter stemmed from the CMA which is against section 32A of the Public Service Act (supra). This application qualifies to be struck out for being incompetent before this court.

The worse thing is that the respondent being a Government Corporation it ought to be joined and sued together with the Attorney General as respondents as the law states that, all suits against the Government shall, upon the expiry of the notice period, be brought against the Government, Ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party as provided for by section 26 of the Written Laws (Miscellaneous Amendment) Act No.



1 of 2020 which amended Section 6 of the Government Proceedings Act [Cap. 5 R.E. 2019].

Having determined these two points, I see no need to labor on other two points of preliminary objections as by so doing it will be a wastage of time. As observed above, this court has no jurisdiction to determine this revision application and non-joinder of the Attorney General as a necessary party by the applicant is fatal and incurably defective.

In the result, this application is lacking merits and it is hereby struck out with no orders as to costs.

**It is so ordered.**

**DATED at MOROGORO** this 29<sup>th</sup> day of April, 2022.



**M. J. Chaba**

**Judge**

**29/04/2022**

**Court:**

Ruling delivered at my hand and Seal of this Court in Chambers this 29<sup>th</sup> day of April, 2022 in the presence of Mr. Boniphace Basesa, Secretary DOSHITWU who represented the applicant and Mr. Said Hamis Mkomwa, learned State Attorney for the respondent / the Government of the United Republic of Tanzania.



**M. J. Chaba**

**Judge**

**29/04/2022**

Rights of the parties fully explained.



**M. J. Chaba**

**Judge**

**29/04/2022**

