IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]
AT ARUSHA

REVISION APPLICATION NO. 110 OF 2021
(C/F Labour Dispute No. CMA/ARS/ARS/266/20/232/20)

JOHNSON THEURI MWANGI ..... 1ST APPLICANT

ROBIN KAIRUKI MWANGI ..... 2ND APPLICANT

Versus

AURIC AIR SERVICES LIMITED ..... RESPONDENT

JUDGMENT

15th & 19th August 2022

Masara, J.

1.0 INTRODUCTION

Johnson Theuri Mwangi and **Robin Kariuki Mwangi** ("the Applicants") approached this Court challenging the award of the Commission for Mediation and Arbitration at Arusha (henceforth the "CMA"), which rejected their claims and held in favour of the Respondent herein. The Applicants had, after being terminated by the Respondent on operational requirements (retrenchment), lodged a dispute of unfair termination at the CMA. The Applicants prayed to be reinstated. After hearing the parties and scrutinizing the tendered exhibits, the CMA found that the Applicants' termination was substantively and procedurally fair and that it was based on fair reasons. It proceeded to dismiss the

Application. The Applicants were aggrieved by the CMA Award and have thus preferred this Application.

The Application is supported with the affidavit of Mr Shedrack Boniface Mofulu, learned advocate, who also entered appearance for the Applicants at the hearing. The Respondent opposed the Application through a counter affidavit deponed by Mr Geofrey Kange, learned advocate. Dr George Mwaisondola, learned advocate, teamed up with Mr Kange in representing the Respondent at the hearing. On 20/12/2021, learned advocates for the Respondent raised two points of preliminary objections couched in the following terms:

a) *That the Applicants' application is hopelessly time barred; and*
b) *That, the Applicants' application is supported by an incurably defective affidavit.*

At the hearing, this Court ordered both the preliminary objection and the main Application to be heard simultaneously. By consent, it was resolved that both the preliminary objection and the main Application be disposed of through filing of written submissions.

2.0 FACTUAL BACKGROUND

The Respondent is an airline operating company registered in Tanzania. The Applicants were employees of the Respondent recruited on diverse

dates as pilots. While the 1st Applicant was employed on 21/08/2019, the 2nd Applicant was employed on 20/04/2019. They were recruited on a two years term contract at an annual renumeration of USD 56,664 and USD 40,224 respectively. From the evidence available, both Applicants were recruited at Mwanza. They were later transferred to Dar es Salaam before they were relocated to Arusha. They worked peacefully with the Respondent until things turned sour due to the outbreak of the Covid 19 (Corona) pandemic in early 2020. After the outbreak of Covid 19, most airline companies worldwide minimized operations while others were completely grounded.

The Respondent, as well, was adversely affected due to travel restrictions both internally and globally. The Respondent resolved to retrench some of its employees after cancellation of some of the bookings and hiring contracts by its customers. On 30/03/2020, the Respondent agreed with its employees, including the Applicants, to cut down their salaries at 50% for the months of April and May 2020 so as to rescue the Respondent from bringing operations to a halt. That did not help much as the effects of the pandemic became severe as days went on. On 03/05/2020, the Respondent decided to retrench some of its employees and communicated notices to that effect to the Applicants. The criteria for the

intended retrenchment in that notice were: contracts expiring within 3 months from May 01, 2020; work permits not applied for or which were due; performance; Last in first out criteria and expatriates.

As the pandemic continued, the Applicants went on a forced leave that commenced on 01/05/2020 ending on 31/05/2020. Notices of retrenchment of the Applicants were communicated to them on 11/05/2020. On 19/05/2020, there was an online consultative meeting jointly conducted between the two through zoom video link. On 22/05/2020, the employees communicated their proposals to the management that they were ready to have their salaries reduced to 20%. The Respondent's management found the proposals laid down by the employees unviable. On 23/05/2020 the Applicants were issued with notices of retrenchment.

On 10/06/2020, the Applicants referred the dispute of unfair termination at the CMA. Among other things, the Applicants complained that retrenchment procedures as provided for under section 38 of the Employment and Labour Relations Act, Cap. 366 [R.E 2019] (henceforth "ELRA") were not complied with. They contended that the notice of the retrenchment was not properly issued and communicated to them, that there were no adequate and fair consultation meetings and that reasons

for the retrenchment was not disclosed and proved by the Respondent. They were of the view that the termination was both substantively and procedurally unfair. As earlier stated, the CMA dismissed all of their claims. I will hereinbelow deal with the submissions of Counsel for the parties.

3.0 SUBMISSIONS ON THE PRELIMINARY OBJECTIONS

Submitting on the first point of preliminary objection, Counsel for the Respondent contended that the CMA award was delivered on 01/10/2021 and the instant Application was filed on 16/11/2021. They added that upon perusal of the CMA records, they confirmed that copy of the Award was availed to the Applicants on the same day it was pronounced; that is 01/10/2021. They made reference to section 91(1)(a) of ELRA which provides six weeks as the time limit to file revision against the CMA award from the day the award is served on the party in question. That, since the revision was filed in this Court on 16/11/2021, it was filed after 46 days, 4 days late. They also referred this Court to the decision of the Court of Appeal in the case of **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016** (unreported). They thus prayed that the Application be dismissed for being time barred.

On the second point of preliminary objection, Counsel for the Respondent averred that the affidavit in support of the Application does not contain

the statement of material facts on which it is based nor does it contain the statement of the legal issues that arise from the material facts. They contend that such omissions contravene Rule 24(3)(b) and (c) of the Labour Court Rules, G.N No. 106 of 2007 (henceforth "the Rules"). They, therefore, urged the Court to strike out the Application for being preferred on an incurably defective affidavit.

Responding to the first point of preliminary objection, Mr Mofulu did not contest the fact that they were served with the CMA Award on 01/10/2021. But he was emphatic that the Application was filed within the prescribed time as this Application was filed online on 06/11/2021 at 09:10:13hrs. He attached a copy of the online printout which showed that it was registered on the day and time indicated. Mr Mofulu urged the Court to overrule the objection on the ground that the Application was filed within the prescribed time as time to file the Application would have ended on 12/11/2021. Since the Application was filed online on 06/11/2021, it was within the time prescribed by law, he argued.

Regarding the second point of preliminary objection, it was Mr Mofulu's submission that paragraph 2 and 3 of the affidavit in support of the Application provides material facts. Likewise, the statement of legal issues arising from the facts as per Rule 24(3) of the Rules are enumerated under

paragraph 4 of the affidavit in support of the Application, he contended. Mr. Mofulu prayed that the objections be overruled and the main Application proceeds on merits.

4.0 COURT'S DETERMINATION OF PRELIMINARY OBJECTIONS

I have taken note of the preliminary objections raised and the submissions for and against them. To begin with the first preliminary objection, the Respondent challenges the Application stating that it was preferred outside the statutory time. The Applicants' Counsel, on the other hand, submitted that the Application was filed electronically through JSDS2 online filing system on 06/11/2021.

Admittedly, with the advent of the online case filing system, a case is considered duly filed once it is filed electronically online. The e-filing system is governed by the Judicature and Application of Laws (Electronic Filing) Rules, G.N No. 148 of 2018. Rule 21(1) of that G.N provides:

> *"A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless specific time is set by the Court or it is rejected."*

In the Application under scrutiny, according to the printout of the online filing system attached by the Applicants' Counsel, it clearly shows that the

Revision Application No. 110/2021 with reference No. 83596276 was submitted online on 06/11/2021 at 09:10:13hrs. Counting from 01/10/2021 when the award was pronounced by the CMA, and in accordance with the provision of the law cited above, it is apparent that the Application was filed on time, as it was filed 36 days after the award.

This Court, in the case of **Mohamed Hashii vs National Microfinance Bank Ltd (NMB Bank), Revision No. 106 of 2020**, while deliberating on the same issue held as follows:

> *"The Applicant filed this revision application electronically on 10th March, 2020, at 21:14:03 and he submitted the hardcopy on 16th March, 2020. I have checked the system which confirm that the application was filed on 10th March 2020, as the applicant's asserts. Counting from 28th, January 2020 when the award was delivered which I assume the date the award was served to the applicant since the applicant has said nothing as to when the award was served to him, to 10th March, 2020 when this application was filed online, it is clear that the application was filed within six weeks provided by the law ..."*

Guided by the above position of the law, I subscribe to the submission of the advocate for the Applicants that the Application was filed within time prescribed by law. 16/11/2021, the date alleged by Counsel for the Respondent that the case was filed, is the date the hardcopy documents were physically filed in Court, which cannot be taken as the date the

Application was filed. For the above reasons, the first limb of the preliminary objection is overruled.

In the second preliminary objection, Counsel for the Respondent submitted that the affidavit in support of the Application does not disclose the statement of material facts on which it is based and statement of legal issues that arise from those facts. I have scanned the affidavit in support of the Application. It depicts under paragraphs 2 and 3 of the said affidavit statement of material facts upon which the Application is based. It is stated therein that the Application emanates from labour dispute No. CMA/ARS/266/20/232/20, in which the deponent was representing the Applicants at the CMA. It further states that the dispute was decided in favour of the Respondent on 01/10/2021 by Hon. Arbitrator Mourice Egbert Sekabila. The description of the dispute leading to the Application is lucid in the said paragraphs. Hence, the statement of material facts are reflected in the affidavit contrary to what is contended by Counsel for the Respondent.

More precisely, the statement of legal issues upon which the Application is predicated is amplifies in paragraph 4 of the said affidavit. The statements under that paragraph are the issues of contention upon which this Court is called to determine. I therefore agree with Mr Mofulu that

the second preliminary objection lacks merits, it is as well overruled. Consequently, the two preliminary objections raised by Counsel for the Respondent are devoid of merits, they stand overruled.

5.0 SUBMISSIONS ON THE SUBSTANCE OF THE APPLICATION

In his affidavit and in the course of his written submissions, Counsel for the Applicants raised three issues calling for determination by this Court. Submitting on the first issue, Mr. Mofulu contended that the reasons for termination of the Applicants' employment were not fair as the Respondent failed to prove the same. He added that principles enumerated under section 38(1)(a) of the ELRA on retrenchment procedures were not complied with by the Respondent. To cement his submission, Mr Mofulu inferred that consultation was not adequate as the Respondent failed to disclose relevant information pertaining to the intended retrenchment. The only reason disclosed to the Applicants is that the company was suffering economic crisis due to Covid 19. However, it was Mr Mofulu's view that the Respondent failed to prove the said economic hardship at the CMA.

According to Mr Mofulu, the notice contained in exhibit D2 tendered during hearing at the CMA was not a valid notice issued to the Applicants, as the same was declared null and void by the letter dated 18/05/2020 (exhibit

D7). Further, that there was no agreement between the Applicants and the Respondent as the proposal by the Applicants was turned down by the Respondent. According to Mr Mofulu, since there was no agreement, the matter ought to have been referred to mediation in compliance with section 38(2) of the ELRA. On top of that, it was Mr Mofulu's submission that at the time the Applicants were issued with notice of termination as per exhibit P1, the Applicants were on their annual leave contrary to section 41(4) of the ELRA.

Mr Mofulu added that the consultation meeting held on 19/05/2020 was also held while the Applicants were on leave. The learned advocate insisted that it was the duty of the Respondent to prove that the termination was fair and that it complied with the dictates of the law. To support his contention, he referred to the case of **Project Manager SIETCO vs Edgar Luena and Another, Revision Application No. 59 of 2015.**

On the second issue, it was Mr. Mofulu's submission that the Applicants are Kenyans, and they were recruited in Mwanza and terminated in Arusha, but the Respondent did not pay them repatriation costs to the place of recruitment, which is Nairobi Kenya. To back up his submission, he referred this Court to section 43(1) and (2) of the ELRA, which requires

employers to mandatorily transport an employee and his personal effects to the place of recruitment. To bolster his argument, Mr. Mofulu relied on the case of **Multichoice Tanzania Ltd vs Felix Nyari, Revision No. 9 of 2018**.

He faulted the CMA award for not ordering repatriation to place of recruitment after it was found to be Mwanza, and not Kenya. Since the Applicants were not repatriated, he maintained that they ought also to have been paid subsistence allowance for the days they stayed unrepatriated from the day they were terminated. To further reinforce his submission, he relied on the Court of Appeal decision in the case of **Paul Yustus Nchia vs National Executive Secretary Chama cha Mapinduzi and Another, Civil Appeal No. 85 of 2005** (unreported), which was elaborate on the aspect of repatriation of employees by employers.

Submitting on the third issue, Mr Mofulu stressed that the CMA erred in issuing its decision using a wrong dispute number. In the CMA, the dispute with respect of the parties herein was CMA/ARS/266/20/232/20 but the Award was issued as CMA/ARS/ARS/182/20. The implication of this, according to Mr Mofulu, is that the Award was in respect of another case, not the one filed by the Applicants. He made reference to the Court of

Appeal decision in **Saulo Mwaldu Q Kamando & 2 Others vs Republic, Criminal Appeal No. 247 of 2015** (unreported), calling upon the Court to find the Award defective and set aside the CMA decision.

On the other hand, Mr Kange and Dr Mwaisondola in response to the first issue raised by the Applicants contested the arguments presented by Counsel for the Applicant and submitted that procedures for retrenching the Applicants complied with section 38(1)(a) of ELRA. According to them, the Applicants and other employees were informed of the retrenchment through a notice (exhibit D2) and the reason for the intended retrenchment was stated therein; to wit, that it was due to the spread of Covid 19 which affected the airline business. According to them, it was not the notice which was nullified by the Respondent but what was nullified was the termination letter which was declared null and void by exhibit D7. What was declared null and void according to Counsel for the Respondent, was exhibit D5, which was the termination letters. The duo added that in exhibit D2 the Respondent disclosed all information to the employees.

Regarding the contention by Applicants' Counsel that the matter ought to have been referred for mediation for failure to reach an amicable agreement, Counsel for the Respondent intimated that reference of the

matter for mediation is done under part VIII of the ELRA. They argued that mediation referred in that part would be the same as the one that involved parties herein before the CMA. It was their further contention that after the proposals of the Applicants were found unviable by the Respondent, and retrenchment effected, the Applicants referred the matter to the CMA for mediation. On the argument that the Applicants were terminated while on leave, it was Counsel for the Respondent's submission that at the time the retrenchment was effected, the Applicants were on forced leave to curb the spread of the corona virus, but they were not in their annual leave.

Submitting against the second issue, Counsel for the Respondent contended that the issue of repatriation was not pleaded in the CMA F1. That what the Applicants claimed in the CMA F1, was to be reinstated. Further, that the Applicants did not prove that their place of recruitment was Kenya, as that is nowhere found in their employment contracts. According to Counsel for the Respondent, there is no mention of a specific place of recruitment in Kenya where the Applicants could be repatriated to.

Responding to the third issue, Counsel for the Respondent admitted that the CMA Award bears case number CMA/ARS/ARS/184/20 contrary to the

case that was heard and determined which is CMA/ARS/266/20/232/20. However, in their respective view, that was a typographic error which does not occasion miscarriage of justice. They referred this Court to section 90 of the ELRA which allows the arbitrator to correct any clerical or typographical error in any Award. Counsel for the Respondent also distinguished the case cited by Mr Mofulu in this respect stating that the case deals with citing the number of the impugned decision in the notice of appeal contrary to the case at hand. They invited the Court to dismiss the Application.

In a rejoinder submission, Mr Mofulu contended that exhibit P1 cannot be challenged by the Respondent's Counsel at this stage bearing in mind that they were in the CMA when it was being admitted and they raised no objection against it. Regarding the amount the Applicants ought to have been awarded, it was Mr Mofulu's submission that the arbitrator ought to have awarded damages considering circumstances of the case. According to Counsel for the Applicant, the error in recording the number of the case in the CMA Award cannot be rectified, the only available remedy in his view, is to set aside the CMA Award.

6.0 COURT'S DETERMINATION OF THE APPLICATION

Having gone through the affidavits of the parties and the rival submissions of Counsel for both parties, issues for determination are: whether the CMA's decision regarding reasons for termination of the Applicants is correct, whether the Arbitrator erred in not awarding repatriation costs to the Applicants and whether by making the Award using a wrong case number, the Award by the CMA should be vitiated.

In the first issue, it was the submission on behalf of the Applicants that procedures enumerated under section 38 of the ELRA were not complied with. I should point out at the outset that where an employer seeks to retrench an employee on operational requirements, as in the present Application, that employer has to conform with the procedures provided for under section 38 of the ELRA and Rules 23 and 24 of G.N No. 42 of 2007. This was held in **Bakari Athumani Mtandika Vs. Superdoll Trailer Ltd, Labour Revision No. 171 of 2013.** Section 38 of the ELRA provides:

> *"38.- (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall-*
> *(a) give notice of any intention to retrench as soon as it is contemplated;*

(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(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,

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognized in terms of section 67;

(ii) any registered trade union which members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognized or registered trade union. (2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment."

In determining the first issue, I will start with the issue regarding notice of the intended retrenchment. CMA records show that the first notice (exhibit D2), was issued on 30/03/2020 to the employees. The notice

parties, particularly the Respondent, as that error cannot be attributable to any of the parties. That said, and for the purposes of clear records, this Court orders the record to be remitted back to the CMA so that the Award may be rectified, by inserting the proper dispute number (which is CMA/ARS/266/20/232/20).

Consequently, this Application only partially succeeds. The Respondent is ordered to pay the Applicants transportation costs for themselves and their personal effects to the place of engagement, which is Mwanza. The Respondent is also directed to pay to the Applicants subsistence allowance of at least 30 days as above analysed. The rest of the Applicants' claims are hereby dismissed. The Award by the CMA arbitrator is therefore partially altered. Since this is a labour dispute, each party shall bear their own costs. It is so ordered.

Y. B. Masara,

JUDGE

August 19, 2022.