IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

LABOUR REVISION NO. 25 OF 2022

(Originating from CMA/MZ/ILEM/194/2019/78/2019)

TWAHA SAID RAJAB.....APPLICANT

Versus

ZUBERI BUS SERVICES.....RESPONDENT

JUDGMENT

Sept.28th, 2022 & Oct.4th, 2022

Morris, J

The court is being moved by Twaha Said Rajab (the applicant) through a Notice of Application, Chamber Summons and Affidavit filed on 29th March 2022. The applicant seeks this court to, on the one hand, call for and examine the records of proceedings of the Mwanza Commission for Mediation and Arbitration (elsewhere, CMA or Commission) in order to satisfy correctness, legality or propriety of the CMA decision dated 15th February 2022 (Hon. D.M. Wandiba, Arbitrator). On the other hand, the court receives an invitation to revise and set aside the CMA award for want of regularity and lawfulness.

According to the lodged documents, revision hereof is being pursued in connection with Labour Application No. CMA/MZ/ILE/194/2019/78/2019 of CMA. Facts relevant to this application are that the applicant was a fixed-term contract employee of the respondent. According to the subject employment contract, the first four-year tenure commenced on March, 1st 2010. Upon expiry on December, 31st 2014, the applicant continued working consequence of which renewal of the contract self-ignited on existing terms. That is, renewal by default. Accordingly, four years of the new term expired on December, 31st 2018. On record, are allegations that the applicant was orally stopped from working on January, 5th 2019 but got the official termination letter on April, 24th 2019. A swift note here is that the said termination letter is not part of the original record of the Commission. Aggrieved by the respondent's step, the applicant filed and pursued labour dispute before the Commission unsuccessfully. The present matter is yet another attempt of his determination to seek justice.

During hearing of this application, the applicant enjoyed services of Mr. Erick Mutta, learned advocate while Mr. Deocles Rutahindurwa, learned counsel, represented the respondent. Submitting in favour of the application after praying to adopt depositions in the affidavit, Mr. Mutta argued that CMA erred to hold that there was no employment contract

between parties at the time of termination because the previous contract has expired on 31/12/2018. He made reference to the employment contract (**Exhibit SU1**), particularly clause 12 which enjoined any party to it to give another, a one month's written notice before terminating the employment. Contrary to such express term, the applicant's counsel argued that the employer-respondent issued a letter of termination of employment dated 3/01/2019 but served to the applicant over three (3) months later; that is, on 24/4/2019 (see parties' testimonies on pgs. 8 and 15 of the typed proceedings) without such prior notice. He argued further that this fact was not controverted at CMA.

The court was refereed to section 36(a)(iii) of the **Employment and Labour Relations Act**, Cap 366 R.E. 2019 (ELRA), whose object is that when a fixed term contract expires but the employer fails to renew it contrary to employee's legitimate expectation the omission becomes termination. To him, this position is a clear reflection in the present matter. Consequently, he argued that the employer had no justifiable ground to terminate the applicant without paying due regard to both statutory and contractual obligations.

It was also submitted by the applicant's counsel that apart from the respondent terminating the applicant's employment unprocedurally, he based his decision on unproven allegations of fraud in blatant non-

compliance with rules 12 and 13 of **Employment & Labour Relations (Code of Good Practice) Rules,2007** GN 42/2007. Therefore, the applicant faults the Commission's decision which did not hold the employer responsible for payment to the applicant of the outstanding four-year salaries on the basis of the remaining portion of the contract. He reiterated his client's prayer before this court.

The respondent's counsel fiercely challenged this application. He too began by praying to adopt the respondent's counter affidavit as part of his submissions. He kick-submitted that powers of the court to revise the Commission's decision are under rule 28(1) (c) and (d) of the **Labour Court Rules** (LCR) particularly when there is a material irregularity on the Commission's decision. To him, CMA's proceedings, findings and award are free of any irregularity. Hence, the respondent maintains that the Commission should not be faulted howsoever.

Drawing his basis from **Exhibit SU1**, the respondent's advocate also submitted that the contract between parties created a fixed-term employment which expired on 31/12/2018. He argued that such kind of contracts terminate automatically on the last day stated therein. He invited the court to refer to cases of **Serenity of the Lake Ltd v Dorcus Martin Nyanda** Civil Appeal NO.33/2018 CAT(Mwanza)pages 7-8; and **Board of Trustees of MSD v Robert Njau**, Rev.621/2019 HC-Labour

Division (Dar es Salaam). Both cases interpreted rule 4(2) of GN.42/2007 towards the conclusion of automatic expiration of fixed-term contracts.

Regarding the applicant's argument that he was entitled to a written notice prior to the impugned termination pursuant to clause 12 of the purported contract, the respondent submitted that his counterpart was laboring on misapprehension of the law and facts. To him, the subject clause would only apply if termination is done during pendency of the employment tenure. Accordingly, rule 8(2) (a) of the **Employment and Labour Relations** (**Code of Good Practice**) **Rules** requires the employer to terminate a contract upon giving notice. He, however, submitted that the situation is different under the present matter in which the contract had automatically expired. So, he concluded that the respondent was under no contractual or statutory obligation to issue the notice to the applicant.

Furthermore, the respondent's counsel disagreed with the submissions of his counterpart regarding service of the termination letter to the applicant on 24/04/2019. He submitted that the applicant did not tender the envisaged letter or corroborative or ICT-related evidence to prove such allegations at CMA (pp.15-16 of typed proceedings). He buttressed this argument by reciting the legal adage of whoever alleges must prove pursuant to section 110(1) of the **Evidence Act**, Cap. 20. He

argued further that the Commission's findings and decision (p.4 last paragraph of the proceedings) did not focus or base on the ground of alleged termination (fraud) as submitted by the applicant's advocate but rather the expiry of the contract. Thus, to him this aspect is not subject to revision.

In conclusion, the respondent's advocate argued that the applicant was also supposed to demonstrate what constituted legitimacy of his expectation for renewal of his contract pursuant to rule 4(5) of GN 42/2007 but did not do so at CMA. To the contrary, the respondent's uncontroverted testimony (page 9 of the typed proceedings) proved that for the few days after expiry of the contract, the applicant was just going to the place of employment and sitting idly. Hence, the CMA was justified to find and hold as it did. Consequently, the respondent prayed for dismissal of this application.

A brief rejoinder from advocate Mutta was that the respondent acknowledged automatic renewal of the contract (p.9 of the proceedings); that the burden of proving fair termination rests on the employer (s.37(2)(a) & (c) of **ELRA**, Cap 366 R.E. 2019); and the employer did not tender termination letter though he stated that the applicant was dishonest ("*kukosa uaminifu*" -pp. 9-10). Therefore, such evidence

suffices to conclude that there existed employment relationship between the parties and termination was unfair.

Discernible from the detailed rivalry positions of the parties, is the fact that this court should, in my view, decide on three (3) fundamental issues: one, whether or not the Commission was justified to hold that there existed no employment contract between the parties; two, if the first issue is negated, whether the applicant's employment was fairly terminated; and three, what remedies should parties get. I will address one issue at a time.

At the fore is the question regarding existence of employment contract between the parties as at January, 5th 2019 or better still, April, 24th 2019. In order to address this issue to a clear fruition, a two-limb discussion is imperative: matters disputed and those that are not. For obvious reasons, let me begin with matters not disputed. First, that the initial four-year tenure ended on December, 31st 2014. Second, the applicant continued working and getting paid beyond the expiry date, hence automatic renewal of the previous contract on existing terms. Third, the second (automatically renewed) tenure ran up to December, 31st 2018. Fourth, the applicant's employment being a fixed-term contract was susceptible to automatic termination at every end of the tenure and/or could be renewed (on existing terms) by default. Matters in which parties

join issues in this regard include, applicant's legitimate expectation of renewal of his employment; existence of vivid indicators towards automatic renewal (by default) of applicant's employment; and need for notice of termination of employment contract immediately after expiry of the second tenure if the employment was to come to an end.

The court would now inquire if the applicant legitimately expected his employment to be renewed. Submissions of both counsel are at incongruence in this connection. Whereas the applicant maintains that conditions under section 36(a)(iii) of **ELRA** should be invoked, his opponent did not support such argument. For clarity, I will quote the provision below;

> '*For purposes of this Sub-Part-*
> *(a) "termination of employment" includes-*
> *(i) ..... Not relevant .....;*
> *(ii) ..... Not relevant .....;*
> *(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal'*

The relevant aspect from the excerpt above is that for fixed-term employment contract to be considered as having been terminated there must be failure to renew it and reasonable expectation to renew it. In my considered view, the first element concerns the employer most though it

is not relevant in this application. The applicant throughout the trial at CMA and in these proceedings does not allege that the respondent failed to renew his contract. To the contrary, he asserts that his contract was actually renewed. The respondent, however, denies to had renewed it. So, the most critical aspect in this regard remains to be, did the applicant demonstrate the ground(s) of such reasonable expectation enough to qualify his plight as "termination of employment"? With respect, I am afraid not. I have taken adequate interest in the Commission's records but I have not found the applicant's proof that he expected his employer to renew his contract which he did not. His major focus during the arbitration proceedings was on the unfairness of termination of employment. Apparently, the applicant maintained that his employment had not only been renewed but also terminated unfairly. This misdirection on the applicant's part notwithstanding, the respondent testified that towards the end of the second tenure of the applicant's employment, he discovered fraudulent transactions in which the applicant was also involved along other staff. As such, there was no harmonious relations between parties. Consequently, I affirm CMA's finding that, I quote:

> *'Aidha, kutokana na ushahidi wa sintofahamu iliyojitokeza mwishoni mwa awamu ya pili ya mkataba, sidhani kama kungekuwepo na tegemeo halali la kuhuisha tena mkataba wa*

ajira, na hata mlalamikaji hakutoa ushahidi juu ya mazingira ya uwepo wa tegemeo hilo (legitimate expectation of renewal of contract)'

The quoted paragraph implies that due misunderstandings between parties hereto as the second phase of the contract was ending; it was unlikely that the applicant would have had any expectation that his contract was going to be renewed, previous renewal by default notwithstanding (**Gerald Majura and 19 Others v Tanzania Trade Dev. Authority** [2017] LCCD 1; **National Oil (T) Ltd v Jaffery D. Msensemi & Others** [2018] LCCD 1). Such that he did not lay evidence before CMA in that respect.

I now turn to the question of existence of vivid indicators towards renewal of applicant's employment by default. When a fixed-term contract expires but employer and employee maintain the employment status quo; it becomes renewed on existing contract's terms and conditions. This is according to rule 4 (3) of the **Employment and Labour Relations** (**Code of Good Practice**) **Rules**. It reads:

'*Subject to sub-rule (2), a fixed term contract **may** be renewed by **default** if an employee **continues to work** after the **expiry of fixed term** contract and circumstances warrants it.*' (Bolding for emphasis)

Accordingly, the operating phrases from the foregoing provision are expiry of the existing contract; and continuance of work by the employee as if the contract has not expired; and merit of circumstances. Though the first element is not disputed; and the last one related to evaluation of the case as a whole; the second element calls for a specific elucidation. One would wish to know the indicators of "continuity of working" relationship between parties. I endeavor to list some of them. In my view, indicators may include, employee's reporting on duty at his station within the usual/agreed time; employer assigning duties to the employee or permitting the latter to perform his normal chores; employee being allowed to access all amenities at the employment post just like any other staff of similar or equivalent rank; and applicant getting paid his dues as previously; to mention but a few.

Going through the CMA records, I did not find proof of any of these pointers, save for respondent's testimony that the applicant would come to the respondent's premises and remain there idly. It is not clear, from such records, as to why the applicant did not volunteer evidence in terms of what he was doing on his duty station immediately after expiry of the second phase of his contract. In the same vein, the applicant's counsel did not submit on these very key aspects during the hearing of this application. This court is, therefore, inclined to record that there were no

pointers to exhibit that the applicant actually had his employment automatically renewed by conduct/default. The reasons for so holding are obvious.

If every person whose fixed-term contract comes to an end, simply parades himself at his former working station on daily basis doing nothing; was to be declared to have his immediately-expired contract renewed, then the purpose of having fixed-term contracts under the employment regime will be defeated. Moreover, such pronouncement will lead to absurdity for employers will have to dish out their money to non-producing section of the idle-employment community. The impact of such financial indiscipline is not without serious fiscal consequences in the general economy of a country.

In our present matter, assuming the employer-respondent was not giving the applicant tasks to perform or otherwise making his working environment unbearable (because no evidence from him that he actually worked-even for a single day), subject to the contract being renewed by default; the applicant could have made use of remedies available under the concept of constructive termination under section 36 (a) (ii) of **ELRA**.

I should be hasty to remark here that, though the law casts a duty on the employer to prove if termination was or was not fair (section 39 of **ELRA**); elasticity of such duty does stretch to cover all aspects of

employment relations or disputes. For instance, if an employee alleges that he is entitled to certain benefits; or that he claims to have reported timely on duty from leave; or that he is eligible to be considered for promotion, *et cetera, et cetera*; the burden of proof cannot, in all fairness, be cast on his employer (See, for instance, **Falcon Restaurant v Hussein Mohamed and Another** [2017] LCCD 1). In **Ibrahim S/O Mgunga and 3 Others v African Muslim Agency**, CAT-Kigoma, Civ. Appeal No.476 of 2020 (unreported) the following was held in this regard:

> *'However, in the circumstances such as the ones obtaining in the instant case, where an employee challenges the fairness of termination on the grounds of reasonable expectation of renewal of a fixed term contract, in terms of rule 4(5) of the Rules, it is the employee who assumes the duty to prove the basis of his expectation and this cannot be said to be a shift of the burden of proof as it is an elementary principle that he who alleges is the one responsible to prove his allegations.'*

The other equally important aspect under the first issue is the need for notice of termination of employment contract immediately after expiry of the second tenure. I have laboured to detail the first two concepts so as to lay a foundation stone for this very last item. That is, the requirement of the notice in in the contract of employment (**SU1**). Thus, it goes without saying, that for any term to continue being operational,

the contract must be active. In other words, execution and/or tenability of the terms of a contract, are subject to or dependent upon existence of the contract in which they are contained.

Having recorded the court's findings regarding the contract having not been renewed on the "by default" basis; no term therein was spared. Consequently, the respondent was not supposed to issue the notice on the non-existent contract. The case of **Ibrahim S/O Mgunga** (*supra*) also delt with almost a similar situation whereby the appellants had not tendered the letters which they had construed as being notices of termination of employment. The relevant excerpt is quoted as:

> *'Bearing this in mind, it follows in our judgment that, the appellants having failed to adduce threshold evidence in support of the proposition that the said letter was a notice of termination of their fixed term employment contracts, it is difficult if not impossible for us to reach to the conclusion that their contracts were unfairly terminated.'*

All said and done, this court finds no justifiable cause to fault the trial CMA's proceedings, findings, orders and award. The first issue is accordingly determined in favour of the respondent.

The second issue depended on negation or confirmation of the first one. As it has been exhibited above, it has not been negated.

Consequently, the court will not be detained longer than holding, as I hereby do, that there was no contract to terminate, fairly or otherwise. Thus, this issue is determined in the applicant's disfavour too.

The last issue on remedies for the parties is equally straightforward. The applicant having failed to demonstrate adequate basis upon which this court to act and revise the Commission's proceedings, findings, orders and award; the court is inclined to hold that the present application is devoid of merits and is accordingly dismissed.

It is so ordered.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

C.K.K. Morris
Judge
October, 4th 2022

Judgement delivered in the presence of Mr. Erick Mutta, learned advocate for the applicant (and the applicant) and Mr. James Joseph, the respondent's manager.

C.K.K. Morris
Judge
October, 4th 2022