IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF IRINGA

AT IRINGA

LABOUR REVISION NO. 08 OF 2021

(Originating from the decision of the Commission for Mediation and Arbitration for Iringa in Labour Dispute No. CMA/IR/MED/24/2021)

MATHEW MWAIFANI ..... APPLICANT

VERSUS

EBENEZER SEMINARY ..... RESPONDENT

RULING

Date of Last Order: 02/09/2022 &
Date of Ruling: 05/09/2022

S.M. KALUNDE, J.:

On the 19.02.2021, the applicant, MATHEW MWAIFANI referred a **Labour Dispute No. CMA/IR/MED/24/2021** to the Commission for Mediation and Arbitration for Iringa (hereinafter "the CMA") against his employer EBENEZER SEMINARY, who are the respondent herein. The dispute at the Commission comprised of a claim for payment of **TZS. 9,220,500.00** being overtime payment allowances for the period of three years. On being served with the application the respondents filed a Notice of Preliminary Objections on three points of law as follows: **one**, that the applicants' claims had already been considered by the Commission and the applicant had been dully awarded over the same claims; **two**, that the application was time barred; and **three**, that overtime claims by the applicant were contrary to **the Employment and Labour Relations Act [CAP. 366 R.E. 2019]** (hereinafter "the ELRA"). Upon hearing the parties, the Commission was satisfied *inter alia*

that the same claims had been raised by the applicant settled through a settlement agreement between the parties on 06.07.2020 in **Labour Dispute No. CMA/IR/30/2020**. In addition to that the commission made a finding that the dispute was filed out of time in contravention of rule 29(1)(a), (2); (3) and (4) of **the Labour Institutions (Mediation and Arbitration) Rules, GN No. 67 of 2007** (hereinafter "the Rules").

Dissatisfied by that decision the applicant filed the present application with a view to convince this Court to revise the decision of the Commission. The present application id preferred under section 56 (b) of the ELRA and rules 24 (1), (2) (a), (b), (c), (d), (e), and (f); (3) (a), (b), (c) and (d) of **the Labour Court Rules, GN. No. 106 of 2007**.

On the date fixed for hearing of the application **Mr. Ignas A. Charaji** represented the applicant whilst the respondent was represented by **Mr. Silius Benedict Msolansimbi**, learned advocate. I acknowledge the efforts made by both parties in furnishing this Court with the relevant submissions hence this ruling. Having done so, I will proceed to consider the merits of the application. I propose to start with the applicant's grievance that the CMA erred in holding that the applicants' claims about overtime payments were heard and determined through Labour Dispute No. CMA/IR/30/2020. In its decision the CMA made the following remarks:

> ***"Tatu tume ikiangalia hati ya makubaliano yaliyofikiwa na pande zote yanaonyesha madai tajwa ni mjumuisho katika malipo ya stahili zilizohusishwa kwenye shauri la namba.***

CMA/IR/30/20 na tume kumaliza mgogoro huo kwenye hatua ya usuluhishi hapo tarehe 06/07/2020.

Kwahiyo kwa kitendo hicho tume inashindwa kuendelea na shauri hili kwa sababu inaonekana lilishasikilizwa na tume ingawa haikuahinishwa kama stahili mojamoja lakini walitaja. Tume inatupilia mbali maombi hayo."

[Emphasis supplied]

In essence the CMA made a finding that the matter was res-judicata. Mr. Charaji believe the above decision was erroneously reached. He contends that the CMA erred in holding that there was a settlement in Labour Disputes No. CMA/IR/30/2020. He reasoned that the **"CERTIFICATE OF SETTLEMENT/NON SETTLEMENT"**, CMA F.6, which was filled by the arbitrator was not an order concluding the matter but rather a notification on whether there is settlement or non-settlement of the dispute. In his view the matter could have been fully settled if the CMA had completed a **"SETTLEMENT AGREEMENT UNDER MEDIATION"**, CMA F.7; and that parties had signed the same. In addition to that the applicant argued that the settlement reached by the CMA did not specify the amount to be paid to the applicant. Having stated the above, the applicant argued that in absence of CMA F.7 there was no conclusion of mediation in Labour Disputes No. CMA/IR/30/2020 and thus it cannot be assumed that the applicants' claims were resolved.

In response Mr. Msolansimbi the subject in Labour Dispute No. CMA/IR/MED/24/2021, which is the subject in the present application was adequately dealt with and concluded through Labour Dispute No.

CMA/IR/30/2020. The counsel argued that the mediator correctly arrived at a conclusion that the matter is *Res Judicata*. He argued that mediation was conducted in accordance with section 86(5) of the ELRA, and that thereafter, CMA F.6 was prepared and signed by both parties on 06.07.2020. He added that in the said settlement it was agreed that the applicant be paid TZS. 800,000.00. The counsel submitted that in accordance with rule 16(1) of the Labour Institutions (Mediation and Arbitration) Rules CMA F.6 marked conclusive determination of the Labour Dispute No. CMA/IR/30/2020. In support his view the counsel cited the decision of this Court in the case of **MFI Document Solutions Limited vs Shamshuddin Hiran & Another** (Civil Case 163 of 2019) [2020] TZHC 1974 (14 August 2020TANZLII).

My issue for determination on this subject is whether Labour Dispute No. CMA/IR/MED/24/2021 was res-judicata to Labour Dispute No. CMA/IR/30/2020. In order to set the ball rolling I propose to state, albeit briefly, the principles governing the doctrine of res-judicata in our jurisdiction. The doctrine is enshrined under section 9 of **the Civil Procedure Code [CAP.33 R.E.2019]** which provides as follows:

> *"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."*

The above provision has been a subject of interpretation in several decisions including the case the famous case of **Peniel Lotta vs. Gabriel Tanaki & Others** [2003] TLR 314 where the Court held:

> *"The Doctrine of res judicata is provided for in section 9 of the Civil Procedure Code, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties of their privies on the same issue by a court of competent jurisdiction in the subject of the suit. The scheme of section 9, therefore, contemplates five conditions which, when co – existent, will bar a subsequent suit. The conditions are* ***(i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."***

The rationale of the doctrine of res-judicata is that when a matter, be it a question of fact or a question of law has been adjudicated between two parties in one suit or proceeding and the decision made is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

Guided by the above principles I will now proceed to consider whether the CMA was justified in making a finding that Labour Dispute No. CMA/IR/MED/24/2021 was res-judicata.

Having carefully examined the records and submissions by the parties in the present matter, in essence there is no dispute that the parties in Labour Dispute No. CMA/IR/30/2020 and Labour Dispute No. CMA/IR/MED/24/2021 were the same and that they were litigating under the same capacity. There is also no dispute on the competence of the CMA in handling both the former dispute and the present dispute.

In responding to the question whether the subject matter in Labour Dispute No. CMA/IR/MED/24/2021 is directly and substantially the same to the matter in Labour Dispute No. CMA/IR/30/2020 I would like to seek guidance in the words of Fardunji Mulla in **Mulla: The Code of Civil Procedure (18th Edition, 2011)** defines the "direct and substantially in issue" in the following terms (page 168):

> *"The words 'directly and substantially in issue' are used in contra-distinction to the words 'incidentally and collaterally in issue'. That means that.....there is identity of the matter in issue in both the suits meaning thereby, that the whole of the subject matter in both the proceedings is identical and not merely one of the many issues arising for determination."*

In his affidavit and submissions Mr. Charaji did not rebut that the subject matter in Labour Dispute No. CMA/IR/MED/24/2021 was directly and substantially the same matter in Labour Dispute No. CMA/IR/30/2020. On my part, I have cautiously examined the records

and noted that the applicant main complaint in Labour Disputes No. CMA/IR/MED/24/2021 was that he was not paid overtime during public holidays for three years. This is reflected on item 4 [OUTCOME OF MEDIATION] at page 3 of CMA F. 1 which commenced the application. The said part reads:

> *"TUNAOMBA **TULIPWE MADAI YETU YA MASAA YA ZIADA YA MIAKA YOTE MITATU.**" [Emphasis is mine]*

I have also noted that, under item 6 [SPECIAL FEATURES/ADDITIONAL INFORMATION] item (b) at page 4 of CMA F.1 it was further stated that:

> ***"MWAJIRI WANGU ALIKUWA HANILIPI MASAA YA ZIADA (OVERTIME AND PUBLIC HOLIDAYS)** NA SIKU ZA SIKUU ZA KITAIFA WAKATI NILIPOKUWA KAZINI KWAKE." [Emphasis is mine]*

Furthermore, in the CMA F.2 at page 3 item number 4(b) the applicant recognized that Labour Disputes No. CMA/IR/30/2020 at the CMA considered the matter and ordered payment of the overtime payments for one year leaving out payment in the remaining years which were agreed to be paid. That part reads as follows:

> *"Reasons of lateness:*
>
> ***KESI ILIKUWA CMA – IRINGA ILIFIKIA HATUA YA USULUHISHI AMBAO ULIANGALIA MADAI YETU YA MWAKA MMOJA NA KUACHA MADAI MENGINE** AMBAYO BODI ILITOA BARAKA TULIPWE ILA MKUU WA SHULE ALIKATAA KUTEKELEZA AMRI YA BODI." [Emphasis is mine]*

My reading of the above excerpts yields me to a conclusion that indeed overtime payments were part of the applicant's complaint in Labour Disputes No. CMA/IR/30/2020. There is a concession that parties agreed to settle the matter and the applicant agreed to be paid TZS. 800,000.00. However, it would appear that the applicant was not contented with the amount as it could only cater for only one year's worth of overtime payments. Having noted that the applicant decided to lodge another application claiming to be paid the remaining amount. In the circumstances, I am satisfied that the matter directly and substantially in issue in Labour Disputes No. CMA/IR/MED/24/2021 was directly and substantially in issue in the former suit Labour Dispute No. CMA/IR/30/2020.

On whether the matter in issue was heard and finally decided in the former suit, the records show that upon conclusion of mediation in Labour Dispute No. CMA/IR/30/2020 the mediator prepared "CERTIFICATE OF SETTLEMENT/NON SETTLEMENT", CMA F.6. The said form was tendered during the proceedings in Labour Disputes No. CMA/IR/MED/24/2021 it reads as follows:

> *"MEDIATORS COMMENTS (IF ANY)*
>
> *Parties agreed to settle the dispute whereby the applicant will be paid 800,000 in two inst. 1st 06.07.2020 second inst. 20.08.2020."*

Pursuant to the respondent, the amount agreed in the certificate was dully paid to the applicant and he received the same. I have also noted that neither his affidavit filed in support of the application nor

submissions made before the Court, refute the fact that the matter was settled or that he received the said money. His only complaint was the failure by the commission the prepare "SETTLEMENT AGREEMENT UNDER MEDIATION", CMA F.7. In his view, CMA F.6 did not conclusively determine the matter. He maintains that for the matter to deemed closed the mediator ought to have prepared. The respondent consider that the matter was heard and finally decided, and a settlement was reached resulting into the applicant being paid the agreed amount therein.

On my part, I am content that that the matter was finally settled. First, the applicant does not deny the existence of Labour Dispute No. CMA/IR/30/2020; second, he does not refute that the parties agreed to settle the matter; third, he does not refute that he received payments as part of the settlement arrangement. Rule 16(1) of the Labour Institutions (Mediation and Arbitration) Rules requires the meditator to prepare a certificate of settlement. That requirement was complied with. After the certificate has been issued and the applicant has received the benefits therein, he cannot be allowed to reopen the matter by wishing to revise the matter. If the benefits were not sufficient the applicant had an option to reject the settlement proposal. When he agreed for the payment, he technically forgo his rights in the remaining two years. Re-opening the forgone claims would defeat the entire purpose of the said settlement and the objection for which the law allowed the settlement of disputes. This Court cannot allow that to happen. At least not in the present case.

That said, it is my finding that the matter in issue in the present application was heard and finally decided in Labour Dispute No. CMA/IR/30/2020. The CMA was therefore correct in its finding that Labour Disputes No. CMA/IR/MED/24/2021 was *res-judicata*. Under circumstance, the CMA hands were tied, as it was *functus officio*. Since this finding settles the entire application, it would therefore be an academic exercise to consider whether the application was filed on time or otherwise. The application stands dismissed. Each party to bare its costs.

It is so ordered.

DATED at **IRINGA** this **05th** day of **SEPTEMBER, 2022**.

S.M. KALUNDE

JUDGE