

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

**LABOUR DIVISION**

**AT ARUSHA**

**LABOUR REVISION NO. 42 OF 2022**

**(Originating from CMA Complaint No. CMA/ARS/ARS/86/2022)**

**EMANUEL ZACHARIA MLAY.....APPLICANT**

**VERSUS**

**SINOHYDRO ELECTRICAL POC.....RESPONDENT**

**JUDGMENT**

**17/10/2022 & 21/11/2022**

**GWAE, J**

The applicant, Emmanuel Zacharia has filed this application after being dissatisfied with the decision of the Commission for Mediation and Arbitration (CMA) dismissing his complaint for being time barred that is to say, after lapse of thirty (30) days from the date when the dispute arose to the date when the complaint was filed.

Essentially, the applicant filed a complaint against his employer, Sinohydro Electrical POC at the CMA claiming for unfair termination. His application was lodged to the Commission on 28<sup>th</sup> February 2022 however before commencement of the hearing; the respondent raised a preliminary objection on the point of law that, the complaint before the

Commission was time barred. In their submission, the respondent alleged that, the applicant was retrenched on 02/01/2022 and therefore the same was filed out of time as per Rule 10 (1) (2) of G.N No. 64 of 2007.

On the other hand, the applicant maintained that, his application before the Commission was filed within time as he was retrenched on 31/01/2022 and that he brought his complaint at the Commission on 28/02/2022. In its findings, the Commission sustained the respondent's Preliminary Objection as it was fully satisfied that, the applicant was retrenched on 02/01/2022 whereas his complaint was filed at the CMA on 28/02/2022. Therefore, as the cause of action arose on 02/01/2022. Hence, a decree of lateness of 25 days.

Aggrieved, the applicant has filed this application supported with an affidavit sworn by himself. It is in the applicant's affidavit where he continued stating that, the Commission grossly misdirected itself to have dismissed his application based on the limitation of time while he was terminated on 31/01/2021 and that he filed his complaint on 28/02/2022 and therefore he was within time.

The respondent opposed the application through a sworn counter affidavit of one Herman Rocky Marandu, the principal officer of the respondent. In their counter affidavit, the respondent insisted that, the

applicant was verbally retrenched on 2<sup>nd</sup> day of January 2022 and not 31<sup>st</sup> January 2022 as contended by the applicant. Therefore, according to him, the complaint was filed out of the prescribed time.

When this matter was called on for hearing, applicant appeared in person while unrepresented. On the other hand, the respondent did not appear to defend her case as a result the hearing of the application was ordered to proceed ex-parte.

Orally, supporting his application, the applicant did not have much to say as he contended that, his complaint at the CMA was filed within time as he was terminated on 31<sup>st</sup> January 2022.

Having considered the court records, laws and the submission of the applicant, the main issue to be determined by this court is whether the Commission was justified to hold that the complaint was filed out of time. While the applicant maintains that, his complaint was filed with the prescribed period, the respondent on the other hand seriously argued that, the complaint was filed out of time.

It is trite law that, once a preliminary objection is canvassed by a party to judicial proceedings, the trial court or tribunal should be duty bound to dispose it fully by pronouncement of its ruling before dealing with the merit of the main suit or application (**Thabit Ramadhan Maziku and**

**Kisuku Salum Kaptula vs. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar**, Civil Appeal No. 98 of 2011(unreported). The essence being to serve the precious time of the court and that of the parties to the proceedings as well as the money. It is in this aspect, the Court of Appeal of Tanzania in the case of **Bank of Tanzania Ltd v. Devram P. Valambhia**, Civil Application No. 15 of 2002 (unreported) stated: -

*"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."*

This court having carefully perused the records of the Commission, it observed that the point of controversy between the parties herein is, the date when the applicant was retrenched. At the Commission, the applicant argued that he was retrenched on 31/01/2022 as brightly indicated in his Referral Form No. 1, while the respondent on her part submitted that the applicant was retrenched on 02/01/2022.

From the above rival arguments, this court is of the view that the preliminary objection raised call for evidence to ascertain as to when exactly the applicant was retrenched in order to establish whether the complaint was filed out of time or not. It should be remembered that this being a preliminary objection the court is only confined to deal with pure

points of law and not facts which needs proof or ascertainment of certain facts pleaded and or supported by annextures.

It is my considered view that, the respondent's preliminary objection inevitably called for evidence before the Commission. I am holding so since neither party had appended a termination letter indicating the date on which the applicant's employment with the respondent came to an end. It would have perhaps been proper if the issue of the limitation of time was dealt with, while determining the merit of the complaint so that, parties would be given an opportunity to prove the date of the applicant's termination. It has been consistently emphasized by our courts that, preliminary objection is arguable and determinable only where parties' pleadings and annextures thereof are self-satisfactory for the court to dispose of the matter.

In the most famous case of **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD** (1969) EA 696. At page 700 Law, J.A defined a preliminary objection as follows;

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of*

*limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.”*

It follows therefore, a preliminary objection cannot be raised if any fact has to be ascertained. Accordingly, in the matter at hand, it is apparent that the question as to whether the plaintiff's suit is time barred or not, is not self-proof as it is subject to proof by some other material facts, which will establish the date of retrenchment of the applicant. Neither can it be dependent on the date indicated in the Referral Form by the applicant except termination letter unless the same is also contested in terms of its genuineness. It was therefore not safe for the Commission to rely on the date indicated by the applicant without attaching the termination letter which could bear an official seal, name and signature of a personnel in authority and date of termination. This position was stressed in **Bikubwa Issa Ali vs. Sultan Mohammed Zahran** (1997) TLR 295 (HC-ZA)

*The time when the deed of transfer was purportedly made because the alleged maker is the respondent; that deed was itself an issue which needed to be proved one way or the other and it could not be relied upon to dispose of the suit on a preliminary objection based on the law of limitation.”*

Basing on the **Mukisa's** jurisprudence and that of **Bikubwa Issa** (supra), I am therefore of the view that, the respondent raised what she named as Preliminary Objection but the same, in legal sense, did not meet the tests.

In the upshot, the application for revision is not without merit. Consequently, the decision of the Commission is hereby revised and set aside. The case file to be remitted back to the CMA for the determination of the merit of the dispute and among the issues that will be framed is the question of time limitation unless the parties' disclose the same at the time of filing their respective opening statement. This being a labour matter, no order as to costs is issued.

It is so ordered.

**DELIVERED** and **DATED** at **ARUSHA** this 21<sup>st</sup> November, 2022

  
**M. R. GWAE**  
**JUDGE**

