

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 109 OF 2020

(From the Award of the Commission for Mediation and Arbitration at Arusha by Mwebuga

O. Mediator)

(Dispute Number CMA/ARS/ARS/153/2020)

BARAKA MHINA1ST APPLICANT

ZENOBI KIPETA2ND APPLICANT

VERSUS

SBC TANZANIA LIMITED.....RESPONDENT

JUDGMENT

7/02/2022 & 21/03/2022

GWAE, J

On 31st March 2020, the applicants, Baraka Mhina, Zenobi Kipeta and another person (Daniel Nnko) referred their dispute on unfair termination of their employment to the Commission for Mediation and Arbitration (Commission) against their employer now respondent. Both applicants and another person through their respective Referral Forms No. 1 claimed payment of 15 months' compensation, payment in lieu of notice, leave due but not paid, payment of 11 worked days (March 200) incentives and clean certificates.

Upon service of the applicants' dispute, the respondent, SBC Limited filed a notice of preliminary objection (PO) on two points of the so-called facts, to wit;

1. The dispute is incompetent before the Commission
2. The complaint should be dismissed with costs

The respondent's PO was orally argued before the Commission, the mediator in his ruling, sustained the respondent's preliminary objection and finally struck out the applicants' dispute. Dissatisfied with the order of the mediator, the applicants have filed this application for revision subject of the judgment.

Before me, the applicants and respondent were represented by Miss Venasa Nyanga and Miss Neema Oscar respectively, both the learned advocates. The parties' counsel obtained leave of the court to argue this matter by way of written submission.

The applicants' counsel argued that, the mediator wrongly ruled in favour of the respondent sustaining the PO which was not pure point of law rather based on facts requiring a proof of the same. The counsel went on arguing that the preliminary objection raised by the respondent was incapable of disposing of the dispute. She then urged this court to make a

reference to the case of **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD** (1969) EA 696 where preliminary objection was defined 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.”

Resisting this application, the respondent’s counsel submitted that the applicants ought to have referred their dispute under breach of contract being their cause of action against the respondent and not termination of employment since they were employed under fixed contract. According to Miss Neema, there are no substantive grounds to move the court revise the decision of the mediator.

In her rejoinder, the applicants’ advocate maintained that the purported PO does not meet the criteria and legal test of the preliminary objection and that the contract of employment entered between the parties was for unspecified period.

From the referral forms presented by the applicants, it is apparent that, the dispute is based on the unfair termination. The applicants and that other claimed to have been unfairly terminated since 11th March 2020, following the termination, they sought to be paid their terminal benefits plus compensation for the said unfair termination.

Examining the PO canvassed by the respondent in the Commission on the 26th March 2020 which reads; that the respondent will raise a preliminary objection on points of fact and urge the Commission to dismiss the labour dispute with costs. On the face of the notice of the PO it is therefore clear that the respondent's objections were not based on pure points of law but point of facts.

Assuming the 1st limb of the respondent's preliminary objection was on a pure point of law, yet the mediator would not easily and conveniently be in better position to know if the dispute in question was on unfair termination or breach of contract since the parties had not appended contracts of employment. Hence, mere assertion by the respondent's Human Resource Officer that, the applicants were employed under specific term of contract would not constitute a preliminary objection on a pure point of law since the applicants are found complaining that they

were unfairly terminated and that their contract of employment was for unspecified period.

It follows therefore, a preliminary objection cannot be raised if any fact has to be ascertained or verified or investigated. In the matter at hand, it is quite clear that, there is contentious issue between the parties as to whether the applicants were working under specific term contract or unspecific term. Hence, a requirement for ascertainment of some facts as correctly submitted by the applicants' advocate.

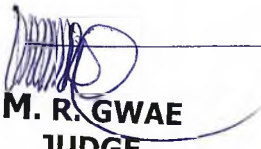
It is trite law that the preliminary objection cannot be raised in a situation where a certain fact has to be ascertained since the preliminary objection must contain points of law and not point of facts as wrongly raised by the respondent in the Commission (See **Musanga Ng'andwa vs. Chief Japhet Wanzagi and 8 others** (2006) TLR 352. In our case, it is my considered opinion, there were facts which were missing to enable the mediator to hold that, the dispute was on breach of contract and not unfair termination of employment as depicted in the applicants' referral forms.

For the foregoing reasons, I accordingly quash and set aside the decision of Hon. Mediator dated 13th November 2020 and direct that the

applicants' dispute to proceed pursuant to the labour laws. No order as to costs is made.

It is so ordered.




M. R. GWAE
JUDGE
21/03/2022