

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 12 OF 2023

*(Arising from an Award issued on ... by Hon. Makundi H, arbitrator in Labour dispute No.
CMA/PWN/BG/23/2022/11 at Bagamoyo)*

BLUE NILE LODGEAPPLICANT

VERSUS

RASHID JUMA HAZALI RESPONDENT

JUDGMENT

*Date of last Order: 20/03/2023
Date of Judgment: 28/4/2023*

B. E.K. Mganga, J

Brief facts of this application are that Blue Nile Lodge, the herein applicant was the employer of the respondent. In June 2022, applicant suspended the respondent pending investigation. On 1st August 2022, respondent filed Labour dispute No. CMA/PWN/BG/23/2022/11 before the Commission for Mediation and Arbitration henceforth CMA for breach of contract of employment. In the CMA F1, respondent was claiming to be paid TZS 21,200,000/= being salary compensation for sixty-three months' remaining period of the contract of employment. Having heard evidence of

the parties, Hon. Makundi H, arbitrator, issued an award that applicant suspended and terminated employment of the respondent. The arbitrator therefore, awarded respondent be paid (i) TZS 300,000/= being one month salary in lieu of Notice, (ii) TZS 18,900,000/= being salary for 63 months', (iii) TZS 300,000 being leave pay all amounting to TZS 19,500,000/= and be issued with termination letter and a certificate of service.

Aggrieved with the award, applicant filed both the Notice of Application and the affidavit of Ibrahim Ameir Charity supporting the Notice of Application. In the affidavit supporting the Notice of Application, applicant raised six grounds namely:-

- 1. The Arbitrator erred in making a finding that the respondent was terminated while he was on suspension.*
- 2. The Arbitrator erred in awarding the respondent based on inapplicable law namely the Law of Contract.*
- 3. The arbitrator erred in finding that respondent was unfairly terminated while he was not terminated.*
- 4. The Arbitrator based a decision relying on unknown contract to the applicant.*
- 5. That the Arbitrator erred in awarding 63 months' salaries as compensation for unfair termination with no justifiable reasons.*

6. The arbitrator erred in issuing the award without considering evidence adduced by the applicant.

In resisting the application, respondent filed the Notice of Opposition and his Counter affidavit.

When the application was called on for hearing, Ms. Fauzia Kajoki learned advocate appeared and argued for and on behalf of the applicant while Mr. Rashid Juma Hazali, the respondent appeared in person.

Submitting in support of the 1st ground and the 3rd grounds, counsel for the applicant submitted that respondent was employed for a fixed period contract of 15 years from 01st March 2013. She went on that, on 14th June 2022, applicant suspended respondent for unspecified period because he committed misconducts. Counsel for the applicant submitted that immediately after being served with suspension letter, respondent filed the dispute at CMA.

Submitting on the 2nd ground, counsel for the applicant submitted that, the arbitrator erred to base the award on the Law of Contract and not the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. Counsel submitted further that, the arbitrator considered Section 74(1) of the Law of Contract Act and awarded respondent 63 months' salary

compensation to the respondent. Counsel for the applicant went on that, the arbitrator was supposed to consider Section 40(1)(c) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and award respondent not less than 12 months' salary compensation. Counsel for the applicant submitted further that, arbitrator awarded respondent to be paid TZS 19,000,000/=. Ms. Kajoki, learned counsel for the applicant submitted further that applicant disputes the said contract because it is not genuine.

During submissions, the court asked the parties to submit whether, exhibits including the contract of employment were properly admitted in evidence or not.

Responding to the issue raised by the court, Ms. Kajoki, learned counsel for the applicant submitted that during hearing, the contract showing that respondent was employed for fixed period of 15 years was not properly admitted because there is no signature of the arbitrator and date of admission of the said exhibit. Counsel for the applicant submitted further that, the same irregularity applies also to exhibit PW2. Counsel for the applicant added that applicant was not asked whether she objects the said exhibits to be admitted in evidence or not hence applicant was denied right to be heard. Based on that, counsel for the applicant prayed that

CMA proceedings be nullified, the award be quashed and order trial *de novo*.

In resisting the application, Mr. Hazali, the respondent, submitted that he was suspended on 14th June 2022 without pay or being informed reasons for suspension. Respondent submitted further that, on 01st August 2022, he filed the dispute at CMA. Respondent submitted further that, in suspension letter, he was told to surrender all property of the applicant and argued that the said suspension letter amounted to termination. Respondent submitted further that he worked for 10 years and that only five (5) years were remaining before expiration of the contract.

In his submissions, respondent conceded that proceedings do not show that at the time of tendering both exhibits PW1 and PW2, applicant was asked whether she objects or not. Respondent was quick to submit that, he believed that some of the matters were not recorded because applicant was asked and she had no objection. With the noted irregularity, respondent did not resist the prayer for retrial.

In rejoinder, counsel for the applicant had nothing to add.

As submitted by the parties, the CMA record does not show that parties were asked whether they have objection or not before admission of exhibits into evidence. It is my view that, that was fatal irregularity. I am of that view because applicant is challenging *inter-alia* authenticity of the exhibits that were tendered including the contract of employment. In fact, the Court of Appeal had an advantage to discuss the effect of that omission in the case of [Mhubiri Rogega Mong'ateko vs Mak Medics Ltd](#) (Civil Appeal 106 of 2019) [2022] TZCA 452 and held *inter-alia*:-

"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record... Therefore it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence..."

See also the case of [M.S SDV Transami Limited vs M.S Ste Datco](#) (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International Cooperation Agency vs. Khaki Complex Limited** [2006] T.L.R 343 and [Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd](#) (Rev. Appl 253 of 2022) [2023] TZHCLD 1170.

Since the issue that was raised by the court has disposed the whole application, I will not consider the grounds raised by the applicant.

For the foregoing, I agree with submissions of the parties and hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and remit the CMA record to CMA so that the dispute can be heard *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam on this 28th April 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 28th April 2023 in chambers in the presence of Fauzia Kajoki, Advocate for the Applicant and Rashid Juma Hazali, the Respondent.



B. E. K. Mganga
JUDGE