

**IN THE HIGH COURT OF TANZANIA  
(IN THE SUB-REGISTRY OF MWANZA)**

**AT MWANZA**

**CONSOLIDATED LABOUR REVISIONS NO.27 AND 56 OF 2022**

*(Originating from CMA/GTA/25/2021 at CMA-GEITA)*

**CURECHEM TANZANIA (PVT) LTD.....APPLICANT**

**VERSUS**

**HAMANDISHE MATSEKWA.....RESPONDENT**

**JUDGMENT**

*Date of Last Order:24/03/2023*

*Date of Judgment: 06/03/2023*

**Kamana, J:**

This is a cross-revision case in which both parties were not satisfied by the decision of the Commission for Mediation and Arbitration sitting at Geita in CMA/GTA/25/2021. The Respondent referred his dispute with Curechem Tanzania (PVT) Ltd, the Applicant to the Commission over terminal benefits.

Upon hearing the rival arguments, the Commission entered judgment in favor of the Respondent. In that decision, the Commission ruled that the Respondent should be paid the following:

- (a) Tshs.5,367,214/= as a salary for February 2021;
- (b) Tshs. 2,270,741/= as a salary for 11 days of March 2021;
- (c)Tshs. 13,211.584/= as leave allowance for 64 days;

(d) Tshs.1,500,000/= as transport allowance to the place of recruitment;

(e) Tshs.64,406,568/= as subsistence allowance from the date of termination (11<sup>th</sup> March 2021) to 17<sup>th</sup> March 2021 when the decision was pronounced.

Suffices to note that the decision did not amuse any party. Whilst the Applicant is of the view that the Commission did not have jurisdiction to determine the dispute, the Respondent claims that the Commission erred in fixing the subsistence allowance as the same was supposed to count until he is repatriated.

Since both revisions were assigned to me, I thought as a matter of practice to consolidate them considering that they were emanating from the same proceedings and judgment of the Commission. Both parties were represented whereby the Applicant had the services of Mr. Paul Kaunda, learned Counsel, and the Respondent was advocated by Mr. Andrew Luhigo, learned Counsel.

Arguing for the revision, Mr. Kaunda faulted the judgment of the Commission on two grounds. Firstly, it was his submission that the Commission acted without the requisite jurisdiction since the Respondent as a foreigner failed to tender his work permit. Secondly, he

was of the view that the dispute was referred to the Commission beyond the period of limitation.

Concerning the absence of a work permit, the learned Counsel emphasized that the Respondent despite tendering his contract of employment, resignation letter, and the Applicant's letter that accepted his resignation, was bound to tender his work permit. In the absence of the work permit, the learned Counsel was of the view that the Commission was not seized of jurisdiction to arbitrate the dispute.

Mr. Kaunda argued further that since the Respondent failed to tender a work permit to prove his case, the contract of employment between him and the Applicant was void ab initio. In that regard, the learned Counsel contended that the absence of the work permit renders the contract of employment contravening the provisions of section 26 of the National Employment Promotion Service Act, Cap.243 [RE.2002]. On account of such contravention, Mr. Kaunda submitted that the Commission did not have jurisdiction to arbitrate the dispute arising out of the contract which in a way defeats the provisions of the said Act. To buttress his position, the learned Counsel referred to section 23 of the Law of Contract Act, Cap.345 [RE.2019] and the cases of **Richard Zakaria Odongo v. Alliance Boys Secondary and High School**,

Labour Revision No. 20 of 2017 and **Serengeti Breweries Limited v. Hector Sequeira**, Civil Application No. 373/18/2018.

Responding as to whether the Commission had jurisdiction in the absence of a work permit, Mr. Luhigo, learned Counsel submitted that parties to a case are supposed to adduce evidence based on the framed issues. The learned Counsel believed that since the validity of the contract between the parties and its existence were not in dispute according to the framed issues, the Commission was right in not including any issue on the existence or enforceability of the employment contract. In that case, Mr. Luhigo averred that the Respondent was not under the obligation to testify or tender any evidence concerning the work permit and validity of the employment contract. That being the case, the learned Counsel summed up by submitting that the Commission had the jurisdiction despite the absence of the work permit before it.

Rejoining, Mr. Kaunda submitted that, as a matter of principle, any issue on the point of law may be raised at any point. He thought that the validity of the contract of employment between the parties is a legal issue that can be raised at any stage. To buttress his arguments, the learned Counsel cited the case of **Manase C. Mayela v. Biashara SACCOS Ltd and Another**, Land Appeal No. 27 of 2020.

For the reasons which will soon be unveiled, I proceed to determine this contentious issue as to whether the Commission had jurisdiction or otherwise to arbitrate in the absence of the proof of a work permit on the part of the Respondent.

The crux of this matter arises from the claims submitted by the Respondent over terminal benefits following his resignation as an Accountant in Curechem Tanzania (PVT) Ltd, the Applicant. On 17th June 2016, the Respondent entered into a contract of employment with the Applicant. The same was entered in Zimbabwe, probably, because the Respondent is a Zimbabwean. Thereafter, the Respondent came to Tanzania and started to work with his employer, the Applicant. On 11<sup>th</sup> February 2021, the Respondent resigned whereby his resignation was accepted by the Applicant on 22<sup>nd</sup> February 2021.

I have decided to give a snapshot of what led to this cross-revision so that one may understand that the whole episode originates from a contract of employment between the parties. In other words, the existence of the contract of employment, whether valid or otherwise, led the Respondent to claim his terminal benefits. If such a contract was not entered by the parties, surely there would be no resignation and consequently no claims for terminal benefits.

It is trite law in this Country that certain objects of agreements are termed to be unlawful. For instance, an object of an agreement that defeats the provisions of any law renders such an agreement unlawful. This is clearly stated in section 23 of the Law of Contract Act, Cap. 345 as follows:

*'The consideration or object of an agreement is lawful, unless—*

*(a) it is forbidden by law;*

*(b) **it is of such a nature that, if permitted, it would defeat the provisions of any law;***

*(c) it is fraudulent;*

*(d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral or opposed to public policy.'* **(Emphasis added)**

The Legislature was not mean to the extent of not providing the consequences of the agreement which contains an unlawful object. Subsection (2) of section 23 of the Law of Contract Act provides vividly, save for few exceptions, that such kind of an agreement is void and no suit can be entertained over such kind of an agreement. It stipulates:

*'(2) In each of cases referred to in subsection (1), the consideration or object of an agreement is said to be unlawful; and **every agreement of which the object or consideration is unlawful is void and no suit shall be brought for the recovery of any money paid or thing delivered, or for compensation for anything done, under any such agreement, unless—'. (Emphasis added).***

Since there was a contract of employment between the parties as the records depict, for such a contract to be enforced by the courts of law in this country, the same must be subjected to the provisions of section 23 of the Law of Contract Act, Cap. 345. In his submission, Mr. Kaunda submitted that the contract of employment between the parties offends the provisions of section 26(1) of the National Employment Promotion Service Act, Cap.243 which categorically prohibit the employment of a foreigner without a work permit being issued to the such foreigner. Such section provides:

*'**26.-(1) No person shall employ any foreigner, and no foreigner shall take up any employment with any employer, except under and in accordance with work permit issued to such foreigner.'***

The thrust of this provision is repronounced in section 9(1) and (2) of the Non-Citizens (Employment Regulation) Act, 2015 which provides:

*'9. -(1) A non-citizen shall not engage in any occupation for reward, profit or non-profit unless he-*

*(a) has a valid work permit that allows that person to engage in the occupation specified in the valid work permit; or*

*(b) is the holder of a valid certificate of exemption issued to him under this Act;*

*(2) A person shall not employ, engage or cause to be employed in the occupation a non-citizen unless-*

*(a) the non-citizen has a valid work permit that allows that person to be employed in the occupation specified in the valid work permit; or*

*(b) the non-citizen has a valid certificate of exception issued to him under this Act.'*

Undoubtedly, a contract of employment involving a foreigner, as contended by Mr. Kaunda, must be supported by a valid work permit. In that case, the Commission was under the obligation to satisfy itself that the terminal benefits claimed by the Respondent arise from a contract of employment that is lawful in the eyes of the Law of Contract Act,



Cap.325 by conforming to the provisions of the National Employment Promotion Service Act, Cap.243 and Non-Citizens (Employment Regulation) Act, 2015.

While I take that position, I am aware of the arguments of Mr. Luhigo that the existence and validity of the contract were not an issue at the Commission. I am in total agreement with the learned Counsel. However, in labour matters relating to foreigners, the question of a work permit is a jurisdictional one. At this juncture, it is worthy to note that jurisdiction is a creature of statutes. Decision bodies like the Commission derive their powers to adjudicate, mediate or arbitrate from the statutes. In other words, the parties do not confer jurisdiction upon the decision bodies. In this regard, I am fortified by the decision of the Court of Appeal in the case of **Sospeter Kahindi v. Mbeshi Mashini**, Civil appeal No. 56 of 2017 where it was held that: -

*'..parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction. Indeed, the erstwhile East African Court of Appeal sitting at Dar es Salaam held in **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199 at 202 that:*

*"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an*

*elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.'*

Fortified by that position, it is my considered view that the Commission before delving into the dispute was supposed to ascertain whether it has jurisdiction or otherwise to entertain the matter. In this regard, the Commission should have appraised itself on the provisions of section 23 of the Law of Contract Act as to whether the contract of employment tendered by the Respondent was lawful in the eyes of the National Employment Promotion Service Act, Cap.243 and Non-Citizens (Employment Regulation) Act, 2015.

Since the records depict that the work permit was not tendered by either party, the Commission was supposed to adhere to the provisions of subsection (2) of section 23 of the Law of Contract Act which in effect brings in jurisdictional issues by prohibiting courts to entertain suits for the recovery of any money paid or thing delivered, or for compensation for anything done, under any void agreements.

It is worth noting that issues of a jurisdiction can be raised at any stage. In that case, there is no harm in the question of jurisdiction being raised at this stage.

For the foregoing reasons, it is my conviction that the Commission acted without jurisdiction for not considering whether there was in place a valid work permit before arbitrating the dispute involving a foreigner in the capacity of an employee. In this regard, I am fortified by the decisions of this Court in the cases of **Rock City Tours Ltd v. Andy Murray**, Revision No. 69 of 2013 (Rweyemamu J, (May Her Soul Rest in Peace), **Zakaria Richard Odongo v. Alliance Boys Secondary and High School (Supra)** (Matupa, J) and of the Court of Appeal in the case of **Serengeti Breweries Limited v. Hector Sequeiraa (Supra)** (Ndika, JA).

Given that, I do not see any reason to go through the remaining grounds in both revisions as the one I have gone through determines the fate of both. Invoking revisional powers of this Court, I quash the Commission's proceedings, decisions, and orders. It is so ordered.

Right to Appeal Explained.

**DATED** at **MWANZA** this 6th day of March, 2023



A handwritten signature in blue ink, appearing to read 'KS Kamana', written over a horizontal line.

**KS KAMANA**

**JUDGE**