THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

LABOUR REVISION NO 13 OF 2021

(Originating from CMA/MT/98/2020)

DANGOTE CEMENT LIMITED TANZANIA ..... APPLICANT

VERSUS

SUFIANI MOHAMED GAU ..... 1st RESPONDENT
JUMA MTETA JUMA. ..... 2nd RESPONDENT

JUDGEMENT

4/4/2023 & 30/5/2023

LALTAIKA. J;

The applicant herein **DANGOTE CEMENT LIMITED TANZANIA** is dissatisfied with the decision of the Commission for Mediation and Arbitration (the CMA) in Labour Dispute Number CMA/MT/98/2020. She has appealed to this court on five grounds as will be discussed in some considerable length shortly.

When the appeal was called on for hearing on 27/9/2022 the applicant was represented by Adv. Lightness Kikao holding brief for **Adv. Stephen**

Lekey. The respondent on the other hand, enjoyed legal services of **Mr. Gide Magila, learned Advocate**. Parties opted for hearing of the appeal by way of written submissions. With this court's nod signifying a go-ahead, a schedule to that effect was jointly agreed upon. I take this opportunity to register my commendation to learned counsel for their unwavering compliance to the schedule. Needless to say, that this court has benefited tremendously from skillful lawyering by both counsel.

Before delving into the submissions, I find it imperative at this juncture to provide, albeit briefly, a contextual and factual backdrop. The applicant is a juridic person. A well-known entity, I would say, almost a household name in Mtwara and Tanzania in general. As the name implies, she is a dealer in manufacturing cement at a plant located in the outskirts of Mtwara. The respondents, on the other hand, are natural persons, young men in their late 20's. On the 8th of May and the 1st of June 2018, in that order, the first and second respondents secured a two-year fixed term employment with the applicant. They were both employed in the position of Junior Process Engineer. The respondents signed their contracts whose two years term ended on 7th of May 2020 and 31st May 2020 respectively.

Although the first two years contract ended uneventfully, the respondents indicated their unwillingness to proceed with a new two-year contract, (that the applicant was willing to offer), unless their salary was increased. This typical employer-employee wrangle sometimes referred in Kiswahili as "Vuta ni kuvute" (inspired by the legendary **Adam Shafi**

Adam's Award-Winning Novel **Vuta N'Kuvute)** is the crux of the matter at hand.

Records inform that in spite of the **"Vuta N'Kuvute"** common in most work environments, the respondents continued with their job as Process Engineers while the applicant paid them their dues (using the expired contract's rates). On the 14th of September 2020 the conflict took a new turn. The respondents indicated that they would laydown tools unless their salaries were increased.

The applicant, on her part, having duly been informed of the respondents' intention, promised to work on their complaint. She also continued to pay them their dues not only for the month of September when the respondents' dissatisfaction took a new turn but also October 2020. The respondents' assert that on their part, they were also willing to work but the applicant instructed his *gate keepers* not to allow them into the manufacturing plant.

It was in November 2020 when the applicant stopped paying salaries to the respondents that the conflict took yet another twist. The respondents knocked on the doors of the Commission for Mediation and Arbitration (the CMA) seeking redress for breach of contract. The CMA adjudged in their favour. In the next paragraphs, I pen down a part of the learned counsel's submissions for and against the appeal before I move on to render my verdict. Their submissions are also another Vuta'Nkuvute rooted in our adversarial system.

Submitting in support of the appeal, counsel for the Appellant Mr. Lekey informed the court that the Respondents were employees of the Applicant with an initial fixed contract of 2 years, which was renewed by default for another 2 years. The Respondents demanded contracts with better terms, particularly regarding salary. When their demands were not positively addressed, they issued an ultimatum that they would not attend work until their claims were met.

After failed meetings and a period of over 2 months without being paid salaries, the Respondents filed a complaint at the CMA for unfair termination, which was later amended to a complaint for breach of contract. The CMA decided the complaint in favor of the Respondents, leading to the Appellant filing the current application.

Premised on the above introductory remarks, Mr. Lekey submitted that his appeal was based on the following grounds of appeal (The numbering is based on Mr. Lekey's Written Submission whose first to third paragraphs are dedicated to introductory and analytical aspects.)

> *4(a) The Arbitrator erred in law in entertained the complaint without requisite jurisdiction.*
> *4(b) The Arbitrator erred in law and fact in not deciding that the complaint was filed out of time.*
> *4c) In the circumstances of the case the Arbitrator erred in law and fact in ordering the Applicant to begin adducing evidence.*
> *4d) The Arbitrator erred in law and fact in deciding that the Applicant breached the Respondents' contract.*
> *4e) The Arbitrator erred in law and fact in awarding reliefs which were not pleaded.*

Regarding grounds 4(a) and (b), Mr. Lekey argued that the CMA failed to deliberate and decide on the issue of time, which was raised during the

hearing. He referred to **Rule 10(2) of the Labor Institutions (Mediation and Arbitrations) Rules**, stating that a claim of breach of contract must be referred to the CMA within 60 days from the date when the dispute arose. He contended that the cause of action or dispute arose when the Respondents were stopped from entering the Applicant's premises, not when they were not paid their salaries. He cited the case of **Upendo Malisa v. Charity Secondary School, Labour Revision No. 68 of 2019 HC-Labour Division (Unreported) to support** his argument. Mr. Lekey further argued that even if the dispute arose on the date the Respondents expected to be paid their salaries, the complaint was still filed out of time. He disagreed with the order of amendment and claimed that it introduced a different cause of action. To buttress his argument, the learned counsel referred this court to, among other cases, the case of **Effco Solutions (T) Ltd. Vs. Juma Omari Kitenge (Revision No 753 of 2019) [2021] TZHCLD.**

Moving on to ground 4(d), Mr. Lekey asserted that the duty to prove breach of contract rested on the Respondents, who failed to discharge that duty. He stated that they could not prove the existence of a contract and a specific clause that was breached. To support this line of reasoning Mr. Lekey relied on the decision of this court in **Pena Pura Oil Tanzania Ltd v Ekta v. Karsanji Rev. No 317/2020 and Victoria Perch Ltd v. Seba John Revision No. 82/2020 [2021] TZH 7449.**

The learned counsel questioned the alleged stoppage from entering the Applicant's premises, providing evidence that the Respondents were

actually at work on the alleged date of stoppage. He argued that even if they were stopped, it was conditional upon meeting the Human Resource Officer (HR) the following day. He pointed out that the Respondents did not meet with the HR as directed and were absent from the attendance register. He claimed that the Respondents' argument about being told to wait at home was fabricated after they were not paid salaries and that their emails and letters asking about the stoppage contradicted their claim. Mr. Lekey referred to case law to support his contention that there was no evidence that the Applicant informed the Respondents they were no longer employed.

Finally, regarding ground 4e, Mr. Lekey argued that the Respondents had not pleaded for the specific reliefs awarded by the Arbitrator. He stated that although they claimed for payment of salaries and terminal benefits, they did not specify the exact amount they believed they were owed.

Mr. Magila, counsel for the respondents, stated that after thoroughly reviewing the applicant's submission, he found no merit in any of the grounds for revision. He then proceeded to address each ground individually in the order followed by his learned brother Mr. Lekey.

Regarding ground number 4 (a) and (b), Mr. Magila explained that the respondents were terminated from employment on 30/11/2020, and they filed a complaint on 14/12/2020, which was within the required timeframe. He countered the allegation that termination occurred on 21/09/2020 when the respondents were blocked from entering the work premises. He stated that the blocking was a temporary suspension measure while the parties were negotiating new contracts, and the employer used this tactic to

facilitate the negotiations. He supported this claim with testimonies, **CMA records, and exhibits such as email conversations between the parties.**

Mr. Magila cited an email sent by the first and second respondents in December 2020 as evidence. He also pointed out that the employer continued paying salaries to the respondents during this period, indicating that their employment relations were still intact. He concluded that the dispute arose when the employer stopped paying salaries on 30th November 2022.

In response to the applicant's citation of the case **of *UPENDO* MALISA vs KISSA CHARITY SECONDARY SCHOOL (supra)**, Mr. Magila argued that the case was irrelevant to the current matter. He emphasized that the employment relations between the parties were still intact, as evidenced by the continued salary payments and the respondents' access to their staff email accounts. He stated that the cited case did not address a situation where an employee was paid salaries and all other entitlements during their absence from work premises, making it unrelated to the present matter.

Mr. Magila addressed the issue of time, stating that the matter at CMA was neither struck out nor condoned to be filed out of time by the CMA. He explained that the dispute was filed on time, and the applicant had not previously raised any issue regarding time. He clarified **the difference between striking out a dispute and amending it**, asserting that they were **distinct phenomena with different impacts and connotations.**

He argued that the cases cited by the applicant's counsel were irrelevant since their facts did not align with the facts of the present matter.

Mr. Magila further stated that the issue of time bar had never been raised or discussed during the trial commission, and therefore, it had no grounds for deliberation. He referred to the case of **HALFANI CHARLES vs HALIMA S.MAKAPU and Another,** Misc. Land Appeal No 85 of 2021 (Unreported) to support his argument that grounds of appeal should be based on facts discussed in the lower courts or tribunals.

Moving on to ground number 4(d), Mr. Magila explained that the respondents were blocked from entering the work premises by the applicant while negotiations for new contracts were underway. Despite their previous contracts having expired, the applicant retained the respondents and continued to assign them duties. He quoted Rule4(3) of **The Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42/2007** that a fixed term of contract may be renewed by default.

On the last ground of appeal namely ground 4(e), Mr. Magila stated that it is a well-known principle that the remedy for breach of a fixed term contract of employment is payment of the [salaries] of the remaining period of the contract. He asserted that what was pleaded by the respondents in CMA F1 was what the CMA awarded, no more no less.

In rejoinder Mr. Lekey stated that he had carefully read and understood the essence of the respondents' submission. Concerning ground 4 (a) and (b), Mr. Lekey informed the court that the respondents had presented two reasons as to why they believed their relationship with the

applicant ended on November 30, 2022. These reasons were that negotiations continued after the blockage, and the applicant continued to pay them salaries.

Mr. Lekey argued that even if it were agreed that the dispute arose on November 30, 2020, the submission by the appellants was regarding a breach of contract, not unfair termination. He pointed out that the dispute on breach of contract was filed on February 12, 2021, which exceeded the 60-day time limit specified in Rule 10 (2) of the Labour Institutions (Mediation and Arbitrations) Rules, G.N No. 64 of 2007.

Responding to the respondents' claim that the issue of time had not been raised before and was not among the framed issues by the CMA (Court of Mediation and Arbitration), Mr. Lekey referred the court to item 2.1 of their submission in chief filed on November 2, 2022, before the court and items 6.1 to 6.8 of the submission of the appellants filed at the CMA on September 20, 2021. He emphasized that the issue of time limitation had indeed been raised.

Mr. Lekey argued that even if the respondents wished the court to believe that they did not raise the issue, it would not strip the court of jurisdiction to decide on it since it pertained to jurisdiction. He referred the court to the decision of the Court of Appeal in the case of **Isaya Linus Chengula vs. Frank Nyika (Civil Application 487 of 2020) [2022] TZCA 167 (31 March 2022),** where it was held that the issue of jurisdiction can be raised at any stage and it is for the court to determine whether or not jurisdiction existed, regardless of whether it was in issue at

the trial court. He also cited the decision of the court in **TOTAL TANZANIA LIMITED V. SEET PENG SWEE, Revision Application No. 500 of 2020) [2022] TZHCLD** 216, which emphasized that jurisdiction is a creature of statute and cannot automatically exist simply because the other party failed to object at the earliest opportunity.

Furthermore, Mr. Lekey stated that the issue of time limitation had been raised in their pleadings filed before the court. He cited the case of **David Nzaligo v. National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, C.A-Dar Es Salaam (Unreported) at page 25, where the Court of Appeal declined to fault the High Court for deciding on an issue that formed part of the parties' pleadings.

Having dispassionately considered the rival submissions, I am inclined to decide on whether or not the appeal is meritorious. In arriving at such a verdict, I have carefully evaluated the evidence submitted in the trial tribunal in the light of grounds of appeal and submissions by counsel.

Regarding jurisdiction of the tribunal to entertain a matter, it is clear from the record of the trial tribunal that the respondents were rightful employees of the appellant up until October 2020 as they received their salary in accordance with their contractual agreement. As Mr. Lekey rightly observed, **Rule 10(2) of the Labor Institutions (Mediation and Arbitrations) Rules (supra)** requires that a claim of breach of contract must be referred to the CMA within 60 days of the date when the dispute arose. Nevertheless, I cannot accept the reasoning that the cause of action

or dispute arose when the Respondents were stopped from entering the Applicant's premises, not when they were not paid their salaries.

It does not take much thought to realize that payment of salaries is the most important part of the contract of employment. No one, in their right sense is expected to report on "breach of contract" while they are receiving their salaries. **I agree with Mr. Magila** that the blocking of respondents from entering their workplace was a temporary suspension measure while the parties were negotiating new contracts, and the employer used this tactic to facilitate the negotiations. Stoppage of payment of salaries on 30/11/2020 to filing of the complaint on 14/12/2020 falls within the required timeframe. To this end, I see no merit on grounds 4(a) and (b).

Counsels have strongly argued on the order of amendment issued by the CMA. Mr. Lekey claimed that it introduced a different cause of action. He referred the case of **Effco Solutions (T) Ltd. Vs. Juma Omari Kitenge (Revision No 753 of 2019) [2021] TZHCLD.** Mr. Magila, on his part argued strongly that the matter at CMA was neither struck out nor condoned to be filed out of time by the CMA. He explained that the dispute was filed on time, and the applicant had not previously raised any issue regarding time.

I agree with Mr. Lekey that the issue of lack of jurisdiction based on time limitation can be raised at any stage including during appeal. There are too many authorities on the matter. However, with respect, in the cited case **Hon. I.D. Aboud, J**. dealt with a matter that was struck out. The matter at hand was neither struck out nor condoned to be filed out of time by the CMA.

I see no reason to interfere with the CMA decision to allow the amend. Procedures obtained in the CMA do not have the same rigorous favour as those applicable in this court.

I have taken a rather keen interest in the arguments of learned counsel on ground 4(d). Arguing in support of the appeal, Mr. Lekey asserted that the duty to prove breach of contract rested on the Respondents, who failed to discharge that duty. He stated that they could not prove the existence of a contract and a specific clause that was breached. As much as I agree that he who alleges must prove and that a specific clause in a contract need to be pointed out, with respect, this argument is not very helpful in the instant matter.

It goes without saying that a contract of employment is said to have been breached in whole when either party fails to fulfil their obligation. If one has been stopped from entering their work premises and no salary paid, it would be counterproductive to demand citation of a specific clause of the employment contact. With respect, I found the caselaw cited by the learned counsel for the applicant to support this position slightly off point. They make the greatest of arguments for perpetuating technicalities but not to disapprove the contention that a contract of employment had been breached as soon as the applicant stopped paying salaries as required of her by the said contract. I must admit that the arguments by both counsel on this ground have been more on technicalities than substantive justice untypical of labour lawyers. This ground equally fails.

Regarding ground 4(e), that the Arbitrator awarded reliefs that were not pleaded, I have carefully examined the records to that effect. In my view in addition to being guided by CMA F1 as argued by Mr. Magila, the learned Arbitrator rightly played her role in addressing the third issue jointly raised by the parties namely "to what reliefs are the parties entitled to." Citing the case of **Good Samaritan vs. Joseph Robert Savari** (supra) the Arbitrator correctly justified her decision for the award of salaries of the remaining months of the contract.

Premised on the above, this appeal is hereby dismissed for lack of merit. The AWARD of the CMA and all orders emanating therefrom are upheld.

It is so ordered.

E.I. LALTAIKA
JUDGE
30/5/2023

COURT:
This Ruling is delivered under my hand and the seal of this Court on this 30th day of May 2023 in the presence of **Ms. Lightness Kikao, Counsel** for the Applicant, and holding brief for Mr. Gide Magila, Counsel for the respondents

E.I. LALTAIKA
JUDGE
30.5.2023

COURT:
The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
30.5.2023