

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL CASE NO. 13 OF 2023

BETWEEN

MATTHEW GOODMAN PLAINTIFF

VERSUS

NORTH MARA GOLD MINE LTD DEFENDANT

RULING

14th & 21st September, 2023

M. L. KOMBA, J.:

The plaintiff herein who was previous the defendant's employee, sues the defendant claiming a specific damages in aggregate amounts of **AUS \$ 292,208.59** for loss of wages and bonus, due to the defendant's negligence. From his plaint he filed, the plaintiff alleges the defendant was negligent to ensure the standard security in her premises which led the applicant to be attacked and injured by the armed gangs.

The plaintiff is also prayed for a general damages, costs of the suit and any other relief (s) as this Court may deem fit and just to grant.

In filing her written statement of defence, the defendant filed together with a preliminary objection on three points which can be summarized as follows;

- 1. That since the Plaintiff's claims or causes of action emanate from employer-employee relationship, this Honourable Court lacks jurisdiction to entertain and determine the suit.*
- 2. That the suit is re judicata to Labour Dispute No. CMA/MAR/MUS/32/2022 determined by the Commission for Mediation and Arbitration at Musoma and Labour Revision No. 15 of 2022 determined by the High Court of Tanzania (Labour Division) at Musoma.*
3. That the suit is an abuse of court process.

It is prominent, as ruled out in several decisions of the Court of Appeal and this Court, that whenever there is a preliminary objection, then the Court has to deal with it first before embarking into determining the merit of the case. See **Deonesia Onesmo Muyoga & 4 Others vs Emmanuel Jumanne Luhahula**, Civil Appeal No. 219 of 2020 CAT at Tabora.

When the case placed before me for hearing of preliminary objection, only the defendant's counsel, Mr. Imani Mfuru entered an appearance.

The situation led the matter to proceed ex parte against the plaintiff as this court satisfied itself that the plaintiff was aware of the hearing date and time but he failed to enter his appearance.

Arguing in support of the preliminary objection, the defendant's counsel on the first point he submitted that this court lacks jurisdiction as the matter was already filed to CMA, the forum which has exclusive jurisdiction to inquire the matter concerning employer and employee relationship together with the High Court Labour Division. He proceeded that at paragraph 4 of the plaint, the plaintiff claiming a specific amount on loss of wages and bonus due to defendant negligence. And that at paragraph 5, 6 and 7 the plaintiff claimed that his employment was terminated pre maturely and the same was triggered by the subject matter of the suit.

The counsel was of the opinion that the cause of action in the present suit arose out of employment. Referring to section 88 (1) and (2) of the Employment and Labour Relations Act, CAP 366 [R.E 2019] (the ELRA), he submitted that the act defines what the dispute is, and stated to include tortious liability and vicarious liability. Referring to the cases of **NMC Nation Micro Finance Bank PLC vs. Sarah Richard Hamza**, Civil Appeal No. 01 of 2020 High Court of Mwanza and **Bulyanhulu**

Gold Mines Ltd vs. Mwalami Mohamed Mabaya, Civil Appeal No. 11 of 2021, High Court Shinyanga, the defendant's counsel was of the views that the plaintiff should have been filed his case at CMA or High Court Labour Division.

As to the second point of preliminary objection regarding to the issue of *res judicata*, the defendant's counsel submitted that the case was already determined by CMA in the dispute No. CMA/MAR/32/2022 and before this Court as Labour Revision No. 15 of 2022. Citing the case of **Peniel Rotta vs. Gabriel Tanaki & Others**, TLR 2003 at page 312, he argued that the conditions for a matter to be *res judicata* were stated to be, that the matter must be direct in the former suit, former suit must be between the same party or privy claiming, and the last is parties must have litigated under the same title in the former suit.

Mr. Mfuru proceeded that, in the Labour Dispute No. CMA/MAR/32/2022 lodged at the CMA, the plaintiff was seeking to be paid compensation, re-imbursement of mobile phone and general damages. The dispute was dismissed by the CMA for failure of plaintiff to justify his delay for condonation and again the case was dismissed by the High Court in Labour Revision No. 15 of 2022 for being time barred. The counsel averred that in the present suit the plaintiff is seeking for compensation,

re-imbursement of mobile phone and general damage. He was of the views that all these matters were direct in issue before the CMA.

On the third point the defendant's counsel submitted that since the present suit is barred by the doctrine of *res judicata* as the plaintiff is trying to circulate the justice system by filing a fresh suit which is based on the former suit. He further argued that, the gist of the preliminary objection is that the suit is an abuse of court process. He cemented that the point has been discussed in **Graham Rioba Sagwe vs. Fina Bank Ltd**, Petition No. 82 of 2016 and in the case of **JV Tangerm Construction Ltd & Technocombine Construction Ltd vs. Tanzania Port Authority & AG**, Commercial Case No. 117 of 2015 at page 14. In conclusion the counsel prayed the suit to be dismissed.

Having heard the submission by the defendant's counsel and carefully read the corresponding documents, the issue which I am called upon to determine is whether the preliminary objection raised by the defendant is meritorious.

It is trite law that a preliminary objection must first raise a point of law based on ascertained facts and not on evidence. In the case of **Selcom Gaming Limited vs Gaming Management (T) Limited & Gaming**

Board of Tanzania, Civil Application No. 175 of 2005, (unreported), the Court observed that: -

*"A preliminary objection is in the nature of a legal objection **not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged Irregularity, defect or default must be apparent on the face of the application.**"*

See also the cases of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 and **Shahida Abdul Hassanali Kasam vs. Mahed Mohamed Gulamali Kanji**, Civil Application. No. 42 of 1999 (unreported).

Persuaded by the mentioned decision above, I am in a position that the third point of preliminary objection raised by the defendant about *abuse of court process* attract evidence hence does not qualify to be a point of law. In the case of **JV Tangerm Construction Ltd & Technocombine Construction Ltd vs. Tanzania Port Authority & AG (supra)** referred by the defendant's counsel, when the court decided on akin situation, my learned brother Ismail, J. had this to say;

"I take the view that this is a serious allegation which cannot be ascertained without calling into action an evidence which would prove the allegation. This would certainly entail carrying out a hearing at which

evidence would be adduced and rebutted before finding is made."

Therefore, in the analysis I find the second point of preliminary objection is devoid of merit and I dismiss it.

Moving to the first point of preliminary objection, the defendant's counsel contended that this Court lacks jurisdiction to entertain the present case as the causes of action emanates from employer-employee relationship thus the plaintiff ought to have filed the case before the Commission for Mediation and Arbitration. In his submission the counsel referred to section 88 of the ELRA and stated that the provision defines what is the meaning of the dispute. He proceeded further that according to the said law the dispute includes the complaint over tortious liability and vicarious liability and that the law requires compulsory arbitration on matters arise out of the employment relationship.

In analysing the defendant's contention under this point I find it pertinent to rephrase the relevant part of the said section 88 of the ELRA. The section reads;

88.-(1) For the purposes of this section, a dispute means -

(a) a dispute of interest if the parties to the dispute are engaged in an essential service;

(b) a complaint over-

- (i) the fairness or lawfulness of an employee's termination of employment;*
- (ii) any other contravention of this Act or any other labour law or breach of contract or any employment or labour matter falling under common law, **tortious liability and vicarious liability;***

From the above excerpt, it is evidently that even the tortious complains arises out of employment relationship fall under the jurisdiction of Labour Institutions which are vested with power to determine labour disputes. Looking at the plaintiff's plaint, the plaintiff complains about the defendant negligence at her working premises which led him to suffer physical and psychological trauma after being attacked and injured. The incident also led him to suffer loss including wages, bonus and employment termination.

It is my opinion that, the plaintiff complaints are based on tortious liability. And since the complaints emanates from the employment relationship, I am at one with the defendant's counsel that the plaintiff ought to have file the case before the relevant Labour Institution which bestowed with the power to determine the labour disputes. Thus, I find the second point of preliminary objection hold water and I sustain it.

As to the second point of preliminary objection, since the first point of preliminary objection answered in affirmative, I find no need to bring it

into a discussion. Therefore, I find the preliminary objection filed by the defendant is meritorious and I proceed to strukt out the present suit as this Court lacks jurisdiction to entertain it. The defendant shall have her costs.

It is accordingly ordered.

DATED at **MUSOMA** this 21st day of September 2023.




M. L. KOMBA
Judge