

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA**

CIVIL CASE NO. 17 OF 2023

BETWEEN

PENDO JOSEPH MASWI PLAINTIFF

VERSUS

BARRICK NORTH MARA GOLD MINE DEFENDANT

RULING

19th September & 05th October, 2023

M. L. KOMBA, J.:

The plaintiff herein who was previous the defendant's employee, sues the defendant claiming for compensation to the tune of Tshs. 100,000,000/= for the injury sustained in cause of employment and cause the plaintiff permanent displacement. From her plaint, the plaintiff sustained injury in 2017 while in duty and diagnosed with severe *muscle spasms of the lumber spine due to the loss of natural spinal lordosis*. There after she undergo several medical examinations and all revealed she has low back pain syndrome due to *loss of spinal lordosis* and the employer decided to terminate her contract. Plaintiff now is suing the defendant for

compensation of the injury she sustained in cause of employment which cause permanent disablement.

The plaintiff is also prayed for a general damage, 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 five points whereby, during hearing of PO two points were abandoned and left with;

- 1. To the extent of plaintiff's claim or cause of action is tort, the suit is hopelessly time barred. The defendant will move the Honourable Court to dismiss the suit with costs.*
- 2. In alternative, but without prejudice to the above Preliminary objection to the extent that the plaintiff's claim or cause of action is the alleged tortious liability of the defendant and to the extent that the cause of action is based on employer -employee relationship, this honorable court lacks the requisite jurisdiction to entertain the suit in terms of section 88(1)(b) (ii) of the Employment and Labour Relations Act, [Cap 366 R. E. 2019] and section 51 of the Labour Institutions Act, [Cap 300 R.E 2019]. The defendant will move the court to strike the suit with costs.*
- 3. Further alternative, but without prejudice to the above Preliminary objections, the court has no pecuniary jurisdiction to entertain and determine this matter. The defendant will move the court to strike the suit with costs.*

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, plaintiff had a legal service of Mr. Baraka Dishon while defendant was represented by Mr. Faustine Malongo, both learned advocates.

It was Mr. Malongo who kicked the ball by starting submission on his objection that according to paragraph 6 of plaint, the plaintiff was injured in the year 2017 and she is claiming compensation for injury sustained and cause of permanent disability and tortious liability resulted in accident. He said the cause of action is tort and therefore the matter was supposed to be filed within three years since its occurrence as it is in item 6 part I of the schedule of the Law of Limitation Act, [Cap 89 R.E. 2019] (Cap 89). To the contrary the matter was filed in 2023 which is six years since the cause of action arose and he prayed under section 3 of Cap 89 the suit to be dismissed with costs. To convince this court he cited the case of **Barclays Bank Tanzania Ltd vs Phylisiah Hussein Mcheni**, Civil Appeal No. 19

of 2016 CAT at Dar es salaam where at page 11 and 12 the court referred the case and hold if a person has filed a case out of prescribed time court should not act on sympathy or rely on equity, the law should follow its cause.

On the second point about jurisdiction, he submitted that Musoma High Court has no jurisdiction as the cause of action is tort which arise out of employment relationship. The employment relationship has been elaborated at paragraph 3 of the plaint where plaintiff is claiming for Tshs. 100,000,000/= for injury sustained in the cause of employment. He further said the same is featured at paragraphs 4 and 5 which has connection with paragraph 6 that she was injured while performing duties of the defendants.

Mr. Malongo expounded that the tort complained of, arose from employment relationship and according to S. 88 (1) (b) (ii) of the ELRA Cap 366 R.E. 2019 (Cap 366) and S. 51 of the Labour Institution Act, [Cap 300 R.E. 2019] (Cap 300) this matter was supposed to be lodged at CMA or High Court Labour Division and not High Court normal registry while referring the case of **National Microfinance Bank vs Sara Richard Hamza**, Civil Appeal No. 1 of 2020 and **Bulyanhulu Gold Mines vs**

Mwalami Mohamed Mbaya, Civil Appeal No. 11 of 2021 High Court Shinyanga decided that according to labour laws the matter fall under tortious liability is subject to compulsory arbitration. He insisted that this court has no jurisdiction and prayed the matter to be struck out.

While arguing on the 3rd point as an alternative of the two points above, Mr. Malongo said this court has no pecuniary jurisdiction to entertain the matter as in plaint Plaintiff is claiming special damage of one hundred million (100,000,000/=). According to section 40(2) (b) of the Magistrate Courts Act, [Cap 11 R.E. 2019] (the MCA) this matter was supposed to be filed either to District Court or Resident Magistrate's Court because the amount claimed is within those courts jurisdiction and prayed the suit to be struck out with costs.

Rebut over the points, Mr. Baraka argued that the plaint should not be read in isolation and the facts are in sequence to show the claim. He said the claim before this court was based on the negligence and breach of statutory duty by the employer as revealed starting at paragraph 19 of the plaint. He said the plaintiff is claiming for compensation if the employer could not be negligent for act immediately to inform the Workers Compensation Fund (the WCF). According to him, the cause emanates on

05/10/2021 as the plaintiff complained within time but WCF responded in 2021 that the information was delayed and it could work if employer acted immediately.

Mr. Baraka explained that from 05/10/2021 to the date when the matter is filed is only two years while according to law, the tortious liability limitation is three years and therefore matter is within time while agreeing the content of item 6 of 1st schedule of Cap 89 as cited by counter counsel that tortious liability is three years but their cause of action arose in 2021.

It was his submission that the plaintiffs claim is based under S. 30 of Workers Compensation Act, Cap 263 which reveals liability of the employer on the negligence, breach of statutory duty and omission of employer. Being the cause of action as is in para 19 of the plaint he prays this court to find the point as raised by defendant lacks merit and overrule it. On the cited case of **Barclays Bank Tanzania Ltd vs Phylisiah Hussein Mcheni** (Supra) he said the plaintiff is seeking for sympathy rather the plaint explains when the cause of action arises and leave the rest to this court. Paragraph 19 explained it all that she should be paid by employer if the employer did not act negligently. He prayed this court to disregard the PO and order the matter be heard on merit.

On the second point about jurisdiction the counsel submitted that this court has jurisdiction to entertain the matter under S. 30 (1) of Cap 263 as it involve civil liability of the employer and provide a list of authorities that High Court has jurisdiction to entertain the matter arise from tortious liability and the jurisdiction is unlimited, he cited the cases of **Moku Security vs. Juma Sakeya Juma**, Civil Appeal No. 48 of 2020 High Court Dar es salaam at page 9, **NBC Limited vs National Chicks Corporation Limited and 4 others**, Civil Appeal No, 129 of 2015 (unreported) and **Emmanuel Massanja Gaganga vs Managing Director of Out Door Tanzania**, Civil Appeal No. 162 of 2018 High Court Dar es salaam at page 9 and 10. Counsel was of the view that as per the cause of action this court has jurisdiction as revealed in paragraph 19 of the plaint and pray this point of objection to be overruled and the matter heard on merit.

On the 3rd point about pecuniary jurisdiction, he submitted that the plaintiff is claiming for Tshs. 100,000,000/= as it is only the High Court which has jurisdiction to entertain both the subject matter and the claim of Tsh.100,000,000/= as based on section 13 of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC) that the High Court has general jurisdiction as per Article 108 of the Constitution of the United Republic of Tanzania which

confer the general jurisdiction of the High Court. He cited the decision in **Benitho Thadei Chengula vs Abdulahi Mohamed Ismail**, Civil Appeal No. 183 of 2020 at Dar es salaam Page 11 to boost his argument. Mr. Baraka distinguishes all the case cited by the counsel for the defendant as he said this court has mandate. Being on alternative he prayed all points to be overruled with costs and the matter be heard on merit.

During rejoinder Mr. Malongo insisted that cause of action does not depend on letter rather that occurrence of the injury. He said even if when he bases on the former that means an employer was negligent in 12 months after the accident the period end on 30/06/2018 that's why the WCF decline to pay. He calculated from June 2018 three years ends in June 2021 therefore, according to him, still the matter which was filed on 2023 is time barred although the letter referred did not indicate negligent occurred on 05/11/2021.

He further submitted that S. 30 of Cap 263 is irrelevant as it does not provide time limit and does not explain the time shall run the moment WCF write a letter. He said the section was discussed in length by the case of **Bulyanhulu Gold Mines vs. Mwalami Mohamed Mmbaya** (Supra) at page 18 where it was said the section does not empower High Court to

entertain the suit and the case of **Emmanuel Masanja Gaganga vs. Managing Director Out Door Tanzania** (Supra) was also discussed and High Court said the court which is competent to hear the compensation arising from employment is CMA or Labour Court.

Mr. Malongo distinguished the case of **Moku Security vs Juma Sabaya Juma** (supra) saying is irrelevant as in that case the High Court did not analyze jurisdiction of CMA or Jurisdiction of labour court and the case of **Emmanuel Massanja Gaganga vs. Managing Director Out DOOR Tanzania** (Supra) does not help the plaintiff but confirm the position as raised in PO as at page 18 this court said as the law stand it is the High Court Labour division which has mandate subject to pecuniary jurisdiction. As officer of the court counsel pray to withdraw the third point after being aware of the decision in **Benitho Thadei Chengula vs Abdulahi Mohamed Ismail** and prayed other points to be found with merit.

That makes the end of submission by counsels and my duty is to determine if the PO as filed by the counsel for defendant has merit.

The issue of jurisdiction is of paramount to this court and therefore I find prudent to start my analysis with the second limb which is about jurisdiction. Counsel for defendant was of the position that so far as the

plaintiff was injured while performing his duties, to him, there is employer and employee relationship and therefore section 88 of the Cap 366 or section 51 of Cap 300 are applicable and the relevant forum was CMA or Labour court. Counsel for the plaintiff claimed that under section 30 (1) of Cap 263 this court has jurisdiction to entertain the matter as it involves civil liability of the employer. Counsel for defendant disputed this position claiming the same does not provide time limitation.

For easy of reference section 30(1) reads as follows;

*'30-(1) Nothing in this Act shall limit or in any way affect any civil liability of an employer or any other person in respect of an occupational injury or disease resulting in the disablement or death of an employee **if the injury or disease was caused by negligence, breach of statutory duty** or any other wrongful act or omission of the employer, or any person for whose act or omission the employer is responsible, or of any other person.'*

[Emphasis is mine]

The cited provision has qualification for its application which is, if the injury or disease was caused by negligent, breach of statutory duty or any other wrongful act. Plaintiff did not explain what wrong was done by employer or conduct which can fall on negligent. From plaint, plaintiff is complaining of negligent on reporting the matter and not on causation of injury. He did

not explain how employer contributed to his injury which is internal. In **Emmanuel Massanja Gaganga vs Managing Director Tanzania** (supra) plaintiff had an accident while at work which resulted into amputation of toe and burns of the body. In the case at hand, plaintiff suffered *severe muscle spasms of the lumber spine due to the loss of natural spinal lordosis*. How the employer was involved on this so as to amount to civil liability in terms of section 30 (1). I find the case of **Emmanuel Massanja Gaganga vs. Managing Director Out Door Tanzania**, (supra) and **Moku Security vs. Juma Sakeya Juma** (supra) are distinguishable.

My brother Mkwizu J. when faced with akin situation in **Bulyanhulu Gold Mines vs. Mwalami Mohamed Mbaya** (supra) had this to say;

'Even assuming the respondent's claim is a result of the appellant's negligence and / or willful omission, still, the District Court would not have jurisdiction. This is so because, civil wrong arising out of employment relationship between the parties is regulated by section 88 of ELRA or section 51 of Labour Institution Act which both provides exclusive jurisdiction to either the CMA or labour court.'

Counsel for the plaintiff cited the case of **NBC Limited vs National Chicks Corporation Limited and 4 others** (supra) which was decided

basing on Article of the Constitution of United Republic of Tanzania. I am in full support of that. However, the same Constitution under Article 108 it refers other law or other written law. Here I find Labour Laws and or the Law of Limitation Act. Claim by plaintiff by its nature is tortious liability just as submitted by Mr. Malongo, am in agreement with his submission and therefore this court has no jurisdiction. See **Emmanuel Massanja Gaganga vs Managing Director Out Door Tanzania**, (supra) and **Bulyanhulu Gold Mines vs Mwalami Mohamed Mbaya** (supra). I find the second limb of PO has merit and sustain it.

On the first limb that the matter is time barred, Mr. Malongo said the cause of action is tort and the matter was supposed to be filed within three years to the contrary Mr. Baraka insisted that cause of action arose in 2021 and the matter is within time. Mr. Baraka conceded that the claim by plaintiff is based on the negligence and breach of statutory duty by the employer as revealed starting at paragraph 19 of the plaint. I find the issue for determination is when the cause of action arose. Plaintiff was employee of the defendant and in the year 2017 he sustained injury while at work. According to pleadings filed, employer lately report the matter to WCF and the fund refused to pay the plaintiff. Information that WCF will not pay was

revealed in the letter dated 05/10/2021. The same letter referred the accident which took place on 01/07/2017.

It was the argument of Mr. Baraka that the cause of action arose in the year 2021 and therefore the suit is within 3 years as per item 6 of the I schedule to cap 89. I find this issue does not need much effort to know when the injury occurred which is the cause of action. I find the cause of action occurred in 2017 when the plaintiff was injured and not otherwise. Mr. Baraka while on this point he submitted that the claim is based under section 30 (1) of Cap 263 that employer was negligent and breached his statutory duty. The section does not provide for the time limitation for the action against the employer. The section reads;

*'30-(1) Nothing in this Act shall limit or in any way affect any civil liability of an employer or any other person in respect of an occupational injury or disease resulting in the disablement or death of an employee **if the injury or disease was caused by negligence, breach of statutory duty** or any other wrongful act or omission of the employer, or any person for whose act or omission the employer is responsible, or of any other person.'*


There is condition to the cited section that the injury or disease must be a result of action or omission or negligence on the side of employer. There is

no doubt that plaintiff sustain injury in the cause of employment. In paragraph 19 of plaint the plaintiff explains the negligence and intent will of the defendant failure to lodge the application on time. I find the negligent is on failure to lodge application and not on breach of statutory duty which cause injury. In other words, injury or disease must be a result of action of the employer which was not the issue in the suit at hand. Plaintiff sustained injury while performing his duty and complained of the delay of employer to report the same. There being the tortious liability as the plaintiff sustained injury while performing his duties and responsibilities, then, Cap 89 is applicable. Failure to report the matter to WCF does not fall within the margin of section 30 (1) of Cap 263. However, so far as under the previous limb this court find it has no jurisdiction and so it cannot provide remedy for this.

As said the issue of jurisdiction is domain of any court, as discussed in the second limb of the objection this court has no jurisdiction and the remedy is, as hereby do, struck out the suit with costs.

DATED at **TARIME** this 05th day of October, 2023.




M. L. KOMBA
Judge