

**IN THE HIGH COURT OF TANZANIA**

**(LABOUR DIVISION)**

**TANGA DISTRICT REGISTRY**

**AT TANGA**

**LABOUR REVISION NO. 2 OF 2023**

*(Originating from Labour Dispute No. CMA/TAN/176/2021/08 of the Commission for Mediation and Arbitration of Tanga at Tanga)*

**AMBONI PLANTATIONS LIMITED -----APPLICANT**

**VERSUS**

**MWINYI TAJIRI -----RESPONDENT**

**JUDGMENT**

**K. R. Mteule, J.**

**26<sup>th</sup> October 2023 & 26<sup>th</sup> October 2023**

This is an application for revision brought under **Section 94(1) (a), 2 (a)** of the **Employment and Labour Relations Act [Act No. 4 of 2004] [Cap. 366 of R.E. 2019]**, **Rule 24 (1) & (2) and 28 (1) (a), (c) and (d)** of the **Labour Court Rules, 2007, GN. No. 106 of 2007**.

The Application contains Notice of Application and a Chamber Summons in which the Applicant pleads this Court to revise the award and proceedings of the Commission for Mediation and Arbitration (CMA) for Tanga at Tanga in **Labour Dispute No. CMA/TAN/176/2021/08** to be satisfied as to its legality.



From what transpired in the record of the CMA, the Respondent was employed by the Applicant on **12<sup>th</sup> May 2013** as an assistant accountant under a written contract of employment. On **15<sup>th</sup> November 2021** the Applicant terminated the employment of the Respondent basing on alleged fraud and occasioning loss. Dissatisfied with the termination of his employment, the Respondent referred his complaint to the CMA vide CMA Form No. 1, asserting unfair termination.

Before the CMA three issues were framed which were

1. Whether the CMA has jurisdiction to determine the dispute.
2. If the first issue is affirmative, whether there were fair reasons and procedures in terminating the employment.
3. What reliefs are parties entitled to.

The CMA found that it had jurisdiction to determine the dispute. It further confirmed that there was unfair termination and proceeded to award compensation for 20 months remuneration and other terminal benefits.

In this revision, the Applicant is challenging the CMA findings and decision basing on the following issues:



1. Deliverance of the decision in the absence of the parties.
2. CMA determination of the dispute without jurisdiction.
3. CMA error in finding substantive and procedural unfairness in the termination of the employment.
4. Excessive award of 20 months compensation.

The Respondent disputed the above assertions hence the Application was argued by written submissions. The Applicant was represented by Yona Lucas, Advocate while the respondent was represented by Personal Representative, Mr. Salumu Pastory Makunga.

From parties' submission, the issue before this court is **whether this Application for revision has merit**. In responding to this issue, all the issues raised in the affidavit will be considered. I will start with the issue of jurisdiction of the CMA due to its prominence as a determinant of the validity of the entire proceedings in the CMA.

In deciding as to whether the CMA had jurisdiction, the Arbitrator was confronted with an argument that **item 17 of exhibit D3** tendered in the CMA, which was the employment contract, stipulates that parties should refer their dispute to two Arbitrators appointed by the parties who shall as well appoint one additional Arbitrator to make 3 arbitrators to resolve the dispute.



The Arbitrator was of the view that since in the termination the Respondent applied the same procedure as stipulated in **Regulation 13 of GN 42 of 2007**, then the employer has been the first to violate the requirement of referring the dispute to private arbitration. He then held the CMA to have jurisdiction and proceeded to determine the dispute.

In his submission before this Court, Mr. Yona has argument that the arbitrator erred since pursuant to **Clause 17 of the Exhibit D3**, parties were to refer their disputes to private Arbitrators. He challenged the CMA for having ignored the authorities cited by the Applicant in case laws which were binding on the CMA. Mr. Yona recited the authority which he cited in the CMA which is **Jocelyne Mkilima vs Economic Social Research Institute, in the High Court of Tanzania (Labour Division at Dares Salaam, Revision No. 568 of 2018** by Muruke J as she then was) (unreported). To support the argument that CMA did not have jurisdiction to try the dispute due to existence of arbitration clause in the parties' employment contract, Mr. Yona further cited the case of **Tanzania Motors Services Ltd and Another vs Mehar Singh t/a Thaker Singh, in the Court of Appeal of Tanzania, Civil Appeal No. 115 of 2005**, at 2<sup>nd</sup> paragraph on page 10.



Mr. Yona quoted the following words from Jocelyne Mkilima's case:-

*"In the matter at hand, just like the case above cited, parties agreed to submit themselves to arbitration in case of dispute. It was wrong for the applicant to file dispute at the CMA. Thus, CMA proceeded with the dispute without jurisdiction. To the best of my understanding, any dispute conducted without jurisdiction, proceedings and subsequent orders, rulings and or Judgment are rendered nullity."*

In response, the Respondent cited **section 92 of the Employment and Labour Relations Act (Cap 366 of 2019 RE)** and submitted that this provision provides that the Arbitration Act does not apply in arbitration conducted by the Commission. He challenged the Applicant for having failed to appoint any Arbitrator.

It is a general principle that parties are bound by the terms of their own contracts. It was not disputed that in the parties' contract, the mode of dispute resolution was clearly stipulated under clause 7. It is not disputed that the type of arbitration agreed thereon was pure private arbitration which by any standard, not the arbitration by the CMA. As held in **Jocelyne's case**, (supra) since parties agreed to subject themselves to Arbitration, it means they did not intend to be covered by the jurisdiction vested in the CMA. Since courts need to respect parties'

contract, CMA wrongly determined the dispute which from the beginning parties agreed not to use it.

I cannot agree with the Respondent's interpretation to **Section 92 of the Cap 366 of 2019 RE** that the provision prohibits application of Arbitration Act to matters conducted by CMA even when the CMA sits on matters to be guided by the Arbitration Act. The section provides:

*"92. The Arbitration Act, does not apply to an arbitration conducted by the Commission."*

The above provision could not mean private arbitration but meant arbitration done by the CMA according to the procedures guiding Arbitration in the CMA. I do not agree with the Respondent that the provision will apply even when the CMA is dealing with matters peculiar to the Arbitration Act. What I see is the Act will apply only when the CMA Arbitrates matters with full jurisdiction to do so.

I will borrow a leaf from the position in **Jocelyne's** case to decide that CMA did not have jurisdiction to determine the matter which had a clear arbitration clause. In my view the first ground of revision constitute merit. As well, this ground being a pure jurisdictional issue, can sufficiently dispose of the matter. From the foregoing, the issue as to whether this revision application has merits is answered affirmatively.



Consequently, I allow the application and nullify the proceedings of the CMA. I hereby quash and set aside the award issued therefrom. Shall any of the parties be interested to pursue the matter, let him do so through the Arbitration process stipulated in their contract. It is so ordered.

**Dated at Tanga this 26<sup>th</sup> day of October 2023.**



**KATARINA REVOCATI MTEULE**

**JUDGE**

**26/10/2023**

**Court:**

Judgment delivered this 26<sup>th</sup> Day of October 2023 in the presence of Mary Wilfred, the Applicant's Director and in the presence of the Respondent in person.



**KATARINA REVOCATI MTEULE**

**JUDGE**

**26/10/2023**