THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 16 OF 2022

(From Complaint Ref. CMA/MBY/Mby/56/2020 in the Commission for Mediation and Arbitration for Mbeya at Mbeya)

1. **PHILEMON L. M. KADUMA**
2. **JOHN YOTHAM CHAULA**
3. **YUNUS BASHANGE**
4. **ATHUMANI MISUKE**
5. **CHARLES KAZIMOTO**
6. **SOSPETER CHILONWA**
7. **ERNEST NAKITUNDU**
8. **GEORGE ANANIA**
9. **GERALD MASENGO**
10. **JOHN MGALULA**
11. **GODFREY M. NYARI**
12. **ELIA ANDREW NG'EVE**
13. **SHABANI R. MKEIY**
14. **YAMBAZY M. KARATA**

APPLICANTS

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY.....RESPONDENT

JUDGEMENT

Date of Last Order : 15.06.2023
Date of Judgement: 20.12.2023

MONGELLA, J.

The application at hand is brought under section 91(1)(a), (2) (c), (4) (b), and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap 366 R.E. 2019; Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), and 28(1)(b) (e), (4) (a) of the Labour Court Rules, G.N. No. 106 of 2007. It is supported by the affidavit of Gerald C. Msegeya, the applicants' advocate.

In the application, the applicant is seeking for the following reliefs:

(a) *That this Honourable Court be pleased to call for and examine the record of proceedings and the Ruling by the Commission for Mediation and Arbitration in Labour Dispute No. CMA/MBY/Mby/56/2020 and revise it on the ground that the Commission failed to exercise jurisdiction so vested by the law.*

(b) *Any other order this Honourable Court shall deem fit and just to grant.*

The brief facts of the case are as follows: the applicants were employees of the Tanzania Zambia Railways Authority (TAZARA), the respondent herein. They retired at different periods between the year 2005 and 2018 whereby they were paid their retirement benefits. However, they later realized to be underpaid as the payment was not according to the managerial scales. Following that discovery, they

started making follow ups on the difference in payment with the respondent whereby they were promised to be paid the difference. The promises went on, but were never realized. This situation led them to file a labour dispute in the Commission for Mediation and Arbitration (CMA, hereinafter) vide Labour Dispute No. CMA/MBY/Mby/56/2020. The matter was filed following condonation granted by the CMA.

Upon failure of mediation, the matter was scheduled for arbitration. Before hearing could take off, the respondent's advocate, one, Ms. Beatrice Mutembei filed a notice of preliminary objection to the effect that the CMA had no jurisdiction to entertain the matter as the complainants/applicants were public servants. She argued before the CMA that before knocking its doors, the applicants ought to have exhausted all remedies as provided under the Public Service Act, Cap 298 R.E. 2019. The objection was sustained by the CMA rendering the matter being dismissed.

In accordance with the CMA Ruling rendered on 09.06.2022, the impugned decision, the applicants through their counsel, Mr. Gerald Msegeya, conceded to the preliminary objection taking into consideration a decision by the Court of Appeal of this land in the case of **Tanzania Posts Corporation vs. Dominic Kalangi** (Civil Appeal No. 12 of 2022) [2022] TZCA 154 TANZLII. However, despite the concession, the applicants are before this court challenging the CMA

decision on the preliminary objection on the grounds already stated hereinabove.

The application at hand was argued by written submissions whereby both parties were legally represented. The applicants were represented by Mr. Gerald C. Msegeya, learned advocate, while the respondent was represented by Mr. Joseph E. Tibaijuka, learned state attorney.

In his submission in chief, after adopting the supporting affidavit, Mr. Msegeya pointed out, as contained under paragraph 12 of the supporting affidavit, the issues to be determined by this court in resolving the dispute between the parties as being:

That, the Honourable Arbitrator was in violation of her powers vested on her by law and thereby occasioning injustice, to wit;

(i) *That the Arbitrator erred in law and facts for failure to take cognizant the fact that the applicants were not public employees.*

(ii) *That the Arbitrator erred in law by finding and holding that the CMA had no jurisdiction to entertain the complaint that was before it, while in actual fact it had jurisdiction to hear and determine the same.*

In his submission, while first of all agreeing that public servants are governed by the Public Service Act, Cap 298 R.E. 2019, he contended that the applicants were not public servants and as such not governed by the Public Service Act as alleged. He argued so on the grounds that: TAZARA is an independent parastatal organisation with its own procedures of suing and being sued. That, it has its own internal rules and regulations of dealing and resolving disputes, including labour disputes. He added that the Public Service Act does not cover TAZARA as the authority was established by contract between two sister countries, which excludes the use of some laws of each state, including the Public Service Act.

On those bases, Mr. Msegeya found the holding by the CMA misconceived and untenable in law. He argued further that TAZARA is not a public authority governed under the Public Service Act, as alleged. That, it is a body corporate established under the Tanzania Zambia Railways Act, Cap 143 R.E. 2009. To substantiate his argument, he referred the pre-amble of the Act and section 14 (1) and (2) of the Act.

Mr. Msegeya argued further that, in law, for an organisation to qualify as a public corporation, the government must be the majority shareholder, holding not less than 51% of the shares. In the matter at hand, he argued that the contracting countries, that is, Tanzania and Zambia hold equal shares at 50% each. In that respect, he referred to

section 3 of the Public Corporations Act, Cap 257 of 1992, as amended. With that observation, he maintained his stance that it was erroneous to hold that TAZARA is a public corporation and the applicants cannot be treated as public servants.

Arguing further, he explained the meaning of "public servant" and "public service office, as provides under section 3 of the Public Service Act, Cap 298 R.E. 2019, saying that it is a person holding or acting in a public service office. That, a public service office is a "paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than ... any office declared by or under any other written law to be a public service office." He also referred to section 9 (1) of the same Act which provides for establishment of the Commission dealing with disciplinary matters of public servants.

He insisted that the provisions of the Act do not include TAZARA and that they deal with disciplinary issues involving public servants. Considering the applicant's claims, he had the stance that the same do not fall under disciplinary issues as their claims concern retirement benefits whereby they claim to have been underpaid. In the premises, he had the view that it is a misconception of the law that the CMA had no jurisdiction to entertain the matter as it does have jurisdiction. Mr. Msegeya had further view that the Court of Appeal decision in the

case of **Tanzania Posts Corporation** (supra) relied upon by the CMA to dismiss the case was applied out of context.

Arguing on the applicant's employment status, Mr. Msegeya contended that apart from his argument that TAZARA is not a public corporation, the applicants ceased to be TAZARA employees for the period between 2005 and 2018 following attaining retirement age. He argued that because they are no longer employees, the Public Service Act cannot apply on their claims. That, the applicants cannot lodge their retirement claims to the Public Service Commission because the functions of the Commission as provided under section 10 (1) (d), among others, is to receive and act on appeals from decisions of other delegates and disciplinary authorities.

He reiterated his point that the matter placed before the CMA was not a disciplinary one but on retirement benefits. He claimed that, it is not provided anywhere in the Act that complaints of retirees who have been underpaid are to be lodged to the Public Service Commission. He reiterated his stance that the argument that the applicants were to exhaust all internal remedies before going to the CMA was misplaced. On those bases, he urged the court to make a finding that the applicants are not public servants.

In conclusion, he insisted that the CMA had jurisdiction to entertain the applicants' matter before it. To cement on his point, he referred

to **section 12 and 14 of the Labour Institutions Act, Cap 300 R.E. 2019** arguing that the functions of the CMA as enshrined under that law are to mediate and determine any dispute that touches labour law. He further referred to section 2 (1) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 saying that the provision provides that the Act applies to all employees, including those in public service of the Government of Tanzania in the mainland.

However, he then reverted to his position that the applicants were not public servants and were not terminated on disciplinary grounds, but retirement. He faulted the CMA for dismissing the case on ground of lack of jurisdiction arguing that it rendered shut all the doors to justice for the applicants. Mr. Msegeya further contended that the CMA ought to have strike out the matter and not to dismiss the same. He reiterated his prayers for the CMA decision to be quashed and for orders that the matter be held to finality by the CMA.

Mr. Tibaijuka, on behalf of the respondent, opposed the application and the arguments by Mr. Msegeya. From the outset he had the firm view that the respondent is a public entity. He argued that for it to be established that the respondent is a public entity, the court considers four (4) factors being; (a) establishment, (b) control test, (c) funding, and (d) nature of service rendered.

Explaining the factor of "establishment" he contended that the respondent was established by an Act of Parliament, that is, the Tanzania Zambia Railway Act No. 23 of 1975, which was later repealed and replaced by the Tanzania Zambia Railway Act, Cap 143 R.E. 2009. Referring to the preamble of the Act, he submitted that the same provides that "it is an Act to give effect to the Agreement relating to the Tanzania Zambia Railway made between the Government of the United Republic of Tanzania and the Government of Zambia dated 29th September 1993. He argued further that the said Agreement had no effect until an Act of Parliament was put in place to that effect. He referred to section 2 (1) of the Act while conceding to Mr. Msegeya's argument that TAZARA is a result of the Agreement between the two countries.

Further referring to **section 4 of the Tanzania Zambia Railway Authority Act, Cap 143 R.E. 2019**, which establishes the Tanzania Zambia Railway Authority, he argued that the respondent is then rendered a public entity. In his views, Act of Parliament are not made to regulate private arrangements, rather they are made to regulate public matters whereby the respondent fits in. In further support of his stance, he referred the case of **Tanzania Posts Corporation vs. Dominic Kalangi**, (Civil Appeal No. 12 of 2022) [2022] TZCA 153, arguing that in that case, the Court of Appeal held that where an entity is established by an Act of Parliament, the same is a public entity.

Addressing the "control test" factor, Mr. Tibaijuka challenged Mr. Msegeya's contention that the respondent is a private entity as all operations and management by its Council and Board is autonomous and that even the registration of the respondent's motor vehicles is not "SU." Starting with the issue of registration of the respondent's motor vehicles, he found the argument misconceived. He argued that there is no law which requires a public entity to register its motor vehicles under "SU." He also had a stance that the issue of registration of motor vehicles does not disqualify an entity from being a public entity.

With regard to the "control test" he had two points. **One**, regards the issue of ownership whereby he contended that it is undisputed by both parties that under Article 11 of the Agreement between Tanzania and Zambia, the ownership is 50% share for each country and there is no any division of shares to any private entity. He again referred the case of **Dominic Kalangi** (supra) arguing that it was held that where the Government owns share wholly or substantive then the same is public entity.

Two, regards management whereby he contended that the respondent is managed through the Council and Board of Directors which comprise members from the Governments of both countries. Specifically, he referred to **section 9 (1) and (2) of Cap 143 R.E. 2009** arguing that the provision establishes the council which is formed by

three Ministers from both countries responsible for finance, transport and trade. He added that the Council is chaired by the Minister of transport whereby the seat is held on rotational basis.

With regard to the Board of Directors, he argued that the same is established under section 11 (a) to (d) of Cap 143 R.E. 2009 and it comprises the Permanent Secretary in the Ministry for Transport for Zambia; Permanent Secretary in the Ministry for Transport for Tanzania; and four members with experience in either transport, commerce, industry or finance whereby two are appointed by the Minister responsible for transport in Tanzania and two are appointed by the Minister responsible for transport in Zambia.

Considering the composition of the Council and Board of Directors as stated above, he argued further that the fact that the members of the Council are appointed into their offices by the presidents and that the rest of the members of the Board are appointed by the ministers/government officials, who are presidential appointees, it is evident that the respondent is controlled by the Government. Proving further that the respondent is a public entity, he referred **section 23 (3) of Cap 143 R.E. 2009**, which obliges the Council to submit annual report to the National Assembly rendering the respondent un-autonomous.

As to the third factor, which is on "funding" Mr. Tibaijuka argued that **section 19 of Cap 143 R.E. 2009** provides that one of the sources of funding of the Organisation comes from appropriation of funds by the Parliaments. He thus considered this being a concrete proof that the respondent is a public entity as the Government cannot appropriate funds for private entities. He added that even the auditors of the respondent are appointed by the Council, which is formed by members from the two countries and not private entities.

On the last factor, that is, "service rendered" Mr. Tibaijuka referred to **section 7 of Cap 143 R.E. 2009** arguing that the provision clearly states that the respondent shall provide transportation services whereby the said service shall be rendered to the public.

Mr. Tibaijuka persuaded this court to be guided by a number of decisions by other judges from this court. Citing the case of **Ali Linus & 11 Others vs. Tanzania Harbours Authority [1998] TLR 5**, he argued that the doctrine of precedent requires judges not to depart lightly from decisions of fellow judges, unless there are compelling reasons to do so, the rationale being to preserve predictability and consistence of the law.

In that respect, he urged the court to be persuaded by decisions in **TAZARA vs. William Mhame**, Revision Application No. 481 of 2021(unreported); and **Benjamin T. Mangula & 20 Others vs. Tanzania**

Zambia Railway Authority & Attorney General, Revision No. 418 of 2022 (HC Lab. Div. at DSM, unreported). He contended that in those cases the holding of the court was that TAZARA is a public entity which became so through Cap. 143 R.E. 2009 on part of the United Republic of Tanzania, and Tanzania Zambia Railway Act, Cap 454 of 1975 on part of the Republic of Zambia, and that the insignia of establishing TAZARA was to make it a public entity between the two contracting States.

Convinced that his observations, as hereinabove, have established that the respondent is a public entity, Mr. Tibaijuka further argued that it is obvious that all persons holding, acting and or working for the respondent, like the applicants herein are rendered public servants. Referring to **section 3 of the Public Service Act, Cap 298 R.E. 2019**, he argued that a public servant means a person holding or acting in a public service office. In that respect, he had the stance that the Hon. Arbitrator was correct in holding that the applicants are public servants.

Addressing the 2nd ground, he challenged the applicant's contention that the Hon. Arbitrator erred in law by finding and holding that the CMA had no jurisdiction to entertain the complaint that was before it while it had jurisdiction to hear and determine the matter. Referring to **section 32A of the Public Service Act**, he contended that a public

servant is required to exhaust all remedies provided under the Act before seeking remedies provided under the labour laws.

Explaining the remedies as enshrined under the Act, he argued that an aggrieved person has first to refer the complaint to the Public Service Commission, and when aggrieved by the decision of the Commission, appeal to the president as provided under **section 25** of the Act. He further supported his stance with the case of **Dominic Kalangi** (supra) and **Benjamin T. Mangula & 20 Others** (supra). He further challenged the applicants as they conceded that the CMA had no jurisdiction to entertain their complaint and prayed to withdraw the matter so that they refer the same to the body which had authority to entertain it.

In consideration of his submission in reply, he concluded by maintaining his stance that the respondent is a public entity and the applicants were public servants so they ought to refer their matter to the Public Service Commission. He concluded by praying for the court to confirm the CMA decision and dismiss the application.

In his rejoinder, Mr. Msegeya mostly reiterated his stances in his submission in chief. To start with, he maintained that TAZARA is a public entity owned by two sister countries, but its employees are not public servants in the meaning provided under **section 3 of the Public Service Act**. He argued so on the ground that TAZARA does not formulate

Government policies and that there is no any law declaring it as a public service office. He insisted that the CMA has jurisdiction to entertain this matter as it contains claims of underpayment of retirement benefits. Still relying on section 10 (1) (d) of the Public Service Commission Act, he maintained that the Commission deals with appeals in disciplinary issues only.

He added that the CMA has jurisdiction because the ELRA, under section 2 (1) covers all employees, including Government employees. In that respect, he argued that the case of **Benjamin T. Mangula** (supra) cited by Mr. Tibaijuka was decided per incuriam. He as well went on to distinguish the case of **Tanzania Posts Corporation vs, Dominic A. Kalangi** (supra) on the argument that in the said case the Court of Appeal dealt with a disciplinary matter, which is in the domain of the Public Service Act. That, the Court of Appeal never dealt with a different matter such as one in this case.

With regard to Mr. Tibaijuka's argument that Acts of Parliament are not meant to regulate private arrangements, but rather public matters, Mr. Msegeya found the argument a narrow interpretation of the law. He had the stance that Acts of Parliament are enacted to regulate both public and private arrangements. Concerning the argument that the respondent is a public entity as it provides public transport, he contended that provision of transport services to the public does not mean that the transportation entity is public. That,

even private entities engage in transportation services to the public. He prayed for the argument to be found without merit and for the court to order the CMA to hear the matter on merits.

After careful consideration of the arguments by the learned counsels for both sides, and gone thoroughly on the CMA record, I am of the view that allowing this matter to belabour me shall be a meaningless exercise. This is for the reason to unfold soon hereunder.

As noted earlier and vivid on the CMA record, the applicants through their counsel, Mr. Gerald Msegeya conceded to the preliminary objection raised by the respondent's counsel, one Ms. Beatrice Mutembei, to the effect that the CMA lacked jurisdiction for the applicants being public servants. As such, the CMA, in agreement with the counsels for both parties dismissed the matter before it. In the application at hand, it is the same applicants through their counsel, who represented them in the CMA, challenging the decision that dismissed their matter.

In this revision, the applicants' counsel has advanced arguments to the effect that the CMA erred in dismissing the matter on ground of lack of jurisdiction, which it had. That, the respondent was not a public entity but a private entity owned by the governments of the two States, that is, Tanzania and Zambia. In that regard, the learned

counsel faulted the CMA decision which agreed with the preliminary objection and his concession to the preliminary objection.

After careful consideration of the applicants' counsel's arguments, I find it evident that the arguments present new matters at this revisional stage. The arguments by Mr. Msegeya in this revision were definitely not canvassed by the CMA while deliberating on the preliminary objection following his concession. This is contrary to the dictates of the law, which prohibit raising of new matters during appellate or revisional stage.

There is a plethora of decisions from the Court of Appeal and this court on this aspect. In the case of ***Leopold Mutembei vs. Principle Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & Attorney General***, Civil Appeal No. 57 of 2017 (unreported), the CAT relying on its previous decisions in ***Elia Moses Msaki vs. Yesaya Ngateu Matee*** [1990] TLR 90 and that of ***Ludger Bernard Nyoni & Harrison Lyambe vs. The National Housing Corporation***, Civil Application No. 211 of 2009, declined to entertain grounds of appeal based on matters that were never raised and dealt with at the trial court.

In its other decision in the case of ***Hotel Traveltine Limited & 2 Others vs. National Bank of Commerce Limited*** [2006] TLR 133, the CAT also relying on its previous decision in ***James Funke Gwagilo vs. Attorney General*** [2004] TLR 161 and a case from the ***East African Court of***

Justice in Captain Harry Gandy vs. Caspar Air Charter Limited (1956) 23 EACA 139 ruled:

> "...As a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal."

I am alive at the legal position that matters of law, especially on jurisdiction can be raised at any time, including at the appeal or revisional stage. However, considering the environment in this case, I find the rule inapplicable. In this case, the question of jurisdiction was placed before the CMA, the appellants through their counsels conceded to the preliminary objection thereby depriving the CMA the opportunity to scrutinize and deliberate on the arguments the appellants' counsel has endeavoured to advance at this revisional stage. Matters would have been different if the appellant's arguments were advanced at the CMA and rejected on their merit, thus rendering this court with powers to check the correctness of the CMA's decision in rejecting such arguments. I therefore find it an afterthought being raised at this revisional stage.

On the other hand, however, just like pointed out by Mr. Msegeya, I have also noted that the CMA, upon agreeing with the views of both counsels to the effect that it lacked jurisdiction, went ahead to dismiss the matter. I find this erroneous as the matter did not end on merits. The CMA ought to have struck out the matter instead of dismissing the

same. As such, I substitute the order of dismissal with that of striking out of the matter.

With exception of the substitution order as above, the applicants' application is hereby dismissed. It being a labour matter, I make no orders as to costs.

Dated and delivered at Mbeya on this 20th day of December 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA