

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

REVISION APPLICATION NO 38 OF 2023

(Arising from Labour Dispute No. CMA/ARS/ARB/28/2021/12/2022)

MIKE MOSES LYIMO _____ **APPLICANT**

VERSUS

NEW AGE CONSTRUCTION COMPANY LTD _____ **RESPONDENT**

JUDGMENT

23/02/2024 & 01/03/2024

BADE, J.

This Application is made under section 91(1) (a) and (b) (2) (a)(b) (c) and 94(1) (b) (i) of the Employment and Labour Relations Act, CAP 366 R.E 2019 and Rule 24(1), (2), (a),(b), (c), (d), (e), (f), (3) (a), (b), (c), (d), and Rule 28 (1) (a) (c), (d) and (e), of the Labour Court Rules, G.N. No.106 of 2007, where the Applicant is praying for the orders that

- i) The Court be pleased to call for records of the commission Mediation and Arbitration for Arusha at Arusha and revise the proceedings and set aside the Arbitrator's Ruling in Labour Dispute No. CMA/ARS/ARB/28/2021/12/2022 issued on 02/06/2023, and
- ii) any other reliefs that this Court may deem fit and just to grant.

A brief background which leads to this Application according to the records found in the file is that the Applicant was employed by Respondent as a driver on 07/02/2007. He was terminated because the company underwent uncertain situations which made it unable to come back to the operations due to lack of funds. After his termination he lodged a complaint before the Commission for Mediation and Arbitration for unfair termination. After closing the evidence on the Respondent's side, the Arbitrator while receiving the Applicant's evidence realized that the suit is time barred. He requested the parties to address him on the particular issue, and came to a decision to dismiss the matter for being time barred. The Applicant was aggrieved by this decision, preferring the instant Application for Revision.

This Application is supported by an affidavit sworn by the Applicant, who is represented by Kenneth Samwel Ochina, learned counsel. The Respondent's Principal Officer, one Godson Ngomuo swore the opposing counter affidavit, being represented in court by Mr. Erick Kimaro, learned counsel.

In presenting his client's case, Mr. Ochina adopted the Applicant's affidavit to form part of his submissions. He argues that the matter

was filed in the CMA for unfair termination, where Form no.1 was filed on 20th January 2021, pointing to page 3 of that Form where it was indicated in it that the dispute arose on 18 January 2021. The Form also indicated that the Applicant was terminated verbally. It is Mr. Ochina's contention that since CMA Form no. 1 forms part of the pleadings, the arbitrator was supposed to consider Form no. 1 as the basis of time computation rather than determining the matter on mere assumption as Form no.1 is equivalent to the plaint. He argues further that the legal principle is for the parties to be bound by their pleadings, buttressing his position with the case of **Masaka Mussa vs Rogers Andrew Lumenyela and 2 others**, Civil Appeal No.497 of 2021 where it was held that court should observe the parties' pleadings since they bind the parties, as well as the court, and none is allowed to depart from such pleadings and create their own case.

Moreover, Mr. Ochina added that disregarding the pleadings brought through CMA Form No 1 has wronged the Applicant and prejudiced his case. That Arbitrator has failed to consider the fact that the Applicant was terminated (as per page 5 of the CMA Form No 1) which necessarily means CMA Form No 1 would be the only indication of the information for the interest of justice, since it is the only

document containing the information on the complainant filings on its matter at the CMA. The counsel reasoned that the Ruling did not have any regard for this matter making the CMA award wrongfully procured and deserves to be set aside.

The counsel for the Applicant further observes in the contention that there are procedures for the termination of an employee. Ideally, the letter for termination must be addressed to the employee himself, and the notice as such should be addressed to the employee. He referred this court to section 37 of the Employment and Labour Relations Act, which makes a requirement for giving the termination letter as well as notice of termination. Both these requirements were not followed by the Respondent, rather the Applicant was orally terminated upon the Applicant issuing the Respondent with a medical report, after which the Applicant was denied access to the Respondent's premises. Mr. Ochina further added that CMA's Ruling based its decision on the document that was sent to PSSF as the notice/letter of termination which was termed as "termination of office operations" addressed to the Manager of the PSSF and not the Applicant. Unfortunately, the Arbitrator went ahead and regarded the said letter as a termination letter, while in actual sense the Arbitrator

should have determined the dispute to its finality and assessed the parties' evidence as well as the truth of the matter instead of dismissing the Applicant's complaint. He observes that on numerous occasions, the Court has emphasized the right to be heard since it's a fundamental right, supporting his position with the case of **M.B Business Ltd vs Amos David Kasanda and 2 others**, Civil Application No. 429/17 of 2019 which emphasized the right to be heard and stated that it is the duty of the court of justice or authority with powers to determine the rights of the parties to ensure not to adversely affect the parties' interest without according them the right to be heard in adherence to the principle of natural justice.

Opposing the Application, Mr. Kimaro submitted in response that limitations on jurisdiction are all creatures of statutes while acceding to the fact that parties are bound by their pleadings. He insists that the Applicant filed CMA Form No. 1 on 18/01/2021 which was time barred. In his views, annexure A3 is self-explanatory that the employment relations between the Applicant and the Respondent had ended since 02/02/2021. The counsel for the Respondent contends that the Applicant should have filed a complaint at the CMA at that time, since the cause of action if any occurred in February 2020.

While it is true that the issue of jurisdiction was raised suo mottu by the Arbitrator, he accorded parties the right to address him on that particular issue. Mr. Kimaro argues that the employment relations between the parties ended on 18/11/2020, after the letter from the medical officer in charge, and this was 11 months after the fact. He referred this court at annexure A4. In his view, there was no illegality in the Ruling of the CMA.

Moreover, The counsel for the Respondent contends that there was nothing to be proved as the relationship was ended on 18/11/2020. Needless to say, the Applicant had requested his pension fund and that is why the letter to PSSF was issued to indicate that there was no other relationship among the parties., the letter to PSSF was a clear indication that the employment relationship between the parties had already ended.

Mr. Kimaro further contended that the complainant letter was written on 25/05/2023 after the parties had already closed their evidence and at that time the Commission was already made functus officio concerning the matter at hand. That, if there were any acts of injustice or irregularities during the hearing of the complaint, the Applicant was at liberty to adjourn and request for another impartial

Arbitrator or make his complaint in the right way, not waiting after the matter was closed and complaining that he was unfairly treated. To support his position, he cited the case of **Barclays Bank vs Philisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016. In his opinion, since the matter was time-barred at the time it was filed at the CMA the right decision was to dismiss the complaint, praying that this Application for Revision should face the same fate for want of merits.

In rejoinder, Mr. Ochina reiterated his submission in chief clarifying that the letter was written at the time when the parties have not closed their case or closed their evidence. The medical letter on the other hand was not an afterthought since it was issued to the employer before the termination. He added that the termination came afterward.

After hearing the rival submission of the parties and perusing the court records, the task before me is to determine whether the decision of the Arbitrator to dismiss the Application on the reason that it was time-barred was erroneous.

I am firmly guided by the law which sets the time limits for the institution of matters at the CMA particularly Rule 10 (1) of the

Labour Institutions (Mediation and Arbitration) Rules, 2007, Government Notice No.64 of 2007 which provides:

"Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate".

Going through the CMA record, while the pleaded date was 18/01/2021, (as filed in the CMA Form No 1) the Applicant contradicted this fact by testifying that he was terminated on 02/02/2020, as it can be gleaned in his testimony. It is true as alleged by counsel for the Applicant that parties should be bound by their own pleadings. Furthermore and in fine tune to the stated principle, any evidence produced by any of the parties that does not support the pleaded facts or is at variance with the pleaded facts must be ignored by the court. See the Court of Appeal in the case of **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No.357 of 2019, and **James Funke Ngwagilo vs Attorney General**, [2004] TLR 161.

The circumstance of this case is different in honoring the principle stated above, since it is clear from the record that the date of termination is not what was pleaded by the Applicant herein, also an

Applicant then as per Form No 1. This position is well supported by Applicant's testimony, as submitted by his counsel Mr. Ochina and the letter to the PSSF dated 02/02/2020 demanding PSSF to pay the Applicant his pension funds (exhibit P3). The Applicant testified before the Commission that he was terminated on 02/02/2020. This testimony was supported by exhibit P3 which was the letter written by the Respondent addressed to the Manager of PSSF demanding him to pay the Applicant his pension funds. It defies logic that If by that time the employment relationship between the parties was still in existence as alleged by Mr. Ochina, why then would his employer write a letter to the PSSF demanding them to pay their employee his pension funds? When Mr. Ochina (who was also the counsel in conduct at the CMA) was called by the Arbitrator to address that issue, he responded that the Applicant returned to work on 02/02/2020 up to 18/01/2021 when he was terminated. Still, this fact was never proven other than being responses from the bar. When the Applicant himself was asked by the Arbitrator if he indeed returned to work, he replied that due to his ill health, he had not returned to the job since 02/02/2020.

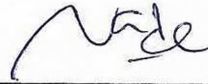
Reckoning from 02/02/2020 when the Applicant was terminated to 20/01/2021 when the Applicant lodged his complaint before the Commission is about 11 months, contrary to the law which requires a complaint of this nature to be referred to the Commission within 30 days. And the consequence for a matter filed beyond the prescribed time limit is to be dismissed. See thus court in **The Governing Body of the College of Business Education vs Biton Carson Mwenisongole** (Labour Revision No. 125 of 2021) [2022] TZHCLD 910 whose decision was guided through the case of **Barclays Bank vs Philisiah Hussein Mcheni** (supra). The argument by the Applicant's counsel that the Arbitrator used exhibit P3 as a termination letter is without merit as the Arbitrator used exhibit P3 as a corroborator to establish when the cause of action arose after the Applicant contradicted what he pleaded regarding the date of termination.

It is my finding and I must agree with what was correctly stated by the Arbitrator in his Ruling that, the Applicant misrepresented a fact in his referral form that he was terminated on 18/01/2021 to conceal the fact that his Application was time-barred.

Having found so this Revision is dismissed for want of merits.

It is so ordered.

DATED at ARUSHA this 01st day of March 2024



A. Z. Bade

Judge

01/03/2024

Judgment delivered in the presence of the Parties and/ or their representatives in chambers on the **01st** day of **March 2024**



A. Z. BADE

JUDGE

01/03/2024