IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LABOUR REVISION NO. 27 OF 2023

(Arising from Labour Dispute No. CMA/ARS/77/2022)

JUSTINE STEVEN _____ APPLICANT

VERSUS

TWIGA LOGDE AND CAMPSITE _____ RESPONDENT

JUDGMENT

07/03/2024 **&** *24/05/2024*

BADE, J.

The applicant, filed the present Application seeking to revise the decision of the Commission for Mediation and Arbitration (herein referred as the CMA) delivered on 14/04/2023 by Hon. Anosisye, Arbitrator in Labour Dispute No. CMA/ARS/77/2022. The 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 (herein referred as the Act); and Rule 24(1), (2), (a),(b), (c), (d), (e), (f), (3) (a), (b), (c), (d), and Rule 28 (1) (a) (b) (c), (d) and (e), of the Labour Court Rules, G.N. No.106 of 2007.

The Applicant prays for the following orders:

i. That this Court be pleased to call for and examine the records of the proceedings of Commission for Mediation and Arbitration of Arusha in Application No. CMA/ARS/77/2022 and satisfy itself as to correctness, legality and/or propriety of the Ruling thereto.

ii. Any other orders that this Honourable Court deems fit and just to grant.

A brief background which leads to the present Application according to the records is that the Applicant was employed by the Respondent as a chef from June 2022, but when exactly did his employment come to an end is contentious between the parties as the Applicant claimed that he worked up to January 2023 when his employment was terminated unfairly by the Respondent, while the Respondent claimed that the Applicant worked with him only up to September 2022.

After the employment of the Applicant was terminated, he lodged his complaint before the CMA, but before his complaint could be heard, the Respondent raised preliminary objection that the CMA had no jurisdiction under section 35 of the Act on the reason that the Applicant had not served six months on the employment. The Arbitrator heard the objection and held that the Applicant failed to prove that he worked with the Respondent up to January 2023, and proceeded to dismissed the

Application on the reason that the Commission had no jurisdiction to hear the matter since the Applicant worked with the Respondent for a period that is less than six months, he could not bring a complaint to the Commission as per section 35 of the Act, and that he is not entitled to the remedies provided under sub-part E of the Act.

The Applicant was aggrieved by the said decision preferring the instance Application on the following sole ground as found on his affidavit:

> *Arbitrator erred in law and fact for wrongly determining the preliminary objection raised by the respondent as a result he pronounced an erroneous decision.*

This application was disposed off by way of written submissions, with the Applicant being represented by Ms. Fransisca Lengeju, learned advocate; while the Respondent was represented by Mr. Dennis Mworia, also a learned advocate.

Ms. Lengeju prayed for the Applicant's affidavit to form part of her submission, and contended that the arbitrator erred in law and fact as he wrongly determined the preliminary objection raised by the Respondent, and as a result, he pronounced an erroneous decision. That, the Respondent raised the point of the objection and claiming the

Applicant had no employee status and therefore could not bring a complaint for unfair termination.

Ms. Lengeju argues that it is trite law that a preliminary objection should basically be one on a point of law, and not one requiring evidence, pointing that the determination of whether the Applicant was an employee or not is a matter of evidence and could not have been determined on a preliminary stage of the case, rather, it should have been left to be determined on merit. To support her argument, she cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696.

Ms. Lengeju contended that the point of preliminary objection as raised by the Respondent at the CMA was clearly a matter of evidence and not a matter of law. She argues that the fact that the Respondent questioned the commission's jurisdiction based on the nature of the employment contract of the Applicant was a contentious issue that needed evidence from both parties, and that the Commission used evidence from the Respondent which in reality went to the root of the case and not merely on points of law. She insists that weighing such preliminary objection on the scale of **Mukisa biscuit's case** (supra) it was undoubtedly not worth a determination as preliminary objection.

Opposing the application, Mr. Mworia prayed to have the contents of counter affidavit to form part of his submission. He argues that the Court is required to put emphasis on jurisdictional matter being amongst the first thing to be considered when a court or tribunal is approached to determine a claim. To support his position, he cited the case of **Zephania O. Adina vs GPH Industries Limited,** Labour Revision No. 27 of 2020 (unreported) citing the case of **Rui Wang vs Eminence Consulting (T) Limited,** Revision No. 306 of 2022.

On further argument, Mr. Mworia contended that the provision of Rule 15 of GN No. 64 of 2007 provided that during mediation proceedings the mediator is empowered to determine jurisdictional issues relating to the dispute. Mr. Mworia conceded with the argued position that a preliminary objection has to be on a matter of law, but was quick to point out that the preliminary objection raised at CMA was based on the jurisdiction of the Commission to entertain the claim that was raised by the Applicant, furthering his argument that since jurisdiction is a creature of statute, the preliminary objection raised was a pure point of law, according to Rule 15 of GN No. 64 of 2007. He insisted that once an issue on jurisdiction is raised the Commission would require the referring party to prove that it had the authority to hear and determine the

matter, and in the instant case, the Commission required the Applicant to prove that the Commission had the jurisdiction to entertain the complaint, which the Applicant failed to do. Mr. Mworia further argued that the laws governing the Commission want the presiding officer to seek proof it has jurisdiction from the party referring the suit. In his view, whatever was done by CMA was in accordance with the laws and no error was occasioned by the Arbitrator.

I have carefully considered the record of the revision and the rival submissions by the learned counsels for the both parties, and I am convinced that the task before me is to determine whether the point of objection raised and determined at the CMA qualified to be a preliminary objection and be determined as such.

For the interest of justice, I think it is pertinent to say a few words on what is a preliminary objection as has been determined by the court time and again. In the case of **Herzon M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers and Another,** Civil Appeal No. 79 of 2001 citing the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd.** (1969) EA 696, the Court of Appeal has this to say on what is a preliminary objection:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained on what is the exercise of judicial discretion.

In the light of the above observation, I have tasked myself in the instant Application to make a finding whether the point of objection raised at the CMA is indeed a preliminary objection.

With due respect to Mr. Mworia I abundantly think it is not. The allegation that the Applicant worked with the Respondent for four months only and not seven months as pleaded by the Applicant in the CMA form no.1 cannot, by any stretch of imagination, be a pure point of law. Rather, one could safely say it is a point of law mixed with facts. And the facts are required to be proved by evidence.

It is trite that preliminary objections draw a distinction between the merits of the suit and the subject matter of the objection. An objection should bear the character of a matter that can be dealt with by the court or the tribunal without touching the merits, or involving parties in argument of the merits of the case needing evidence, but rather can be disposed off at an early stage without examining the merits of the claim.

The same should be based on pure points of law, or on ascertained undisputed facts and any reasonable inferences that may be drawn from those facts. Objections should be sustained only in cases where the facts on which they are based are clear and free from doubt. Obviously where an objection is inextricably linked to facts that are disputed or have to be proved, then it goes to the merits of the suit and it should be enjoined to be determined on merits.

Assuming the factual proposition as argued by the counsel for the Respondent is true that the CMA had to be satisfied that it was seized with the jurisdiction to determine the matter before it, then it would have been fair and enough for the CMA to base its assumption on the fact that what was pleaded in the CMA form no. 1 is correct to establish its jurisdiction on the simple reason that the pleadings indicated that the Applicant worked with the Respondent for seven months, counting from 19/06/2022 when he started working with Respondent to 31/01/2023 when the cause of the dispute arose. If the Respondent were of the view that the Applicant lied on the pleading about the date that the dispute arose, then that fact would have been required to be proved by evidence during the hearing of the matter on merit.

It should not have been determined on preliminary hearing because it required evidence to prove that the Applicant lied in his pleading.

I thus refuse the proposition by Mr. Mworia that the preliminary objection was based on the jurisdiction of the Commission, and thus justified to entertain it first is misconceived as I have already demonstrated that the CMA form no. 1 had established the jurisdiction of the Commission. I am also of the view that If after hearing this disputed fact the arbitrator in his mind thought it a fact to be resolved first, the issue on whether the Commission had jurisdiction or not should have been amongst the framed issues to be determined on merit after hearing the evidence of both sides.

In the final analysis, this Application for Revision is allowed. The Ruling acquired thereto is hereby quashed and set aside. The file is remitted back to the CMA for the matter to be heard on merit. It being a labour matter, I make no order to costs.

It is so ordered.

DATED at **ARUSHA** this **24th** day of **May 2024**

A. Z. Bade
Judge
24/05/2024

Judgment delivered in the presence of the Parties' representatives in chambers on the **24th** day of **May 2024**

A. Z. BADE
JUDGE
24/05/2024