IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO SUB-REGISTRY

REVISION NO. 12 OF 2019

BETWEEN

GILBERT KATONDA.....APPLICANT

VERSUS

TANZANIA ASSEMBLIES OF GOD KISEGESE.....RESPONDENT

JUDGEMENT

Date of Last Order: 03/07/2020
Date of Judgement: 08/07/2020

Aboud, J.

The application is made under the provision of section 91 (1) (a), 91 (2) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2019] (here forth The Act) Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) and (f), Rule 24 (3) (a) (b) (c) (d) and 28 (1) (c) (d) and (e) of the Labour Court Rules GN. No. 106 of 2007 (herein The Rules) and any other enabling provision of law. The applicant moved the Court on the following orders:-

i. That this Honourable Court be pleased to revise the award of the Commission for Mediation and Arbitration at

Morogoro in the Labour dispute No. CMA/MOR/86/2018, dated 28th February, 2019 before Hon. Zuhura Kiobya (Arbitrator) for appropriateness of the decision and award issued therein.

ii. That this Honourable Court be pleased to hear and determine the dispute accordingly.

Briefly are facts led to this application; the applicant was employed by the respondent as a Treasurer and later on promoted to be a Project Director. He alleged to be unfairly terminated on 01/05/2018 and referred the dispute to CMA for unfair termination on 14/05/2018. When the matter was scheduled for arbitration the respondent raised two preliminary objections that, the Commission for Mediation and Arbitration had no jurisdiction to entertain the application of unfair termination because the applicant was a probationary employee and that the applicant sued non exiting entity.

The Arbitrator found the second preliminary objection had merit and dismissed the application on the ground that the applicant was supposed to sue the respondent's Board of Trustees. Dissatisfied by the Arbitrator's decision the applicant filed the present application.

During hearing at this Court, both parties were represented. Mr. Hamisi Salum, Trade Union representative represented the applicant while Ms. Theresia Martin, Learned Counsel was for the respondent.

Arguing the application Mr. Hamisi Salum prayed for the affidavit in support of the application to be adopted as part of his submission. He submitted that, according to the employment contract between the parties, the employer who signed the contract is Tanzania Assemblies of God - Kisegese (TAG - Kisegese). Mr. Hamisi Salum stated that, TAG Kisegese was the applicant's employer because he was the one who paid the applicant salaries and terminated him. He also added that, TAG Kisegese as an employer promoted the applicant from the Treasurer to the position of a Project Director.

Mr. Hamisi Salum argued that, it is on the basis of the above reasons; the applicant believed and treated TAG Kisegese as his employer and nobody else. He submitted that, the Arbitrator wrongly decided that the TAG Kisegese was not the employer of the applicant. Mr. Hamisi Salum stated that, the fact that TAG Kisegese had no status of employer, they had no powers to employ and terminate the

applicant as happened in this matter, therefore all documents including termination letter should be nullified.

Mr. Hamisi Salum further submitted that, the Arbitrator erred to dismiss the complaint at the CMA, because the respondent notified him that TAG Kisegese cannot be sued as a legal entity but through its Board of Trustees. Mr. Hamisi Salum therefore argued that, the Arbitrator was supposed to strike out the complaint and not to dismiss it. He therefore prayed for the application to be allowed and CMA be ordered to entertain the applicant complaint.

In reply Mrs. Theresia Martin submitted that, TAG is a Board Corporate Trustee Registered under [CAP 318 of 2002]. She stated that, in this matter it is true that the applicant was employed by TAG Kisegese and his employment was terminated by TAG Kisegese. However, in case of any legal dispute the Board of Trustee is the one to sue and be sued. She submitted that, this is clearly provided in the Constitution of the TAG.

Mrs. Theresia Martin further submitted that, according to the administration of TAG, the Board of Trustee has delegated its powers to the TAG Kisegese to employ and terminate its employees. Mrs.

Theresia Martin admitted that, the only person or authority which is reflected in the applicant's employment documents is TAG Kisegese and not the Board of Trustee. She therefore prayed for the application to be dismissed because the Arbitrator was right to decide that the respondent was not the right person to be sued.

In rejoinder Mr. Hamisi Salum reiterated his submission in chief.

Having gone through Court records and submissions by parties I find the issue for determination before this Court; is whether the Arbitrator's ruling was properly made.

In the application at hand it is an undisputed fact that the employment contract was entered between the applicant and respondent as indicated in the employment contract. It is also undisputed fact that the applicant was terminated by the respondent according to the termination letter.

Therefore, the only issue to be determined at this Court is whether the Arbitrator properly dismissed this matter. It is on record that the basis for the Arbitrator's decision was that the applicant wrongly brought or sued respondent at the CMA. In her award Arbitrator decided that the Board of Trustee of TAG was the only

authority to terminate the applicant. The Arbitrator in her finding held that the applicant was supposed to sue the respondent's Board of Trustee because TAG Kisegese is a sub branch of TAG which is a Board Corporate Trustee registered under [CAP 318 of 2002]. The Arbitrator referred a number of cases to support her position.

In labour disputes before the CMA and this Court the first thing to be considered is whether parties have established the employer - employee relationship. And when the dispute is about termination like this at hand, the Court directs it mind on what kind of termination, which mostly means termination of employment at the initiative of the employer. Normally termination of employment means termination of employment relationships which was created immediately when the contract was executed and made binding between the parties.

The law further provides for the basic conditions or principles to be followed in establishing employer-employee relationship. The applicant has to be given a written contract of employment which appreciates the actual nature of employment and corresponding terms. This is the position in our laws, which requires the

employment contract to provide a very clear written employment contract with all the detailed particulars of the employment as is provided under section 15 of the Act. I quote the relevant section for easy of reference:-

> "15 (1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing namely:-
>
> (a) Name, age, permanent address and sex of the employee;
>
> (b) Place of recruitment;
>
> (c) Job description;
>
> (d) Date of commencement;
>
> (e) Form and duration of the contract;
>
> (f) Place of work;
>
> (g) Hours of work;
>
> (h) Remuneration, the method of its calculation, and details of any benefits or payments in kind, and

(i) Any other prescribed matter;"

In this application all written communication (documents) in relation to applicant's employment including the employment contract was between the applicant and the respondent herein. Therefore, in my view if there is any anomaly or ambiguity in the written contract of employment of the applicant shall be construed against the employment respondent in this case. Respondent entered into contract with the applicant on behalf of TAG Board of Trustees such fact should have been clearly stated in the employment contract. As quoted above, section 15 of the Act requires all matters regarding the employment of an employee must be reduced into writing. However, the record in this matter does not support the respondent's argument that TAG Kisegese was acting on behalf of TAG Board of Trustees.

The respondent relied on the TAG Constitution, that it clearly expressed the only juristic person to sue and be sued is the TAG Board of Trustee. In this matter I have observed that the respondent failed to comprehensively outline the terms and condition of employment of the applicant to enable him to discharge his responsibility and in case of any dispute to know who was to be

dragged to the justice. In my view the respondent had a duty to let the applicant know that in case of any labour dispute between them, the TAG Kisegese was not the right entity to be sued, but there is a different juristic person to sue and be sued. In this case TAG Kisegese was to inform the applicant that it is the TAG Board of Trustee which could have been sued.

In her submission, learned counsel for the respondent argued that the applicant was supposed to know the right person to be sued. As I stated above, the contract between the two parties in this case was not that detailed. There was no any employer's disciplinary guideline hand book or Human Resource Manual which contains general statement of policy and procedures at the workplace which were brought to the attention of the applicant and the CMA. The relevant guidelines would have guided the applicant to know as to who was the right person to be sued on behalf of his employer, TAG Kisegese.

In principle, the terms of the employees' contract may either be guided by the individual employee's contract of the employment or the provisions of the manual. However, the provision of the manual

policies does not automatically govern individual contracts of employment in the work place but just expounds work place policies and does not automatically become incorporated to the employee's individual contract of employment. Thus, since the provisions of the work policies are not impliedly incorporated in individual employee's contract must have a clause expressly adopting the contents of those policies.

In this case as I said, the contract of employment of the two parties did not have any clause to expressly indicate that in case of any dispute the applicant was suppose to sue the TAG Board of Trustee and not his employer as the one who entered into contract of employment with. The proper provision in the purported TAG Constitution was supposed to expressly be incorporated in the relevant contract and be known to the applicant. The Constitution of TAG in relation to the applicants' work place, in my view does not form part of the applicant's contract simply by being either posted on the notice board or dispersed online. So with due respect to the respondent's counsel, she was wrong to say applicant had to know that TAG Board of Trustee was the right party to be sued. It was not the responsibility of the applicant as an employee to go out looking

for the TAG Constitution or any related manual to discover who was to be sued in this matter.

All in all I have glanced the attached two pages of TAG Constitution of which the respondent relied upon in urging that it provides clearly in case of any legal dispute TAG Board of Trustee will be the rightful party to sue and be sued, but I could not find any provision in that regard.

Therefore, on the basis of the above is my considered view that the applicant sued his employer as is required under the labour laws of the soil. And if at all there was any need to join the TAG Board of Trustee, the Arbitrator was wrong to dismiss the application rather she would have strike it out and allow the applicant to file his proper pleadings. In other words even if the complaint before the CMA was found to be incompetent the remedy was not to dismiss but was to strike it out as is the position in many cases. In **Leon Silayo Ngalai Vs. Hon. Justine Salakana**, Civil Appeal No. 3 of 1996 (unreported) the Court of Appeal held that:-

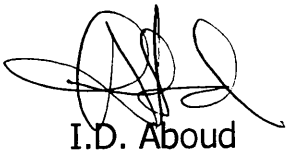
> ".....this Court had said it before that an incompetent appeal amounts to no appeal. It

follows therefore the Court cannot adjourn what it does not have under such circumstance, what the Court does is to strike out the purported appeal off the register...."

In view of the above, the only remedy in case of incompetent matter before the CMA was to strike it out to give the applicant an opportunity to go back in case he wished to do so. This promotes justice which is one of the objectives of our labour laws.

In the result the application is allowed and the CMA ruling is revised and set aside. The case file has to be returned back to the CMA where should be placed before another competent Arbitrator to allow the applicant to file a competent complaint without being affected by limitation of time.

It is so ordered.



I.D. Aboud

JUDGE

08/07/2020