IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 259 OF 2019

BETWEEN

JOHN BUTABILE .....APPLICANT

VERSUS

TANZANIA FISHERIES RESEARCH INSTITUTE...RESPONDENT

JUDGEMENT

Date of last Order: 10/06/2020

Date of Ruling: 21/08/2020

Aboud, J.

This is an application to revise and set aside the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 07/06/2016 by Hon. E. Tibendwa in labour dispute No. CMA/DSM/KIN/R.01/16. At the CMA the applicant referred the dispute claiming for incomplete payment of fare dues to be recovered as per CMA ruling dated 31/10/2013 and other related costs. The respondent herein raised two preliminary objections at the CMA against the applicant's application. The said preliminary objections are to the effect that:-

i. That the complaint is res-judicata

ii. That the CMA had no jurisdiction over the matter.

The Arbitrator in his findings held that both preliminary objections had merit that the applicant's claims were finally determined in Revision No. 448 of 2014 hence the CMA had no jurisdiction to determine the same. Aggrieved by the Arbitrator's decision the applicant filed the present application for the court to revise and set aside the same.

The matter was argued by way of written submissions. Both parties were represented, Mr. Denis Simon David, Learned Counsel was for the applicant while Ms. Janeth Rajabu Makondoo, Senior State Attorney was for the respondent.

Arguing in support of the application Mr. Denis submitted on one issue as to whether the trial decision maker was correct to rule Labour Dispute No. CMA/DSM/KIN/R.01/16 was res-judicata to labour dispute No. CMA/DSM/ILA/598/09/947/10. Mr. Denis stated that, the two applications are distinct arose from different cause of action.

Mr. Denis went on to submit that the claims in Labour dispute No. CMA/DSM/ILA/598/09/947/10 arose when the applicant was unfairly terminated by the respondent on 23/07/2007 and travelled

back to Geita with his family without being paid his transportation allowances. While the claims in dispute No. CMA/DSM/KIN/R.01/16 emerges after the applicant's employment contract was legally terminated upon retirement on 26/11/2011 but he was not paid his transport allowance. Mr. Denis stated that, the applicant applied for condonation to institute his claims. He argued that for a matter to be regarded as res judicata five ingredients established in the case of **Paniellotta Vs. Gabriel Tanaki & Others** [2003] TLR 312 must be established. He mentioned the said ingredients as follows:-

i. The former suit must have been between the same litigant parties or between parties under whom they or any of them claim.
ii. The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively.
iii. The party in the subsequent suit must have litigated under the same title in the former suit.
iv. The matter must have been heard and finally decided.

v. That the former suit must have been decided by a court of competent jurisdiction.

Mr. Denis further submitted that the referred cases above and this dispute are distinguishable. Therefore the Arbitrator erroneously reached into a conclusion that the matter was res judicata. He thus, prayed for the application to be allowed.

Responding to the application Ms. Janeth submitted that the CMA rightly ruled that the matter is res judicata because the applicant's claims were finally determined and the applicant in his submission admitted that the matter was adjudged. Ms. Janeth added that the applicant's claims were dismissed for being time barred but in his affidavit the applicant did not state the reasons for his delay. She therefore prayed for the application to be dismissed.

In rejoinder Mr. Denis submitted that, the Arbitrator wrongly adjudged the matter to be res judicata as the same does not qualify to be a preliminary objection. To cement his argument he cited the famous case of Mukisa Biscuit Manufacturing Company Ltd. Vs. East Distributors Ltd. He thus prated for the application to be granted.

Having considered parties submissions and court records, I find the issue to be determined is whether the matter at hand is *res judicata*. In other words, whether the CMA correctly decided that the matter has already been decided upon. It was established in the case of **Ottoman Bank Vs Ghani,** Civ. Case 63 (1971) H.C.D. 69 where Georges C.J. (As he then was) that:-

> "A prerequisite for the operation of the doctrine of Res-judicata is that there should have been a former suit in which the issue allegedly Res-judicata has been decided."

For *res judicata* to operate it must be shown that the earlier judgment relied upon was a final judgment, and that there must be identity of parties and of the subject-matter in the former and in the present litigation. This is the position in the Court of Appeal of Tanzania in the case of **Umoja Garage Vs. NBC Holding Corporation** (2003) TLR at P. Page 339, where it was held that:-

> "Since by the time the previous suit was filed giving rise to the cause of action in the subsequent suit, were known to the appellant the matters raised in the subsequent case are

deemed to have been matters directly, and substantially in issue in the previous case and principle of res-judicata applies."

Furthermore to the above, Section 9 of the Civil Procedure Code (Cap 33 R.E 2002) provide that:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court".

The applicant has convinced the court that his claims are not res judicata. He argued that in dispute No. CMA/DSM/ILA/605/10/49 he claimed for transport allowances after being unfairly terminated while in the present application he is claiming for transport allowance after retirement. I have gone through the CMA Form No. 1 which

institutes proceedings at the CMA the applicant summarized the facts of the dispute to be *"incomplete fare dues which were recovered by both TAFIRI and CMA but now to be recovered as per CMA ruling dated 30/10/2013 and other related costs."* It is on record that the applicant's claims were referred at the CMA out of time he therefore filed his application accompanied with application for condonation where he filled CMA Form No. 7. In the relevant form the applicant stated that his claim were dependent on the outcome of the latest revision No. 448 of 2014. The applicant did not state that his claims resulted from his retirement that fact was only disclosed when arguing the preliminary objections raised by the respondent. The applicant ought to have stated clearly in his pleadings that the present claims are distinguishable from the ones in Labour dispute No. CMA/DSM/ILA/598/09/947/10 but he did not do so.

Therefore in my view the decision by the Arbitrator was right because he could not entertain and decide again on the issue of transport allowances which was substantially and directly in issue at the CMA in complaint No. CMA/DSM/ILA/598/09/947. In other words the application stems from the fact that an action was previously instituted in the CMA under No. CMA/DSM/ILA/598/09/947/10 and

decision was given in the first action by E. Mwidunda, Arbitrator on 31/10/2013. It is also on record that such dispute was already executed. Thus the applicant had no further claims arising from such dispute. In my observation the payment of his retirement benefits had nothing to do with his former claims; therefore he ought to have instituted such claim on time. As rightly submitted by the respondent's Counsel the applicant did not state any sufficient reasons for his failure to refer his dispute on time since the record reveals that he retired on 04/01/2016. Thus the Arbitrator was right to dismiss the claims in question.

On the basis of the above discussion, I have no hesitation to say that the matter at hand met all the requirements which need to be considered for the doctrine of res judicata to apply. The arbitrator correctly upheld that the applicant complaint was res-judicata and he had no jurisdiction to entertain it.

In the result the application is dismissed as it lacks merit.

It is so ordered.

I.D. Aboud

JUDGE

21/08/2020