

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO 711 OF 2019**

**BETWEEN**

**JOHN JOSEPH MWAKYOMA.....1<sup>ST</sup> APPLICANT**

**SALIEL JOSEPH MLAY.....2<sup>ND</sup> APPLICANT**

**MUGISHA LWERAULA.....3<sup>RD</sup> APPLICANT**

**BIRAS LUCAS BIRAS.....4<sup>TH</sup> APPLICANT**

**AND**

**TANZANIA PORTS AUTHORITY..... RESPONDENT**

**JUDGMENT**

Date of Last Order 13/10/2020

Date of Judgement 30/10/2020

**A. E. MWIPOPO J**

The Applicants namely **JOHN JOSEPH MWAKYOMA, SALEL JOSEPH MLAY, MUGISHA LWERAULA** and **BIRAS LUCAS BIRAS** have lodged the present application for revision against the Commission for Mediation and Arbitration ruling in Labour Dispute No. CMA/DSM/TEM/655/18/01/19 delivered by Hon. Bitenga, Arbitrator. The Applicants are praying for the order of the Court in the following terms:-

1. That the Court may be pleased to call for and examine the proceedings and subsequent ruling of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/TEM/655/18/01/19 delivered by Hon. Batenga in order to satisfy itself on its appropriateness.
2. That the Court be pleased to make finding that the Commission has jurisdiction to entertain the dispute and therefore be pleased to revise and set aside the said ruling.
3. That the Court may be pleased to order the dispute to proceed interparty.
4. That the Court may be pleased to grant any other relief it may deem fit and just to grant.

The Applicants grounds of revision are provided in paragraph 10 of the affidavit in support of the application. The grounds are as following hereunder:-

- i. Whether the right accorded to the Attorney General to intervene in any suit or matter against the Respondent renders the Respondent a public service office.

- ii. Whether the Respondent being a corporate under control of the Government regardless of its status as a body corporate renders it a public service office.
- iii. Whether the Respondent is a public service office under the umbrella of the Executive Agencies.
- iv. Whether in the absence of the Respondent's own code of conduct the law that govern the Respondent's employees with regard to conduct and grievance procedure is no other than Public Service Act.
- v. Whether the Applicants' were required to appeal to the Permanent Secretary.
- vi. Whether a public servant under operational cadre is required to exhaust the remedies provided under the Public Service Act prior to resorting to the remedies under the labour laws.
- vii. Whether the Respondent is a public office hence making its employees public servants who ought to have exhausted the local remedies under the Act.
- viii. Whether the Applicants have sought the remedies under the labour laws prematurely as they are barred by the Amendment No. 3 of 2016 from filing the dispute to the Commission.

The history of the dispute in brief is that the Applicants were employed by the Respondent namely Tanzania Ports Authority on diverse dates in different posts. They were terminated for misconduct on 23<sup>rd</sup> September, 2018. Aggrieved by the decision the Applicants referred the dispute to the Commission. The Respondent raised Preliminary Objection (P.O.) on two points of law. The first point is that the complaint was incompetent for failure to exhaust all the available remedies under the Public Service Act; and the second point is that the Commission has no jurisdiction to entertain the complaint thereof. The Commission found the P.O. to have merits and dismissed the complaint. The Applicants were not satisfied with the Commission decision and decided to file the present revision application.

Both parties to the application were represented. The Applicants were represented by Ms. Stella Simkoko, Advocate, whereas the Respondent was represented by Mr. Shija Charles, Principal Officer of the Respondent. The Court ordered for the hearing of the application to proceed by way of written submissions.

It was submitted by the Applicants Counsel that the employees of the Respondent does not fall under the public servants who have to exhaust the available remedies under the Public Service Act. The Respondent is a body corporate capable of suing or to be sued in its

corporate personality. Intervention of the Attorney General when the Government have interest in the matter does not render the Respondent a public office. To support the position she cited the case of **Ernest Maneno Shija vs. Mzinga Corporation**, Civil Case No. 196 of 2003, High Court, at Dar Es Salaam, (Unreported); the case of **the Attorney General vs. Tanzania Ports Authority and Another**, Civil Application No. 87 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported); and the case of **Salehe Komba and Another vs. Tanzania Post Corporation**, Labour Revision No. 12 of 2018, High Court Labour Revision, at Mwanza, (Unreported).

Ms. Simkoko submitted further that the definition of public service office has not been amended to provide that if the Attorney General can intervene in Respondent's disputes then that makes the Respondent a public office as it was held by the Arbitrator. The Arbitrator did not cite any law to justify her finding that the Respondent is an executive agency.

The Applicants were terminated by the Director General who is not among the disciplinary authorities of a public servant. The disciplinary authorities are listed under Regulation 35 (1), (2), (3), (4) and (5) of the Public Service Regulations, 2003, hence the CMA had jurisdiction to entertain the matter. The Public Service Act does not provide for appeals



against the decision of the Director General as disciplinary authority. The Standing Orders for Public Service, 2009, provides for the category of public servants who have access to the Employment and Labour Relations Act. The Applicants being in operation service cadre are among the public servants with access to refer their dispute according to the procedure provided under the Employment and Labour Relations Act. The Applicants prayed for the application to be allowed.

Replying to the Applicants submission, the Respondent submitted that the CMA rightly held that the Applicants were public servants who were bound to have exhausted all remedies provided under the Public Service Act, No. 8 of 2002. The Public Service Act is applicable to the Respondent who provide service to the public. Thus, all employees of the Respondent are public servants regardless of the cadre.

The recruitment of the employees of the Respondent as nowadays are done through Public Service Recruitment Secretariat and even the Applicants disciplinary proceedings leading to their termination were conducted under the Public Service Act. It is not possible for the Respondent to apply the Act in recruitment and disciplinary proceedings if the employees were not public servants. The requirement of exhausting local remedies available in the Act was brought by section 32A of the Public Service Act as amended.

To support the position the Respondent cited the case of **the Board of Trustees of the Public Service Pension Fund (PSPF) vs. Jalia Mayanja and Another**, Revision No. 248 of 2017, High Court Labour Division, at Dar Es Salaam, (Unreported); and the case of **Faima Siraji vs. Mbeya Urban Water & Sewerage Authority**, Labour Revision No. 47 of 2017, High Court Labour Division, at Mbeya, (Unreported).

The Respondent submitted further that the argument by the Applicants that the Public Service Act does not provide for appeals against the decision of Director General has no merits since regulation 60 (4) of the Public Service Regulation, 2003, does not prohibit a public servant in operational service from appealing to the Public Service Commission. The Regulation give such employee freedom to choose whether to appeal to the Public Service Commission or to the remedies provided under the Employment and Labour Relations Act, 2004. However, the coming of section 32A of the Public Service Act has made it mandatory for the public servant to exhaust all remedies under the Act before seeking remedies under the labour laws. Therefore, the CMA was right to uphold the P.O.

In rejoinder, the Counsel for the Applicants retaliated her submission in chief. She also distinguished the cases of **Board of Trustees of the Public Service Pension Fund (PSPF) vs. Jalia Mayanja and Another**, (Supra), and **Faima Siraji vs. Mbeya Urban Water &**

**Sewarage Authority**, (Supra), that the Public Service Pension Fund (PSPF) and Mbeya Urban Water & Sewarage Authority are public institutions hence they are public service office and its employees are public servants. While the Respondent is body corporate/Public Corporation as provided under section 31(2) of the Public Service Act, 2002.

From submissions, the pertinent issue for determination is whether the Commission for Mediation and Arbitration has jurisdiction to entertain a labour dispute referred by a public servant who has not exhausted all available remedies under the Public Service Act, 2002.

The public servant is defined under section 3 of the public Service Act, 2002 as a person holding or acting in a public service office. The same section provides a meaning of "public service office" for the purpose of the Act. The meaning includes the following, I quote;

**'public service office' for the purpose of this Act means:**

**(a) a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than-**

**(i) a parliamentary office;**



**(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law;**

**(iii) an office the emoluments of which are payable at an hourly rate, daily rate or term contract;**

**(iv) an office of a judge or other judicial office;**

**(v) an office in the police force or prisons service;**

The applicants submitted that the Respondent is a body corporate capable of suing or to be sued in its corporate personality and that the presence of Government interest does not render the Respondent a public office. The Arbitrator erred to hold that the respondent was employed by Executive Agency as Executive Agencies are governed by the Executive Agencies Act, Cap. 245 R.E. 2002. In opposition, the Respondent submitted that the Public Service Act is applicable to the Respondent who provide service to the public. The recruitment of the employees and even the Applicants disciplinary proceedings were conducted under the Public Service Act.

Reading the Ports Act, Cap. 166, especially in section 4, it is clear that the Tanzania Ports Authority is not Executive Agency falling under the Executive Agencies Act. The Respondent is Body Corporate with

perpetual succession and a common seal. Thus, the Arbitrator erred to hold that the Respondent is Executive Agency.

The applicability of the Public Service Act to the Applicants as public servant is governed by section 3(a) and (b) of the Public Service Act, 2002. The section clearly provides that there are public servants who are covered under the Act and those not covered by the Act. Section 3 of the Act provides that the public servant for the purpose of the Act means a person holding or acting in a public service office. And the public service office for the purpose of the Act means a paid Public office in the United Republic charged with the formulation of Government Policy and delivery Public service or any office declared by or under any Written Law to be a Public Service Office.

The Port Act, Act No. 17 of 2004, provides in section 4 (1) (a) (d) that the Respondent is a body corporate capable of suing and being sued and capable of entering into any contract. Under section 38 of the Ports Act the Board have power to appoint such number of employees of the Respondent as it may deem necessary. Thus, the Respondent in this case being a Body Corporate falls among public offices not covered by the Act according to section 3(a) (ii) of the Public Service Act, 2002. This Court had the same opinion in the case **Jeremiah Mwandi Versus Tanzania**

**Posts Corporation**, Labour Revision No. 06 Of 2019, High Court Labour Division at Kigoma, (Unreported) where it held that, I quote;

**“The said Public service Act, despite of the understanding of the wide range of public offices, it clearly excludes some public offices into its operations. Thus for example under section 3 (supra) it excludes certain public offices from its operations and subject them to the relevant Laws which established them”.**

Therefore, I’m of the same opinion with the decision of the Court in the case **Jeremiah Mwandi Versus Tanzania Posts Corporation (supra)** and it is my finding that the Applicants being employees of the Board of the Respondent are not among the public servants covered under the Public Service Act.

It was submitted by the applicant that under the Public Service Act the Applicants have no rights to appeal against the decision of the Director General. The available route to appeal against the decision is through the procedures provided under the Employment and Labour Relations Act. The Respondent is of the opinion that the Applicants may appeal to the Permanent Secretary under Executive Agencies Act and that the Applicants being in operational services cadre are not prohibited from

appealing to the Public Service Commission under Public Service Regulations, 2003.

Section 25 of the Public Service Act provides for an appeal from the decision of disciplinary authorities. The Disciplinary Authorities whose decisions may be challenge through appeal under the Public Service Act are the minister responsible for local government, a permanent secretary, Head of Independent Department, Regional Administrative Secretary or Director of the local Government Authority.

The Respondent decision to terminate the Applicants is not among those Disciplinary Authorities whom their decision may be challenged through appeal under the Public Service Act. I'm of the opinion that the reason for the section to be silence on the appeal from the decision of Respondent's Director General as disciplinary authority is that the Respondent is not among public service office covered under the Public Service Act. The fact that the recruitment of the employees of the Respondent as nowadays are done through Public Service Recruitment Secretariat and even the Applicants disciplinary proceedings leading to their termination were conducted under the Public Service Act, does not make the Applicants to be public servants covered under the Public Service Act.



The situation would have been different if the Applicants were terminated after coming into force the Written Laws (Miscellaneous Amendments) (No. 7) Act, on 19<sup>th</sup> November, 2019, which added section 38A in the Ports Act, Cap. 166. The section gave power to the Tanzania Ports Authority to make general rules relating to condition of service of employees of the Authority consistent with the Public Service Act. However, the dispute in the present case did arise before the amendment and there is no evidence to prove that there is general rules made by the authority relating to condition of service of its employees. Therefore under the Public Service Act there is no mechanism provided for the Applicants to appeal from the decision of the Director General of the Respondent as disciplinary authority as a result there is possibility for their right of appeal to be prejudiced.

As submitted by the Applicants, the Standing Orders for the Public Office, 2009, provides in Order F. 29 (4) provides that the Employment and Labour Relations Act, 2004, is binding to every disciplinary authority having power to discipline public servants of the Operational Service. I'm of the opinion that where the Public Service is silent on the public servants not covered by the Act, then the Employment and Labour Relations Act is applicable. Reading section 2 of the Employment and Labour Relations Act, 2004, the Act apply to all employees including those in the public



service. Thus, the aggrieved employee may refer the dispute to the CMA for redress. Therefore, I find that the CMA has jurisdiction to entertain the dispute of public servants not covered under the Public Service Act as in this case.

Having said so, I do not hesitate to say this application has merits and I hereby allow it. The CMA ruling is hereby quashed and the P.O. is overruled. The file is reverted back to the Commission for Mediation and Arbitration before another Arbitrator to proceed with arbitration process according to the labour laws. Each party to bear its own cost of the suit. It is so ordered.



**A. E. MWIPOPO**

**JUDGE**

**30/10/2020**