

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 747 OF 2019

BETWEEN

PMM ESTATE (2001) LIMITEDAPPLICANT

VERSUS

HAMAD ALLY MSHANA & 3 OTHERS.....RESPONDENTS

JUDGMENT

Date of Last Order: 30/12/2020

Date of Judgment: 14/12/2020

Z.G.Muruke, J.

This application emanates from a labour dispute No. CMA/DSM/PWN/BAG/R.18/108 before the Commission of Mediation and Arbitration (herein CMA) which was decided on favour of the respondents on 2nd March, 2016. The applicant PMM ESTATE (2001) LIMITED filed present application calling upon this court to revise the CMA's award on the following grounds;

- i. Whether it was proper for the trial arbitrator to hear and determine the matter basing on evidence of a person who has never been appointed to represent others.
- ii. Whether it was proper for the trial arbitrator to proceed with hearing of dispute while pleadings were not ready.

The application was supported by affidavit of Dr. Judith Irungu Mhina, applicant's Principle Officer. The respondents in challenging the application filed their joint counter affidavit.

It is on records that, the respondents were the applicant's employees on various capacities. They worked, with the respondents until November 2017 when they decided to lodge their complaint against the applicant to the labour officer at Kibaha. The applicant was summoned and they had a discussion concerning the respondent's claims. Thereafter the respondents referred their dispute at CMA claiming to have been unfairly terminated. CMA decided on the respondent's favour, having found that the respondents were the applicant's employee and not casual labourers as alleged by the applicant, were awarded with 12 months' salary compensation. Dissatisfied with the award applicant filed the present application seeking revision of the same.

Leave was granted for the matter to be argued by way of written submission. Both parties were represented by advocates, where Advocate Amina Mohamed Mkungu served the applicant while Advocate Eliaman Daniel was for the respondents.

Arguing in support of the application on the 1st ground the applicant's counsel submitted that it is a trite law that, where there is more than one claimants and the right to relief alleged to exist in each claimant arises out of the same act or transaction , and if such claimants brought separate claims, on common questions of law or facts the said claimant should authorize one among them to file any labour dispute on their behalf. In

this matter the arbitrator erred in law and fact by allowing only one respondent Hamad Ally Mshana ,witness to testify citing the case of **NAFCO v Mulbadaw Village & Others**[1985] TLR.

It was further submitted for the applicant that, Rule 25(1) (b) of Labour Institutions(Mediation and Arbitration Guidelines) Rules GN.67/2007 (GN.67/2007) requires each party to prove his case through evidence and witnesses. In the case at hand the said rule was not adhered as three (3) respondents neither testified nor presented witness to testify on their favour and that questions the legality of the award.

In regard to the 2nd issue the applicant counsel submitted that, on the labour disputes, pleadings includes CMA F1 and the opening statements. In this matter the arbitrator failed to comply with Rule 24(4) of GN.67/2007 by narrowing issues prior conclusion of the opening statement. Consequently there were no common understanding of the issues between the arbitrator and the parties. Applicant counsel cited the case of **The GM Pangea Minerals v Migumo Mwakalasya**, Rev.No.35/2008 (unreported), thus prayed for the application to be granted.

On the other hand, the respondent's counsel submitted that, respondent acknowledge the provision of Rule 5(2) of GN.64/2007, however same has been complied as the respondent's authorized Mr. Hamad Ally Mshana who is among the respondents not only to sign the documents on behalf but also to represent and testify on their behalf, citing the case of **Warwick v Queens College Oxford**[1871]L.R 6.Ch.716/726. He further stated that it is quite clear from the CMA records

through the attached list containing names of the other respondents who authorized Mr. Mshana to represent them, hence the applicant's ground is baseless.

In regard to the 2nd ground the respondent submitted that all the pleadings particularly the opening statements containing all relevant information related to the dispute were duly filed, and the same was served to the applicant as required under Rule 24(1) of GN.67/2007. What was submitted and argued by the parties in the pleadings especially opening statement, is what was used by the arbitrator in disposing off the matter. Therefore the applicant's allegations are baseless. Learned counsel prayed for dismissal of the application.

After consideration of the parties' submissions, CMA records and laws applicable, this court has the following issues for determination;

- i. Whether the arbitrator adhered to the required procedure in determining the dispute.
- ii. On the second issue whether the arbitrator was correct to determine the matter basing on PW1's evidence only

On the first issue, the law under Rule 22 of GN.67/2007 provides for procedures arbitration stage including opening statement and narrowing of issues. The applicant alleged that the arbitrator went contrary to rule 24 (4) by framing issues before conclusion of opening statements. In his argument the applicant's counsel have not connected his allegation with what transpired during arbitration stage. Rule 24(4) of GN.67/2007 provides;



"At the conclusion of the opening statement, the arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes."

This court having gone through CMA records, observed that, on 28th March, 2018 the applicant filed their opening statement and from the CMA proceeding issues were framed on 22nd June, 2018. I thus find the applicant's allegation with no basis as the arbitrator adhered to the required procedures in determining the dispute, thus issue number one has been answered in the affirmative. On the second issue, the applicant alleged that the arbitrator failed to adhere to the law by determining the matter depending on PW1's evidence only, while he was not authorized to testify on behalf of others.

I have gone through the CMA records and I came across the document titled "**ORODHA YA WALALAMIKAJI WA PMM ESTATE (2001) LTD.**" I find worth to reproduce the same for easy reference;

ORODHA YA WALALAMIKAJI WA PMM ESTATE (2001) LTD.

Sisi walalamikaji ambao majina na sahihi zetu zinaonekana katika orodha hii hapa chini tumemteua Ndugu Hamadi Ally Mshana awe mwakilishi wetu na atie saina nyaraka za mgogoro huu kwa naiba yetu kwa mujibu wa kanuni ya Asasi za kazi (usuluhishi na uamuzi) Kanuni 1,2,3.

Jina	Mshahara	sahihi
1. Hamadi Ally Mshana	Tshs.1,800,000/=	(signed)
2. Said Abdalah Salum	Tshs. 450,000/=	(signed)



3. Mikidad Ramadhan Kipesa Tshs. 450,000/= (signed)
4. Meshak Devis Daud Tshs. 270,000/= (signed)

The above document was received by CMA on 3rd January 2018. From the wording of the above (reproduced document) it is apparent that the applicant had appointed PW1 Hamad Ally Mshana to be their representative. However, in evidence, every individual is supposed to prove his claim. One person cannot testify on behalf of others. Failure by other complainants (respondents) to testify is fatal to their rights.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving the fact is upon the person alleging. This is the equipment section 110,111,112 and 115 the evidence Act [CAP 6 R.E 2002] which require that the one who alleges the existence of a particular fact must prove to the satisfaction of the court on the existence of such fact. The Court of Appeal of Tanzania in the case of **Future Century Limited Vs. Tanesco**, Civil Appeal No. 102 of 2008 (unreported) held in inter alia that:

"The burden of the person alleging a fact having to prove that he alleges is clearly stated under the provision of Section 115 of the Evidence Act Cap. 6, which states that;

"In Civil proceeding when any fact is especially within the knowledge of any person the burden of providing the fact is upon him."

In the case of **Manson Shaba and Others Vs. The Ministry of Works and another Land Case No. 201 of 2005 (unreported)** his **Lordship Ndika, J** as then high court Judge held that *the leave to the plaintiffs to lodge the representative suit does not dispense with the onus in each plaintiffs to prove his or her own claim in respect of land in dispute.* This authority follows the decision of the Court of Appeal of Tanzania on the subject in case of **The Attorney General Vs. Mathias Ndyuki and 15 others, Civil Appeal No. 31 of 2006** (unreported) where the court held that *it was not enough for the respondents back up their claim for the alleged underpayment of salaries based on the evidence of PW.1, referring to the case of Marcky Mhango Vs. Tanzania Shoes Company Ltd and another, Civil Appeal No. 36 of 1996 (unreported)* their Lordships held further that it was not enough to the Appellants in the present case to *make generalized claims on accumulative entitlements.* The only evidence to be valued is that of Hamad Ally Mshana for the rest there is no evidence they did not testify. Thus award in respect of 3 others is quashed and set aside.

To be able to appraise what PW1 testified to prove his claim, his evidence while being cross examined by applicant counsel from page 24 to page 25 of CMA typed proceedings reflect as follows:

X- EXAMINATION:

Swali: Umesema uliajiriwa tarehe.....una mkataba?

Jibu: Mkataba ni suala la mwajiri kunipa na sio mimi. Nimeshawahi kuudai mara nyingi na alikuwa MD anaeleza mkataba upo ila hajasaini. Aliyetusimamisha ni injinia spendin (M/Mkurugenzi).

Getini mlinzi mkuu alieleza tumezuiliwa kuingia getini. Sikupewa barua. Niagizo la mdomo tu.

Swali: About madai ya 6 months; una ushahidi wa maandishi kuulizia madai? Ni mdomo na alimuuliza bosi?

Jibu: 6/07/2017 mlipoleka katika madai kwa Labour Officer; majibu ya labour officer yapo katika faili la Tume. Askari aliyetupa agizo la kusimamishwa anaitwa Mzee Mrisho; mimi nilikuwa bosi wake katika mradi hakunisimamisha bali alinipa agizo. Mimi sijui gari ni Shs. Ngapi ila najua ni la thamani kubwa. Gari nilimkabidhi Mr. Spend tarehe 08/11/2007. Mlimjibu bosi nisingeweza kurudisha gari siku huo sio utovu wa nidhamu as sikukabidhiwa gari usiku. Kwa labour officer walikuja watu wengi akiwepo Mr. Mtinid namfahamu na ndiye alipokea CMA F.1.Mtu wa Labour alitueleza tuje hapa Tume.

Swali: Je una notice ya kuachishwa kazi?

Jibu: Hapana. No notice.

Swali: Ulisema sijaachishwa kazi ina maana manaendelea kulipa.

Jibu: Mikidaki – Mimi ndo nilopatana nao mashahra as a site Manager. Site si yangu. Taratibu za PMM, mimi nilipewa jukumu la kuajiri. Said pia ni mmoja wa watu nilowapokea katika karatasi ya malipo (open payment) ilionyesha malipo yake. Karatasi ya malipo ipo hapa. Ila mimi si mwanasheria



site hatuzalishi umeme. Mimi ndiye nilianza kazi before saidi tarehe 24/01/2017.

Swali: About kokoto mlizozalisha trip 100, nani alizalisah na kupima.

Jibu: Aliyetuambia Mkurugenzi amesafiri ni Cashier M. Balinda.

Swali: Je Said ulimpa mkataba?

Jibu: Mkataba anatoa Kampuni alipaswa kutoa mkutano kwa wafanyakazi wote.

Swali: After kuripoti tukio kwa afisa kazi, kulitokea corruption what is it?

Jibu: Kutokuelewana kati yetu na bosi. Sio lengo langu kusema rushwa ila nilimaanisha kutokuelewana.

Having evaluated evidence of PW1 Hamadi Ally Mshana, his evidence, does not even prove what was being paid as salary. It is his claim, thus required to prove. Applicant as employer has no obligation to prove respondent claim. Employee has an obligation to prove that he was terminated. Employer has a duty to prove that termination was fair. Duty of employee to prove his claim does not shift to the employer in anyhow. In the case at hand, Hamadi Ally Mshana, has failed to prove his allegation of being permanently employed.

Accordingly to DW1 Balinda Charles evidence at page 9 of CMA typed proceedings, Hamadi Ally Mshana salary is 250,000 Tshs. Such evidence has not been contradicted throughout proceedings. Equally evidence of PW2 **Monica Simeo** from page 18 to 19 of CMA proceedings while being



cross examined by Hamadi Ally Mshana proves that respondents were casual employee, only that their cited was far away from head office thus paid 250,000 per month.

At CMA Hamadi Ally Mshana prayed for 6 months areas of salary. Applicant did not prove that he paid Hamadi Ally Mshana for his claim of 6 months areas. From records Hamadi Ally Mshana was casual employee receiving 250,000 per months. So, his claim of six month areas of salary in terms of CMA form number one, are granted. Issue of unfair termination does not arise as not backed up by records. Hamadi Ally Mshana, testified that officers from Labour Commissioner visited their cite, but none of the officer testified to that effect. Who alleges must prove. Since there is no evidence to prove their claims, CMA awards is quashed and set aside, instead, Hamadi Ally Mshana to be paid his six months areas of salary at the rate of 250,000,Tshs. The rest of the award are quashed and set aside. Revision application allowed to the extent shown.


Z.G. Muruke

JUDGE

14/12/2020

Judgment delivered in the presence of Eliamani Daniel for applicant and Eliamani Daniel holding brief of Amina Mkungu for the respondent.


Z.G. Muruke

JUDGE

14/12/2020