

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 751 OF 2019**

**BETWEEN**

**BENEDICTO NYAGARYA.....APPLICANT**

**VERSUS**

**FARIS EXPRESS SERVICES CO.LTD.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 19/10/2020*

*Date of Judgment: 14/12/2020*

**Z.G.Muruke, J.**

BENEDICTO NYAGARYA the applicant, being aggrieved with the decision of Commission for Mediation and Arbitration (herein to be referred as CMA) in Labour Dispute no. CMA/ DSM/KIN/R.438/19 delivered 21<sup>st</sup> August,2019 in favour of the respondent, filed present application seeking to revise and set aside of the award. The application was supported by an affidavit of the applicant. Challenging the application the respondent filed a counter affidavit sworn by Judith Mecky Osima, their Principal Officer.

The brief facts of the dispute is that the applicant was the respondent's employee until 8th May, 2019 when he decided to terminate their contract. Being aggrieved with termination the applicant referred the matter to the CMA claiming to have been unfairly terminated. During mediation stage the respondent raised a preliminary objection that the application was contrary to Section 35 of Employment and Labour Relations Act ,Cap 366 RE 2019 (herein Cap.366 Re 2019.) The mediator



decided on favour of the respondent and dismissed the application for being bad in law. Aggrieved with the decision the applicant filed the present application seeking for revision of the ruling.

With leave of the court the matter was disposed of by way of written submission. The applicant was served by Advocate Silvester Sebastian, whereas the respondent enjoyed the services of Advocates Sosten Mbedule.

The applicant's counsel prayed to adopt the affidavit in support of the application and reply to counter affidavit to form part of his submissions. He opted to submit on only one legal issues to wit; "Honourable mediator erred in law by allowing the preliminary objection on the point of law to be proved by evidence contrary to the requirement of the law and practice."

Learned counsel submitted for the applicant that the applicant stated that he was employed by the respondent on 26<sup>th</sup> March, 2018 and the dispute arose on 8<sup>th</sup> May, 2019. That period is more than a year. Preliminary objection raised by the applicant was untenable under Section 35 of Cap 366 RE 2019, since there was need of evidence to prove or disapprove the same. Mediator relied on the contract of employment tendered by the respondent to determine the preliminary objection and the same was contrary to the law and practice. Tendering of evidence on matter of point of law is a blatant irregularity which court of law must not subscribe. By nature of the pleadings in the CMA F1 and the raised objection, evidence of both parties were necessary. He cited the case of



**Karata Ernest & others v Attorney General**, Civil Rev. No. 10/2010( (unreported) where it was held that the preliminary objection must be on point of law and the same must not attract evidence. Learned counsel prayed for the grant of the application so that the matter to be heard afresh by another mediator.

In reply the respondent's counsel in his submission raised a preliminary objection that the application is defective for failure to include legal issue in a notice of application contrary to rule 24 (3)(c) of The Labour Court Rules, GN 106/2007 hence shall be dismissed. On the merits it was submitted that the respondent was employed on 1<sup>st</sup> January, 2019 and terminated on 8<sup>th</sup> May, 2019 while on probation, therefore he cannot claim for unfair termination referring the case of **Jane Chabruma v National Microfinance Bank**, Rev. No. 159/2010(unreported)

In rejoinder the applicant's counsel reiterated their submission in chief. He further added that the respondent's submission shall be disregarded by this court as the same was filed out of time, contrary to the order that the respondent to file the submission on or before 23<sup>rd</sup> September, 2020, but he served the same on 25<sup>th</sup> September, 2020. In regard to the preliminary objection that the affidavit have no legal issues contrary to Rule 24(3), (c) of Labour Court Rules, GN.106/20107, the applicant counsel argued that the objection was baseless as the affidavit contains the legal issues.

Before going to the merits of the revision, respondent raised preliminary objection in the cause of submission that is not right.



Preliminary objection being point of law ought to have been raised at the earliest opportunity not only for the parties to be aware but also the court. Assume it was raised as required, yet same lacks merits. Rule 24(3)(c) of the Labour court rules GN 106/2007 has been complied with as affidavit contains legal issues. Thus preliminary objection is dismissed. After carefully consideration of the parties submissions, CMA records and the relevant laws, issue for determination is "whether the arbitrator properly determined the Preliminary Objection raised by the respondent."

Preliminary objection has been defined in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD** (1969) EA 696, to be in respect of points of law which have been pleaded or which arise by a clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

Also in the case of **SELCOM GAMING LIMITED v GAMING MANAGEMENT (T) LIMITED & GAMING BOARD OF TANZANIA**, Civil Application No. 175 of 2005, (unreported), the Court stated that :-

"A preliminary objection **is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds.** Any alleged irregularity, defect or default must be apparent on the face of the application."

[Emphasis is mine].

On that basis preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Secondly if the objection is sustained, it should dispose of the matter. In the case of **Shahida**



**Abdul Hassanali Kasam V. Mahed Mohamed Gulamali Kanji**, Civil Appl. No. 42 of 1999 (unreported) it was that:-

"The aim of a preliminary objection **is to save time of the court and of the parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily**. Examples: Objection to the **jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract to refer the dispute to arbitration**".

[Emphasis is mine].

It is on record that the preliminary objection raised by the respondent before CMA was that; **"The application is bad in law, same is contrary to Section 35 of Employment and Labour Relations Act, Cap 366 RE 2019 as per attached employment contract"**.

It is principle of law under Section 35 of Cap 366 RE 2019 that, an employee with less than 6 months employment is not covered under unfair termination as provided under Sub part E of Cap 366 RE 2019. The applicant through CMA F1 claimed for unfair termination and claimed to have been employed on 26<sup>th</sup> March, 2018. The date of employment was contrary to what has stated by the respondent through the attached contract of employment. In the circumstances, I find the objection raised at CMA was not pure point of law, because it called for evidence to prove the same. It is thus not a preliminary objection in the eyes of the law. The mediator misdirected himself to determine the preliminary objection by



relying on the contract of employment attached by the applicant on his notice of preliminary objection and ended up dismissing the application.

On that basis I hereby quash and set aside the CMA's ruling and remit the file back to the CMA for the parties be mediated by another mediator. CMA file to be remitted within 30 days from today. Deputy Registrar to ensure compliance.




Z.G. Muruke.

**JUDGE**

14/12/2020

Judgment delivered in the presence of Serivesta Sebastian for applicant and in the absence of respondent.



Z.G. Muruke.

**JUDGE**

14/12/2020