IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 869 OF 2019

ENIKON (T) LTD.....1st APPLICANT

ENIKON CONSTRUCTION CYPRUS (LTD).....2nd APPLICANT

VERSUS

ABEID S. MAKAI..... .....1st RESPONDENT

JUMA BUSUG.....2nd RESPONDENT

HAMIM HASSAN HAMAZA.....3rd RESPONDENT

MOSES MAJUTO.....4th RESPONDENT

MKOLE CHIZA.....5th RESPONDENT

JUMA ISSA SANDA.....6th RESPONDENT

RICHARD LISEKI.....7th RESPONDENT

ZUBERI KITAPWA.....8th RESPONDENT

JOSEPHAT SAINA.....9th RESPONDENT

FLORENTIUS KASHAIJA.....10th RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(Massay: Arbitrator)

dated 22nd day of March 2016

in

Labour Dispute No. CMA/DSM/KIN/R.503/13/1355

JUDGEMENT

27th September & 1st December 2021

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration. The applicants are asking this court to call for and examine the records of the Commission and thereby revise the same. It has been commenced by the chamber summons, supported by an affidavit of one Karlo Kolak an officer of the first applicant. Apart from facts narrated in his affidavit. He has as well-advanced grounds for which this application is ground as thus;

> *Whether the arbitrator can entertain the case where the cause of action arose in the Republic of Cyprus under the laws of Cyprus* and *whether, the arbitrator can compel the 1st applicant to pay the respondent while they were not employed by him.*

Facts of this case can be stated thus; the respondents were once employees of the 1st applicant. Sometimes in 2012, they secured employment in Cyprus. They were according to them asked to sign a contract of employment of one years to go and work for the 2nd applicant. As they arrived, their contracts signed in Tanzania were terminated and asked to sign another new deal with different terms. This time, their

contracts were for unspecified period of time and with reduced remuneration. After some time, they were terminated. They came back to the country and filed a dispute at the Commission.

After a hearing, the Commission was of the finding that the applicants did not pay them as per their contract signed in Tanzania. Therefore, the applicants were ordered to pay them a total of 82,881 EUROS. Being arears of salaries and leave. The applicant was not happy with the decision of the commission hence this application.

For the applicants, stood Mr. Wilson Moses Mafie learned advocate, while the respondents were represented by Jackson Mhando, a personal representative.

Arguing the application, Mr. Mafie learned advocate submitted that the Commission has no jurisdiction to hear disputes arising outside Tanzania. He said, the 1st applicant is the company registered in the United Republic of Tanzania, while the second applicant is registered in the Republic of Cyprus. The respondents were not employed or did not get into contract with the 1st applicant but the 2nd applicant and it happened in Cyprus. The learned counsel went on submitting that since the respondents worked with 1st applicant until 2010 and when the opportunity arose, she only assisted them to move to Cyprus. The counsel argued that the respondents

applied for jobs via email from the 2nd applicant. The two parties entered into their contract without the 1st applicant's involvement. Referring to the case of **Miriam E Maro vs BOT**, Civil Appeal No. 22 of 2017, where the Court of Appeal, held that parties are bound by their agreements and that courts have no jurisdiction to alter the terms of their agreements.

Mr. Mafie was of the view that looking at the employment contracts annexed to the application, there is nowhere, the 1st applicant is involved. He said because, under section 14(2) of the Employment Labour Relations Act, their contracts of employment are in writing. It is clear, he argued that the award misconceived and so the same should be set aside.

As to jurisdiction, it was submitted that the commission is empowered to hear disputes that are within its area of jurisdiction as under Rule 22(2) of GN 64 of 2007. The respondents' contracts, he argued arose in Cyprus and therefore the commission has no jurisdiction as held in the case of **Bulyanhulu Gold Mine Ltd vs Gasto Myovela,** Revision No. 217 of 2011. The 2nd respondent, he submitted, is neither registered nor does it have office in Tanzania. Based on this argument, the learned counsel held the view that all courts in Tanzania are created by statutes and therefore their jurisdiction is created by statutes, parties cannot confer jurisdiction on

courts as held in the case of **Shyam Thanki and Others vs New Palace Hotel** [1971] EA 199.

For the respondent, it was submitted that the applicant's affidavit was sworn by the 1st applicant's direct one Karlo Kolak, without permission of the 2nd applicant. According to him, this is rendering the affidavit in support of the application defective. It was further said, that the respondents were employees of the applicant until 2010. When an opportunity came, they were transferred to Cyprus for a fixed term contract of one year in 2012. It was stated that when they arrived in Cyprus, their contracts that were signed in Tanzania were retained but forced to sign other contracts with reduced remuneration of 1,750 EUROS.

Their contracts however, it was submitted, were terminated and as they came back, the 1st applicant did not accept them. They were hence terminated.

To prove that the 1st applicant was behind this, they asked this court to go through the 1st applicant's letter to immigration showing that the respondents were transferred to Cyprus as the employees of the 1st applicant. It was the view of Mr. Mhando that the respondents were terminated without being heard which is contrary to article 13(3) of the

Constitution. According to him, article 13(3) has to be read with section 14 of the ELRA. Therefore, the commission had jurisdiction to hear the matter, he argued.

In the view of the respondents, there is documentary proof to show that the 1st applicant secured jobs for them in Cyprus, home of the 2nd applicant. The 1st applicant is a branch of the 2nd applicant. In the view of Mr. Mhando, rule 22(1) of GN No. 64 of 2007 allows the commission to hear any matter provided it is within its jurisdiction. Their contracts, it was submitted had different work places as in Tanzania and Cyprus.

It was his further submission that the applicant cited and miss applied the case of **Bulyanhulu Gold Mine** (supra). Further, it was said, that the affidavit supporting the application was sworn without the permission of the 2nd respondent which contradicts section 4 of the Oaths and Statutory Declarations Act. Mr. Mhando further argued that the chamber summons lacks legal basis because the 2nd applicant did not swear any affidavit. The same as well was filed without notice of intention to sue as per Regulation 34(1) of GN No. 47 of 2007.

It was Mr. Mhando's view that the case of **Unilever Tea Tanzania Ltd vs Paul Basondole**, Revision No. 14 of 2020, held the similar position.

Finally, the personal representative was of the view that the respondent was hearing a matter within its jurisdiction as held in the case of **Registered Trustee of Arusha Muslim Union vs Registered Trustee of National Muslim Council (BAKWATA),** Civil Appeal No. 300 of 2017. The respondent therefore asked this court to dismiss the application.

As shown before, there are two issues to determine. The first is whether the cause of action arose in Tanzania or in Cyprus. To answer this point, I have to say that under section 14 of the ELRA, contracts of employment have to be in writing if the duty stated therein is to be performed in or outside Tanzania. The respondents have alleged, they signed contracts in Tanzania but did not produce any copy of the same.

It is not disputed by the 1st applicant that the respondents worked with her until 2010. The respondents have also admitted to have worked with the 1st applicant. The question that has not been answered by the parties is how, the respondents got jobs in Cyprus. In the 1st applicant's submission, it was said that they applied for the jobs in Cyprus via emails and they signed contracts in Cyprus. The only responsibility of the 1st applicant was to facilitate immigration issues. According to Solomon (Dw1), the Human Resource Manager of the 1st applicant. The respondents were not

employed by the 1st applicant. The 1st applicant only paid for their air tickets and facilitated immigration issues. He was also of the evidence that the 2nd applicant is a fellow company to the 1st applicant.

From the evidence, it is apparent that the applicants are two different companies. Whereas one is registered in Tanzania the other one, may be, is registered in Cyprus. One can say with certainty, that the two are sister companies, since there is no evidence establishing otherwise. It was therefore the duty of the 1st applicant to prove that it has no relationship with the 2nd applicant. But the evidence by Dw1 is straight forward that the two companies are related. That is why, the respondents were provided with jobs and worked with the 1st applicant here in Tanzania. In exh. P1 collectively, there are contracts signed on 1st October 2012, by the respondents alleging it was for 12 months. While exh D1 collectively is another contract for unspecified term also signed by the same. The respondents have testified that the terms were changed as they arrived in Cyprus.

From both contracts there is reason to believed that exh. P1 was indeed signed in Tanzania. That is why the 1st applicant issued exh. P3, a letter to immigration clearly saying the respondents were its employees. This is as well in line with the evidence of Dw1 that they facilitated the payment of

air tickets and immigration issues. There is no evidence showing under which terms the 1st applicant did that. It follows therefore that the two companies are related in material terms. The respondents have testified that the 1st applicant is an extended arm of the 2nd applicant. I share the view, because there is no reason to suppose that the two companies sharing the name are not related. The duties that the respondents performed with the 1st applicant in Tanzania were the similar duties performed in Cyprus. The submission that the respondents applied for jobs and communicated with the 2nd applicant by emails are words from the bar. Dw1 did not testify so or the respondents in that respect. The evidence by Dw1 sums it all. If indeed, the applicants are not related in any way how could they have facilitated all that without any communication. It is therefore clear to me that the respondents signed a contract in Tanzania. Under section 14 of the ELRA, contracts signed in Tanzania are in the jurisdiction of the courts. Above all, the respondents were employees of the 1st applicant in Tanzania and went to Cyprus by transfer as it was admitted in exhibit P3 collectively. The cases of **Bulyanhulu Gold Mine Ltd vs Gasto Myovela and Shyam Thanki and Others vs New Palace Hotel (supra)** as cited by the applicant, on jurisdiction and the role of parties on the same issue are distinguishable. In

the case at hand, it is true that parties are bound by their own contracts as in the case of **Miriam E Maro vs BOT.** The applicants are bound by the terms of contract signed by them in Tanzania.

It should be noted further in the dispute of this nature, it was the duty of the applicants under section 15 (6) of the ELRA to prove under the existing circumstances that the respondents were not their employees and were not associated in any way with the 2nd respondent. This duty, in my view has not been discharged by the 1st applicant. Further, changing of the terms of the contract of employment is a legal issue. It is governed by section 15(4) of ELRA. Therefore, before an employer engages in such an exercise, she has to comply with the section wholly and entirely.

Lastly, it was the respondent's submission that the 1st applicant signed an affidavit through its officer without the consent of the 2nd applicant.

To support this point, I was cited with the case of **Unilever Tea Tanzania Ltd vs Paul Basondole (supra)** and asked this court to dismiss this application for having been supported by a defective affidavit. I think, the respondents are not right. It is so because, there is no evidence to prove that the same officer was not by consent allowed to file an affidavit. After all, the 1st respondent has the right to prosecute her case, the consent of

the 2nd applicant notwithstanding. That being the case therefore, this point is baseless.

Having answered the first issue in the affirmative, then it goes without saying that the respondents were employees of the applicants who were transferred to work for 2nd applicant. This application therefore is dismissed. I make no order as to costs.

A.K. Rwizile

JUDGE

01.12. 2021