

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

REVISION NO. 243 OF 2020

BETWEEN

TANZANIA PORTS AUTHORITY APPLICANT

VERSUS

HALIMA KASSIM JUMA RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The matter beforehand revolves around the jurisdiction of the Commission for Mediation and Arbitration for Ilala (CMA) to entertain the respondent's dispute labeled as CMA/DSM/ILA/100/18 ("The Dispute"). According to the applicant, the CMA had no jurisdiction to entertain the matter as it was prematurely filed therein. In her CMA Form No. 1, the respondent herein (then applicant) lodged a dispute complaining about unfair termination by the respondent who was then her employer. In the third part of the form which requires description of the nature of the dispute, the applicant's claim was ticked where it said "termination of employment" where she alleged to have been terminated on 05th of

September, 2018. The reason for termination as claimed by the applicant was due to false allegations of forgery of her O'Level certificate.

The respondent's further claim on the unfairness of the termination was that the procedure was not followed as she was summarily terminated and that she was never called before a disciplinary committee and was never issued with any warning letter. On the substantive part of the allegation, the respondent claimed that the employer's allegations had never been proved and that no investigation was done prior to her termination. In all those claims, the respondent's relief sought was reinstatement without loss of remuneration.

At the CMA, the applicant raised an objection that the dispute was prematurely filed before the CMA hence the CMA did not have jurisdiction. The applicant then prayed for the application to be struck out. The CMA overruled the objection on the ground that the arguments therein contain mixed matters of law and facts which need more evidence to be adduced. The CMA further ordered that the objections shall be entertained during the main hearing of the dispute. In its award dated 12th May, 2020, the CMA made a finding that the respondent was not terminated from employment as alleged. However, the CMA proceeded to determine the

dispute on the grounds of suspension of the respondent, which is worth noting, was not disputed by the parties. The CMA ordered the applicant to pay the respondent arrears of her salaries due during suspension. It is this finding of the CMA that the applicant is aggrieved with and has lodged this application raising the following legal issues:

1. The Honorable Arbitrator erred in law for entertaining the dispute which was prematurely lodged.
2. The Honorable Arbitrator erred in law for ordering payment of full monthly salaries after suspension contrary to Public Service Act.
3. The Honorable Arbitrator erred in facts for not considering evidence adduced by the applicant
4. The Honorable Arbitrator erred in law and facts by holding that the Respondent had been terminated while she not; and that the applicant should reinstate the respondent while there was no termination at all.

By moving the court to call for the records and proceedings in the Dispute, the applicant prayed that the CMA award is quashed. Hearing of the application was conducted orally. On the date of the hearing, Mr. Shija Charles, learned State Attorney made submissions on behalf of the

applicant while the respondent was represented by Mr. Eric Nzowa. I will begin with the first legal issue, whether the Arbitrator erred in law for entertaining the dispute which was prematurely lodged.

Mr. Shija's submissions started by a prayer to adopt the affidavit of Ms. Fatma Suleiman Kitwana, Principia Legal Officer of the applicant which was in support of the Chamber Summons. He then submitted that the CMA erred or entertained a complaint which was prematurely proved or filed. That the complaint concerned alleged unfair termination and that can be seen at pg 6 of Form No 1 while in actual fact, the respondent has never been terminated by the applicant. That the issue of termination was also confirmed by the CMA in the award pronounced on 12/05/2020 at page 8 of the award, the second paragraph of page 8 which states:

"Hivyo kwa kuhitimisha hoja ya kwanza, pamoja na mkanganyiko huo, Tume inaona kuwa mlalamikaji hajaachishwa kazi, kwakuwa hajawahi kupewa barua rasmi na mlalamikiwa kusitisha ajira yake."

In the subsequent para, the CMA found:

"kwa mantiki hiyo, hoja ya pili haitajadiliwa kwakuwa mlalamikaji hajaachishwa kazi."

He then argued that having found that the respondent was not terminated by the applicant, the CMA was not supposed to continue making any other order because this concluded the matter was prematurely filed and for that the CMA had no jurisdiction. He supported his submissions by citing the decisions of this court to the effect that where the complaint was prematurely filed the CMA will not have jurisdiction to entertain the same. The decisions cited included the case of **Fransisca Muindi Vs. the TPA & 2 others, Misc. Application No. 95/2014** where it was held on page 4:

"again as submitted by Mr. Sereu, the application is premature for want of the termination order. One cannot challenge to be suspended as it is a process in determining whether or not one should be terminated.

He then submitted that the Court then concluded in the last para of the page that the application was prematurely filed and incompetent before it. He also cited the case of **Jacob Abner Ntupwa Vs. TANESCO, Revision No. 759/2019** whereby Muruke J held at page 6:

"This court fully subscribes to the decision of Fransisca Muindi Vs. TPA(supra), applicant Jacob Abner Ntupwa, by filing a dispute at the CMA while on suspension from his employment, was not properly done".

On the premises of the foregoing, Mr. Shija submitted that it was grossly illegal for the CMA to continue making orders on the dispute which was prematurely filed as it did not have that jurisdiction. He concluded that the proceedings and the award of the CMA are a nullity and this court should intervene to put the records straight.

In reply, Mr. Nzowa also prayed that the court adopts the counter affidavit of Ms. Halima Kassim as part of their submissions. He then replied that the it because the dispute was lodged there in relation to unfair termination. Secondly, he submitted, in the process of determining the dispute, there arose a dispute that the respondent was not terminated, the CMA was hence duty bound to determine whether the respondent was terminated. This could only be done after hearing of evidence that was adduced and after hearing the dispute from both sides, the CMA concluded that the respondent had not yet been terminated. He argued that the decision of the CMA was correct and in reply to the main issue that the

CMA turned the dispute from termination to suspension, the same was done after hearing of the evidence.

On the complains about the subsequent orders of the CMA after making a finding that the respondent had not yet been terminated, Mr. Nzowa submitted that the orders issued by the CMA were correct as the applicant was entitled to be paid all her dues at the time she was suspended because that is the position of the law under, Rule 27 (1) of the Employment and Labor Relations (Code of Good Practice) GN. No. 42/2007 which explains that the employer may suspend an employee by paying full salary at the time of suspension. Further that what the CMA did was to interpret the position of the law and the evidence on that was adduced and the respondent established when they stopped to pay her the salary.

Having considered the parties submissions, as per the records, indeed the CMA went on determine that the dispute was prematurely filed before it. Up until this point am in agreement with the CMA that the applicant had not been terminated yet hence the cause of action alleged in the CMA Form No. 1 had not accrued. The part she filled was in relation to unfair termination and even the reliefs sought revolved around the remedies for unfair termination stipulated under the ELRA. However, I

have noted that despite finding that the dispute was prematurely lodged, the CMA went ahead and started awarding compensation and ordering reinstatement of the respondent. I could not stop to wonder where the CMA procured such mandate after finding that the dispute was prematurely filed before it, it meant that the respondent had no cause of action against the applicant where the issue of unfair termination was concerned hence had no legs to stand. The parties are bound by their pleadings and it is trite law that the CMA Form No. 1 is like the plaint, it initiates the whole dispute. Hence the CMA is bound to decide that which is only pleaded in the CMA Form No. 1 and anything outside that, the CMA assumed jurisdiction it did not have.

Owing to the above, I find that the finding of the CMA that the dispute was prematurely filed was proper, the dispute ends there; the CMA had no jurisdiction to entertain the subsequent matters, it ought to have dismissed the dispute before it. Therefore, any orders that followed after finding that the CMA had no jurisdiction are a nullity and illegal and are hereby nullified. The dispute at the CMA stands dismissed for lack of jurisdiction.

Having made the above findings, this revision is allowed, since the CMA had no jurisdiction to entertain the dispute, the award of the CMA is therefore set aside.

Dated at Dar es Salaam this 08th day of December, 2021.




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S.M. MAGHIMBI
JUDGE