IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISON NO. 405 OF 2020

BETWEEN

HUSSEIN KILANGO, ABDUL YAHAYA MALIPULA AND DAVID MWAIPYANA Appearing on their own behalf and in representative capacity on behalf of 106 OTHERS.....APPLICANTS

VESRUS

SWISSPORT INTERNATIONAL.....1ST RESPONDENT

SWISSPORT TANZANIA PLC.....2ND RESPONDENT

JUDGMENT

Date of Last order: 5/82021

Date of Judgment: 23/8/2021

B.E.K. MGANGA, J

On 9th October 2020, Hussein Kilango, Abdul Yahaya Malipula and David Mwaipyana on their own behalf and in representative capacity on behalf of 106 others, filed a Notice of Application under Rule 24(1), 2(a),(b), (c), (d), (e) and (f), Rule 24(3)(a), (b), (c), and (d) of the Labour Court Rules, Government Notice No. 106 of 2007 (herein referred to as GN. No. 106 of 2007) praying this Court to revise the proceedings, decisions and orders of the Commission for Mediation and Arbitration (herein referred to as CMA) Award given by Hon. Kachenje J.J.Y.M, Arbitrator, on the 27th day of November 2017 in Labour Dispute No. CMA/DSM/ILA/R. 41/2017/293 and issue an order that a different

arbitrator be appointed to write the Award on merit or hear the application de novo. In the alternative, this Court be pleased to consider the evidence on record and determine the rights of the parties on merit. Being out of time, on 24th July 2020, this Court granted their prayer to extend time within which they can make application for revision. The application is supported by a joint affidavit affirmed by Hussein Kilango, Abdul Yahaya Malipula on 6th October 2020 and an affidavit of David Mwaipyana sworn on the same date. The application was resisted by the respondents who filed a counter affidavit sworn by Peter Amos Mwelelo to that effect.

Factual background of this application is that applicants were initially employed by Air Tanzania Corporation (ATC). In october,1985, Swissport international, the 2nd respondent, was established as a subsidiary company of Air Tanzania Corporation. During its inception it was called as Dar es salaam Airport Handling Company (DAHCO) in which Air Tanzania Corporation was the majority shareholder. Most of DAHCO employees were transferred from Air Tanzania Corporation. The said ex ATC staff referred a dispute to the Industrial Court demanding termination of their service with ATC. The Court ruled in their favour according to the ruling of the Court annexed to their founding affidavit and marked A. In 2000, DAHCO minority shareholders sold their shares

to Swissport international, the 1st respondent. The government of the United Republic of Tanzania also sold her shares to the 1st respondent remaining with 49% shares, as a result, the 1st respondent became majority shareholders. Later on, the Government of the United Republic of Tanzania sold her shares to the public through Dar es salaam stock Exchange. But staff policy and terminal benefits did not change. On 28th November 2016 applicants through their legal counsel wrote a demand letter to the 1st respondent claiming terminal benefits of EX-ATC/ DAHCO that were not paid to them by the 2nd respondent. On 13th December 2016, the 2nd respondent replied to the said demand letter that she has already paid all terminal benefits to the applicants and denied being aware of any outstanding terminal benefit claims from them. On 11th January 2017, H.A Kiwango signed CMA Form 1 and on 13th January 2017 filed a referral of dispute to CMA indicating that the nature of the **dispute is discrimination** because local staff were not paid equally to those of Swissport South Africa, Kenya and Swiss branches performing the same work. Based on CMA Form 1, Labour Dispute No. CMA/DSM/ILA/R.41/2017/293 was registered at CMA between the parties. That dispute was heard by Urassa, Arbitrator to the stage of composing an award but didn't issue an award as he retired from the public service. Kachenje, J.J.Y.M, arbitrator took over with a

view of composing an award, instead, on 27th November 2017, he wrote a ruling that the dispute was time-barred as it was filed out of time. Aggrieved by the said ruling, applicants filed this application for revision.

The application was argued by way of written submissions. Mr. Barnabas Luguwa, Advocate for the applicant adopted affidavits of the applicants and submitted that applicants allege double standard in payment of salary within the company worldwide and that they claim for payment of uniform emoluments for workers working in the same category. That they claim arrears of balance of salaries. He argued that the arbitrator improperly raised suo moto the issue of limitation that the dispute was improperly filed while applicants were granted condonation on 2/1/2017. He was of the view that the complaint by the applicants at CMA was wrongly dismissed because the cause of action arose when applicants demanded to be paid the arrears of emoluments and the respondent declined to honour the same. He was further of the view that this dispute arose during the time when the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Labour Institutions Act [Cap. 300 R.E. 2019] were in force.

On the other hand, Tumwesige Evanns Lushakuzi, Advocate for the respondent adopted the counter affidavit of Peter Amos Mwelelo for the respondent. Counsel for the respondent argued that the complaint

was improperly filed at CMA because in CMA Form 1 and 2, applicants indicated that the dispute arose on 31/5/2000 that is 17 years way back before filing the complaint at CMA. He submitted that applicants were supposed to file their complaint under the old laws as per section. 13 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019]. He refuted the claim that cause of action rose on the date the demand letter by the applicants was turned down by the respondent. He argued that applicants were granted condonation improperly on 2/1/2017 because no reasons were assigned to by the arbitrator. He cited the decision of this court (A.E. Mwipopo, J) in ***Mohamed Marekani v. Auric Air services Limited,*** Revision Application No. 964 of 2018 (unreported), arguing that applicants failed to account for each day of delay as such they were not supposed to be granted condonation.

In rejoinder, counsel for applicants maintained that the arbitrator erred to dismiss the complaint on ground that it was time-barred while they were granted condonation. He also maintained that the cause of action arose on 13th December 2016 when the respondents refused to recognize claims of the applicants. He concluded that, the law applicable is the Employment and Labour Relations Act, [Cap. 366 R.E. 2019].

It is clear to me that the central issue is whether the complaint was properly filed at CMA and whether the Arbitrator erred to dismiss the complaint for being time-barred.

I have examined both affidavit and counter affidavit of the applicants and the respondents in this application and the CMA record in order to properly deal with the afore stated issues. I have found that in paragraph 8 of the joint affidavit by Hussein Kilango and Abdul Yahaya Malipula and that of David Mwaipyana, the deponents have averred that the cause of action arose when a demand notice dated 28th November 2016 was refused by the respondents on 13/12/2016. They have averred further in paragraph 9 of their respective affidavits that they were granted condonation by CMA. ***The alleged ruling for condonation dated 02/1/2017 allegedly issued by Lemwely. D***, arbitrator was annexed to their affidavit and **marked F**. I have examined the said ruling and come to the conclusion that it is fabricated. I am of that view because it reads in part:-

> *"... waleta maombi walileta maombi wakiwa wameambanisha fomu za kisheria CMA F1 na CMA F7* ***wameambanisha hati ya kiapo cha 13/01/2017 kilichasainiwa na Husein Kilambo****...Tume baada ya kupitia mawasilisho ya waleta maombi imeona kwamba ni haki na sahihi kuruhusu maombi haya ya kusikiliza sahuri nje ya muda ili haki iweze kutendeka.hivyo Tume imepitisha maombi haya na mgogoro utaendelea kwa hatua inayofuata.*
>
> *Imeamriwa hivyo.*

Uamuzi huu umetolewa leo tarehe 02/1/2017."

I have examined Form No. 7 herein referred to as CMA F7 for Application for condonation of late referral of a Dispute to the Commission and find that Hussein Kilango, 1st Applicant indicated that the dispute arose **31/05/2000 and the degree of lateness is 17 years**. 1st applicant recorded in CMA F7 reasons for lateness that

> "***THE ISSUE WAS TREATED AS CONFIDENTIAL BY THE MANAGEMENT OF TANZANIA BRANCH, DISCRIMINATION WHICH LED TO SWISSPORT KENYA AND SOUTH AFRICA BRANCHES BOYCOT ON THE SAME ISSUE (LATE KNOWLEDGE)".***

Hussein Kilango attached to CMA F7, (i) minutes for the meeting dated 31/12/2016 in which he was appointed to be representative of the group, (ii) attendance list of Ex Air Tanzania, DAHCO and Swissport international and (iii) Affidavit.

It is worth to point out right here that this CMA F7 is not dated and no affidavit was annexed thereto. Nothing is indicated as to when it was received at CMA if at all it was filed but so long as it is CMA record, I take it that it was filed. But Form No.1 herein referred to as CMA F1 for referral of a dispute to the Commission was received at the CMA on **13th January 2017**. It is indicated in the said CMA F1 that was signed by the 1st applicant **on 11/1/2017** showing Swissport international as the respondent. I have found that the next document that was filed in this

file after CMA F1 is Notice to attend Mediation (CMA F. 18) that was issued by Meshack, G, Mediator/arbitrator on **18/1/2017** informing Hussein Kilango and 108 others (complainants) and Swissport International (respondent) that Labour dispute No. CMA/DSM/ILA/R.41/17 was fixed for mediation hearing on **13/2/2017**. On **16/1/2017** that is, two days even before the said CMA F.18 was issued, **A.Y. Malipula** signed and confirmed to have served this summons. This in my view, is a total fabrication. CMA record shows further that on **20/2/2017** Pius L. Chabruma Advocate for the applicant and Mapuli advocate for the 1st respondent agreed that the 2nd respondent should be joined as a result the matter was adjourned to 20/20/2017. On **14/3/2017** the 1st applicant signed another CMA F7 (for condonation) with similar claims quoted above and annexed thereto an amended affidavit of **Hussein Kilango**, the 1st applicant. The said affidavit of the 1st applicant reads:-

> *"...1. That I am a Representative of EX Employees of Air Tanzania, the firmer DAHACO, SWISSPORT INTERNATIONAL and SWISS TANZANIA LTD(Plc)*
>
> *2. That during our previous employment with SWISSPORT TANZANIA LTD(Plc) our entitlements were treated as strictly confidential until our counterparts in Kenya and South Africa put up a strike. This was on 4/12/2011 and that is the time we became aware of our rights. It took us quite some time to organize ourselves before approaching CMA. Hence the delay is doing so."*

Attestation of the said affidavit was made before advocate **Pius Lazarus Chabruma Advocate on 14/3/2017**. On the same date, the 1st applicant signed another CMA F1 with similar claims but unlike the first one in which the respondent was only the 1st respondent in this application, in the latter, he joined the 2nd respondent. This CMA F1 was received at CMA on **14/3/2017**. On **15/3/2017**, **Leawely**, mediator/arbitrator, issued a summons to parties to appear for hearing on 3/4/2017 as shown in CMA F.18. The record shows that thereafter, the dispute was heard by **E.F. Urassa**, Arbitrator who was supposed to compose the award as pointed out earlier but failed as he retired from public service. **Kachenje, J.J.Y.M**, Arbitrator took over from there. Instead of considering the evidence adduced by the parties, he raised the issue of time limitation and dismissed the complaint hence this application.

I have decided to give the above narration because that is where the controversy between the parties is. Kachenje, J.J.Y.M, Arbitrator, is being challenged by the applicant that he was not supposed to dismiss their complaint because they were granted condonation on **2/1/2017** by **Leawely**. From the above narration, there is nothing on record to show that on the said date, **Leawely**, issued a ruling granting the applicants condonation of time. In the CMA record, there is a typed

document similar to annexture F to the applicant's affidavit allegedly to be ruling for condonation purportedly signed by **Leawely**. I have also found another handwritten piece of paper purporting to be a ruling but without any words suggesting that it is a ruling. The contents of the said paper differs slightly with the alleged ruling for condonation annexed to the affidavits of the applicants and the typed one in the CMA file. The last paragraph in the said piece of paper reads:-

> " ***Tume baada ya kupitia mawasilisho ya waleta maombi, inaruhusu ombi hili la waleta maombi la kuleta mgogoro nje ya muda ili haki iweze kutendeka na kuonekana kutendeka.***
>
> ***Uamuzi huu umetolewa leo tarehe."***

That piece of paper is neither signed nor dated. But the last paragraph in the purported ruling for condonation annexed to the affidavits of the applicant and a copy filed in CMA file reads:-

> ***Tume baada ya kupitia mawasilisho ya waleta maombi imeona kwamba ni haki na sahihi kuruhusu maombi haya ya kusikiliza sahuri nje ya muda ili haki iweze kutendeka.hivyo Tume imepitisha maombi haya na mgogoro utaendelea kwa hatua inayofuata.***
>
> ***Imeamriwa hivyo.***
>
> ***Uamuzi huu umetolewa leo tarehe 02/1/2017***
>
> ***Signed***
>
> **Leawely**

It is without doubt that the two quoted paragraphs though speaking of a similar issue, were not taken from the same document. In

short, there are forgeries of the CMA documents with intention of showing that Leawely Arbitrator composed a ruling and granted condonation to the applicants. I am of the strong view that, there are forgeries because the record does not show that Leawely dealt with this matter on 2/01/2017. The record shows that Leawely dealt with that complaint on 15/3/2017 by signing and issuing a summons to parties to appear for hearing on 3/4/2017 only as shown in CMA F.18. Further to that, there is no proceedings in the CMA record showing that parties were heard on the application for condonation based on the undated CMA F7 followed by CMA F1 dated **11/1/2017** that was received at CMA on **13/1/2017**. Normally, CMA F7 that is; an application for condonation has to be filed together with CMA F1 that is; referral of a dispute to the Commission to enable the arbitrator to consider properly ground for condonation. That being the case, the undated CMA F7 showing only the 1st respondent, was received at CMA on **13/1/2017**, the date CMA F1 was received and not before that date. Therefore, it is unfounded to argue that applicants were granted condonation on **2/1/2017** before even filing CMA F1 to CMA.

More worse, as pointed out hereinabove, On **14/3/2017** the 1st applicant signed another CMA F7 and annexed thereto his amended affidavit quoted above that was attested to by **Pius Lazarus**

Chabruma Advocate on 14/3/2017 and signed another CMA F1 that was received at CMA on the same date but at this time adding the 2nd respondent. There is nothing on the record to show that, this application was heard. No logic for the applicant to file another CMA F7 on **14/3/2017** annexed with his affidavit if at all on 2/1/2017 condonation was granted as they want this court to believe. Even if assuming that on 2/1/2017 applicants were granted condonation of which it is not the case, at that time, there was only one respondent namely the 1st respondent in this application. Nowhere in the CMA record is shown that the 2nd respondent was afforded right to contest or concede to the application for condonation that was filed at CMA on 14/3/2017. For all what I have pointed above, the only conclusion available is that applicants were not granted condonation and that forgeries were done to show that there was condonation. Since the issue of limitation of time is crucial and touches the jurisdiction of both CMA and the court, it was proper for the arbitrator to satisfy himself as to whether he has jurisdiction or not as he did. In no doubt, the application was filed out of time without condonation. But the Arbitrator was supposed to call the parties and hear them instead of raising the issue and make a decision as he did.

I have examined the list of names of applicants that was attached to the affidavit of Applicants of **Hussein Kilango** on **14/3/2017** and annexed to CMA F7 for the alleged application for condonation and find that out of 109 applicants, only **60** persons signed and consented to the said **Hussein Kilango** to file the dispute at CMA. In other words, consent of **49** persons was not sought and granted yet the applicant purported to have filed Labour Dispute at CMA the subject of this revision for and on behalf of 109 persons. As if that is not enough, the applicant has filed this revision application purporting to do so on behalf of **106** applicants. The issue is where and when did he got consent of 46 other applicants who did not grant him consent to file the dispute at CMA as only **60** persons granted him that consent. This court, on revision, cannot hear **46** applicants parties whose dispute was not heard at CMA. In short, there is no room for this court to add and hear 46 applicants more than those 60 who consented and submitted their dispute at CMA. In **Revocatus A. Kitole and 420 Others vs. G4s Security Solutions (T) Limited, Revision No. 4 of 2020,** (unreported) this court held that, that is iliegal because the dispute was heard without their knowledge of persons who has not consented. This court went on that, those people are likely to be affected positively or negatively without themselves being heard. In short, hearing the dispute

without their knowledge and or consent is violation of cardinal principle of right to be heard.

The applicants have prayed that, this court may revise the award and appoint another Arbitrator to compose the award. In alternative, they prayed this court to consider the evidence on record and determine the rights of the parties on merit. It is my considered opinion that the prayer for this court to consider evidence and determine the rights of the parties is misconceived because this is an invitation to the court to assume original jurisdiction normally exercisable by CMA which is supposed to prepare an award. At any rate, it would have been proper to return the file to CMA to compose the award. But for the reasons given herein that hearing of the dispute proceeded without consent of 49 applicants hence denying them right to be heard, and further being out of time, I hereby nullify the whole CMA proceedings.

It is so ordered.

B.E.K. Mganga
JUDGE
23/08/2021