IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

MOROGORO

REVISION NO. 30 OF 2020

(ARISING FROM LABOUR DISPUTE NO. CMA/MORO/03/2019)

ABUBAKARI ALLY TIMAM.....APPLICANT

Versus

MAJI KILOMBERO LIMITED.....RESPONDENT

JUDGMENT

02nd & 8th September 2021

Rwizile, J

The Applicants here in namely **ABUBAKARI ALLY TIMAM** has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/MOR/03/2019, praying for the following order: -

1. That this Honourable Court be pleased to call for the records, examine the proceedings and set aside the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/MOR/03/2019 delivered by Hon. Kayugwa, Haji, Arbitrator, dated 18th April, 2019, and make appropriate orders.

2. That, this Honourable Court be pleased to make any other order(s) as it may deem just equitable to grant.

The application is supported by the affidavit of Abubakar Ally Timam, the applicant. Opposing the application, the respondent filed the counter affidavit sworn by Mbarak Nahdi respondent's Principal Officer.

The application is based on the following issues;

i. That, the arbitrator erred in law and in facts for relying on irrelevant case law and reasoning, therefore arriving at an erroneous ruling

ii. That the arbitrator erred in law and facts by holding that the applicant's complaint is res judicata.

It was gathered from the record that the applicant was an employee of the respondent. He was however suspended from duty for the period not defined in the suspension letter dated 29th August 2018. About two months or so later, the applicant commenced a dispute before the CMA claiming for salaries during the period of suspension. CMA/MOR/184/2018, was terminated by a settlement. It occurred that sometimes later, the applicant filed the impugned disputed with the Commission – CMA/MOR/03/2019, claiming for terminal benefits. Before, the same was heard, a point was raised in *lamine*, that the dispute was res judicata. The arbitrator was

persuaded with the same and sustained the objection on grounds of res judicata. The application was dismissed. The applicant was exasperated by the decision and hence this application.

At the hearing, the Applicant was represented by Mr. Zongwe Personal Representative from (TPAWU), whereas the respondent was represented by Mr. Benjamin Jonas, learned advocate.

Supporting this application Mr. Zongwe submitted that the objection by the respondent was based on the case of **Yasin Phadhili and others vs ATT Ltd,** LCCD 65 of 2010 as shown at page 5 of CMA award. He stated that the same was distinguishable, because the terminal benefits were an issue, but not in dispute No. CMA/MOR/184/2018.

He submitted that the applicant was claiming unpaid salaries during the time of suspension. Therefore, what was settled by the parties is not relating to termination of his employment as per CMA Form No. 6 and 7. It was a dispute regarding unpaid salaries that ended at mediation stage. In his view, that does not mean the employment dispute was settled, because it was not an issue.

Mr. Zongwe went on submitting that the arbitrator failed to act in accordance with Rule 16(2) of GN 64/2007 which demands the arbitrator to know the claims of the parties. He said, the record reveal that the dispute between parties was on unpaid salaries which was settled by payment of 800,000/= and the case reported at the police station be withdrawn by the respondent. He was of the view that the matter was not therefore res-judicata as covered by section 9 of Civil Procedure Code, [Cap 33 R.E 2019]. To support his view, he cited the case of **MFI Documents solution Ltd v Shamshudin Heran and another** Civil Case No. 163/2019 at Pg. 6, which provides how does the principle of res-judicata applies.

Opposing the application for the respondent, Mr. Benjamin submitted that there is no dispute as to the decision in the case of **Yasin Phadhili** (supra). He stated that, claims should not be in pieces but should be brought in totality. He stated that basing on this application the applicant is trying to separate two cases from one. He was of the view that since the claim was on suspended term without limit, the applicant ought to bring the issue of termination on the same application and not separately. The second dispute, in his view, has no merit as the same was settled in first dispute. Therefore, the CMA was right in holding that both disputes ought

to be brought together. The settlement, he added, had to be made once, that is why the same was required to withdraw the second dispute.

It was further submitted that the dispute on termination aborted and so could not be filed separately. Doing otherwise attracts the principle of res judicata to apply. Thus, the learned counsel prayed for the application to be dismissed.

In rejoining, the applicant reiterated his submission in chief, but emphasized that the first dispute was about suspension while the second one was about termination of employment. Therefore, two disputes could not be treated as one.

Having considered rival submissions, this Court is called upon to determine; *whether the dispute filed at the CMA was res judicata?*

In addressing the disputed fact, the relevant provision is Section 9 of the Civil Procedure Code, [Cap 33 R. E 2019] which provides that; -

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try subsequent suit or the suit in which such issue has been*

subsequently raised and has been heard and finally decided by such court."

Disputing the fact, the applicant contend that what was settled by the parties in labour Dispute No. No. CMA/MOR/184/2018 is not relating to employment as the same was relating to unpaid three months salaries during suspension.

On other hand the respondent maintained that since the claim was on suspended term without limit, the applicant ought to bring the issue of termination on the same application, not separately.

It is undisputed there was dispute at CMA between the same parties regarding salary claim that resulted from suspension.

The dispute, however was terminated after a successful mediation. In the case of **Paniel Iotta v Gabriel Tanaki & Others** [2003] TLR 312, five things must be considered for the doctrine of res judicata to apply;

i. The former suit must have been between the same litigants

or between parties under whom they or any of them litigating under the same title in a court of competence to try the subsequent suit

ii. *The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively.*

iii. *The party in the subsequent suit must have litigated under the same title in the former suit.*

iv. *The matter must have been heard and finally decided.*

v. *That the former suit must have been decided by a court of competent jurisdiction*

The evidence available including CMA Form No. 1, reveals that in the second application, the applicant filed the dispute of unfair termination. The first application labour Dispute No. No. CMA/MOR/184/2018 was a claim of unpaid salaries during the period of suspension. The dispute here was stated as shown hereunder;

Mwajiri aendelee kunilipa mishahara yangu kwa kipindi chote atakacho ni simamisha.

While in the second claim, the applicant claimed under the nature of dispute it is; *Termination of employment*

Tracing from the above, it goes without saying therefore that the nature of causes of action are different. While in the first dispute the claim was based on salaries of the period he was on suspension, he could not claim for terminal benefits before termination. He could not either, be forced to claim terminal dues before his employment was still alive. In law, it was proper for the applicant to claim for payment of salaries because he was not yet terminated. In the circumstance, I hold the view the claims were different, for that reason the doctrine of res judicata cannot apply in the same. The same position was emphasized by the Court of Appeal of Tanzania in the case of **Umoja Garage v. NBC Holding Corporation** (2003) TLR at P. Page 339, where it was held that: -

"Since by the time the previous suit was filed giving rise to the cause of action in the subsequent suit, were known to the appellant the matters raised in the subsequent case are deemed to have been matters directly, and substantially in

issue in the previous case and principle of res-judicata applies."

From the above cited cases it is an established principle, that for res judicata to apply it must be shown that there was a final judgement, by the same parties, litigating under the same head and that issues in the matter were the same or ought to have been the same. I need not emphasize here that the same were quite different and could not have been litigated at the same.

Therefore, this application has merit, it is allowed. I then quashed and set aside the CMA ruling. This means, the Commission has to proceed hearing the application as if the there was no such preliminary objection. Each party to bear its own costs.

AK. Rwizile
Judge
08.09. 2021