

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

REVISION NO. 90 OF 2022

KINONDONI MUNICIPAL COUNCIL APPLICANT

VERSUS

RUPIA SAID & 108 OTHERS RESPONDENT

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

(Mpulla: Arbitrator)

Dated 02nd March, 2020

in

REF: CMA/DSM/KIN/1136/18/49

JUDGEMENT

03rd October & 28th October, 2022

Rwizile, J

This is an application for Revision. The applicant has asked this Court to call for records of the Commission for Mediation and Arbitration (CMA) in order to examine its correctness, legality or propriety of the award, then quash and set it aside.

It can be factually stated that the respondents were employed by the applicant as *Watendaji wa Mitaa* (Street executive officers) in Kinondoni Municipality since 2002. It seems, they had a dispute with their employer on payment of basic wages agreed. After consultation, efforts to settle

their dispute did not bear fruits. Upon termination, in 2009, the respondents instituted a labour dispute CMA/DSM/ILA/03/2009 at CMA claiming for benefits due to unfair termination termed as un paid salaries, accrued leave, notice, overtime, severance pay and NSSF contributions.

The CMA found in their favour. They were awarded compensation of five months salary, notice, accrued leave, severance pay and un paid salary each.

Aggrieved, the applicant filed revision No. 417 of 2013 before this court.

It was also found in favour of the respondents in all claims save for salary arrears, which were found to be time barred. After that decision, the respondents went back to CMA and filed an application for condonation in respect of unpaid salaries. The CMA found that the matter was a *res judicata*. The respondents were not happy, they filed application No. 230 of 2016 asking this court to revise the award. This court allowed the application by setting the award aside. Then, the application for condonation before the CMA was heard and granted. A full hearing was accorded to the parties in labour dispute No. CMA/DSM/KIN/1136/18/49.

It was also found in their favour. The CMA ordered payment of a total of TZS 490,500,000.00 to all 109 respondents for arrears of salaries not paid to them since 2002 when they were employed to 2007. It was categorical

that each has to be paid a total amount of TZS 4,500,000.00. This decision did not please the applicant, hence this application.

The application is supported by the affidavit sworn by Leah N. Mnzava, Legal Officer from the office of the applicant. The application was opposed by the counter affidavit of Saulo Kusakalah the respondent's counsel. Four grounds of revision are stated under paragraph 3 of the affidavit, that is;

- i. Whether the Commission was right to grant an award without considering an application on a representative suit on the side of respondents.*
- ii. Whether Commission was right to award what were not pleaded and prayed in CMA F1 materially contrary to the provision of the laws.*
- iii. Whether the Commission was right not to consider the evidence adduced by the applicant regarding agreement between the two parties which was filed to the Commission as part of evidence.*
- iv. Whether the Commission was right to issue an award which does not summarize the evidence of both parties and analysis to reaching at a sound and just such decision.*

The hearing was done orally. Both parties were represented. Mr. Urso Luoga, assisted by Leah Mnzava learned State Attorneys stood for the applicant. Mr. Saulo Jackson Kusakalah, learned Advocate was for the respondents.

For the applicant only two grounds, one and three were argued, while the rest were dropped. For avoidance of doubt the two argued grounds are as hereunder;

Whether the Commission was right to grant an award without considering an application on a representative suit on the side of respondents

And

Whether the Commission was right not to consider the evidence adduced by the applicant regarding agreement between the two parties which was filed to the Commission as part of evidence.

Submitting on the first ground, which is on the representative suit, it was argued that the respondent did not follow the procedure in filing a representative suit. He continued to argue that there is no evidence to prove that Rupia Said was mandated to represent others.

He further stated that the award, which is impugned shows, only one person testified on behalf of others and that person is not Rupia Said. His name is Edmund Thomas Nusese. He submitted further that the person who testified is in the list of others. He had no mandate in his view to testify for others. To support his point, he cited the case of **Haruna Mpangaos and 932 Others v Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 129 of 2008, Court of Appeal of Tanzania at Dar es Salaam. He then stated that the respondents were all duty bound to testify and it was not proved that they were all present.

Submitting on the second ground, Mr. Luoga was quick to point out that, there was an agreement which concluded issues between the parties. He stated that the respondents had agreed to be paid some money in total settlement of their claims. The learned attorney was clear that the settlement agreement was final and barred any other claims. In his view, CMA did not consider all evidence and exhibits brought before it, in this aspect. When prompted by the court to state if the agreement was party of the evidence before the CMA, Mr. Luoga could not recall. He then finalised by stating that the respondents were not represented by Rupia Said, there was no affidavit to let Rupia represent them before the CMA and there was no affidavit that they were 108 people.

In reply Mr. Kusakalah submitted that CMA appointed Rupia Said to represent others in the decision made on 16th November, 2018. He added that at CMA, there is no rule on representative suit, but under rule 5 (1) to (3) of the Labour Institutions (Mediation and Arbitration) Rules 2007, G.N. No. 64 of 2007, it provides the procedure on how to appoint one. To him the issue of representative suit complied with the law. It was his argument that the case of **Haruna Mpangaos and 932 Others (supra)** has no relevance before this court, since it was about proof of land ownership. The learned counsel continued to argue that there is no rule providing that the person representing others should testify. According to him, such a person is the coordinator.

Mr. Kusakalah, dealing with the second ground, submitted that the issue of salary arrears was not settled between the parties. There is no evidence to prove so. He stated that there was no such an agreement brought to the CMA. Further, he added, it was not an issue before it. He then submitted that, there is a notice of representation that appointed Rupia Said to represent all others. Mr. Kusakalah prayed, the application to be dismissed with costs. In a rejoinder, Mr. Luoga almost reiterated what was submitted in chief.

There are two points to determine as shown before. Starting with the first ground, *Whether the Commission was right to grant an award without considering an application on representative suit on the side of respondents.*

Before going into details of my finding on this point, I have to note with seriousness that proceedings before the CMA are to be conducted as informal as possible. The proceedings should in no way be taken as those governed by the Civil Procedure Code or other Laws operating in Courts. The exception may be when there is a lacuna in the Law and rules governing the proceedings in the CMA or labour court resort is taken in other laws. It is only for bridging the gap in the laws. Having said so, I have now to agree with Mr. Kusakalah for the respondents that even though it is not clear but a representative suit before the CMA is governed by rule 5 (1) to (3) of the Labour Institutions (Mediation and Arbitration) Rules 2007, G.N. No. 64 of 2007. For avoidance of doubt, the rule is hereby reproduced as hereunder;

5(1) A document shall be signed by the party or any other person entitled under the Act or these rules to represent that party in the proceedings.

(2) Where proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to do so.

(3) Subject to sub rule (2) a list in writing, of the employees who have mandated a particular employee to sign on their behalf, must be attached to the document. The list must be signed by the employees whose names appear on it.

Having examined terms of the rule cited, I hesitate to equate it with Order 1 rule 8(1) of the Civil Procedure Code, which governs proceedings of the similar nature in courts of law other than the CMA or Labour Court. The order cited states that *where there are numerous persons having the same interest in one suit, one or more of such persons may, **with the permission of the Court**, sue or be sued ... (emphasis is mine)*”

Interpreting this order, courts have made several pronouncements insisting the legal requirement of seeking permission of the court before filing a representative suit. To cite as a paradigm, the case of **K.J. Motors & 3 Others v Reichard Kishamba and others**, Civil Appeal No. 74 of

1999 as cited in the case of Director, **Rajani Industries Ltd v Ally Kanuwa & 26 Others**, Civil Appeal No. 98 of 2009 at pages 7 & 8 where the following principles were laid down: -

"1. The provisions of section 134 (now S. 139) of the Employment Ordinance do not exclude the application of Order 1 R 8(1) of CPC to employment cases.

2. The said Rule 8(1) governs certain categories of cases and requires such cases to be brought with leave of the Court (emphasis added).

3. The discretion or option under Order 1 R 8(1) is given to the parties – either to sue as individuals or to be represented by one or some of them for and on behalf of the others.

4. Before granting leave to sue in a representative capacity, the Court must satisfy itself that the complainants do exist and that they have duly mandated their representative to sue on their behalf."

It follows therefore that, the duty of the CMA and I think this Court in terms of rules 5 and rule 44 of the Labour Court Rules, respectively, is to make sure, not suit is defeated due to absence of a representative suit. All what is necessary is, **first**, there has to be a list of employees

authorising one among them to represent them. **Second**, the same should sign the authorisation and **lastly**, the document must be signed by the person authorised to represent others.

Looking at the record, it is true that on 16th November 2018, CMAF1 and 2 were filed. The same were attached with the document signed by 109 respondents authorising him to represent them. It is therefore as clear as crystal that the legal requirement obtaining in the CMA proceedings was in my view complied with. I have to also comment though by passing that this point however, was not raised before the CMA. Why then raise it at this stage. But all in all, this point or ground has no merit. It is dismissed.

In determining the second ground of revision which is *whether the Commission was right not to consider the evidence adduced by the applicant regarding agreement between the two parties which was filed to the Commission as part of evidence.*

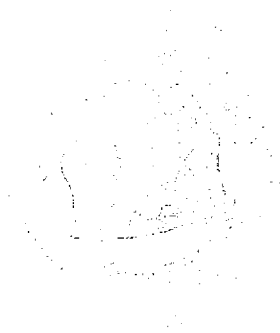
I think, this ground should not detain me. The applicant claimed, there was evidence before the CMA showing parties had an agreement settling their dispute. It was said, the same barred subsequent claims. I have perused the record and asked the parties to refer to such evidence. There

no such evidence whatsoever. The CMA had no chance to go through such evidence. It remains the applicant's assertion, not backed by evidence.

If the same was in existence, it ought to have been tendered before the CMA which is not the case. The applicant who was cast with the duty to prove, did not do so. In the final analysis, I hold, the same did not exist. That being the case, I find no merit in this ground too. Having done so, I hereby dismiss this application for want of merit. This being a labour matter, each party has to bear its own costs.

X 

Signed by: A.K.RWIZILE



A. K. Rwizile
JUDGE
28.10.2022