**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**MISC. LABOUR APPLICATION NO. 03 OF 2021**

*(Originating from Award in Labour Dispute No. CMA/RK/NKS/34/2019 Dated 10th May 2021)*

**ENDEVILE INTERNATIONAL (TZ) LTD.....APPLICANT**

**VERSUS**

**PETER JOSEPHAT JIMBO .....1ST RESPONDENT**
**JAMHURI ABDALLA MBAMBA.....2ND RESPONDENT**
**ISACK FILLY AUGUSTINO.....3RD RESPONDENT**
**NICHOLAUS BABU MAGANGA.....4TH RESPONDENT**
**NELLY GEORGE MWANOGILE.....5TH RESPONDENT**
**TERESIA CREDO BAGAMOYO.....6TH RESPONDENT**
**LOUIS MOSES KAPYLE ..... 7TH RESPONDENT**
**VERONICA KIEMYA .....8TH RESPONDENT**
**HASSAN MNYELESHI HASSAN.....9TH RESPONDENT**
**MOSES PILI TENGANAMBA.....10TH RESPONDENT**
**ADAM JIMY MWAMTOBE.....11TH RESPONDENT**
**VESTUS LAUTERY SOKONI.....12TH RESPONDENT**
**WENCESLAUS MISSANDO.....13TH RESPONDENT**
**SIMONI MSAFIRI SINGU.....14TH RESPONDENT**
**JACOB BENEDICTO MPEMBA.....15TH RESPONDENT**
**RAFAEL AUGUSTINO MBULU.....16TH RESPONDENT**

**JUDGMENT**

*Date of last Order: 31/08/2021*
*Date of judgment: 12/ 12/ 2022*

**NDUNGURU, J**

The applicant above named, filed the present application seeking revision of the decision of the Commission for mediation and Arbitration

(herein CMA) delivered on 10th May 2021 by Hon. Ngaruka, Arbitrator with a view to satisfy itself as to the correctness, legality, and propriety of the award. The application is made under section 91 (1) (a) and (2) (b), (c) and (d), section 94 (1) (b) (i) of the Employment and Labour Relations Act Cap 366 RE of 2019, Rule 24 (1), rule 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (a) (b) (c) (d) and (e) and (2) of the Labour Court Rules Government Notice Number 106 of 2007 (herein referred as the Labour Court Rules.

The application originates from the following background as gotten from applicant's affidavit; the applicant was the employer of the respondents for drilling minerals as works and casual labourers. The applicant is the company dealing with operations of prospecting, drilling, excavation of minerals (coal mining) in the village of Nkomolo in the District of Nkasi and exporting abroad. That following outbreak of Covid 19 early 2020 the applicant's operations were faced with financial constraints as result great customers abroad could not be able to buy the applicant's products. That major operations were stopped due to financial constraints worldwide and the drop of business at large, thus, the applicant decided to terminate workers as it could not manage and proceed on paying employee's monthly salaries and due to the disease the applicant could not also manage to assemble the employees for any

kind of meeting before the move leading to their termination on the ground of condition of social distance. That early of August 2020 the company prepared list of employees entitled for the terminal benefits but when paying them the dispute arose and eventually filed at the CMA Labour Dispute with reference No. CMA/RK/NKS/34/2020. That during the Arbitration proceedings before the CMA Arbitrator, the applicant was represented by Mr. Peter Kamyalile, learned advocate who on 24th November 2020 withdrew himself from defending the applicant and during the given 14 days, the applicant failed to find another advocate to defend. That when operations of the company ceased because of Covid-19 all of them fled to Dar es salaam where they are update and they could not get ample time to find another advocate within prescribed period and thus, complained that they were condemned unheard. That CMA Arbitrator did not consider such failure, instead it closed their case without giving them chance even to call their main witnesses who are applicants officers from the company to testify. That the Arbitrator allowed only four applicants to testify among 22 applicants who initiated the labour dispute and Arbitrator permitted and proceeded with the proceedings relying only on CMA FORMS No. 1 filed by Peter Josephat Jimbo instead of using CMA FORMS for each of the applicants. That Geofrey Simon and Muniri Mitha who testified as DWI and DW2

respectively were only called as consultants for the exercise of paying the benefits but not officers of the company, thus are not aware of operations of the applicant's s. That the applicant raised preliminary objection on point of law but the arbitrator did not consider the same. That the applicant was respondent in labour dispute No. CMA/RK/NKS/34/2020 before the commission for the Mediation and Arbitration which delivered its award on 10th May 2021 in favour of the respondents for unfair termination and severance allowances. Aggrieved by the CMA's award the applicant filed the present application for revision raising legal issues in her affidavit wit (a) whether the arbitrator was justified in granting the award for all claimants who did not testify on merits of their claims (b) whether the Arbitrator was justified and directed himself for failure to allow the applicant to call principal officers of the applicant to testify (c) whether the Arbitrator was correct to disregard the reasons which were made by the applicant which is a force majeure that grew into dangerous disease called Covid-19 and the financial crisis to be not good reasons before the commission and (d) whether the Arbitrator has properly directed himself by permitting and proceeded with the proceedings, relying on CMA FORM No. 1 filed by Peter Joseph Jimbo instead of using separate CMA Forms for each of the applicants to substantiate their claims.

The matter proceeded by way of written submissions. The applicant was represented by Mr. Maumba, learned advocate whereas Ms. Tunu Mahundi, learned advocate holding brief of Mr. Baraka Mbwilo represented the respondents. Written submissions were filed as scheduled.

Arguing in support of the application Mr. P.Y. Maumba, learned advocate who prayed to withdraw name of 14th respondent with the name of Simon Msafiri Singu who was wrongly pleaded.

Submitting in respect of ground one of revision Mr. Maumba contended that the document which initiated the arbitration proceedings in the CMA is CMA Form No. 1 in which there were 21 names of claimants but 4 of the names, to wit No. 7, 8, 13 and 13 were seemed to be deleted leaving only 17 names and no amendments were done. He submitted that the tribunal did not determine the preliminary objection raised by Mr. Peter Kamyalile as regards the defect on the list of names which also affects jurisdiction of the arbitrator and that of Peter Josephat Jimbo instead, he went to the merit of the dispute. He further submitted that the arbitrator did not decide the dispute based on the merit of the evidence adduced by the claimants. He said Arbitrator granted the award to 15 respondents based on what is contained in form No. 1 which only 4 respondents were called to testify only out of

15 which he argued to contrary to section 110 of the Evidence Act, Cap 6 RE 2019. Further he submitted that CMA did not adhere to the procedure as per the case of **Rashid Mkungu vs Ally Mohamed Mahubi** [1984] TLR 46.

Mr. Maumba submitted that there is no evidence on the record that reveals that four respondents who testified had common interest with those 11 respondents who did not testify.

As regards the second ground, Mr. Maumba submitted that the witnesses who testified during the hearing one Geofrey Simon and Muniri Mitha were neither employees nor persons in the management of the applicant. He submitted that learned advocate Kamyalile withdrew from prosecuting the matter on 24th November 2020 and the Arbitrator granted 14 days to find another advocate and the matter was adjourned to 7th December 2020. However, he said the applicant managed to find another advocate called kessy but on the date fixed to proceed hearing the matter, he was already engaged in another case at RMs Court Mbeya and he filed notice of absence suggesting for adjournment and hearing date. When it came on 7th December 2020 the Arbitrator ordered the matter to resume hearing at noon 2:30 pm on the same day, but at that time there was no applicant representative, no witness and no advocate. Then the Arbitrator closed the case for the applicant

and ordered the respondent to call his witnesses. Thus, he said the applicant was denied to prove her case for limited time given by the tribunal. Further he submitted that the Arbitrator combined both mediation and arbitration without notifying the parties as required by Rule 18 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2004.

With the foregoing conducts of the Arbitrator, Mr. Maumba was of the strong view that it violated the principles of natural justice of fairness also contravene Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

He finally prayed for the court to invoke its revisionary powers to nullify the proceedings and set aside the award granted.

In reply, Mr. Baraka Mbwilo, learned advocate for the respondents prayed first to adopt notice of opposition and counter affidavit to form part of his submission. Mr. Mbwilo conceded to the abandonment of the paragraph 14 (c) and (d) as stated in the affidavit and argued that it was because the procedure as regards representative suit at CMA was followed.

It was his further submission that the counsel for the applicant did not peruse court file. He submitted that the issue of names was ruled

out on 7th September 2020 where the applicant collected a copy of the ruling on 8th September 2020 the same to the respondents. He argued that page 6 & 7 of the ruling provides answers to the questions raised by the applicant.

Furthermore, Mr. Mbwilo submitted that this was representative suit where not all claimants ought to have testified to the court as per the authority of Court of Appeal case of **Security Group (T) vs Samson Yakobo and 10 Others**, Civil Appeal No. 76 of 2016, DSM, Unreported where the Court stated that some of the complainants may prove for all complainants. It is further submission that testimony of CW1 testified for all complainants, the same to CW2 and he argued that the other evidence used the word "we" mean all complainants. Also, he referred the testimony of CD3 who also in his testimony testified for 6th respondent.

Mr. Mbwilo submitted that the Arbitrator did not invent his own version of evidence, as this matter was representative suit few complainants were enough to prove the case for all and this being employment case most of reliefs sought are statutory as indicated in the form. He clarified that the duty of the complainant was to prove nature of the claim that is termination of employment, then the reliefs are

statutory. He argued that counsel for the applicant failed to highlight which evidence came from the Arbitrator.

The argument that 11 complainants who were not called to testify had no claims, Mr. Mbwilo submitted that the contention is answered by pleadings, ruling dated 7th September 2020, the testimonies of 4 complainants who testified at CMA and the case of **Security Group (T) vs Samson Yakobo and 10 Others** cited [supra]. He added that the presence of their signatures in the list of complainants appointing the representative was enough to prove that the complainants had common interest in the dispute.

Mr. Mbwilo went on submitting that the argument by the counsel for the applicant that Arbitrator invented her evidence is a new ground which was not featured on the affidavit supporting notice of application. He submitted that the Arbitrator's award is based on pleadings, the evidence and the law.

As to the second ground, Mr. Mbwilo submitted that it was not true that the applicant was denied the right to be heard or the Arbitrator was biased. With regards the two witnesses DW1 and DW2 who were called to testify for the applicant that were not employees of the applicant, Mr. Mbwilo refuted that allegation. He argued that the allegation is from the advocate not the employer, also the argument was

not to be raised at the stage of revision and that the proceedings indicated that witnesses called were employees of the applicant.

As to the argument that the applicant was not given adequate time to defend the case, Mr. Mbwilo submitted that the applicant from the beginning was not cooperative as he opted for more adjournments, also the time given of three hours to find another advocate following withdrew of advocate Kamyalile was enough to find another counsel and on that date no person appeared on 2:30 pm hrs after adjournment of three hours to inform the CMA of the failure to get another advocate and to make necessary prayer for the adjournment.

As to the argument that Arbitrator acted both as mediator and as well the Arbitrator, Mr. Mbwilo argued that this ground is a new one which was not pleaded in the affidavit, thus deserved to be ignored as the same is taking the other party by surprise.

He finally submitted that the Arbitrator did not violate principles of natural justice rather the applicant slept over his right for the failure to defend her case adequately and the cases cited counsel for the applicant are distinguishable and he prayed for the dismissal with costs.

In rejoinder, Mr. Maumba contended that the case of Security Group cited by the counsel for the respondents is distinguishable to the

fact of this case at hand as in that case each of the complainants referred to CMA. But in this case the Arbitrator wrapped all the claimants into one folder without clear facts. Further he argued that the essence of proving common interest is inevitable, that two names in the CMA Form No.1 Simon Msafiri Singu and Gilbert Sotery Nzelani being 20th and 16th respectively have confirmed to have no claims against the applicant. Mr. Maumba insisted that DW1 Geofrey and DW2 Muniri were not in the management of the applicant.

Lastly, Mr. Maumba mainly reiterated what he has submitted in chief and he prayed for the nullification of the proceedings and set aside the award.

Having considered submission of both parties to the application, court records and applicable labour laws, the key issue for determination is whether the applicant application for revision is merited.

The first complaint by the applicant is that the Arbitrator was not justified in granting the award for all the claimants who did not testify on merit of the claims. Learned Counsel for the applicant contended that Arbitrator granted the award to the 15 respondents basing to what is contained in CMA Form No. 1. That out of 15 respondents listed in the form only 4 of them were called to testify.

Labour complaint before the CMA must be in the prescribed form. Section 86 (1) of the Employment and Labour Relations Act and Rule 12 (3) of the Mediation Rules require the labour dispute before the CMA to be filled through a prescribed form the said provisions provide that:

> "S. 86 (1) Dispute referred to the Commission shall be in the prescribed form."
>
> "'Rule 12 (1) A party shall refer a dispute to the Commission for Mediation by completing and delivering the prescribed form (the referral document)"

Besides that, Rule 5 (2) of the Mediation Rules allows one person who is mandated by other employees in writing, to sign and institute the labour dispute involving more than one employee.

Further, the requirement of attaching a list of names is not only provided under Rule 5 (2) and (3) of the Mediation Rules but it is also reflected in an item inserted in the same CMA F1 itself with a direction that ***"if there is more than one party, write the details of the additional parties on a separate page and staple it to this form."***

In this case, the CMA F1 was filled and signed by the first respondent, Peter Joseph Jimbo and was referred to the Commission which is in compliance with the above cited provision of the law.

I have noted also that the respondents had a common claim and, in this situation, testimony of all claimants is not necessary to be adduced by all of them. Their claims were in respect of the breach of the law that they were unfairly terminated. It will be sufficient if the complained of breach is proved by evidence of some of them as it was done in this application. See the case of **Security Group (T) Ltd vs Samson Yakobo and 10 Others** [supra] as cited to me by the learned counsel for the respondents. Thus, the first complaint is devoid of merit.

In this application it is undisputed fact that the employment of the respondents was for a fixed term contract of one year renewable. However, the last contracts entered by the parties started from 1st September 2019 which was to end on 31 August 2020. In this last's contracts, before their expiry date on 31st August 2020 the respondents were issued with notice/letter of unpaid leave dated 1st April 2020 following closing down production of coal. Some of the respondents were given and signed contracts to end the employment on 15th August 2020 contrary to procedure under the employment laws.

It is a settled law that, a fixed term contract shall automatically come to an end when the agreed time expires. The position is provided under **Rule 4 (2)** of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 (herein GN 42 of 2007) which states that:

> *"Rule 4 (2) – where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."*

The applicant is strongly disputing that the respondents were not terminated from the employment. She alleged that the process of paying the respondents was finalised, however the respondents instituted labour dispute prematurely. It is my strong consideration that respondents were employees of the applicant until the time the dispute arose.

The applicant complained that two witnesses who testified at the commission were not her employees. In paragraph 10 of the affidavit, the applicant stated that Geofrey Saimon and Muniri Amilal Mitha who testified as DW1 and DW2 respectively were not officers of the company, thus are not aware of the operation of the applicant's company. Looking at page 12 and 19 of the typed proceedings of the CMA, the mentioned witnesses were led by Mr. Peter Kamyalile, learned

advocate to give evidence in chief. At this stage, I believe Mr. Peter Kamyalile had full instruction from his client, the applicant before he withdrew thereafter. Thus, it is my view that the applicant had indeed knowledge of their presence and knew that they actually gave evidence. To dispute their evidence that they were not employee at this stage is afterthought.

The applicant complained that the arbitrator did not allow the applicant to call principal officers of the applicant. The argument was strongly disputed by the counsel for the respondents. It is on record that following the withdrawal of Mr. Peter Kamyalile, learned advocate to represent the applicant on 24/11/2020, the arbitrator granted 14 days for the applicant to find another counsel and the matter was adjourned till 7/12/2020. The applicant managed to find another counsel one Kessy, however on the date of hearing on 7/12/2020, Mr. Kessy had another matter at Resident Magistrate Court of Mbeya. He then wrote and filed a notice of absence and suggested for adjournment. Hon. Arbitrator ordered for the matter to resume at noon 2:30 pm for the hearing. When the matter was called on for hearing at 2:30 pm applicant had no any representation, then the arbitrator closed the case for the applicant and proceeded to call the respondents to call witnesses. It is the position of the labour laws (Labour Institutions-

Mediation and Arbitration Guidelines) GN 67/2007 that an Arbitrator of the CMA sitting on trial, has no powers, express on inherent, to close the parties' case without the consent of the parties. See the case of **MMI Tanzania (Pvt) Limited vs Nicole Clara Walter**, Labour Division, DMS, Revision No. 110 of 2016, 27/01/2017. In this case, it was stated further that an Arbitrator has the power to postpone or adjourn... and if, as in the present case, an Arbitrator feels that he could no longer grant an adjournment he has an inherent power and, in its discretion, call upon to the party to close its case, and if the party refuses, he may order that parties' case closed.

In the above case, it was also further stated that: -

> "In view of the above findings the order of the Arbitrator to close applicant's case on his will, is nothing but arbitrary deprivation of applicant's right to be heard and cannot be left to stand as it denied applicant's right to be heard. And the facts that this issue is sufficient to dispose of this revision application. So I do not think it is necessary to go into the two remained issues of revision."

The circumstances in the above case is similar to the instant case before me. I may say with strong conviction that this complaint by the applicant suffices to dispose this revision application as the applicant's right to be heard was denied without first hearing the applicant. I see no need to discuss remaining complaints by the applicant.

Consequently, the present application has merit, I invoke the power of this court and I quash and set aside the CMA awards and proceedings and order the CMA record be remitted to the CMA and expeditiously to be arbitrated afresh before a different Arbitrator of competent jurisdiction.

It is so ordered.

**D. B. NDUNGURU**

**JUDGE**

**12. 12. 2022**