

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

**APPLICATION FOR REVISION NO. 497 OF 2020**

**BETWEEN**

**FATUMA JAFARI MGASA..... APPLICANT**

**VERSUS**

**MANISH HOME NEEDS IND. LIMITED.....RESPONDENT**

(From the decision Commission for Mediation & Arbitration of DSM at Ilala)

(Ngwashi: Arbitrator) Dated 22<sup>nd</sup> October 2020 in Labour Dispute No.

CMA/DSM/ILA/926/19/01/2020

**JUDGEMENT**

**K. T. R. MTEULE, J.**

**15<sup>th</sup> & 28<sup>th</sup> March 2022**

This Revision application arises from the decision of Hon. Ngwashi, Y. the Arbitrator dated 22<sup>nd</sup> Day of October 2020 in Labour Dispute No. CMA/DSM/ILA/926/19/01/2020 instituted by employee **Ms. Fatuma Jafari Mgasa** (the Applicant) against her employer **Manish Home Needs Ind. Limited** (the Respondent). The Applicant is applying for this court to call for the records of the proceedings of the CMA for investigation on proprieties, correctness and legality and quash the said proceedings and reverse the award thereof dated 22<sup>nd</sup> October 2020.

To give an insight of the matter, a brief background is explained hereunder. The applicant was employed by the respondent on 20<sup>th</sup> September 2011 as a machine Operator. Her relationship with the Respondent turned bitter on 07<sup>th</sup> October 2019 when the applicant was accused of unlawful use of employer's property which was alleged to be misconduct. Basing on that alleged misconduct, on 8<sup>th</sup> October 2019 a warning letter was issued to the applicant. Being aggrieved with the same the applicant tabled a complaint before Regional Commissioner for the purpose of resolving the dispute. The step taken to RC office failed to bear fruits, hence the matter was filed at CMA. CMA decided that the matter was filed prematurely and proceeded to dismiss it. Aggrieved by the CMA decision the present application was filed before this Court with a view of seeking this Court to revise the said award. The Notice of application is supported by the Applicant's affidavit which contained the following legal issues for determination:-

1. Whether the trial Commission for Mediation and Arbitration was correct in holding that the dispute was prematurely filed before it without ordering the respondent to pay applicant's dues.

2. Whether the trial Commission for Mediation and Arbitration was proper in holding that the dispute before it was prematurely filed and dismiss it without keeping on its findings to the finality if there is still any existing employer/employee relationship between the parties.
3. Whether or not after the dispute was held to be prematurely filed it was proper for the commission for mediation and arbitration not to keep its findings that the respondent was bound legally to accept the applicant to resume on duty without any loss to the remuneration.
4. Whether at all times the respondent stopped salaries to the applicant still there was any existing employment contract between the parties.
5. Whether or not after the dispute held to be prematurely filed it was a proper remedy by the honorable first trial commission for mediation and arbitration to dismiss the complaint at that status without any further determination to the finality of employer/employee relationship between the parties without any observation to the illegally suspended remuneration rights by the respondent to the applicant.

When the application came for hearing, Mr. Rajabu, Personal Representative, appeared for the applicant, while Mr. Mlyambebele, Advocate appeared for the respondent.

Arguing for the application Mr. Rajabu remarked that since it is not disputed that the applicant was terminated without payment, the commission erred in law in holding that there was absenteeism to justify such termination while no disciplinary action was taken by the employer to confirm that allegation. Mr. Rajabu while citing the case of **Amina Ramadhani versus Staywell Apartment Limited** Rev. No. 461 of 2016, Nyerere, J. Pg 14, submitted that as the applicant was still in employment her abscondment without notice attracted disciplinary measures. He denied the allegation that the Applicant never reported at workplace. Supporting his argument, he cited more range of cases including the case of **Abas Sherally & Another v. Abdul Sultan Haji Mohamed Fazal Boy**, Civil Application No. 33 of 2002 (unreported).

It was further submitted by Mr. Rajabu that the CMA award do not have relevance in law in holding that the application was prematurely filed without considering that by all the time of the dispute and before and till the date of decision the rights of applicant in relation

to her employment was violated by the employer, including nonpayment of applicant's terminal benefits. He stated that on that weakness the CMA award is supposed to be revised on the ground that there is no ascertainment of employment relationship between the applicant and the respondent. He asserted that the Applicant was denied access to the office premises and no abscondence as alleged.

Disputing the application Mr. Mlyambebele submitted that the epicenter of this dispute at CMA was whether the applicant's employment was unfairly terminated. In putting the record proper, he stated that initially the Applicant was suspended for one week due to disciplinary action and thereafter, she presented her claim to the Regional Commissioner and the dispute was resolved by an agreement that the Respondent should accept the applicant back to work. In Mr. Mlyambebele's view, such agreement overturned the entire process of suspending the applicant.

Mr. Mlyambebele submitted further that on 25<sup>th</sup> October 2019 the respondent received a letter of applicant's resignation which was issued by **ESS Creative & Legal Foundation** basing on applicant's directives. According to him, that letter acknowledged that the dispute was already resolved at Regional Commissioner's Office. The

counsel averred that due to this the employer was surprised by the matter in court as the applicant acted contrary to what they agreed in resolving the dispute. He relied on **Exhibit M3 (Master Roll Book)** to justify the Applicant's decision of resigning by not attending and signing the office register.

On access to the workplace, Mr. Mlyambebele argued that this lacks merits as the applicant failed to state any other effort made after being blocked to have access to the workplace, even by reporting to the Regional Commissioner.

Regarding the right to be heard Mr. Mlyambebele submitted that the respondent acted fairly by being a good listener to all employees, including responding to Regional Commissioner's call to resolve the applicant's complaint. He challenged **Amina's Case** cited by the applicant by arguing that it addresses the issue of unfair termination and right to be heard while the matter at hand relates to applicant's suspension and not termination. He therefore submits that on that basis CMA was right to hold that the application was prematurely filed.

On procedural aspect challenging lack of disciplinary steps, Mr. Mlyambebele submitted that the respondent failed to take any further

legal action as the applicant opted to resign by serving the respondent with the resignation letter (Exhibit M4) on 25<sup>th</sup> October 2019 and the same has never been disputed and no complaint against Advocate (Specioza Ndunguru) who issued the resignation notice has ever been lodged to put into task the Advocate for having acted in absence of the Applicant's instructions. This confirms that this letter was issued basing on applicant' directives.

The applicant filed a rejoinder. Its contents will be taken into consideration while determining the substantive issues in this application.

Having gone through the CMA record, this Court's record, affidavit, counter affidavit and the final submissions by both parties the central issue for determination is derived from the issues identified in the affidavit. These legal issues can be condensed into 3 main issues for determination in this application. The said issues are:-

1. Whether the CMA was correct in holding that the dispute was prematurely filed before it without ordering the respondent to pay applicant's dues.
2. Whether the trial Commission for Mediation and Arbitration was proper in not making a finding if there is still any

existing employer/employee relationship between the parties at all the times when the respondent stopped salaries to the applicant.

3. To what reliefs parties are entitled to?

In addressing the above issues, I find it pertinent to answer the question as to whether the respondent did terminate the applicant's employment contracts. The applicant claims to have been terminated from the employment and therefore, the CMA erred in law in holding that there was absenteeism while there was no action taken by the employer on such absenteeism.

On other side the respondent maintained that after applicant being accused of unlawful use of employer's property (Misconduct), warning letter was issued which prompted the applicant to table the matter before Regional Commissioner for the purpose of resolving the dispute amicably. It is further claimed by the Respondent that the applicant opted to resign by serving employer with resignation letter on 8<sup>th</sup> October 2019 hence there was no termination at the instant of the Respondent.

Having perused the CMA record especially exhibit M1 (Warning letter) it's undisputed that warning letter was issued to the applicant on 8<sup>th</sup>



October 2019 regarding unlawfully use of employer's property. From that date when the said warning letter was issued the applicant seems to have not attended work till 12<sup>th</sup> October 2019 as per Exhibit M3 (attendance register).

What appears to have happened is the calling from Regional Commissioner issued to the respondent on 09<sup>th</sup> October 2019 which led to an attempt to resolve the dispute on 11<sup>th</sup> October 2019. Subsequently, on 25<sup>th</sup> October 2019 the resignation letter was served to the respondent. Although the resignation was disputed by the applicant, I got an opportunity to read the disputed resignation letter. In my view the language and the content of the said letter, impliedly show that the applicant was source of the information therein. As well I tend to agree with the Respondent's counsel that having no any legal action was taken against the Counsel from ESS Creative Legal Foundation for any forgery this automatically confirm that the letter was written at the instant of the applicant. It is an established principle that the one who allege must prove. (See the case of **Registered Trustees of Joy in the Harvest v. Hamza K. Sungura v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017, Tanzania Court of appeal (unreported). On that basis applicant's

allegation that the resignation letter was not issued by the applicant lacks substantiation. Since the applicant decided to resign as per Rule 6 (2) of the Employment and Labour Relation Act (Code of Good Practices) GN. No. 42 of 2007 and having found no evidence of termination adduced in the CMA, then I have no hesitation to answer the question that the applicant was not terminated by the respondent.

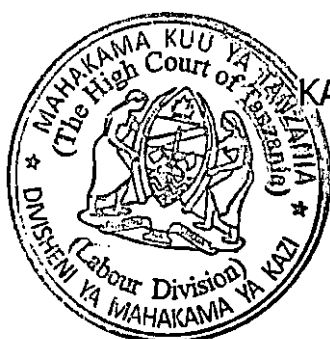
Having found no termination, I proceed to find as to whether the CMA was correct in holding that the dispute was prematurely filed without ordering the respondent to pay applicant's dues. The CMA justified its finding that the application was prematurely before with the ground that the termination did not take place. What was before the CMA was a claim arising from the alleged termination of applicant's employment. The CMA's jurisdiction is confined to what is brought before it. It could not grant relief out of what was sought basing on the purported termination. Since termination did not take place, the arbitrator was correct to find the matter prematurely brought with no further orders. The first issue is therefore answered in the affirmative that the CMA was correct in holding that the dispute

was prematurely filed before it without ordering the respondent to pay applicant's any dues.

The finding in the first issue is sufficient to answer the second issue. Since the Arbitrator found no termination at the instant of the Respondent and that it was the Applicant who decided to resign on her own will, this confirms the employment relationship between the applicant and the Respondent before resignation. The arbitrator correctly directed herself to this point. The second issue is automatically answered in accordance with the findings in the first issue.

With regards to relief, the applicant is asking for revision of the CMA Awards and quash the proceedings and reverse the awards. Since the allegation of termination was not substantiated and that the Arbitrator was correct in her findings, the Applicant cannot obtain the remedies sought in this application. In the upshot, the application is dismissed and the CMA award is hereby upheld. Each party to take care of their own cost.

Dated at Dar es Salaam this 28<sup>th</sup> Day of March, 2022.



KATARINA T. REVOCATI MTEULE

**JUDGE**

28/03/2022