

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
LABOUR REVISION NO. 170 OF 2022**

BIBI CHIKU MATESSA.....APPLICANT

VERSUS

BOARD OF TRUSTEES OF NATIONAL

SECURITY FUND (NSSF)..... RESPONDENT

*(Arising from the decision of the Commission for Mediation and Arbitration at Ilala in
Labour Dispute No. CMA/DSM/ILA/290/12/243)*

JUDGEMENT

S. M. MAGHIMBI, J;

The Applicant filed the present application seeking for the order to set aside the Ruling of the Commission for Mediation and Arbitration for Ilala ("CMA") in Labour Dispute No. CMA/DSM/ILA/R.833/17/398, issued on 29th April, 2022 in by Hon. Igogo M, Arbitrator. The applicant further prays for an order that the CMA proceed with arbitration hearing before another Arbitrator. The application was lodged under the provisions ofby a notice of application and a Chamber Summons supported by an affidavit of Ms. Flora Jacob, learned advocate representing the applicant dated 01st June, 2022.

The application emanates from the following background; the Applicant was employed by the respondent from 15/08/2005 as a Director of Human resources until on 11th July, 2017 when the applicant was

terminated from employment for negligence. Aggrieved by the termination the Applicant filed a labour dispute at the CMA alleging for unfair termination of employment. When the dispute commenced, the Respondent herein raised a Preliminary Objection to the effect that the CMA had no jurisdiction to determine the dispute because the Applicant is the public servant. The CMA sustained the preliminary objection raised and ruled that it had no jurisdiction to determine the matter. Again, being dissatisfied by the CMA's decision the applicant filed the present application.

The respondent challenged the application by filing his counter affidavit together with the preliminary objections which will be determined hereunder first before going to the merit of the application. The Preliminary Objections raised by were to the effect that: -

- i. That, the application is incompetent for being supported by defective affidavit which contains hearsay evidence.
- ii. That, the Affidavit in support of application is defective for containing an incurably defective verification clause.

Both the preliminary objections and main application were disposed concurrently by way of written submissions. Before this court, the applicant was represented by Ms. Flora Jacob, Learned Counsel whereas Ms. Selina I. Kapange, Senior State Attorney appeared for the respondent. In determination of this application, I will start by disposing the points of preliminary objection raised by the respondent and if need be, I will then determine the substance of the application.

Arguing in support of the first point of objection, Ms. Kapange submitted that the affidavit in support of the application was sworn by the applicant's advocate. That on para 12 of the affidavit, it shows that the deponent got the information from the applicant about one CHIELDRICK KOMBA. However it was only Komba's letter that was attached without attaching the affidavit thereto. She then submitted that they failed to understand the basis of attaching and mentioning the name of KOMBA at this stage of the case without attaching the affidavit of Chieldrick Komba. Her argument was that owing to the omission, the Applicant's affidavit contained hearsay evidence.

Ms. Kapange went on submitting that the affidavits are regulated by Order XIX Rule 3(1) and (2) of the Civil Procedure Code [Cap. 33 R. E 2019] which provides that:-

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his or her beliefs may be admitted: provided that, the grounds thereof are stated."

The counsel supported her arguments by citing several cases in which it was held that failure to file an affidavit of the persons named in the affidavit renders the facts in respect of that person to be hearsay and thus, extraneous. She further argued that the affidavit should not contain hearsay evidence and untrue statement, and supported this argument by citing numerous decisions including the cases of **Uganda Vs. Commissioner Of Prisons, Exaparte Matovu [1966] 1 EA 514**, and

that of **Ignazio Messina V. Willow Investment SPRL, Civil Application No. 21/2001** (unreported).

She then argued that all matters of hearsay and opinion are not accepted in evidence and that an affidavit being a substitute of oral evidence is bound not to include opinion and hearsay statements as per Order XIX Rule 3 (2) of the CPC. She urged the court to expunge paragraph 12 of the applicant's affidavit because the facts stated therein are not based on the personal knowledge of the deponent nor Bibi Chiku, the applicant therein.

Concerning the second point of preliminary objection, Ms. Kapange submitted that the application contains defective verification clause consequently offending the provisions of Order XIX Rule 3(1) and Order VI Rule 15(2) of the CPC. She submitted that the provisions of Order VI Rule 15(2) require every person verifying to specify by reference to the numbered paragraphs of the pleading what he/she verifies according to own knowledge and he/she verifies upon information received and believed to be true. She stated that in the affidavit supporting this application, the deponent verified all paragraphs to be true to the best of her own knowledge and belief while paragraph 12 she mentions one Chiedrick Komba, one of the Applicant's colleagues as the person who gave Applicant information concerning the attached letter annexed as "PS-8". She therefore, urged the court to struck out the application as it was decided in the case of **Anatol Peter Rwebangira vs Principle Secretary, Ministry of Defence & National Service (Civil Application 548 of 2018) [2019] TZCA 106 (10 May 2019)**. In conclusion, Ms. Kapange

prayed that the objections be sustained and the application be struck out for being incompetent.

Responding to the first preliminary objection, Ms. Jacob submitted that her affidavit which supports the Application has clearly indicated the source of information relied by the deponent. Further that the attached document annexure "PA-8" to the Applicant's affidavit clearly supports the Applicant's depositions. On the cited case of **Sabena Technics Dar Limited V. Michael J. Luwuzu, (supra)** he argument was that the case is distinguishable to the case at hand because in the said case, the facts were deposed in support of the closure of the company's operating office in Belgium due to Covid 19's lock down but it was found the annexures SAB-6 to paragraphs 10 and 11 of the said affidavit did not contain the matters deposed. That the decision is distinguishable from the case at hand because the deponent deposed the President's office refusal to entertain appeal from Chiedrick Komba against the decision of the Public Service Commission and document in support of the said deposition was attached as Annexure "PA-8". Further that the deponent Flora Jacob never stated in her affidavit that she obtained the said information from Chiedrick Komba. She went on submitting that the source of information under paragraph 12 of the Applicant's affidavit against which the Respondent's objection is centered, was disclosed under verification clause as the Applicant Bibi Chiku Matesa and not from Chiedrick Komba as alleged by the Respondent. It was further submitted that whether the Applicant was knowledgeable of the facts deposed is a matter of evidence which cannot be disposed of by way of preliminary objection.

On the cited case of **Uganda vs. Commissioner of Prisons, Exparte Matovu and Ignazio Massina v Willow investment SPRL (supra)** Ms. Jacob submitted that the case is also irrelevant, distinguishable and inapplicable to the case at hand because in the present case, all the facts in support of the affidavit are true and the contents of paragraph 12 of the Applicant's affidavit are properly verified as based on information obtained from the Applicant. She argued that there is nothing false and nothing hearsay under paragraph 12 of the Applicant's affidavit. She then submitted that the provision of Order XIX Rule 3 (1) and (2) of the CPC cited by the Respondent's counsel is inapplicable at this juncture because there is no any lacuna in Labour Court Rules regarding affidavits because affidavit before the Labour Court is governed by the provisions of Rule 24 (3) of the Labour Court Rules, GN NO. 106 of 2007. She also supported her submission by the case of **Daud Godfrey Macha V. Mek One General Traders, Misc. Application No. 387 of 2019** (unreported), praying that the first preliminary objection be overruled.

Submitting in alternative, Ms. Jacob submitted that even if paragraph 12 of the Applicant's affidavit is said to be defective, a fact which is denied, such defect does not render the whole affidavit defective because the law is very clear that the defective paragraph has to be expunged and remain with the other paragraphs. She supported her argument by citing the decision of the Court of Appeal in the case of **Jamal S. Nkumba & Another vs Attorney General (Civil Application 240 of 2019) [2021] TZCA 756 (15 December 2021)** where it was held at page 9 that: -

"....., we are in total agreement with Mr. Rumisha that the paragraph with extraneous matters ought to be expunged from the record. It is now settled that an offensive paragraph can be expunged or disregarded and the Court can continue to determine the application based on the remaining paragraphs if the expunged paragraph is inconsequential"

Ms. Jacob submitted that if this court will find paragraph 12 of the applicant's affidavit to be inconsequential/defective, then the same be expunged and continue hearing the application basing on the remaining paragraphs.

Regarding the second preliminary objection Ms. Jacob submitted that the verification clause in question is perfectly in order and according to the law governing verification clauses in affidavits. Citing the decision of the Court of Appeal's in the case of **JAMAL S. MKUMBA and another V. ATTORNEY GENERAL, (supra)** at page 10 while citing the case of **Director of Public Prosecution v. Dodoli Kapufi and Patson Tusalile** states that; -

"... verification clause is part of an affidavit which "show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs"

Ms. Jacob submitted that the Applicant's affidavit in this case met all the requirements of the law on proper verification of an affidavit. That the deponent specified the information based on her own knowledge and those based on information obtained from Bi Chiku Matessa, the Applicant herein.

She submitted further that the issue whether the Applicant was knowledgeable of the facts deposed is a matter of evidence which cannot be disposed of by way of preliminary objection. Ms. Jacob further submitted that the case of **Anatol Peter Rwebangira V. The Principal Secretary, Ministry Of Defence And National Service** (supra) cited by the Respondent's counsel is distinguishable and inapplicable in the circumstances of this case because in that case the Applicant never specified which facts were based on his own knowledge and which were based on belief. Ms. Mkumba argued that even if the verification clause to the Applicant's affidavit is said to be defective, such defect does not render the Applicant's application incompetent in the light of the rule in oxygen principle of overriding Objective as was decided in the case of **JAMAL S. MKUMBA & another vs. AG (supra)** and the case of **Sanyou Service Station Ltd vs BP Tanzania Ltd (now Puma Energy T. Ltd) (Civil Application 185 of 2018) [2019] TZCA 144 (20 May 2019)**.

Ms. Jacob concluded that the respondent's preliminary objection has not passed the test of the nature of a preliminary objection as lucidly explained in the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) E.A 696**. She therefore urged the court to overrule the same and proceed with the application on merits.

Having considered the rival submissions of the parties, I will start with the first preliminary objection. Ms. Kapange argued that the applicant's affidavit is defective because it contains hearsay evidence whereby at paragraph 12 of the applicant's affidavit, the deponent mentioned the applicant's colleague namely Chieldrick J. Komba while the

affidavit of the named person was not attached to this application. For easy of reference the affidavit in question states as follows:-

"That, further to the above facts, it is averred that, one of the applicant's colleague namely CHIELDRICK J. KOMBA who was also terminated by the respondent referred his Labour dispute to the Public Service Commission which appeal was dismissed by the Commission through its letter dated 05/01/2018 and further appealed to the President's office of the United Republic of Tanzania and consequently, on 15th October, 2018 the President's office responded to his appeal by directing him to refer his labour dispute and seek remedies according to the laws governing the respondent. Copies of the letters from the President's office and Public Service Commission dated 15/10/2018 and 05/01/2018 respectively, attested to the above stated facts is annexed hereto and marked as ANNEXTURE "PA-8" collectively, which leave of this Court shall be craved for it to form part of this Affidavit".

The above paragraph stated that the applicant's colleague appeal was dismissed by the Public Service Commission referring them to the CMA. The deponent further attached the letter of the said dismissal to prove the assertion. Under such circumstances, it is my view that the allegation of hearsay evidence cannot apply. The information would have been hearsay if the letter was not attached, but to the contrary, the letter is there to prove existence of the deponed information hence the oral evidence was excluded by the attached documentary evidence contents and existence of which were not denied by Ms. Kapange. Furthermore,

taking into consideration that the applicant was the Director of Human Resources she had access to the deponed information because of her position. Thus, such information is not hearsay as the respondent's counsel wish this court to believe.

I have also considered the cases cited by the counsels, decisions cited by Ms. Kapange indeed, as submitted by Ms. Jacob the same are distinguishable to the circumstances at hand because the information contained in the contested paragraph 12 of the applicant's advocate are not hearsay as alleged.

Regarding the second preliminary objections, looking at the verification clause at hand the deponent deponed that the information contained at paragraph 12 of the affidavit in question was the information obtained from the applicant. Therefore, the source of information was specifically stated in the relevant verification clause thus, the submissions thereto and the cited cases are irrelevant to the matter at hand. On the basis of the above findings, both preliminary objections are hereby overruled. The matter is ordered to proceed on merit.

Coming to the merits of the application, the applicant raised the following grounds for revision: -

- (i) Whether it was proper for the Honourable Arbitrator to disregard the principle of *functus officio* by entertaining and determining the point of preliminary objection regarding the CMA jurisdiction previously determined by the CMA in the matter.

- (ii) Whether it was proper for the Honourable Arbitrator to dismiss the Applicant's referral dispute on ground that the CMA lacks jurisdiction to entertain the Applicant's dispute on ground that the Respondent is a public institution.
- (iii) Whether it was proper for the Honourable Arbitrator to disregard the law and regulations governing labour disputes procedures at the Respondent's workplace.
- (iv) Whether it was proper for the Honourable Arbitrator to hold that the law applicable to the Applicant's dispute was the Public Service Act while that was a contentious matter under the CMA Form No. 1

I will start with the first ground whether it was proper for the Honourable Arbitrator to disregard the principle of *functus officio* by entertaining and determining the point of preliminary objection regarding the CMA jurisdiction previously determined by the CMA. Ms. Jacob submitted that the principle of *functus officio* bars the same court from entertaining and determining the same matter which was already disposed. She cited the decision of the High Court Commercial Division, while determining the issue like the one at hand, in the case of **Kogel Fahrzeugwerke Vs. Liberty Transcargo Limited; Misc Commercial Application No 288 of 2015** (unreported) where it was held at page 13-14: -

"the maxim functus Officio is that no Court when it has signed its judgment or final order disposing of a case, shall alter or review

the same except to correct a clerical or arithmetical error. This section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court, in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a prayer with the same relief unless formal order of final disposal is set aside by the Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment a final order disposing of the case is signed."

(Emphasis underlined).

She further cited the decision of this court where the same position was maintained by Hon. Maghimbi J., in the case of **Amina M. Abdallah Vs. Board Of Trustees Of The National Social Security Fund (NSSF), Revision No. 421 of 2021**, High Court of Tanzania, Labour Division at Dar es salaam.

Ms. Jacob submitted that in the case at hand, the CMA had already entertained and determined the preliminary point of objection regarding its jurisdiction to determine the Applicant's dispute in Labour Dispute No. CMA/DSM/ILA/R.833/17/398 whose ruling was issued on 16th April, 2018 by Hon. Mkombozi, Z.B, Mediator. She stated that the respondent unsuccessfully filed numerous applications before this court to challenge the mentioned CMA's decision. She went on to submit that when the matter was remitted to proceed at the CMA, again the respondent raised the preliminary objection on CMA's jurisdiction and the Arbitrator wrongly determined the same relying on the recent decision of the Court of Appeal

of Tanzania in **Tanzania posts Corporation verses Dominic A.Kilangi, Civil Appeal No. 12/2022**. She argued that the Honourable Arbitrator failed to consider that the said decision cannot apply for the issue of jurisdiction had already been determined 4 years back since 2018 which is the same position stipulated by this court in the cited case of **Amina M. Abdallah (Supra)**.

In reply, Ms. Kapange did not make much of substantive submission on whether the CMA was unctuc officio to entertain the matter. She just reiterated her submission on the issue whether the applicant was a public servant. She did not, deliberately so, make any reply submission on the issue of fuctus officio other than insisting that the CMA dismissed the application by obeying to the case of **Tanzania Posts Corporation Vs Dominic A. Kalangi** (supra) hence the matter was not fanctus officio.

Having considered those submission, and having perused the records of this application, the CMA records shows that at the CMA, the respondent herein raised a preliminary objection to the effect that the CMA had no jurisdiction to entertain the application. The said preliminary objection was determined by Hon. Mkombozi, Z on 16/04/2018 who overruled the said preliminary objection and ordered the matter to proceed. The matter was then referred to this court by the respondent and registered as Revision No. 482/2018, Revision No. 302/2019 and Revision No. 612/2019 and in all those revisions, the matter was not decided on merits. The last revision was Revision Application No. 612/2019 in which this Court (Hon Aboud J) dismissed the application for want of prosecution and the parties went back to the CMA to proceed with the matter on

merits. During the proceeding of arbitration, the same objection was raised again and this time it was sustained. The question is whether it was proper for the CMA to reopen the matter (the objection) already determined by it. The answer is simply NO! it was not proper for the CMA to re-entertain the same objection as it had already become functus officio on the matter. As held in the cited case of of **Kogel Fahrzeugwerke Vs. Liberty Transcargo Limited** (Supra):

This section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court, in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a prayer with the same relief unless formal order of final disposal is set aside by the Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment a final order disposing of the case is signed.

From the above holding, even the CMA, being a quasi judicial body is bound by the principles of natural justice and fair hearing and other principles governing the proper and just functioning in dispensation of justice. Therefore once the CMA has disposed of a matter, it becomes functus officio and is disentitled to entertain the same prayer or the same reliefs. Since the respondent had raised an objection about jurisdiction and the same was overruled, it cannot be raised again at the same court because that will be a battle of whose thinking is better than the other instead of whether it was properly determined or not. Similar circumstance of this nature was decided in the case of **AMINA M. ABDALLAH VS,**

BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND (NSSF) (supra) where the court held that:-

"on the above set principle, I will urge the CMA not to entertain the conduct of overruling their decisions simply because one arbitrator thinks he has a better version of finding than the previous one. The principle of functus officio is on all decisions whether one finds them to be wrong or not, let the higher court determine that"

The fact that the matter was already determined by another Arbitrator, the predecessor Arbitrator had no jurisdiction to redetermine the same as they all have concurrent jurisdiction. Owing to that, the CMA (Hon. Igogo, Arbitrator) fell into error when she entertained the same issue of jurisdiction already determined by her fellow arbitrator (Hon. Mkombozi). Consequently, the ruling of the CMA dated 29/04/2022 is hereby quashed and set aside. The Labour Dispute No. CMA/DSM/ILA/R.833/17/398 is hereby remitted back to the CMA to proceed with Arbitration hearing before another Arbitrator with competent jurisdiction to entertain the matter.

It is so ordered.

Dated at Dar es Salaam this 03rd November, 2022.




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S.M. MAGHIMBI
JUDGE