

**IN HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 313 OF 2020**

**BETWEEN**

**ROSE ONGARA & 2 OTHERS ..... APPLICANTS**

**AND**

**NATIONAL HEALTH INSURANCE FUND ..... RESPONDENT**

**JUDGMENT**

Date of last order: 28/3/2022

Date of judgment: 31/3/2022

**B. E. K. Mganga, J**

Rose Ongara, the 1<sup>st</sup> applicant, Jane Kijazi Nchimbi, the 2<sup>nd</sup> Applicant and Godfrey Semwenda, the 3<sup>rd</sup> applicant, on divers' dates entered into a three years fixed term contract of employment with the respondent. The three years fixed term contract of employment between Rose Ongara, the 1<sup>st</sup> applicant and the respondent started on 1<sup>st</sup> July 2013 and expired on 30<sup>th</sup> June 2016. The three years fixed term contract of employment between Jane Kijazi Nchimbi, the 2<sup>nd</sup> applicant and the respondent started on 1<sup>st</sup> May 2013 and ended on 30<sup>th</sup> April 2016 while that of Geofrey Semwenda, the 3<sup>rd</sup> applicant started on 12<sup>th</sup> May 2013 and ended on 11<sup>th</sup>

May 2016. It is said that six months' before expiry of the said three years fixed term contracts of employment, applicants, in terms of article 19.1 of their fixed term contract, notified the respondent their intention of renewal of the said contract as required, but the later did not reply. It is said that applicant continued to work even after expiry of their fixed term contract believing that their applications for renewal was granted by the respondent. It is said further that, in July 2016, respondent asked the applicants to sign a Six (6) months' fixed term of employment instead of renewing the said three years fixed term contracts of employment. Applicants declined to sign the said six months' fixed term contracts of employment.

On 29<sup>th</sup> November 2016, applicants filed labour dispute No. CMA/DSM/TEM/540/210/44/2017 before the Commission for Mediation and Arbitration henceforth CMA at Temeke claiming to be paid TZS 3,280,450,514.17 on ground that respondent breached their contracts. In the CMA F1, applicants showed that the dispute arose on 14<sup>th</sup> July 2016. Together with the said CMA F1, applicants filed an application for condonation. On 11<sup>th</sup> February 2019, Hon. Massawe Y, arbitrator, having heard evidence of the parties, issued an award that the applicants terminated contract with the respondent and that they did not follow

grievance procedures provided for under the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 and dismissed the claims by the applicants.

Aggrieved by the said award, applicants filed this application seeking the court to revise it. In paragraph 3.6 of the affidavit in support of the application sworn by Kalaghe Rashid, advocate, he deponed that at CMA applicants were seeking compensation for unfair termination. In the said affidavit, learned counsel for the applicants, deponed and raised seven(7) grounds namely:-

- 1. The honourable arbitrator misconceived the fact that the grievance was reported to the management but remained unresolved.*
- 2. The honourable arbitrator arrived at a decision without analyzing and giving consideration to the six-months' contract which the employer issued to the employee that resulted to breach of Employment contract.*
- 3. That the honourable arbitrator in the award misconceived the fact that the complaint before the commission did not bar the Board (Employer) from dealing with the complaint.*
- 4. The CMA award has material irregularities and illegalities since the arbitrator misconceived that the complainant/applicants did not follow the grievance procedures.*
- 5. The honourable arbitrator erred in law by disregarding the notice issued by the complainant to review the contract (P3, 712, P19) manifested the intention to continue with the employment.*
- 6. That the honourable arbitrator's award did not focus on the circumstances which caused employment of the applicants to cease.*

*7. That the commission for mediation and arbitration (CMA) award was procured with material irregularities and illegalities.*

The respondent opposed the application and in so doing filed the counter affidavit sworn by Erigh Rumisha, State Attorney. In the counter affidavit, Mr. Rumisha deponed that applicant claimed compensation based on breach of contract and not termination of contracts of employment.

When the application was called for hearing, Mr. Kalaghe Rashid, Advocate, appeared and argued for the applicants while the respondent was represented by Erigh Rumisha, State Attorney.

In arguing the 1<sup>st</sup> ground of revision namely, that the arbitrator arrived at her decision without taking into consideration that the six months contract was not valid at that time, Mr. Rashid, learned counsel for the applicants submitted that applicants and respondent had a fixed term contract that commenced on 1<sup>st</sup> July, 2013 for 1<sup>st</sup> applicant ending on 30<sup>th</sup> June, 2016. This was three years fixed term contract. That the three years fixed term contract of employment for the 2<sup>nd</sup> applicant started on 1<sup>st</sup> May 2013 and expired on 30<sup>th</sup> April 2016. That, the three years fixed term contract of employment for the 3<sup>rd</sup> applicant commenced on 12<sup>th</sup> May 2013 and expired on 11<sup>th</sup> May 2016. Counsel for the applicants submitted that applicants were terminated on 19<sup>th</sup> July 2016, but he conceded that there

is no termination letter. Counsel for the applicants submitted further that, after expiry of the said contracts, applicants initiated renewal of contract but respondent did not respond as a result, applicants continued to work and continued to receive their salaries. Contrary to their expectation, they received a contract showing that their contracts were renewed for six months only. Counsel for the applicants submitted that applicants were in a dilemma whether; their contracts were renewed for six months or three years. During his submissions, counsel for the applicants conceded that no contracts of three years were served to the applicants. Counsel argued that by virtue of clause 19(1) of their employment contract (exh. P1), there was an automatic renewal of the contract. The act of the respondent to require the applicants to sign a six-month contract amounted to breach of contract. Counsel argued further that the course of action arose on 19<sup>th</sup> July 2016 when applicants were served with six months' fixed term contracts of employment. Counsel submitted further that the dispute was filed at CMA on 28<sup>th</sup> November 2016 and that CMA F.1 was signed by Rose Ongara, the 1<sup>st</sup> Applicant alone after she had obtained mandate from other applicants on 24<sup>th</sup> November 2016.

On the 2<sup>nd</sup> ground, Mr. Rashid, counsel for the applicants submitted that arbitrator did not take into consideration that applicants reported the dispute to the management as part of grievance procedure and that the same remained unresolved. Counsel submitted that by failure of the respondent to respond to the applicants' letters means that she was not ready to solve the dispute internally.

On 3<sup>rd</sup> and 4<sup>th</sup> grounds, counsel for the applicants submitted that arbitrator failed to consider the fact that applicants had intention to renew the contracts. Counsel submitted that applicants notified the respondent that they had intention to renew the contracts six months prior expiry of their contracts. Mr. Rashid submitted that there was automatic renewal of the said three years fixed term contracts after failure of the respondent to respond to the notices of renewal of contracts by the applicants. He submitted that employer/respondent was supposed to reply to the notice of applicants informing them that she is not willing to renew their contracts. Counsel for the applicants cited this court's decision in the case of ***Kinondoni Municipal Council v. Maria Emmanuel Rungwa, Revision No. 375 of 2019*** (unreported) to support his argument that, that failure to reply by the respondent amounted to automatic renewal of the said three years fixed term contracts. Counsel for the applicants submitted

further that there was legitimate expectation of renewal of contracts of the applicants.

On the last ground i.e., that arbitrator misconceived the fact that the complaint by the applicants at CMA did not bar the Board from dealing with the complaint internally. Counsel for the applicants submitted that, Arbitrator held that respondent did not reply to the notice of the respondents due to absence of the board, but the person who is mandated to approve extension or otherwise of the contracts of the applicants, is the Director General. Counsel for the applicants concluded by praying the the application be allowed by revising the CMA Award.

On his side, Mr. Rumisha, State Attorney for the respondent, prayed for dismissal of the application. State Attorney submitted that there is no official termination letter from the respondent. State Attorney went on that, applicants resigned as per resignation letters as exhibits P5, P15, and D5. Mr. Rumisha submitted further that the said resignation letters are dated 19<sup>th</sup> July 2016 and are clear that applicants stated that they will stop to attend at work from 20<sup>th</sup> July 2016. State Attorney submitted that applicants did not attend at work for the alleged three years contracts they allege were automatically renewed after the respondent had failed to respond to their notices of renewal. State Attorney submitted that

applicants absconded from work. He however conceded that there is no termination letter based on abscondment because applicants tendered resignation letters and stopped to attend at work.

Mr. Rumisha State Attorney conceded that applicants had three years fixed term contracts of employment with the respondent and that they prayed for renewal. State Attorney argued that it was the Board that was supposed to renew their contract, but there was no board at that time its time expired and was yet to be appointed. State Attorney conceded further that, applicants continued to work even though they did not receive a reply to their notice of renewal. State Attorney submitted further that when the board came in place, it granted six months contract to applicants waiting change of the structure of the contract from fixed term contract to permanent contract. He submitted that applicants refused to sign the said six months contract instead tendered resignation letters. State attorney argued that if applicants had three years fixed term contacts of employment, the issue is, who terminated those contracts.

In rejoinder, Mr. Rashid submitted that applicants went to CMA to get interpretation as they found themselves with two different contracts namely; (i) the six months fixed term contracts and (ii) three years fixed term contracts that were automatically renewed. He however conceded



that in CMA F1, applicants did show that the dispute is based on breach of contracts and not on interpretation of the said contracts. Counsel conceded further that it is true that applicants refused to sign the six months fixed contracts of employment. He conceded that there was no Board, but he was quick to submit that the Permanent Secretary Ministry of Health and the Director General of the respondent were supposed to approve employment contracts of the applicants. Counsel for the applicants conceded further that it is true that applicants wrote resignation letters after respondent had failed to respond to their complaints.

At the time of composing the judgment and after my careful examination of the CMA record, I found that Jane Kijazi Nchimbi, 2<sup>nd</sup> applicant did not testify. Instead, a power of attorney was filed at CMA allowing Rose Ongara, the 1<sup>st</sup> applicant who testified as PW1, to testify on behalf of Jane Kijazi Nchimbi as PW3. I therefore invited counsels of both sides to address the court as whether that procedure was proper and the effect thereof.

Responding to the issue raised by the court, Mr. Rashid counsel for the applicants submitted that that procedure is proper because Rose Ongara was granted power of Attorney and that with the said power of Attorney, she had power to step into shoes of Jane Kijazi Nchimbi. Counsel

for the applicants submitted that after the power of Attorney was granted to Rose Ongara by Jane Kijazi Nchimbi, the said Rose Ongara became competent to testify on behalf of Jane Kijazi Nchimbi. When he was asked by the court as whether the said power of Attorney authorized Rose Ongara to testify on behalf of Jane Kijazi Nchimbi, counsel for the applicant submitted that it was silent. He quickly submitted that by virtue of Rule 2(a) of Order III of the Civil Procedure Code [Cap. 33 R.E. 2019] Rose Ongara was a recognized agent and therefore qualified to testify on behalf of Jane Kijazi Nchimbi. Counsel went on that a foundation was raised that the said Jane Kijazi Nchimbi was outside the United Republic of Tanzania. When asked by the court as who raised that foundation, counsel readily conceded that it was the learned counsel for the applicant, who was not a witness. He conceded further in her evidence, when Rose Ongara was testifying as PW3 on behalf of Jane Kijazi Nchimbi, she said nothing in relation to the whereabouts of the said Jane Kijazi Nchimbi. In further questions by the court, counsel conceded that there is no evidence showing the whereabouts of Jane Kijazi Nchimbi because words uttered by counsel were not evidence. Counsel conceded that it is only the address on the power of Attorney that shows Brazil but that does not prove that at that time she was in Brazil.

Counsel impressed the court that Rose Ongara competently testified on behalf of Jane Kijazi Nchimbi because they were working together and terminated together and further that the former had knowledge of the facts she testified hence gave direct evidence as PW3. Counsel for the applicant cited the case of ***DPP v. Mizrai Pirbakish @ Haji and 30 Others, Criminal Appeal No. 493 of 2016, CAT*** (unreported) and submitted that the Court of Appeal has widened the scope of who can testify arguing that every person with knowledge of the facts can testify. Later on, Mr. Rashid, upon reflection, conceded that Rose Ongara was not competent to testify on behalf of Jane Kijazi Nchimbi on matters relating to employment of the latter.

The court took a liberty to ask Rose Ongara as to whether the said power of attorney gave her power also to testify on behalf of Jane Kijazi Nchimbi. Her reply was that she doesn't know whether it gave her that power or not. The court took further liberty to summon and ask Bakaru Henry advocate who drafted and witnessed the said power of Attorney being executed and asked him a similar question in presence of the parties. Mr. Henry learned counsel submitted that it impliedly gave power to Rose Ongara to testify but later submitted that the wording of the said power of

Attorney does not give power to Rose Ongara to testify on behalf of Jane Kijazi Nchimbi.

Responding to the issue raised by the court, Mr. Rumisha, State Attorney submitted that that was an irregularity. He submitted that there is no proof that Jane Kijazi Nchimbi was outside the country and that all what was testified by Rose Ongara as PW3 on behalf of Jane Kijazi Nchimbi was hearsay hence inadmissible. State Attorney submitted that the said evidence should be disregarded, and the court should only consider evidence of Rose Ongara testifying as PW1 and that of Godfrey Semwenda (PW2) on behalf of the applicants.

Mr. Rumisha, State Attorney submitted further that the said power of Attorney did not expressly grant power to the said Rose Ongara (PW1) to testify as PW3 on behalf of Jane Kijazi Nchimbi. State Attorney submitted further that *Mizrai's case* does not apply in the circumstance of the application at hand.

From the evidence in the CMA record and submissions of both sides, it is undisputed that applicants notified the respondent of their intention to renew their three years fixed term contracts and that there was no response from the respondent because the Board that was supposed to decide, was yet to be appointed as its tenure had expired. It is also undisputed that

applicants continued to work without signing new fixed term contracts. It is also undisputed that after appointment of the Board, applicants were served with a six months' fixed term contracts which they refused to sign. It was submitted by counsel for the applicants that claims of the applicants were based on unfair termination. This submission was countered by State Attorney who argued that at CMA, claims by the applicants was based on breach of contract. With due respect to counsel for the applicant, the claims of the respondents at CMA were based on breach of contracts and not on unfair termination. This is clearly shown in the CMA F1. It is my view that, all submissions that there was legitimate expectation for renewal, intending to show that applicants were unfairly terminated are without substance in the circumstances of the application at hand.

It was further submitted by counsel for the applicants that applicants filed the dispute at CMA seeking interpretation as they found themselves with two different contracts namely (i) the six months fixed term contracts and (ii) three years fixed term contracts that were automatically renewed. I have held hereinabove that the complaints by the applicants at CMA was based on breach of contract. Therefore, the submission that they were seeking interpretation as which between the six months' fixed term contracts and three years fixed term contracts they should be bound lacks

legs on which to stand. My view is further fortified by the truth that it is undisputed that applicants refused to sign the said six months' fixed term contracts hence they cannot be bound with them. In other words, there is no six months' fixed term contracts that was existing between the applicants and the respondent that could have been a subject of interpretation at CMA or before this court.

As the applicants continued to work after expiry of their three years fixed term contracts and after they had served the respondent with notice of renewal, I hold that impression was made in the minds of the applicants that renewal will be for the same three years fixed term. This turned to be opposed as applicants were asked by the respondent to sign a six months' fixed term contracts. Reasons for change from three years fixed term contracts to six months' fixed terms contracts were given by Bernard Konga (DW1) in his evidence that the controller and Auditor General in his report (exh.D1), observed that based on the respondent's current experience and the results of the actuarial projection, assets of the respondent will not be able to cover the total expenses by the year ending 30<sup>th</sup> June 2028. DW1 testified further that based on that report, the Board directed that all employees of the respondent save for the Director General should be employed on permanent basis and that their performance be

annually evaluated, instead of employing them under fixed term contracts of employment as shown in the minutes of the Board (exh. D2). DW1 testified further that, the board directed that organization structure of the respondent be reviewed and that the same was reviewed as shown in the organization structure review -final report (exh. D3). In his evidence, DW1 testified in chief that the Board, that is mandated to employ employees of the respondent decided that all employee with fixed term contracts that has expired be issued with six months' fixed contracts pending procedures of changing the nature of their employment from fixed to permanent. This evidence was not contradicted during cross examination. The arbitrator believed that evidence and I find no reason for disbelieving it.

On the other hand, Rose Ongara (PW1) while giving her evidence in chief stated that, she was notified by the respondent through exhibit P4 that the Board in its meeting held on 1<sup>st</sup> July 2016, decided that she was supposed to sign a six months' fixed term contract. PW1 stated further that she did not sign the said six months' fixed term contract. While under cross examination, PW1 admitted that the Board is responsible with her employment matters. She admitted further that at the time of serving the respondent with a notice to renew the contract, the Board was not there. When she was asked by the arbitrator as when she was given the said six

months' fixed term contract to sign and when was her last date to go to office, PW1 responded that the said six months' fixed term contract was served to her on 14<sup>th</sup> July 2016 and that her last date to go in office was on 18<sup>th</sup> July 2016. PW1 stated further that she did not go in office because she did not sign the said six months' fixed term contract and that she believed that the three years fixed term contract had expired. PW1 stated that she did not go to office because she did not sign the said six months' fixed term contract although there was no condition that there was neither a person who told her not to attend at office nor a condition in the said six months' fixed term contract barring her from going in office.

In his evidence, Godfrey Semwenda (PW2), the 3<sup>rd</sup> respondent testified under cross examination that his employment issues were being handled by the Board and that at the time he prayed to renew his contract there was no Board. He testified that the six months' fixed term contract was issued to him by the Board after its appointment in June 2016. PW2 admitted that there was no clause in the three years fixed term contract showing that any renewal has to be for the same three years. PW1 admitted further that he did not sign the said six months' fixed term contract and stopped to go to office on 20<sup>th</sup> July 2016 because the employer changed the contract from three years to six months. PW2



admitted that the Controller and Auditor General issued a report suggesting changes of administrative structure of the respondent to reduce cost.

As stated hereinabove, Jane Kijazi Nchimbi, 2<sup>nd</sup> applicant did not testify, instead, Rose Ongara (Pw1) allegedly acting on the power of attorney issued to her by the former testified also as PW3. Rose Ongara testifying as PW3 under power of Attorney stated the three years fixed contract of Jane Kijazi Nchimbi expired, and that the latter wrote to the respondent a notice to renew but there was no reply. That later, Jane Kijazi Nchimbi was required by the respondent to sign a six months' fixed term contract, which she refused to sign. While under cross examination, Rose Ongara stated that, after refusal to sign the said six months' fixed term contract, Jane Kijazi Nchimbi stopped to go in office. Rose Ongara admitted further that Jane Kijazi Nchimbi was not served with termination letter.

But before I embark on to deal with rival issues between the parties, I should point albeit briefly one procedural issue that appears to be strange in this application namely one witness testifying twice in two different capacities as PW1 and PW3 in the same proceedings. Rose Ongara, 1<sup>st</sup> applicant testified as PW1 and later acting on the purported power of Attorney of Jane Kijazi Nchimbi as PW3. The CMA record shows that Rose Ongara testified as PW3 on behalf of Jane Kijazi Nchimbi on 18<sup>th</sup> December

2018. I have examined the purported Power of Attorney and find that it was neither marked nor shown the date it was filed and received by the arbitrator at CMA. The said Power of Attorney is shown that it was executed in Dar es salaam on 10<sup>th</sup> June 2017 before **Bakaru Henry**, advocate, Notary Public and Commissioner for Oaths and that it was registered under the **Registry of Documents on 4<sup>th</sup> December 2018**.

The purported power of Attorney reads: -

*By this Power of Attorney I, Jane Kijazi Nichimbi holder of Passport Number AD008304 of Qi 13 Conjunto 08 casa 13, Lao Sul. Zip Code 71635080, Brasilia-Brazil; complainant in Labour Dispute no. CMA/DSM/TEM/S40/2016, Rose Ongara & 2 Others versus National Health Insurance Fund (the "Suit) pending in the Commission of Mediation and Arbitration (CMA) in Dares Salaam Do **Hereby** nominate and appoint my co-complainant **Rose Ongara**, holder of Passport Number AR73845A of Kwembe, of near Babro Johansson Girls Secondary School, P. O. Box 10072 Dares Salaam - Tanzania to be my attorney for me, in my name and on my behalf to do all or any of the acts and things in connection with the suit as mentioned below:-*

- 1. To represent me before CMA or in any other court or authority where the suit transferred in connection with the said suit;*
- 2. To engage or appoint any counsel, advocate, pleader or lawyer to conduct the said suit;*
- 3. To prosecute the said suit and proceedings, to sign and verify all pleadings, applications, petitions or document before CMA, to deposit, withdraw and receive document and money from the Defendant either in execution of the*

*award or otherwise and sign and deliver proper receipt for me and discharges of the same;*

- 4. To apply for inspection and inspect documents and records and to obtain copies of documents;*
- 5. To compromise the suit in such a manner as the attorney thinks fit; and*
- 6. To do generally all other acts and things for the conduct of the said suit as I could have done the same if I were personally present.*

*And I hereby for myself, my heirs, executors, administrators and legal representatives, ratify and confirm and agree to ratify and confirm whatsoever my said attorney shall do or purport to do by virtue of these presents.*

*In Witness Whereof I have duly executed this instrument in the date, month and year herein below appearing..."*

From the quoted purported power of Attorney, it is clear in my mind that, Rose Ongara was not specifically given power to testify in the dispute that was pending at CMA. Had the said Jane Kijazi Nchimbi so intended, she could have so specifically stated. There is no foundation raised in the CMA record as to why the said Jane Kijazi Nchimbi could not appear and testify. Whatever the case, in my view, it was not proper for Rose Ongara (PW1) to testify also as PW3 on behalf of Jane Kijazi Nchimbi. This being a labour dispute, the person who was able to know what happened to her employment is Jane Kijazi Nchimbi herself and not any other person even if they were working in the same office. I am of that view because employment issues go to personal and cannot be by representation. My

position is fortified from what was testified by Rose Ongara as PW3 on behalf of Jane Kijazi Nchimbi while under cross examination as she was recorded stating:-

*"...S/J- umesema Jane, alikuwa Meneja Rasilimali watu? Ndiyo.*

*S/J- Tunaamini wewe unajua vizuri kuwa jane anajua sheria za kazi (ukiwa umevaa viatu vya jane)?. Siwezi kujua vizuri.*

*S/J- Ukiwa meneja mwajiri, mtumishi ambaye hakufika kazini kwa zaidi ya siku 5 bila ruhusu anakuwa katika kundi lipi la watumishi?. Sijui.*

...

*S/J- umesema Jane aliacha kwenda kazini, je alitoa barua kwa mwajiri kuwa anaacha kazi? Alitoa taarifa ila hiyo barua sina.*

*S/J- Nikikuambia hiyo barua ilikuwa ni shukurani kwa mwajiri utasemaje?. Sijui.*

*S/J- Na baada ya barua hiyo ambayo wewe haujui , Jane aliacha kwenda kazini? Ndiyo"*

In his submission, counsel for the applicants argued that Rose Ongara was a recognized agent and relied on Rule 2 (a) of the Civil Procedure Code [cap. 33 R.E. 2019]. The said Rule 2(a) of Order III provides:

*2. The recognised agents of parties by whom such appearances, applications and acts may be made or done are-*

*(a) persons holding powers-of-attorney, authorising them to make appearances or applications and to do such acts on behalf of such parties;*

In my view, Rule 2(a) of Order III of the CPC quoted hereinabove, does not give powers to the recognized agent or a person holding a power of Attorney to testify on behalf of the giver of the power of Attorney. The court of Appeal; in the case of ***National Agriculture and Food Corporation v. Mulbadow Village Council and Others [1985] TLR 88***, had an advantage to discuss a similar issue as whether a person can testify on behalf of the other or not and held:-

*" A person may act and represent another person, but we know of no law or legal enactment which can permit a person to testify in place of the other".*

Counsel for the applicant relied on ***Mizrai's case*** (supra) and submitted that the Court of Appeal has widen the scope of who can testify and that every person with knowledge of the facts can testify. With due respect to counsel for the applicant, in Mizrai's case (supra), the Court of Appeal was discussing as who is competent to tender an exhibit and not who is competent to testify. That case was therefore cited out of context and cannot apply in the circumstances of the application at hand.

The evidence that was adduced by Rose Ongara when testifying as PW3 on behalf of Jane Kijazi Nchimbi suffers another blow. Looking clearly,

the quoted hereinabove evidence, the same is hearsay though counsel for the applicant wanted to impress the court that Rose Ongara was testifying on matters that were in her knowledge because prior to their termination, they were working under respondent. That submission has turned to be the opposite.

It is my respectful opinion to learned State Attorney and counsel for the applicant, correctly as the latter though belatedly, conceded in his submissions upon reflection, that Rose Ongara was not competent to testify on behalf of Jane Kijazi Nchimbi on matters relating to employment of the latter and that the whole evidence given by Rose Ongara as Pw3 on behalf of Jane Kijazi Nchimbi was hearsay. In fact, in the *Mulbadow's case* (supra), the evidence that was given on behalf of the other person was found to be hearsay.

From the foregoing, it was wrong for the arbitrator to allow Rose Ongara (PW1) the 1<sup>st</sup> Applicant herein to testify also as PW3 on behalf of Jane Kijazi Nchimbi. I have examined the evidence adduced by Rose Ongara as PW3 on behalf of Jane Kijazi Nchimbi and find that the same is hearsay worth not to be acted upon. More so, Rose Ongara was not able to know issues of employment relating to the said Jane Kijazi Nchimbi. It is

my view that, in dispute relating to employment, it is an employee who is in the position to tell what happened to his or her employment and not otherwise. I am not saying that other persons cannot testify but that they may be called to corroborate evidence of that employee. In the application at hand, reasons were not assigned as to why Jane Kijazi Nchimbi could not manage to attend at CMA and give her evidence before opting to allow Rose Ongara (PW1) to testify on her behalf as PW3. It can be assumed that Jane Kijazi Nchimbi was in Brazil based on the address on the purported power of Attorney, but we are not told when she came back in Tanzania to sign both the notice of application and notice of representation. That said and done, I hereby expunge evidence of Rose Ongara testifying as PW3 on behalf of Jane Kijazi Nchimbi.

Procedurally it was not proper for the arbitrator to allow the same witness to testify twice in the same proceeding but holding two different caps. The possibility of the witness to fill in the gaps that occurred while under cross examination and forgotten to be cleared during re-examination cannot be eliminated. In other words, there is high possibility of the witness to fabricate evidence in both in his/her favour and the other person

whose evidence is given on behalf. In my view, that can lead to injustice to the opponent.

Now back to the rival issue between the parties namely whether respondent breached the contract of the applicants or not. It was submitted by Mr. Rashid, counsel for the applicants that the respondent by issuing the applicants with a six months' fixed term contracts was in breach of the three years fixed term contracts which were supposed to be signed after applicants has served the respondent with notices of renewal. But this argument was resisted by State Attorney, who argued that applicants resigned and that there was no breach of contract. Counsel for the applicants submitted that there was legitimate expectation for renewal of the contracts.

From the evidence of both sides, it is clear in my mind that, the Board that is mandated to deal with employment of the respondent was not existing at the time the applicants filed their notice of renewal. It is also undisputed that the Board was appointed after expiry of the three years fixed term contracts of employment between the applicants and the respondent while applicants were continuing with employment. It is also undisputed that the Board being alert with the recommendations by the



Controller and Auditor General and with a view of changing organization structure of the respondent, issued a six months' fixed term contracts that applicants refused to sign on ground that in issuing a six months' fixed term contracts, the respondent was in breach of the three years fixed term contracts.

I have pointed out hereinabove that despite expiry of their three years fixed term contracts, applicants continued to work and received their salaries. The arbitrator held that, that created impression that the contracts were renewed. In fact, that impression cannot be ignored but circumstances surrounding the application must be considered. The parties knew what caused delay of the respondent to act on their notices. More so, applicants have not disputed that there was on going organization structural change of the respondent whereas employees were supposed to be employed on permanent basis and do away fixed term contracts to make the respondent sustainable as testified by DW1. It was argued by counsel for the applicant that there was automatic renewal of the said three years fixed contracts, but state Attorney argued that there was none in alternative he submitted that applicants terminated their contracts.

I have examined the said three years fixed term contracts for Rose Ongara and Godfrey Semwenda exhibits. P1 and P.11 respectively and find that there is no automatic renewal. Clause 19.1 and 19.2 that relates to renewal reads:-

*"19.1 Where the Employer intends to renew or extend the agreement or the Employee intends to apply for a renewal or extension of the agreement, each party shall issue a written notice six months' before the expiry of the agreement.*

*19.2 upon receiving the notice of intention of renewal or extension from either party, the Employer or the Employee, as the case may be, shall be required to respond to the notice in not less than three months".*

From the above quoted clause, nowhere it was shown that failure of either party to respond will be regarded as automatic renewal. It could have been illogical for failure for either party to respond within three months to amount to automatic renewal while either party intending to terminate the contract was supposed to issue a thirty days' notice. It is my further view that, the clause relating to renewal did not show that the contract must be renewed for the same position and period. It is my opinion that there was no justification for the applicants to refuse to sign the Six months' fixed contracts that were served to them by the respondent after expiry of the said three years fixed term contracts. I

am of that view, taking into circumstances obtained in this application as was testified by DW1 and admitted to by the applicants in their evidence that there was no Board to approve their application for renewal of their three years fixed term contracts and further the need to employ applicants on permanent basis to cut off expenses. To compel the respondent to renew the said three years fixed term contracts in the presence of the Controller and Auditor General Report, that survival of the respondent was in danger in the near future, is greediness of the highest so to speak. That is to say; applicants were ready to be paid in disregard what will happen in future to the respondent. In my view, this court accepting applicants' view will be against its power and mandate provided for under section 52(1)(a) and(b) of the Labour Institutions Act [cap. 300 R. E. 2019]. The said section provides:-

*"52(1) In the performance of its functions, the Labour Court shall have all the powers of the High Court, save that in making a judgment, ruling, decision, order or decree in so far as it is relevant, the Court may take into account or consider the need-*

- 1. to maintain a high level of domestic capital accumulation with a view to increasing the rate of economic growth and to provide greater employment opportunities;*
- 2. to maintain and expand the level of employment."*

Applying that section in the application at hand, the application for the applicants fails. The application fails also for the grounds explained hereinbelow.

Rumisha, State Attorney submitted that applicants resigned while Mr. Rashid was of the different view. If we agree by the applicants that their three years fixed term contracts were automatically renewed of which it was not correct, then going by evidence, applicants terminated their fixed term contracts. It is clear from evidence that on 15<sup>th</sup> July 2016 Rose Ongara, (PW1), the 1<sup>st</sup> applicant wrote a letter to the Board Chairman titled **"RE: CONTRACT OF EMPLOYMENT WITH THE FUND"** (exhibit P.5) complaining against being issued with a six months' fixed term contract. In the said letter, Rose Ongara, the 1<sup>st</sup> applicant wrote:-

*"Board Chairman,*

*NHIF,*

*P. O. Box, 11360,*

***DARES SALAAM.***

***RE: CONTRACT OF EMPLOYMENT WITH THE FUND***

*Reference is made to your letter with Ref. NHIF/PCP 18/25 dated 13<sup>th</sup> July 2016 concerning the above subject matter.*

*This is to inform you that your letter came as a surprise to me that I been given a new contract which will start on 1<sup>st</sup> July, 2016 and end on 31<sup>st</sup> December, 2016, meaning that the duration of the contract of six months, which will not be extended after expiration of the current term...*

***In the upshot, my contract with the fund ceases on 19<sup>th</sup> July 2016, and that future communications on the matter should be channeled through Tughe NHIF Branch..."***

On his part, on 19<sup>th</sup> July 2016, Godfrey Semwenda, 3<sup>rd</sup> applicant wrote a letter to the respondent (**exh. P15**) as follows:-

*"Board Chairman,*

*NHIF,*

*P. O. Box. 11360,*

***DARES SALAAM.***

***RE: CONTRACT OF EMPLOYMENT WITH THE FUND***

*Reference is made to your letter with Ref. NHIF/PCP 327/1/22 dated 13<sup>th</sup> July, 2016 regarding the above heading.*

*I would like to inform you that your letter came to me as a surprise as it showed that I have been given a **six months'** new contract of employment which started on **12<sup>th</sup> May, 2016** and will end on **11<sup>th</sup> October, 2016** [that means a contract of only **five months**], and that after completion of the contract, The Board of Directors of the **Fund will not extend** the contract...*

*Madam Chairperson, this termination is not in line with The Employment and Labour Relation Act. No. 4 of 2004 and The Employment and Labour Relations (code of Good Practice) Rules, of 2007 due to the following reasons:-*

*a) While your letter dated 13th July 2016 provides that the extended contract of employment is for **six months**, the same letter shows that the contract is only for **five months**.*

*b) If the Board of Directors of the Fund has decided to change the duration of the contract of Members of the Management from 3 years to only six months*

*then other parties to the contract should have been involved in personal or through Trade Union but that was not the case on my part.*

...

***In view of the above, as of 20<sup>th</sup> July, 2016, my employment with the Fund will cease.***

..."

On 18<sup>th</sup> July 2016, Jane Kijazi, 2<sup>nd</sup> respondent wrote a letter to the Board Chairperson (**exh. D5**) as follows:-

*"Board Chairperson*

*NHIF,*

*18/7/2016*

*P. O. Box. 11360,*

***DARES SALAAM.***

***RE: CONTRACT OF EMPLOYMENT WITH THE FUND***

*Kindly refer to your letter with Ref. NHIF/PCP 193/34 dated 13<sup>th</sup> July, 2016 regarding the above subject.*

*The referred letter informed me that I have been given a six months contract starting from 1<sup>st</sup> May, 2016 to 31<sup>st</sup> October, 2016, and that after completion of the said contract, the Board will not extend the same.*

*Madam Chairperson, this is unfair termination of employment under the eyes of The Employment and Labour Relation Act. No. 4 of 2004 and The Employment and Labour Relations (code of Good practice) Rules, of 2007 due to the following reasons:-*

- 1. Section 19 (RENEWAL) of my previous contract of employment made on 1<sup>st</sup> May, 2013 explicitly provide the conditions for renewal of my contract BUT this section is not adhered to by the Board as the employer, as an employee I fulfilled the conditions by submitting my letter of intention to extend my contract with NHIF through my letter dated 16/12/2015*

*(which you acknowledge receipt through your letter with Ref. NHIF/PCP 183/34 dated 13<sup>th</sup> July, 2016) BUT there was no any reply until I received your letter of termination dated 13<sup>th</sup> July, 2016.*

2. *By not responding to my letter of intention to extend my contract as agreed under section 19 of the previous contract of employment and you as employer continued to assign me duties, to me it was an automatic renewal for another three (3) years.*

...

***In view of the above, please be informed that as of 19<sup>th</sup> July 2016, my employment with the Fund ceases...***

It is clear from exhibits P.5, P15 and D.5 that applicants terminated their employment and there is no need for them to complain. There is no termination letter by the respondent terminating employment of the applicants. Evidence is also clear that after applicants has terminated their employment, they were paid their terminal benefits as follows; (i) Rose Ongara, 1<sup>st</sup> applicant was paid TZS 114,538,328.57 as total terminal benefit as shown in a letter with reference No. NHIF/PCF 18/29 dated 13<sup>th</sup> September 2016 and annexure thereto both admitted as **exhibit P.10**. It is indicated in the said exhibit P.10 that TZS 49,999,999.86 were deducted as House loan and TZS 69,726,680.67 were deducted as SACCOS loan as a result she was paid TZS 5,188,351.96 as balance. This evidence was introduced in the CMA record by Rose Ongara, 1<sup>st</sup> applicant herself; and (ii) Godfrey

Semwenda, 3<sup>rd</sup> respondent was paid TZS 51,796,671.43 as terminal benefit as shown in a letter with reference No. NHIF /PCF 327/27 dated 13<sup>th</sup> September 2016 and annexure thereto both admitted as **exhibit P.17**. It is shown in the said exhibit P.17 that TZS 697,500.27 were deducted as SACCOS loan as a result he was paid TZS 51,099,171.16 as balance. This evidence was introduced in the CMA record by Godfrey Semwenda, the 3<sup>rd</sup> applicant himself.

But according to a letter with Ref. No. NHIF/T.20/1/62 dated 3<sup>rd</sup> July 2017 (**part of exhibit D7**), Rose Ongara, the 1<sup>st</sup> applicant, was paid a total of TZS 121,170,028.57. The said letter reads:-

*"... Napenda kukujulisha kuwa mchanganuo wa mafao yako kwa mujibu wa Kanuni za Utumishi za Mfuko wa taifa wa Bima ya Afya za mwaka 2014 ni kama ifuatavyo:-*

1. *Mshahara badala ya notisi – TZS 5,040,000.00*
2. *Malimbikizo ya siku za likizo – TZS 29,571,428.57*
3. *Kusafirisha mizigo – TZS 10,815,000.00*
4. *Kusafirisha familia – TZS 2,000,000.00*
5. *Kusafirisha gari – TZS 1,743,600.00*
6. *Severance pay – TZS 72,000,000.00*

***JUMLA – TZS 121,170,028.57***

***TOA KODI – TZS 29,298,981.00***

***JUMLA BAKI – TZS 91,871,047.57***

*Aidha nakujulisha kuwa una madeni yafuatayo:-*

1. *Mkopo wa nyumba -TZS 49,999,999.86*
2. *Mkopo wa Benki (Azania) -TZS 89,000,000.00*



3. Mkopo wa SACCOS -TZS 69,726,680.67

**JUMLA – TZS 208,726,680.53**

*Bodi imeamua kuwa ulipwe fedha za kusafirisha familia, gari na mizigo kiasi cha **Shs 14,558,600.00(sic)** na zinazobaki **Shs. 77,312,447.57(sic)** zipunguze deni unalodaiwa hivyo utabakiwa na deni la **Shs. 131,414,232.96 (sic)**...*

The said TZS. 14,558,600.00 were paid to Rose Ongara, the 1<sup>st</sup> applicant through her bank account No. 0112095968900 as shown in remittance to NHIF EX-staff (exh D8).

According to a letter with Ref. No. NHIF/T.20/1/63 dated 3<sup>rd</sup> July 2017 (**part of exhibit D7**), Godfrey Semwenda, the 3<sup>rd</sup> applicant, was paid a total of TZS 56,311,671.43. The said letter reads: -

*"... Napenda kukujulisha kuwa mchanganuo wa mafao yako kwa mujibu wa Kanuni za Utumishi za Mfuko wa taifa wa Bima ya Afya za mwaka 2014 ni kama ifuatavyo:-*

1. Mshahara badala ya notisi – TZS 4,515,000.00
2. Malimbikizo ya siku za likizo – TZS 10,028,571.43
3. Kusafirisha mizigo – TZS 2,542,500.00
4. Kusafirisha familia – TZS.118,800.00
5. Kusafirisha gari – TZS 406,800.00
6. Severance pay – TZS 38,700,000.00

**JUMLA – TZS 56,311,671.43**

**TOA KODI – TZS 213,842,462.00**

**JUMLA BAKI – TZS 42,469,209.43**

*Aidha nakujulisha kuwa una madeni yafuatayo:-*

1. Mkopo wa SACCOS -TZS 697,500.27

**JUMLA – TZS 697,500.27**

*Bodi imeamua kuwa ulipwe fedha za kusafirisha familia, gari na mizigo na fedha inayobaki baada ya deni la SACCOS kiasi cha **Shs 41,771,709.16**(sic) na zinazobaki **Shs. 697,500.27 (sic)** zilipe deni unalodaiwa...”*

It is clear that, TZS. 41,771,709.16 were paid to Godfrey Semwenda, 3<sup>rd</sup> applicant through his bank account No. 01J2097932700 as shown in remittance to NHIF EX-staff (exh D8).

According to a letter with Ref. No. NHIF/T.20/1/64 dated 3<sup>rd</sup> July 2017 (**part of exhibit D7**), Jane Kijazi, the 2<sup>nd</sup> applicant, was paid a total of TZS 81,671,614.29. The said letter reads:-

*"... Napenda kukujulisha kuwa mchanganuo wa mafao yako kwa mujibu wa Kanuni za Utumishi za Mfuko wa taifa wa Bima ya Afya za mwaka 2014 ni kama ifuatavyo:-*

- 1. Mshahara badala ya notisi – TZS 4,515,000.00*
- 2. Malimbikizo ya siku za likizo – TZS 6,910,714.29*
- 3. Kusafirisha mizigo – TZS 7,927,500.00*
- 4. Kusafirisha familia – TZS 3,000,000.00*
- 5. Kusafirisha gari – TZS 1,268,400.00*
- 6. Severance pay – TZS 58,050,000.00*

***JUMLA – TZS 81,671,614.29***

***TOA KODI – TZS 35,786,184.00***

***JUMLA BAKI – TZS 45,885,430.29***

*Aidha nakujulisha kuwa una madeni yafuatayo:-*

- 1. Mkopo wa gari -TZS 18,710,472.18*
- 2. JUMLA – TZS 18,710,472.18***

*Bodi imeamua kuwa ulipwe fedha za kusafirisha familia, gari na mizigo na fedha itakayobaki baada ya kulipa mkopo wa gari kiasi cha **Shs.***

**27,174,958.11(sic) na zinazobaki Shs.18,710,472.18 zilipe deni unalodaiwa (sic)...**"

It is clear that TZS 27,174,958.11 were paid to Jane Kijazi, 2<sup>nd</sup> applicant through her bank account No. 01J2027301100 as shown in remittance to NHIF EX-staff (exh D8).

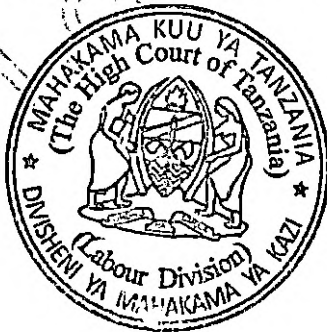
In their letters to the respondent showing their dissatisfaction after being required to sign a six months' fixed term contracts, applicants showed that their three years fixed term contracts were constructively terminated. That is why, they are claiming that respondent terminated their employment contracts. In my view, the claiming of termination of their contract by the respondent is untenable because their pleadings at CMA was breach of contract and not unfair termination (constructive termination). Applicants are bound by their own pleadings and they cannot depart therefrom. It is a cardinal principle of law that parties are bound by their pleadings and they are not allowed to depart as it was held by the Court of Appeal in the case of ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020***, CAT (unreported), and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited***,

**Civil Appeal No. 8 of 2015**, CAT (unreported). In the **IPC's case**, supra, the Court of Appeal held that:-

*"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."*

For all said hereinabove, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam this 31<sup>st</sup> March 2022.



  
B.E.K. Mganga  
**JUDGE**