

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

REVISION APPLICATION NO. 61 OF 2022

(Arising from the Ruling of Kokusiima, L, Arbitrator, dated 21st September 2019 in Labour dispute No.
CMA/DSM/TEM/622/2018/2109/2018 at Temeke)

BETWEEN

CHARLES DAUD & 15 OTHERS APPLICANTS

AND

TANZANIA PORTS AUTHORITY RESPONDENT

JUDGMENT

Date of last order: 27/04/2022
Date of judgment: 28/04/2022

B. E. K. Mganga, J.

On 15th September 2018, the respondent terminated employment of the applicants. Aggrieved by that termination, applicants filed Labour dispute No. CMA/DSM/TEM/622/2018/210/2018 before the Commission for Mediation and Arbitration henceforth CMA at Temeke. The respondent raised a preliminary objection that CMA had no jurisdiction over the dispute because applicants were Public Servants. On 21st May 2019, Kokusiima, L, arbitrator, sustained the preliminary objection raised by the respondent

that applicants, who were Public Servants, did not exhaust all remedies provided for under the Public Service Act prior to filing the dispute at CMA. Being further aggrieved by the CMA ruling and being out of time, applicants filed an application seeking the court to extend time within which to file an application for revision before this court. On 24th February 2022, this court granted the application leave for them to file application for revision within Fourteen (14) days. Applicants complied hence this revision application. In the affidavit sworn by Charles Daud in support of the application, applicants complained that arbitrator erred in facts and in law in holding that the Commission for Mediation and Arbitration had no jurisdiction to determine the dispute.

When the application was called for hearing, Ms. Stella Simkoko, Advocate appeared and argued for and on behalf of the applicants while Ms. Rehema Mtulya and Ms. Mwantumu Seif, State Attorneys appeared and argued for and on behalf of the respondent.

Ms. Simkoko, learned counsel for the applicants, submitted that employment of the applicants was terminated in 2018 and that CMA had jurisdiction because Section 3(a)(ii) of the Public Service Act [Cap. 298 R. E. 2019] provides that a body corporate established under a written law is

not a Public Office. She submitted that the respondent who is a Public Corporation owned by the Government, her employees are not public servants. She argued that a Public Corporation is different from a Public Institution. During submissions, she cited section 31(1) of the Public Service Act to bolster her argument that Government Institution and Agencies are also Public Institutions covered by the Public Service Act. She was however quick to submit that section 58 of the Public Corporation Act, excludes institutions from Public Corporation. She argued that the respondent is a Public Corporation and went on that according section 4(1) of the Ports Act, the respondent is a body corporate hence her employees are not Public Servants and therefore were justified to file the dispute at CMA.

In her submissions, counsel for the applicants submitted that respondent is mandated to provide business commercially regarding Port matters and that she is responsible with Policy matters in the country on port issues. Counsel conceded that, the Public depends on the respondent on Port issues and that respondent was established by Act of Parliament and further that respondent is owned by the Government 100%. She quickly submitted that, these are not governing factors to determine

whether respondent is a Public Office or not. She argued that a body Corporate is not a Public Service Office relying on the definition of Public Service office provided under section 3(ii) of the Public Service Act [Cap. 298 R. E 2019].

Counsel for the applicants submitted further that, in 2019 the Ports Act was amended by written laws Miscellaneous Amendment Act No. 7 of 2019 where Section 38A was added. She argued that Section 38A provides that, the Authority with the approval of the Minister may, make general rules relating to the condition of service of employees of the Authority consistent with the Public Service Act. She concluded that, before the said amendment, applicants were not covered by the Public Service Act and therefore, both CMA and the Court had jurisdiction.

Resisting the application, Mtulya, State Attorney for the Respondent, submitted that both CMA and the Court have no jurisdiction. She submitted that the Tanzania Ports Authority Act, Act No. 17 of 2004, specifically Section 4(1)(a), provides establishment of the Tanzania Ports Authority as a body corporate. Learned State Attorney submitted that, section 3 of the Public Corporation [Cap. 257 RE. 2002] define Public Corporation to mean any Corporation established under this Act or any other law and in which

the Government and its agent owns majority of shares or is the sole owner. She submitted further that; Tanzania Ports Authority (TPA) is a Public Corporation wholly owned by the Government. She went on that, section 34(1) and (2) of TPA Act provides that the Director General is appointed by the President and that in terms of section 6 of the Public Corporation, the Minister is mandated to give directives to the Board of Directors. State Attorney submitted further that, employees of TPA are governed by Civil Service Regulations and Public Service Act and other Laws.

In her submissions, Ms. Mtulya submitted that, applicants were terminated in 2018 due to Certificate verification process that was initiated by the Government. She concluded that applicants were supposed to exhaust remedies provided for under the Public Service Act before resorting to CMA hence CMA had no jurisdiction.

In rejoinder, Ms. Simkoko had nothing to add other than to reiterate her submissions in chief.

It is undisputed by the parties that respondent is a Public Corporation and that it is wholly owned by the government. Counsel for the applicants

relied on the definition of the phrase "Public Service Office" defined under section 3 of the Public Service Act(supra) as: -

"a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than: -

(ii) an office of a member of a council, board, panel, committee of other similar body whether or not corporate, established by or under any other written law"

It was view of counsel for the applicants that a phrase "committee of other similar body whether or not corporate" excludes employees of the respondent because the respondent is a body corporate. With due respect to counsel for the applicants, that interpretation is not correct because committee of other similar body, under the *ejusdem generis* Rule, it refers to committees mentioned in that subsection. This is because under the *ejusdem generis*, when a general word or phrase follows a list of specific, the general word or phrase will be interpreted to include only items of the same type as those listed. In my view, the phrase "committee of other similar body whether or not corporate, established by or under any other written law" in section 3(ii) of the Public Service Act, refers to body similar to member of council, board, panel, and not other body corporates.

Counsel for the applicants submitted correctly, in my view that, government institutions and executive agencies are Public Institutions when she relied on the provisions of section 31(1) of the Public Service Act (supra). But she read section 31(1) of the Public Service Act in isolation of section 31(2) of the same Act. The whole section 31 of the Public Service Act (supra) provides:

31.-(1) Servants in the executive agencies and Government institutions shall be governed by provisions of the laws establishing the respective executive agency or institution.

(2) Without prejudice to subsection (1), public servants referred to under this section shall also be governed by the provisions of this Act.

From the foregoing, every employee in government institution and executive agency is governed by the provisions of the Public Service Act.

It was argued by counsel for the applicants that section 58 of the Public Corporation Act, excludes Public Institutions from Public Corporation. With due respect to counsel for the applicants, that submission is not correct. The said section provides: -

58. For the avoidance of doubt, with effect from the date of coming into operation of this Act, every District Development Corporation, established under the District Corporations Act, all non-commercial services institutions,

sports and culture institutions, research institutions and institutions of learning, shall, in pursuance of section 3, cease to be public corporations.

From that section, it is correct that all public institutions are not public corporations. In my view, section 58 of the said Act, cannot be read in isolation of other sections. It is my view further that, the legislature did not intend and did not limit public Institutions to the scope of public corporation, which is why, section 3 of the Public Corporation Act, cap. 257 defines "public corporation" to means any corporation established under this Act or any other law and in which the Government or its agent owns most of the shares or is the sole shareholder. As correctly submitted by the state Attorney, the respondent is wholly owned by the government and was established by Act of Parliament hence a Public Corporation.

Counsel for the applicants cited section 38A of the Ports Act, cap. 166 and argued that by this section, employees of the respondent are not public servants. With due respect, that interpretation is not correct. The said section was added in the Ports Authority Act, so that the said Act becomes consistent with the Public Service Act. The said section provides:

"38A. The Authority may with the approval of the Minister, make general rules relating to the conditions of service of employees of the Authority consistent with the Public Service Act"

That section tells all. It does not state that employees of the respondents are not public servants. In my view, the said section is clear that employees of the respondent are public servants and that general rules relating to conditions of her employees should not conflict with the provisions of the Public Service Act.

It was correctly submitted, in view, by the State Attorney that, respondent is a corporate body as provided for under section 4(1) of the Ports Act, No. 17 of 2004 [Cap. 166] and in terms of section 4(2), the Attorney General can intervene in any suit or matter instituted by or against the respondent. This position was also given by the Court of Appeal in the case of ***the Attorney General v. Tanzania Ports Authority and Another, Civil Application No. 87 of 2016*** (unreported).

There is no grain of doubt in mind that respondent is mandated to deal with sensitive issues touching security of the nation hence her employee cannot be termed not public servants. One of the functions of the respondent is to maintain ports safety and security as provided for

under section 5(d) of the Act. This is sensitive to the well-being of the nation.

In addition to what I have held hereinabove, the Court of Appeal has put clear this issue in the case of ***Tanzania Posts Corporation v. Dominic A. Kalangi, Civil Appeal No. 12 of 2022*** (unreported) wherein it discussed the provision of section 3 of the Public Service Act, and what should be looked at to conclude that an employee is a public servant or not. In ***Kalangi's case*** (supra), the Court of Appeal held that (i) establishment by an Act of parliament, (ii) ownership namely wholly or substantially by the government and (iii) duty or services rendered by the institutions are some of the criteria to be considered. As pointed out herein above, these criteria were met. More so, as submitted by the State Attorney, applicants were terminated in the process the government was verifying academic certificates of its employees. From where I am standing, I am not convinced by the argument by counsel for the applicants that her clients are not public servants. I hold that they are and that they were supposed to file their complaint to the Public Service Commission prior to filing the dispute to CMA. in other words, they have not exhausted the remedies provided for under the Public Service Act. That being the

position, CMA had no jurisdiction. I uphold the CMA ruling and dismiss this application.

Dated at Dar es Salaam this 28th April 2022.



B.E.K. Mganga
JUDGE

Judgment delivered today 28th April 2022 in the presence of Rehema Mtulya and Mwantumu Selle, State Attorneys, for the respondent but in absence of the applicants.



B.E.K. Mganga
JUDGE

