IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 491 OF 2020

(Arising from Labour Dispute No. CMA/DSM.ILA.R.673/18 dated 23rd October, 2020 issued by Honourable Kiangi, N. the Arbitrator at Dar es Salaam, Ilala)

BETWEEN

MODESTA MODEST.....1ST APPLICANT
HAPPY KIHOGO.....2ND APPLICANT
DANIEL YUSUF.....3RD APPLICANT

VERSUS

MR. CLEAN LTD.....RESPONDENT

JUDGEMENT

12th April, 2022 & 28th April, 2022

K. T. R. MTEULE, J.

This Revision application originates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/R.673/2018 issued by Honourable Kiangi, N. the Arbitrator on 23rd October, 2020. The Applicants herein are praying for the orders of the Court in the following terms:-

1. That this Honorable Court be pleased to call for revising the proceedings and to set aside the award of the Commission for Mediation and Arbitration at Dar es Salaam Zone, Dispute No. CMA/DSM/ILA/R.673/18 issued by Honourable

Kiangi, N. Arbitrator on 23rd October, 2020.

2. Any other relief that this Honorable Court may deem just to grant.

A brief fact which triggered this application are traced from CMA record, affidavit and counter affidavit filed by the parties. On 2nd May, 2016 the Applicants were employed by the respondent as Clerks with different salaries. Their relationship turned bitter on 18th November, 2016 when the Applicants were terminated for an alleged Applicant's misconduct (theft). Aggrieved by the termination and having obtained a leave to file their dispute out time as per CMA Form No. 2, on 11th June, 2018 the applicants filed at the CMA, the Labour Dispute No. CMA/DSM/ILA/R.673/2018, claiming for unpaid salaries from January, 2017 to June, 2017 and other terminal benefits. The Commission decided the matter against the Applicants hence the present application for revision.

Along with the Chamber summons, the Applicants filed a joint affidavit sworn by them in which after explaining the chronological facts leading to this application, alleged that, after being terminated on 18th November, 2016 the Applicant and the Respondent entered into another verbal contract on the same date under which the

applicants continued to render service. They stated further that under that new arrangement, they received payment of November, 2016 and December, 2016 which was paid on 31st December, 2018. On that basis applicants have the view that they had a new contract.

In their affidavit, the Applicants raised the following statement of legal issues:-

1. That the Arbitrator erred in Law and in Fact in dismissing the dispute by relying on the unjustified Respondent's Exhibit D1 which was not received by the Applicants.
2. That the Arbitrator erred in Law and in Fact in holding that the Applicant's employment ended on 18th November, 2016 by disregarding the salary payment made by the Respondent to the Applicants for November and December, 2016.

The application was challenged through counter affidavit sworn by Ravi Shankar Velumani, the Respondent's Principal Officer. The deponent in the counter affidavit denied most of the material facts in the Applicant's Affidavit.

The application was disposed of by a way of written Submissions. The

Applicants were represented by Victor Joseph Mhana, Advocate whereas respondent was represented by Mr. Saulo Kusakalah, Advocate.

Addressing the **first** legal issue concerning the usefulness of **Exhibit D1,** which was a letter of termination of the Applicant's employment, Mr. Victor Mhana submitted that Rule 8 (1) (b) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2017 makes it mandatory for a termination of an employment to have prior notice. In his view, things are different in this application since such document was never served and received by the applicants as no signature or any acknowledgement of receipt by the Applicants, to show that such notice was served to the applicants. He further challenged the error in the notice of termination where the 1st Applicant was referred by the first name Modesta without the Sir name. He is of the view that the arbitrator misdirected himself by admitting and relaying on Exhibit D1 (notice of termination) while the applicants never had knowledge of it. Supporting his argument, Mr. Mhana cited the case of **Georgia Celestine Mtikila versus Registered Trustees of Dar es salaam Nursing School International School of Tanganyika** (1998) 512.

In respect of the 2nd ground, Mr. Victor Mhana submitted that, the applicants' employment neither ended on 18th November, 2016 nor the salary payment ended, rather the respondent proceeded to make salary payment beyond 18th November, 2016, as it is indicated in exhibit D2 showing that payment of the salary of December, 2016 was actually done.

He further argued that the applicants' access to the respondent's office was not driven by anything else other than work contractual relationship and it went further to have them charged with criminal case in 2017.

Mr. Victor Mhana argued that the arbitrator admitted Exhibit D2 (notice of termination). In his view, the arbitrator has wrongly favored the Respondent by accepting the final payment of 18th November, 2016 and disregarding the evidence of further payment made in December, 2016 which had no any explanation from the respondent and the Commission as to why the respondent made a salary payment of December, 2016. It is the applicants' further submission that the issue of the arbitrator of only analyzing favorable evidence of the respondent and disregarding the applicants fact of

been paid salary of December, 2016 while the two facts are on the same document raises a question of doubt in dispensing justice.

Mr. Victor Mhana raised a contradictory statement on the Respondent's case in the CMA. He submitted that the notice to the 3rd applicant was issued on 1st April, 2016 while the respondent contends that the employment of all applicants ended on 18th November, 2016. He questioned that, if that is the case why that the applicants received monthly salary of November and December, 2016. He therefore invited this Court to investigate the misdirection of the arbitrator in delivering the award and allow this application.

Opposing the application, Mr. Saulo Kusakalah Advocate for the respondent denied existence of any employment relationship between the Applicants and the Respondent after the issuance of the termination letter of 18th November, 2016 (Exhibit D1) which was responded by the Applicant's instruction to LABMAN CONSULTANT LIMITED who wrote a demand letter to the Respondent to challenge the fairness of the termination. Mr. Saulo Kusakalah considered the respondent to the termination as a proof that the Applicants did receive the termination notice. In his view, the allegation that the Applicants were still employees of the Respondent after 18th

November 2016 was not proved in the CMA.

On second issue as to why the payment was made on December 2016, Mr. Saulo Kusakalah explained that the heading of the document which effected payment stated that it what paid as final settlement and it states that notice of termination was served to the applicants on 18th November, 2016. Addressing further as to "***whether the applicants worked after termination of 18th November, 2016***", Mr. Kusakalah submitted that the duty of proof lies on the applicants who failed to discharge that duty. He referred to page 2 of the award where one Modesta Moses Rwechungura the sole witness of the applicants stated as follows "*alieleza baada ya kutoka polisi hawakurudi kwa mwajiri wao".*

Regarding the missing sir name of the 1st Applicant in the termination letter, Mr. Saulo Kusakala submitted that, since the issue of name has never been disputed at the CMA, the contents were understood to the applicants that is why they decided to institute the unfair termination dispute before the commission.

Mr. Saulo Kusakala submitted that the applicants want to mislead this Court that since they were accused for theft in 2017 that means they

were still employees of the respondent. He submitted that criminal cases have got no time limit and can be instituted any time retrospectively.

It is the submission of Mr. Saulo Kusakalah that since the applicants failed to prove that they worked after termination of 18th November, 2016, then they are not deserving to be paid free salary without working which is not fair and against our Constitution of the United Republic of Tanzania especially article 23 (1). They thus prayed for the application to be dismissed without cost since it is a labour matter.

Having considered and analyzed the affidavits of the parties, their submissions and the CMA record I find that the issue for determination is:-

i) Whether the Arbitrator erred in Law and Fact in dismissing the dispute by relying on exhibit D1 (notice of termination) which was not served to the Applicants therein.

ii) Whether the arbitrator erred in Law and fact in holding that the Applicant's employment ended on 18th November, 2016

iii) To what reliefs parties are entitled to?

Starting with the **first issue** on arbitrator's reliance on the termination notice, the applicants contended that the notice was not properly served to them and that it had a wrong name by mentioning the single name of the 1st Applicant, "Modester". On the other hand the respondent maintained that the issue of a name has never been disputed at the CMA and the contents was understood to the applicants that is why they decided to institute the unfair termination dispute before the commission against respondent. At the CMA, the arbitrator found that there was no any employment relationship between applicants and respondent, his finding was based on two reasons; - **firstly**, there was no any evidence to support the allegation of having employment relationship between the Applicant and the respondent after the termination notice being issued on 18th October 2016; **Secondly,** the Applicants failed to pray for a notice to produce at CMA.

Basing on arbitrator's findings and parties' submission the question which arise is whether the notice of termination was properly served to the applicants. In addressing this question, I find a relevance in the provision of Section 41 (3) of Employment and Labour Relation

Act, Cap 366 RE. 2019 which provides as follows:-

"41(3) Notice of termination shall be in writing stating:-

*i) The **reason** for termination; and*

*ii) The **date on which the notice was given**-*

(4) N/A

*(5) **Instead of giving an employee notice of termination, an employer may pay the employee the remuneration that the employee would have received if the employee had worked during the notice period."***

From the above provision, it is apparent that an employer may terminate the contract by issuing notice or paying two months' salary in lieu of notice. In this matter it is undisputed that the notice was issued, and that payment was made as per Exhibit D1 and D2 (Final payment) respectively. What is disputed by the Applicants is based on two issues. The first one is the fact that the notice of termination was properly served. The second point of dispute is the fact that the payment made by the Respondent through the document titled "Final payment" essentially intended to end the employer employee relation between the Applicant and the Respondent.

I will start to address the propriety of the notice of termination. The

Applicants are asserting that the notice of termination was not properly served as there was a misnaming of 1st applicant. There is an established principle that the correctness of the name would not affect the suit the same applies in this application. In Austria, mis-description by the addition or omission of a word of party's name, or as a result of a typographical error may be treated by Courts as 'misnomers' which are capable of correction (as a matter of contractual construction) without the need for rectification. In the case of **Kingstream Steel Ltd. v. Stemcor UK Ltd.** [2001] WASCA 138 it was held that:-

> *"In our view the misdescription of the guarantor in the first two documents is simply that, and an error of that kind is not fatal to the validity of the guarantee."*

The advantage of the this position was discussed in Ugandan case of **Buffalo Youngster Inc. v. SGS Uganda Ltd.,** HCMA, No. 6 of 2012 as was cited in the case of **Rev. John Mathiasi Chambi & Another v. Registration Insolvency and Trusteeship & Another,** Miscellaneous Cause No. 21 of 2020, where the Court stated that:-

> *"Multiplicity of proceedings should be avoided as far as possible*

and all amendments which avoid such multiplicity should be allowed."

Here in Tanzania the position was addressed in the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd.** Misc. Civil Application No. 113 of 2011, Court of Appeal of Tanzania at Dar es Salaam, at page 4 - 5 where the Court ordered all proceedings to be amended by stating the correct name of the Respondent and that the appeal proceeds on merit.

For that reason, I have to say that the doctrine of *finger litigation* or *Misnomer* applies in this matter at hand. Therefore, in this application, since the missing name did not occasion any fatality in the notice of termination, and since the employees received it and responded to it by the demand notice issued to the Respondent by LABMAN CONSULTANT LIMITED, I find the notice of termination (Exhibit D1) to be valid evidence of termination of the employment between the Applicants and the Respondent. In this respect, it is my view that the arbitrator was right to admit the termination notice and to rely on it in the CMA decision. From the foregoing, the answer to the first issue is in the negative that the Arbitrator did not error in Law and fact by relying on Exhibit D1 which was the termination

notice.

With regards to the second issue as to whether the arbitrator erred in Law and fact in holding that the Applicant's employment ended on 18th November, 2016. It is not disputed that there was Final Payments made by the Respondent to the Applicants to settle two months salaries. The Applicants used such payment against the Respondent by claiming that it by implication that the Respondent still employed the Applicants by paying them such salaries. It is a legal requirement under Section 41 (3) that after termination, the Respondent had an option to pay either two months salaries or to issue notice of termination. In this matter, the Respondent seems to have opted both options. The respondent paid two months salaries at once and the same was received by all applicants as per Exhibit D2 which is titled *Final Payment*. There is nowhere in the payment document which suggests that there is still employment relationship between the Applicants and the Respondent after the termination, rather, the payment is called *final payment*. One cannot claim that the payment was not final while the applicants signed the document while seeing the title on the payment document. By signing the final payment, I am of the view that parties are bound by the same as it

concerns their employment relationship and not otherwise. In the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, where it was held that:-

> *"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

From the above authority since the applicants did not dispute, that they were paid two months salaries and signed the document to acknowledge payment, this justifies that parties agreed to terminate the employment by receiving the payment apart from the notice itself. Basing on the facts that the employer issued notice and made final payment, I agree with the findings of the arbitrator that the employment relationship between the Applicants and the employer ended on 18th November, 2016 when the termination notice was issued. Therefore, the **second** issue as to whether the arbitrator erred in Law and in fact in holding that the Applicant's employment ended on 18th November, 2016 is answered negatively.

Having found that issues No 1 and 2 are both answered negatively, I

find that the applicants' claim regarding unpaid salaries from January to June, 2017 to lacks legal stance. In the result I find no reason to fault the decision of the Arbitrator. Therefore, the application is devoid of merits, and consequently, the Application is hereby dismissed. Each party to the suit to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 28th day of April, 2022.

KATARINA REVOCATI MTEULE

JUDGE

28/04/2022