

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

REVISION NO. 560 OF 2020

ABDALLAH CHITANDA & 445 OTHERS APPLICANTS

VERSUS

TANZANIA PORTS AUTHORITY RESPONDENT

(From the decision of the Commission for Mediation and Arbitration)

(Massawe: Arbitrator)

Dated 16th November 2016

in

REF: CMA/DSM/LAB/16/720

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JUDGEMENT

31st March & 29th April 2022

Rwizile J

This application is for revision. The applicants are asking this court to call for, examine and set aside the ruling and proceedings of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/LAB/16/720 dated 16th November, 2016.

Factually, the applicants were employed by the respondent serving at its container terminal.

On 6th September, 2000 they were terminated from employment for the reason of privatization of the Container department to Tanzania International Container Terminal Services (TICTS). Later, it came to their knowledge that termination was unfair and in actual fact they were to be retrenched, which was not done. Not satisfied, they filed a representative suit at the High Court Dar es Salaam Registry. It was struck out for being filed out of time. Their appeal to the Court of Appeal was however struck out for being defective.

The applicants, then reported the dispute to the Labour Commissioner who referred it to the CMA. The dispute was not heard in merit, since it was dismissed because the CMA believed had no jurisdiction to hear a dispute filed out of time. This application therefore, protests the ruling of the Commission.

The affidavit supporting this application has been jointly sworn by Abdallah Chitanda, Festo Mabwai and Janath Mfuruki for and on behalf of other four hundred and forty-three applicants. The applicants advanced the following legal issues for determination;

- i. That the applicants' claims against the respondent are not subject of being time barred.*

- ii. That the applicants have never been afforded the right to be heard hence denial of the rules of natural justice.*
- iii. That it was illegal for the respondent not to have given the benefits of the applicants due to the trust deed secured by the group endowment assurance policy dated the 15th day of October, 1991.*

The hearing of this application was by way of written submissions. Mr. Capt. Ibrahim Mbiu Bendera, learned Advocate argued the matter for the applicants whereas for the respondent appeared Salma Kitwana, learned State Attorney.

Mr. Bendera submitted that, the applicants were employed at diverse time and so were permanent and pensionable employees at the container department. When the respondent hired TICTS in container department, the applicants were terminated and not paid all terminal dues.

He further submitted that due to technicalities, the applicants were in corridors of justice without achieving their goals for pursuing wrong claims. He was of the view that the most probable thing to recon would have been retrenchment of the applicants and not termination. The learned advocate reinforced his submission by making reference to

section 36(a) (b) 37(1) and (2) of the Employment and Labour Relations Act and held the view that the applicants were unfairly terminated.

Mr. Bendera submitted that the respondent established the Staff Endowment Assurance Scheme under the Trust Deed secured by the Group Endowment Assurance Policy. He stated that, the purpose of the scheme was to support each and every employee and or his beneficiaries upon retirement. But in his words, none of the applicants have been paid from the scheme.

He states further that, the applicants went to the Commissioner for Labour who referred them to the CMA as the cited provisions of Section 86(1) of The Labour Relations Act and Section 13(5) of the Labour Relations Act. The dispute therefore could not be time barred. Mr. Bendera finally asked this court to revise the ruling in favour of the applicants and grant this application.

Opposing the application Miss Kitwana submitted that the applicants were aggrieved by retrenchment and filed a case to the High Court and Court of Appeal. They identify themselves as Abdallah Chitanda and 379 others. She stated further that, having lost, they appeared at the Labour Commissioner and identified themselves as Festo Mabwai and 445 others. She continued to submit that, the matter from there was

forwarded to the CMA but the dispute was dismissed for being time barred and hence this application.

She continued to submit that, apart from other applications filed and struck out for one reason or another, Application No. 419 of 2019 was found time barred by this court but instead of being dismissed, it was struck out with leave to refile. It was argued further that it ought to have been dismissed under Section 3 of Law of Limitation Act. In support, she cited the case of **Barclays Bank Tanzania Limited v Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016. She stated that, the applicants filed another application for extension of time. They were granted and hence this application.

Miss Kitwana continued to submit that the present revision was filed without a representative suit in contravention of Rule 44(2) of the Labour Court Rules, 2007. In her view, there is a danger of the applicants whom Abdallah Chittanda, Festo Mabwai and Janeth Mfuruki represent to refuse to be bound by the decree. He then cited the case of **Mhoja Mangombe & 16 others v Akida General**, Labour Revision No. 8 of 2011 which was cited with approval in the case of **Christopher Gasper and Others v Tanzania Ports Authority**, Misc. Labour Application No. 281 of 2013. at page 6

Miss Kitwana further submitted that, **one**, the import of the Extension Notice, 2013 was to extend time for determination of disputes originating from the repealed laws which were not finalized immediately before- the commencement of Employment and Labour Relations Act (ELRA). She was of the view that, extension of time was not automatic for matter, claims are out of time. **Two**, paragraph 13(5) of the third schedule to the ELRA states that disputes referred to CMA are liable and subject to time limitation in the same way as any Labour Dispute referred to the CMA by any other person.

She continued to submit that the Labour Commissioner was not right to refer the matter to the CMA. The learned Attorney held the view that the High Court in Civil case No. 275 of 2002 had declared the dispute to be time barred. The CMA, she added, inferior to the High Court, could not entertain a complaint which was held to be time barred. She continued to submit that, this court is not open to reverse CMA's ruling as the decision of time limitation has already been heard by another High Court as held in the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012. Furthermore, she argued, the matter has already been determined by another High Court, which makes it res judicata, reference was made to the case of **MM**

World Trading Company Limited and two others v National Bank of Commerce Limited, Civil Appeal No. 258 of 2017. She finally submitted that this court is functus officio in relation to the applicants' matter and so should be dismissed with costs.

In a form of a rejoinder, Mr. Bendera submitted that in the prayer, they also included Abdallaha Chitanda and two others to represent other applicants, as there are no new claims outside what the CMA decided. Other points are reiterated from the submission in chief.

After considering the submissions of both parties the court has been called upon to determine *whether the CMA had jurisdiction to determine this dispute and to what relief parties are entitled to.*

It should be noted that the dispute was referred to the CMA by the Labour Commissioner. For easy reference the letter stated: -

YAH: MALALAMIKO YA BW. FESTO MABWAI NA WENZAKE 445

DHIDI YA MAMLAKA YA BANDARI TANZANIA

Tafadhali husika na kichwa cha Habari hapo juu.

Nimepokea barua ya mgogoro wa kikazi kutoka kwa Bw. Festo Mabwai na wenzake 445 ambao waliachishwa kazi na Taasisi tajwa hapo juu bila kulipwa mafao yao ipasavyo.

*Kwa mujibu wa aya 13 ya Jedwali la tatu la Sheria ya Ajira na Mahusiano Kazini Na. 6 ya mwaka 2004 kama ilivyorekebisha na kifungu cha 42 cha Sheria ya Marekebisha ya Sheria mbalimbali Na. 11 ya mwaka 2010 yakisomwa Pamoja na Tangazo la kuongeza muda lililotolewa kupitia Gazeti la Serikali Na. 149 la tarehe 31 Mei 2013 (the Employment and Labour Relation (Extension of Time for Dispute Determination) Notice, 2013, **nawasilisha shauri hili kwa hatua zako** (the emphasis is mine).*

Pamoja na barua hii naambatanisha barua ya maelezo ya mlalamikaji kwa rejea yako.

...
"KAMISHNA WA KAZI"

The Labour Commissioner therefore, as a matter of law, is empowered to refer disputes to the CMA. Section 42 of the amendment Act, which the Labour Commissioner referred states that: -

"The principal Act is amended in the third schedule by deleting paragraph 13 and substituting for it the following new paragraph:

13(1) All disputes originating from the repealed laws shall be determined by the substantive laws applicable immediately before the commencement of this Act.

(2) ...

(3) ...

(4) ...

(5) The Commission shall have powers to mediate and arbitrate all dispute originating from the repealed laws brought before the Commission and all such disputes shall be deemed to have been duly instituted under Section 86 of the Act."

The Security of Employment Act No. 62 of 1964, was therefore applicable in disputes of this nature. The applicants, as stated were terminated on 06th September, 2000. Atleast 16 years later, in 2016, they reported the dispute to the Labour Commissioner, who ultimately referred it to the CMA by the letter dated 27th May 2016.

It is my view therefore that based on the law that governed the dispute which is section 23(1)(a)(b)(c) and (2) of Act No. 62 of 1964, it provides: -

"23(1) where an employee-

- (a) *Is summarily dismissed; or*
- (b) *Is informed by his employer, that the employer proposes to dismiss him summarily, or*
- (c) *Suffers a deduction by way of a disciplinary penalty from the wages due to him from his employer,*

He may, within the time specified in subsection (2), refer the matter to the Board and the Board shall, so far as is reasonably practicable, hear the reference and give its decision thereon within seven days (excluding Sundays and public holidays) of the reference being received by it.

(2) A reference to a Board under this section shall be made within seven days of the employer, proposes to dismissed, being informed of the proposal to dismiss him, or differing the deduction, as the case may be; ..."

As the law provides the dispute ought to be filed by the applicants on 13th September, 2000 from the day they were terminated at the Board.

The applicants submitted that, they were in corridors of justice pursuing wrong claims. Further, after perusal of CMA record, there are "THE RULES OF TANZANIA HARBOURS AUTHORITY STAFF ENDOWMENT

ASSURANCE SCHEME". Rule 27 states how the dispute should be handled when the same arises. It states: -

"ARBITRATION

Save where by the Trust Deed or the Rules the decision of the Employer or Trustees is made conclusive, if at any time hereafter any dispute, difference or question shall arise collectively or severally between the Employer, the Trustees, any member or other person claiming under him or touching on the effect of these presents or any clause or thing herein contained or the rights or liabilities of the said parties respectively or any of them under these presents or otherwise howsoever in relation to these premises, then every such dispute difference or question shall be referred to arbitration for adjudication and settlement under the provisions of the Tanzania Arbitration Ordinance or an statutory modification or re-enactment for the time being in force."

The claims are as well based on the scheme. The same as shown has the procedure through which it has to operate. I think, the applicants were supposed to referred their dispute to the stated body. Therefore, based on the dictates of the law cited, as well as the endowment scheme where the claims are based, the dispute was filed out of time. I

think, disputes, whether referred to the CMA by the Labour Commission or otherwise, the law should be followed. In the case of **Barclays Bank Tanzania Limited V. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016, Court of Appeal at Dar es Salaam, which stated: -

"We fully adopt that statement and add that, it would be inequitable if we allowed one party to an employment contract to disregard time in instituting a complaint against the other party. We think matters would not come to finality as required if a party who allows grass to grow under his feet and delays in instituting an action, would only be given an order to refile it.

From the foregoing, this application is dismissed with no order as to costs.




A.K. Rwizile

JUDGE

29.04.2022