IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 261 OF 2021

BETWEEN

MASANJA BIDAYO..... APPLICANT

VERSUS

BAHARI EAGLES FOUNDATION LIMITED.....RESPONDENT

JUDGMENT

Date of Last Order: 10/02/2022
Date of Judgment: 10/02/2022

B.E.K. Mganga, J

Applicant was employed by the respondent as a teacher. The employment relationship between the two started on 1st January 2016 when they entered into two-year fixed term contract ending on 31st December 2017. Before expiry of the said contract, on 24th March 2017 parties entered into another three-year fixed term contract. It happened that relationship between the two went bad as a result, on 6th February 2018, respondent served the applicant with a notice of termination of employment. Applicant challenged the said notice of termination before the Commission for Mediation and Arbitration henceforth CMA. Fortunately, on 3rd March 2018, the dispute was settled before H.

Makundi, Mediator, who issued a certificate to that effect. Following that settlement, applicant was reinstated. On 21st November 2018, respondent wrote a letter notifying applicant that the said three-year fixed term contract will expire on 31st December 2018 and that, there will be no renewal. Applicant felt resentful with that letter as a result, he decided to knock the CMA's doors again this time, on ground that respondent breached the contract. In knocking CMA doors, applicant filed Labour dispute No. CMA/PWN/BAG/05/20129 claiming to be paid TZS 12,600,000/=. Applicant claimed the said amount alleging to be salary for the remaining 15 months of the aforementioned three-year fixed term contract.

The dispute was heard and determined on merit by the arbitrator after hearing evidence of both sides. In deciding the dispute, the arbitrator issued an award in favour the respondent, that there was no breach of the employment contract, rather, the same came to an end upon expiry of the agreed period. Aggrieved by that decision, applicant filed this application challenging the award.

When the application was called for hearing, both Hamza Rajabu, the personal representative of the applicant and Adam Mwambene,

advocate for the respondent prayed the same be argued by way of written submissions, a prayer which was granted.

Mr. Rajabu, the personal representative of the applicant submitted that arbitrator erred in law to admit documents to be relied upon by the respondent that were filed on 26th February 2020 after closure of the applicant's case on 24th January 2020. He submitted further that, no leave of the arbitrator was sought and granted before allowing respondent to use and tender the said documents as evidence. He argued that that was an irregularity and cited the case of **China *Maganlal Kakkad v. Magdalena A. Onwa and Alamniah Heavy Equipment (EA) Limited,*** Land Case No.381/2014 to strengthen his argument.

Mr. Rajabu submitted also that, arbitrator failed to consider the preliminary objection he raised against the list of documents filed by the respondent. He narrated that, instead of issuing a ruling, arbitrator ordered the parties to continue with hearing of the case on merit on reason that the preliminary objection will be determined in the award, of which he did not. Mr. Hamza submitted that, that was not proper and cited the case of ***Benjamin P. Masota v. Mrs Esther Maneno***, Civil Appeal No. 84 of 2010 (Unreported) to support his argument.

It was further submitted by Mr. Rajabu that, respondent was in breach of the three-year fixed term contract that was signed by the parties on 24th March 2017. He submitted that respondent terminated employment of the applicant 15 months before it came to an end. Mr. Rajabu argued that the said three-year fixed contract was expiring on 23rd March 2020.

In response to the submissions made on behalf of the applicant, Mr. Mwambene, counsel for the respondent, submitted that on 28th February 2020, respondent sought and was granted leave to file the list of documents to be relied upon as she was out of time. Counsel for the respondent submitted further that arbitrator granted leave after considering reasons advanced by the respondent as per Rule 31 of the Labour Institution (Mediation and Arbitration Guidelines) Rules GN.64 of 2007. Counsel for the respondent submitted that applicant withdrew the preliminary objection, which is why, leave was granted, as such, it was superfluous to determine the said preliminary objection. In order to show that use of the said documents did not prejudice the applicant, Mwambene, submitted that applicant was given chance to cross examine the respondent on all the documents which were relied upon. He therefore distinguished the case of ***China Magnanlal Kakkad***

(supra) and argued that the Civil Procedure Code particularly, Order VIII Rule 14 (1) and (2), Order XIII Rule 1 (1) and Oder VIII Rule 4 are not applicable in labour matters.

Responding to the submissions done on behalf of the applicant relation to commencement and coming to an end of the said three-year fixed term contract, Mr. Mwambene submitted that the said contract commenced on 1st January 2016 and expired on 31st December 2018. He referred the court to clause 3 of the said contract and concluded that the claims of the applicant are unmaintainable in law.

I have considered submissions of the parties and evidence in CMA record and find that on 9th August 2019, parties were ordered to file their supporting evidences within fourteen days i.e., by 23rd September 2019. Respondent did not file the same in time as he filed the same on 28th February 2020. Rule 24 (6) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 requires parties to serve copies of documents intended to be used as evidence, for the arbitrator and for each party to the dispute. Respondent did not abide by the CMA order which required the intended documents to be used as evidence to be file by 23rd September 2019. It is trite law that, after an

order has been pronounced, any party intending to act on the said order out of time, has to seek leave.

It was argued by counsel for the respondent that respondent filed documents to be used as evidence after being granted leave by the arbitrator on 28th February,2020. What is clear in the CMA record is that, on 28th February 2020 respondent filed a list of documents to be used as evidence and that on 29th May 2019, applicant raised an objection. On 31st July 2020, the arbitrator issued an order to proceed with the hearing on ground that she will give her reasons in the award. The arbitrator relied on Rule 23(9) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007. With due respect to counsel for the respondent, as he decided to tell a brunt lie as there is nothing on CMA record showing that leave was sought and granted. Equally counsel for the respondent told a naked lie when he submitted that applicant withdrew his preliminary objection as the same bears no support on CMA record. I am upset by this state of affairs but for now I opt not to express more feelings. We all know that an Advocate is an officer of the Court, and that, at all time, he should strive to assist the court in dispensing justice and not to mislead it by giving false information. The duty of the advocate is not to win the case at all cost.

As pointed above, the preliminary objection was not determined by the arbitrator, but the arbitrator, both during the hearing admitted them as evidence though there was no objection at this time and proceeded to consider and used them when composing the award and deciding rights of the parties. This in my view, was an error. Though Rule 23(9) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 allows adjournment of determination of a preliminary point, that should be subject to circumstances of the case or nature of the preliminary objection. In my view, that should be limited to preliminary objections that may not affect rights of the other side in the proceedings. The preliminary objection that was raised in the matter at hand was relating to the use of the documents in evidence. The Court of Appeal in ***Benjamini P. Masota' case*** (supra) held that

> *"The law is settled. Whenever a preliminary objection on a point law is raised, unless it is withdrawn or conceded, it has to be determined first, before the merits of the case are considered".*

The arbitrator was supposed to grant leave or not before allowing respondent to use the documents she filed out of time as evidence. Arbitrator had two options namely (i) give reasons at the time of upholding or dismissing the preliminary objection or (ii) uphold or dismiss the preliminary objection and reserve reasons to be delivered in

the award. In scenario (ii), arbitrator was supposed to give the reasons she reserved. Unfortunately, this was not done.

As the arbitrator used documents that were filed in violation of Rule 24 (6) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007, and as the arbitrator failed to determine a preliminary objection relating to the use of those documents, I hereby expunge them from the record as they were wrongly admitted as exhibits in favour of the respondent. Respondent was afforded chance to defend herself, but she wasted that chance by her failure to comply with CMA order. By expunging her exhibits, she will learn a lesson why she should always comply with orders issued by either the court or CMA. For all said, I find the complaint by the applicant in this ground meritorious.

Applicant criticized the arbitrator by holding that the said three-year fixed term contract expired on 31st December 2018. According to the applicant, the said three-year fixed term contract expired on 23rd March 2020. Applicant was relying on the notice of termination of employment dated 6th February 2018 (exh. P3) in which he was referred to the contract which was expiring on 23rd March 2020. Without wasting my time, I should point out that there is no fixed term contract that was

tendered in evidence by the applicant expiring on 23rd March 2020. On the other hand, counsel for the respondent submitted that the said three-year fixed term contract expired on 31st December 2020.

I have considered these rival arguments of the parties. It is undisputed that on 10th May 2016 the parties signed two-year fixed term contract with effect from 1st January 2016 (exh. P1). This contract was expired on 31st December 2017. It is also undisputed that before expiry of the said two-year fixed contract (exh. P1), a three-year fixed term contract was signed by the parties (exh. P2) also with effect from 1st January 2016. It was testified by the applicant (PW1) that the said three-year fixed term contract was signed on 24th March 2017 but Eva Fumbuka (DW 2) who signed the said three-year fixed contract on behalf of the respondent testified that it was on 24th March 2016. Both PW1 and DW2 testified that the said three-year fixed term contract (exh. P2) was with its effect from 1st January 2016. I should point out that I have examined the said three-year fixed term contract and find that the year of signing was altered by pen to read 2017 instead of 2016 but date of its commencement remained 1st January 2016.

It is evidence Eva Fumbuka (DW2) that respondent decided to sign exhibit P2 while two-year fixed term contract (exh. P1) had not

expired because applicant applied a loan from NMB but the condition for eligibility to the loan was that applicant should have a valid contract of employment of three or more years. In my view, whatever was the reason behind for the parties to enter into three-year fixed term contract, that is not an issue between the parties, but the date of its expiry.

Both applicant (PW1) and Eva Fumbuka (DW2) testified that the said three-year fixed term contract commenced on 1st January 2016. They were correct, in my view, because clause 3 of the said contract (exh. P2) reads in part:-

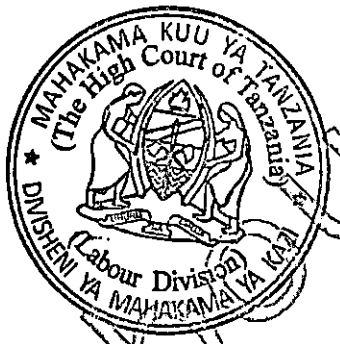
> *"3. The term of this contract will be three (3) years full-time with effect from 1st January 2016... "*

It follows therefore that, as the said three-year fixed term contract commenced on 1st January 2016, therefore three years expired on 31st December 2018. In fact, even applicant (PW1) while under cross examination admitted that the said three-year fixed term contract (exh. P2) expired on 31st December 2018. The law, specifically, Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 is clear that, where the contract is a fixed term contract, the contract will automatically expire when the agreed period

expires, unless the contract provides otherwise. That position of the law was reaffirmed by the Court of Appeal in the case of ***Serenity on the Lake Ltd v. Dorcus Martin Nyanda,*** Civil Appeal No. 33 of 2018, CAT (unreported). It is my considered view therefore that, arbitrator did not error in holding that the contract between applicant and respondent expired on 31st December 2018.

For the foregoing, I hereby uphold the CMA award and dismiss this application for want of merit.

Dated at Dar es Salaam this 10th February 2022.



B.E.K. Mganga
JUDGE