

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

**REVISION APPLICATION NO. 461 OF 2021**

*(Arising from the Ruling dated 12<sup>th</sup> November delivered by Hon. G. Gerald, Arbitrator in Labour dispute  
No. CMA/DSM/KIN/73/21/52/21)*

**BETWEEN**

**KENNEDY OUMA OMOTE ..... APPLICANT**

**AND**

**ATLAS MARK GROUP LIMITED..... RESPONDENT**

**JUDGMENT**

*Date of last order: 09/05/2022  
Date of judgment: 06/06/2022*

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

On 8<sup>th</sup> February 2021, Kennedy Ouma Omote, the applicant filed Labour dispute No. CMA/DSM/KIN/73/21/52/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni complaining that his employment was unfairly terminated by the respondent. In the Form referring the dispute to CMA i.e., CMA F1, applicant showed that the

dispute arose on 18<sup>th</sup> January 2021 that is the date of termination. On 27<sup>th</sup> April 2021, the respondent filed a notice of preliminary objection that CMA has no jurisdiction to entertain the dispute between the parties. When the parties were called for hearing of the said preliminary objection, it was submitted on behalf of the respondent that the dispute was time barred because applicant was terminated on 23<sup>rd</sup> September 2020 contrary to what he filled in the CMA F1 that he was terminated on 18<sup>th</sup> January 2021. As a proof that the dispute arose on 23<sup>rd</sup> September 2020, counsel for the respondent tendered a termination letter to that effect. Counsel for the applicant maintained that applicant was terminated on 18<sup>th</sup> January 2021 hence the dispute was filed within time. Counsel for the applicant prayed the arbitrator to dismiss the preliminary objection on ground that the letter of termination tendered by counsel for the respondent is evidence that is supposed to be considered during hearing of the dispute and not at the time of disposing the preliminary objection.

On 12<sup>th</sup> November 2021, Hon. G. Gerald, Arbitrator, having heard submissions of both sides delivered his ruling upholding the preliminary objection that the dispute was time barred. In arriving to that conclusion, the arbitrator considered the termination letter that was tendered by

counsel for the respondent that applicant's employment was terminated on 23<sup>rd</sup> September 2020.

Aggrieved by the said ruling, applicant filed this application seeking the court to revise it and order the parties to go back to CMA so that they can be heard on merit. In the affidavit of Boniphace Erasto Meli, counsel for the applicant, in support of the application, raised three grounds/issues namely: -

- 1. Whether the Arbitrator was correct in law to admit and consider documentary evidence (termination letter) tendered during hearing of the preliminary objection.*
- 2. Whether the Arbitrator was correct in law to hold that the matter was filed out of time basing on the termination letter tendered by the respondent during hearing of the preliminary objection.*
- 3. Whether it was proper for the Arbitrator to disregard the complaint's counsel evidence in delivering the ruling of the impugned ruling dated 12<sup>th</sup> November 2021.*

The respondent filed a notice of opposition together with the counter affidavit sworn by Conradus Felix, her learned counsel.

At the time of hearing the application, applicant was represented by Boniphace Erasto, learned counsel while respondent was represented by Conradus Felix, learned counsel.

Arguing on behalf of the applicant, Mr. Erasto, learned counsel submitted that applicant filed the dispute at CMA on 8<sup>th</sup> February 2021 because the dispute arose on 18<sup>th</sup> January 2021. He argued that CMA F1 was filed 21 days from the date the dispute arose, but the respondent claimed that termination of the applicant's employment was in September 2021 as per termination letter. Counsel for the applicant submitted further that, the arbitrator erred to admit the said termination letter at preliminary objection stage as evidence instead of waiting to admit it in the main trial. He argued that that was improper and cited the case of ***Shose Sinare v. Stanbic Bank Tanzania Ltd and Another***, Civil Appeal No. 89 of 2020 CAT (unreported), ***Yohana Maganjira & 31 Others v. Tanzania Leaf Tobacco Company Ltd***, Misc. Labour Application No. 3 of 2019, ***Britam Insurance Tanzania Ltd v. Ezekiel Kingongogo & Another***, Civil Appeal No. 125 of 2021, CAT and ***Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu) v. Selemani Hamisi (the Administrator of the Estate of the late Hamisi Abdallah)***, Civil Appeal No. 314 of 2020 CAT (unreported) to support his argument.

Counsel for the applicant submitted further that the arbitrator disregarded submissions made on behalf of the applicant. He submitted that, that was an error and cited the case of ***Athumani Hassani v. The Republic***, Criminal Appeal No. 292 of 2017 CAT (unreported) to bolster his point and prayed the application be allowed.

In resisting the application, Mr. Felix learned counsel for the respondent submitted that proof of termination did not attract evidence because there was no other evidence proving that applicant was terminated in September 2020. He also submitted that the dispute was filed on 8<sup>th</sup> February 2021. He went on that, having found that the matter was time barred, the arbitrator was supposed to dismiss the matter and not to strike it out as it was held in the case of ***Barclays Bank Tanzania Ltd v. Phylisiah Hussein Mcheni***, Civil Appeal No. 19 of 2016 CAT (unreported). Brief as he was, counsel for the respondent prayed the application be dismissed.

In rejoinder, Mr. Erasto, counsel for the applicant submitted that the arbitrator was not supposed to ascertain documents i.e., termination letter because that was evidence. He concluded that in CMA F1 applicant did not show that he was terminated in September 2020.

I have carefully examined the CMA record and considered submissions by both parties and case laws cited during their submissions in this application. It is undisputed by both parties that applicant showed in the CMA F1 that he was terminated on 18<sup>th</sup> January 2021. It is also undisputed that at CMA, during hearing of the preliminary objection, counsel for the respondent tendered a letter showing that applicant was terminated on 23<sup>rd</sup> September 2020. It is further undisputed that the arbitrator based his ruling on the said letter that was tendered by counsel for the respondent in dismissing the dispute for being time barred. In other words, apart from the said letter, there was no evidence proving that applicant was terminated on 23<sup>rd</sup> September 2020. Counsel for the applicant has criticized the arbitrator for admitting the said letter during hearing of the preliminary objection and considered it in his ruling. I agree with counsel for the applicant that the arbitrator erred to admit the said letter as evidence at that stage and form a basis of the ruling that the dispute was time barred. I am of that view because counsel for the respondent, who tendered the said letter was not a witness, as such, could not be cross examined at that stage. Since applicant indicated in the CMA F1 that his employment was terminated on 18<sup>th</sup> January 2021 but respondent stating that it was on 23<sup>rd</sup>

September 2020, then, the arbitrator was supposed to reserve the ruling and proceed with hearing the dispute and determine the issue of limitation of time after receiving evidence from both sides. In short, the date of termination of the applicant was in dispute attracting proof by evidence and was decided wrongly by the arbitrator based on the evidence tendered by counsel for the respondent during submissions in support of the preliminary objection. The arbitrator therefore decided the preliminary objection purely on point of law but by evidence of one side denying the other right to be heard. In ***Shose's case*** (supra) and ***Britam Insurance's case*** (supra) it was held by the Court of Appeal that a preliminary objection does not need support from evidence. In ***Shose's case*** (supra), the Court of Appeal quoted its earlier decision in the case of ***The Soitsambu Village Council v. Tanzania Breweries Ltd and Another***, Civil Appeal No. 105 OF 2011 (unreported) wherein it held that:-

*"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should*

*not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."*

For the foregoing, I allow both the 1<sup>st</sup> and 2<sup>nd</sup> issues raised by the applicant because the arbitrator improperly accepted evidence during hearing of the preliminary objection and erred to base his decision on that evidence to hold that the dispute was time barred.

The arbitrator was also criticized that in his ruling dismissing the dispute for being time barred, he ignored submissions made by counsel for the applicant. This issue cannot detain me. I have read the impugned ruling and find that he considered submissions made on behalf of both parties.

It was submitted by counsel for the respondent that after finding that the dispute was time barred, the arbitrator was supposed to dismiss it, instead, he struck it out. I agree with him that the correct position as obtained in ***Mcheni's case*** (supra) is that a time barred matter is liable to be dismissed.

For all pointed out hereinabove, I allow the application and order that the CMA record be returned to CMA so that the dispute can be heard on



merit. The issue as whether the matter was time barred will be considered by the arbitrator after hearing evidence of both sides.

Dated at Dar es Salaam this 6<sup>th</sup> June 2022.



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

Judgment delivered on this 6<sup>th</sup> June 2022 in the presence of Boniphace Erasto, Advocate for the applicant and Conradus Felix, Advocate for the respondent.



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