

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

REVISION APPLICATION NO. 66 OF 2022

*(Arising from an Award issued on 11th August 2021 by Hon. Msina, H.H, Arbitrator, issued in Labour
Complaint No. CMA/DSM/ILA/04/2020/233 at Ilala)*

BETWEEN

UTT AMIS1ST APPLICANT

ATTORNEY GENERAL 2ND APPLICANT

AND

MWITA NYAGISWA RESPONDENT

JUDGMENT

Date of last Order: 16/06/2022
Date of judgment: 13/7/2022

B. E. K. Mganga, J.

On 1st February 2018, the respondent entered a three-years fixed term contract with UTT projects and Infrastructure Development PLC hereinafter referred to as UTT PID. In the said fixed term contract, the parties agreed that respondent will be head of Head of Finance. Before expiry of the said fixed term contract, the government directed that UTT PID should be closed and merge with UTT Asset Management and Investor Service PLC hereinafter referred to as UTT AMIS. It is said that following

directives of the government, all employees of the UTT PID were retrenched. The respondent was served with a letter terminating his employment and it is alleged that he was paid his entitlements. Respondent was aggrieved as a result, on 31st December 2019 he filed the complaint before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid (i) TZS 240,023,520/= being 36 months' salary for unfair termination, (ii) TZS 124,246,434/= being salary for the remaining period of the contract, (iii) TZS 48,338,070/= being 25% of the gratuity for 29 months and TZS 6,667,320/= being payment for unpaid leave.

On 11th August 2021, Hon. Masina, H.H, Arbitrator, having heard evidence of the parties, awarded the respondent to be paid TZS 141,680,550/= on ground that respondent was unfairly terminated.

Applicants were aggrieved with the said award, as a result, they filed this application for revision. The applicants filed the affidavit sworn by Tuzo Mpiluka in support of the notice of application and raised three issues namely: -

- 1. Whether the Commission for Mediation and Arbitration was to find that the respondent was unfairly terminated.*

- 2. Whether Commission for Mediation and Arbitration was correct to award the respondent compensation of TZS 141,689,550 while the respondent was already paid all his terminal benefits by the 1st applicant.*
- 3. To what relief(s) parties are entitled to.*

In opposing the application, respondent filed both the notice of opposition and the counter affidavit.

When the application was called for hearing, Ms. Lightness Msuya, learned State Attorney appeared and argued for and on behalf of the applicants while Mr. Yona Mwasongwe, Advocate appeared and argued for and on behalf of the respondent.

Submitting on the 1st ground, Ms. Msuya, learned State Attorney argued that the arbitrator erred to hold that applicant did not follow the procedure for retrenchment. She went on that evidence on CMA record shows that respondent was terminated by order of the Government as shown in Exhibit D2 which shows that the Government issued an order of merging UTT PID and UTT AMIS. She submitted further that, due to the said directive, employment of the respondent was terminated and further that respondent was paid all his entitlement and signed agreement of payment Exhibit D1 (consent of payment). She submitted that respondent was paid 7 months' salary, gratuity, airtime, fuel, annual leave pay, fare

from Dar es Salaam to Musoma, one month salary in lieu of notice all amounting to TZS 96,419,376/=. The learned State Attorney submitted further that on 24th December 2019, respondent acknowledge to have received the said money signing exhibit D1. Learned State Attorney went on that the procedure for retrenchment was adhered to because respondent was consulted and signed consent payment voucher and received payment. She concluded that the arbitrator erred to hold that the procedure was not followed.

On the 2nd ground, that the arbitrator erred to award respondent TZS 141,689,550/= while respondent was already paid, Ms. Msuya submitted that, respondent was paid as evidenced by Exhibit D1. She submitted that respondent was not entitled to be awarded that amount because he consented to the payment and accepted it. She concluded that the arbitrator erred to order the 1st applicant to pay the respondent (i) TZS 93,342,480/= as compensation while he had already been paid and (ii) TZS 48,338,070/= as gratuity while the procedure was followed, and the payment voucher shows that he was already paid gratuity of 25% x 7.

On the 3rd ground, Ms. Msuya learned State Attorney submitted that CMA had no jurisdiction, because applicant is a Public Institution governed

by the Public Corporation Act [Cap. 257 R.E. 2019]. She submitted further that, section 32A of the Public Service Act [Cap. 298 R.E. 2019] requires Public Servants to exhaust remedies available under the Act. She went on that, though respondent was employed as Head of Finance for fixed term contract, the said Section covers him also. Ms. Msuya submitted that, in the CMA F1, respondent indicated that his employment is from Public Service. Learned State Attorney cited the case of **Alex Gabriel Kazungu & 2 Others V. Tanzania Electric Supply Company Ltd**, Labour Revision No. 40 of 2020, HC (unreported) and the case of **Tanzania Posts Corporation V. Dominic Kalangi**, Civil Appeal No. 12 of 2022, CAT (unreported) to support her submissions that CMA had no jurisdiction over Public Servants. She therefore prayed that the application be allowed by nullifying the CMA proceedings, quash, and set aside the award arising therefrom.

I perused the CMA record and find that CMA F1 was signed by Mwiru Chimwenda on 31st December 2019 showing the position the said Mwiru Chimwenda was holding as PS. I also found that in the said CMA F1, it was indicated that the employer was UTT AMIS, but the fixed term contract tendered as Exhibit AP1 shows that the employer was UTT PID. I therefore

asked the parties to address the Court on whether, at CMA, the complaint was properly filed by the respondent, and whether, it was properly filed against the 1st applicant.

Responding to the issues raised by the court, Rose Kashamba, learned State Attorney, submitted that it is true that CMA F1 was signed by Mwiru Chimwenda showing that s/he is PS. But the employee who testified at CMA and who is the respondent is Mwita Nyagiswa, who, was an employee of UTT PID as Manager of Finance. Ms. Kashamba submitted further that, CMA F1 was supposed to be filled and signed by the employee who had a complaint and not any other person. She went on that, in the application at hand, CMA F1 was signed by Mwiru Chimwenda, who, was not the complainant. Ms. Kashamba learned State Attorney concluded that the complaint was not properly filed and heard at CMA because CMA F1 was fatally defective.

On the 2nd issue, Ms. Kashamba submitted that, Mr. Mwita Nyagiswa was employed by UTT PID and was terminated by UTT PID, but he filed the dispute against UTT AMIS hence it was not proper for the respondent to file the complaint against UTT AMIS, the 1st applicant, who was not his employer. During her submissions, Ms. Kashamba conceded that the

respondent was paid terminal benefits by UTT AMIS. She was however quick to submit that, respondent was supposed to file the complaint against both UTT PID and UTT AMIS but not against UTT PID alone. She maintained that the complaint was improperly filed and decided against UTT AMIS – 1st Applicant. Ms. Kashamba learned State Attorney prayed that CMA proceedings be nullified, the award arising therefrom be quashed and set aside.

Mr. Mwasongwe, learned counsel for the respondent, responding to the submissions made on behalf of the applicant, submitted that, on 01st February 2019 respondent entered a three-years fixed term contract expiring on 31st January 2021. Counsel for the respondent submitted that, employment contract of the respondent was terminated on 30th November 2019 due to structural change of the employer. Mr. Mwasongwe learned counsel for the respondent submitted further that, respondent was employed by UTT PID that is a Public Company bound by Sections 46 to 54 and 58 of the Companies Act [Cap. 212 R.E. 2019]. Counsel argued further that, applicant is not a Public Company. Mr. Mwasongwe conceded that the Government of the United Republic of Tanzania was the sole shareholder of UTT PID.

On the 1st ground, Mr. Mwasongwe, counsel for the respondent submitted that the arbitrator correctly held that procedures for retrenchment were not followed because respondent has a fixed term contract. Counsel for the respondent submitted further that, Rule 8(2)(a) and (b) of the Employment and Labour Relations (Code of Good practice) Rules, GN. No. 42 of 2007 provides how to terminate a fixed term contract. He went on that the said Rule provides that the contract can be terminated if there is agreement by the two but there was none. Counsel submitted further that Exhibit D1 shows salary payment for seven (7) months from May 2019 to November 2019 and gratuity for these months' that were paid to the respondent. Counsel for the respondent submitted further that respondent worked for 22 months only and was terminated while 14 months were remaining. He argued that respondent was entitled to be paid two (2) leave but was not paid because applicant was in economic constraint. Mr. Mwasongwe submitted further that; respondent was paid only one (1) leave instead of two (2). In his submissions, counsel for the respondent conceded that there was no application for condonation for the said two (2) leave. He conceded further that, according to Exhibit AP2, applicant terminated employment of the respondent due to operation

requirement. He was quick to submit that the procedure provided for under Section 38 of Cap. 366 R.E. 2007 (supra) read together with Rule 23 of GN. No. 42 of 2007 (supra) was not adhered to.

On the 2nd ground, counsel for the respondent submitted that, Exhibit D1 is not an agreement because it does not bear features of the agreement provided for under Section 10 of the Law of Contract [Cap. 345 R.E. 2019] and Section 71(1) of Cap. 366 R.E. 2019 (supra). Counsel argued that the said contract was supposed to be registered in Court in terms of Section 71(7) of Cap. 366 R.E. 2019 (supra).

On the 3rd ground, relating to jurisdiction, counsel for the respondent submitted that UTT PID was not a Public Office. Therefore, respondent was not a Public Servant. During submissions, counsel for the respondent conceded that, in CMA F1, respondent indicated that the dispute originated from the Public Service. He conceded further that, pleadings at CMA are in CMA F1. Counsel for the respondent submitted further that section 3 of the Public Service Act [Cap. 298 R.E. 2019] defines a Public Servant and that respondent had a fixed term contract hence was excluded from the definition of Public Servant. Counsel for the respondent also submitted that UTT PID does not formulate Policy and for that case, it was not a public

office. Mr. Mwasongwe learned counsel for the respondent distinguished **Kalangi's case** arguing that the facts of the application at hand differs from those in **Kalangi's case**. He argued that in *Kalangi's case*, the employer was established by an Act of Parliament while the applicant in the application at hand is governed by the Companies Act.

On the issues that were raised by the court, Mr. Mwasongwe, conceded that CMA F1 was signed by Mwiru Chimwenda who indicated that was holding the position of PS instead of Mwita Nyagiswa, the respondent who was holding the position of Head of Finance Department. He also conceded that Mwiru Chimwenda had no capacity to sign the CMA F1 and that the said CMA F1 was signed by unauthorized person. He concluded that, the CMA F1 was not properly filed and that, the complaint was not properly heard and decided at CMA. Counsel for the respondent submitted further that, the remedy available is to nullify CMA proceedings, quash and set aside the award arising therefrom.

On the 2nd issue, Mr. Mwasongwe, conceded that respondent had a fixed term contract with UTT PID and not UTT AMIS and further that it was not proper for the respondent to file a complaint against UTT AMIS without joining UTT PID. Initially, Mr. Mwasongwe learned counsel for the

respondent submitted that proceedings were properly conducted, but upon reflection, he conceded that in CMA F1, UTT PID was not reflected and that CMA F1 is the pleading in CMA. Mr. Mwasongwe was quick to submit that UTT AMIS, the 1st applicant, knew that Mwita Nyagiswa, the respondent was one of her employees.

In rejoinder, Ms. Msuya, learned State Attorney, submitted that UTT PID was registered under the Companies Act and that it is owned by the Government by 100%. She submitted that section 71 of Cap. 366 R.E. 2019 cited by counsel for the respondent does not apply in the circumstances of this application because Exhibit D1 is not a collective bargain, rather, payment upon cessation of employment. Ms. Msuya went on that, in CMA F1, respondent was claiming to be paid TZS 6,667,320/= as unpaid leave and that he was paid same amount in Exhibit D1.

I have carefully considered submissions of both counsels and for obvious reason, in disposing this application, I will start with the issues raised by the court.

Both counsels in their submissions are on the same footing that CMA F1 initiates pleadings in CMA and that the same was not signed by Mwita Nyagiswa, the respondent who was holding the position of Head of Finance

Department rather, it was signed by Mwiru Chimwenda who indicated that was holding the position of PS. Both counsels conceded that the said Mwiru Chimwenda had no capacity to sign CMA F1 and that the said CMA F1 was signed by unauthorized person. In their submissions, they agree further that CMA F1 was not properly filed, and that the complaint was not properly heard and decided by CMA. I agree with their submissions that CMA FI initiates pleadings at CMA and was supposed to be signed by Mwita Nyagiswa, the respondent and not Mwiru Chimwenda who is unknown in these proceedings. I further agree with them that there was no complaint filed by Mwita Nyagiswa, the respondent at CMA and that the arbitrator improperly heard and determined the dispute on wrong assumption that it was properly filed by the respondent. The law is clear on this issue as who should file documents at CMA. Mwiru Chimwenda, who signed the CMA F1, without authorization as there is no proof that she was authorized to do so, had no power to sign the CMA F1 and file it at CMA to initiate the labour complaint on behalf of the respondent. In terms of Rule 5(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 the documents including CMA FI to be filed at CMA must be signed by a party to the complaint or dispute. Mwiru Chimwenda was not a party to the

complaint or dispute that was filed at CMA giving rise of this revision application. The said Rule provides as follows: -

*"5(1) A document **shall be signed by the party** or any other person entitled under the Act or these Rules to represent that party in the proceedings.*

*(2) Where proceedings are jointly instituted or opposed by more **than one employee, documents may be signed by an employee who is mandated by the other employees** to do so.*

(3) subject to subrule (2) a list in writing, of the employees who have mandated a particular employee to sign on their behalf, must be attached to the document. The list must be signed by the employees whose names appear on it".

I have examined the CMA record and find that there is no evidence showing that the said Mwiru Chimwenda was mandated by Mwita Nyagiswa, the respondent, to sign the CMA F1 on his behalf. In short, CMA F1 was signed in contravention of the said Rule. More so, Mwiru Chimwenda was not a party to the proceedings at CMA. Therefore, there was no CMA F1 that was file at CMA to initiate the dispute between the 1st applicant and the respondent. That being the position, the whole proceedings were a nullity and the award arising therefrom has no base to stand.

Having found that there was no complaint filed by the respondent at CMA, I refrain to discuss other issues such as, whether it was proper for the complaint to be filed against the UTT AMIS, 1st applicant alone without joining UTT PID, whether CMA had jurisdiction to determine the dispute filed by the respondent who, it was alleged that was a public servant and all the grounds filed by the applicants. I have refrained to discuss these issues for obvious reason that there was no complaint filed by the respondent hence there is nothing to be discussed. That said and done, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam this 13th July 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 13th July 2022 in the presence of Lightness Msuya, State Attorney for the applicants and Yonah Mwasongwe, Advocate for the respondent.



B. E. K. Mganga
JUDGE

