IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 475 OF 2020

DURBAN NIGHT CLUB..... APPLICANT

VERSUS

ABBAS SIMBA .....1st RESPONDENT

SAID HUSSEIN.....2nd RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(William: Arbitrator)

dated 16th October 2020

in

CMA/DSM/KIN/R.497/18/147

JUDGEMENT

21st February & 8th March 2022

Rwizile, J

The application seeks to challenge the decision of the Commission for Mediation and Arbitration (CMA). The applicant has filed a chamber summons supported by the affidavit of Braison Kristosa Kimambo. The affidavit that lacks sufficient facts has advanced one issue or ground for determination. It is styled as; *whether the respondent instituted the matter against the wrong person instead of the necessary party D.R.Y Company Ltd (Kangaroo).*

Facts that paved the way to this application are that, the respondents were employed as security guards. They were allegedly terminated by the applicant for no apparent reason.

Not happy with their termination, they referred their dispute to the CMA, claiming for payment of benefits after unfair termination. The CMA found the respondents were unfairly terminated and ordered payment of TZS 6,000,000.00 in total for both respondents. The applicant was not satisfied, hence this application.

Mr. Matumla learned counsel for the applicant filed his brief written submission on the ground raised. He said, the respondents were employed by Kangaroo Night Club. Durban Night Club, he argued, does not exist. He argued that exhibit D1, is a lease agreement between the applicant and Kangaroo Night Club. He added that the respondents were security guards for the disco activities not the building. The learned counsel further submitted that failure to institute a case against the necessary party as the respondents did, is contrary to section 10(2) of Civil Procedure Code. Therefore, he held the view that this application has to be struck out.

To substantiate his point, Mr. Matumla argued that Durban Night Club is legally registered as Durban Hotels limited as per its certificate of registration. This court was referred to the case of **National Social Security Fund vs Rashid Mrisho Kakozi**, Revision No. 165 of 2012.

In conclusion, he submitted that in terms of section 83(a)(ii) of the Evidence Act, the registration certificate, is a public document and names the applicant as Durban Hotels limited. Therefore, he submitted, the award was issued against the wrong person.

Mr. Mwamkwala, a personal representative filed a very, very brief submission in response. He only referred to the evidence of Dw1 before CMA, who said, he started working with the applicant in 2018, and the respondents were employed as security guards before he did, and that he was employed after Ushe who supervised them. Mr. Mwamkwala, concluded that the applicant is the company that employed the respondents.

Having gone through the line of submissions between the parties, I think, I have to answer the crucial issue which hinges on whether the applicant was a proper party to stand this suit. The commission after hearing the parties, based its decision under section 15(5) and (6) of the Employment and Labour Relations Act. The section bids the employer to keep records of the employees. In the view of the Commission, the applicant failed to prove that the respondents were not employed by the applicant. By so deciding, the CMA swam in deep waters without a life jacket. Before the commission, the first point to determine was if, the respondents had sued a proper party. The commission was not called upon to adjudicate a dispute on the terms of the contract of employment as required by

subsection 6 of the same section. The employer in my considered opinion, is only required by law to keep records of his employees. Here a dispute is whether the respondents were employed by the applicant. This point was not accorded due weight. I therefore hold that section 15 is inapplicable in the circumstances of the case.

I, think, when a dispute arises as to whether a person is an employee of another, it is the duty of the employee to prove that he was indeed an employee of the alleged employer. This is governed by section 110 and 112 of the Evidence Act.

For ease reference, the law states;

> *110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

And section 112 states;

> *112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.*

Having so held, I have to venture into the record to see if there is evidence by the respondents discharging that duty. It has been submitted that they

were employed by the applicant as security guards. From their evidence there is no such proof. But the applicant before the CMA called one witness. This is one Ramadhani Abdallah Suba (Dw1). His evidence is clear that the applicant exists and does business at Sinza Africa Sana. He said, Durban Night Club is a business name. The business is owned by one Mhingira General Enterprises. He also said that the respondents worked with Kangaroo Night Club owned by Osama.

There is, however, no documentary evidence showing who owns Durban Night Club or Kangaroo Night Club. The certificate of registration brought here and as submitted by the applicant shows there is Durban Hotels Limited. This document was not tendered at the commission. It only featured here through the applicants' submissions. It has been held times without number, that submissions are not evidence but words from the bar. The same was not even pleaded in the affidavit supporting this application, which as I hinted before lacked material facts that supported the case. It cannot therefore be regarded at this stage. With equal force, section 110 and 112 applies to the applicant. He was duty bound to prove that Durban Night Club does not exist and that the respondents were not employed by her. Further, the evidence of Dw1 shows the respondents were working as security guards. There is no dispute about it. He also said, and it was also submitted by Mr. Matumla that the same were employed by Kangaroo Night club. But the applicant did not prove if

Kangaroo Night Club is not owned by Mhingira General Enterprises or the so-called Durban Hotels Limited.

In fine, the applicant has failed to prove that Durban Night Club does not exist. Based on the evidence of Dw1 who said knows the respondents and also said, he was employed to fill the position left by their supervisor. There is no reason to suppose, in the absence of cogent evidence, that the respondents were not employed by the applicant. The applicant has cited the case of **National Social Security Fund vs Rashid Mrisho Kakozi** (supra). With respect, the issues discussed here are distinguishable. The applicant has not discharged her duty of proving that Durban Night Club does not exist and so is a wrong party. This issue therefore has no merit, it is dismissed.

Because, the applicant only asked this court to determine one issue as above and since the same has been dismissed, therefore, this application fails. It is entirely dismissed with no order as to costs.

A.K.Rwizile

JUDGE

08.03.2022

Delivered in the presence of Mr. Abdallah Mutumla advocate for the applicant and Denis Mwamkwala personal representative for the respondents, this 8th day of March 2022.

A.K.Rwizile

JUDGE

08.03.2022