

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
DAR ES SALAAM
MISCELLANEOUS APPLICATION NO. 67 OF 2021

BETWEEN

**THE ECONOMIC AND SOCIAL RESEARCH
FOUNDATION..... APPLICANT**

AND

JOCELYN MKILIMA..... RESPONDENT

RULING

Date of Last Order: 28/02/2022

Date of Ruling: 07/03/2022

B. E. K. Mganga, J.

Applicant was the employer of the respondent under a fixed term contract of employment. In the said fixed term contract of employment, the parties agreed in clause 11 that the contract shall be governed by the laws of Tanzania and that the language of the contract shall be English. In clause 12 they agreed that any dispute arising out of the contract, which cannot be amicably settled between the parties, shall be referred to Arbitration in accordance with the laws of the Client's country. In clause 9 of the said fixed term contract of employment, parties agreed that any party wishing to give notice of termination of the

agreement, shall give the other party thirty days' notice and that the notice shall not commence until it is received by the other party.

It happened that on 20th February 2014 applicant wrote a notice of termination to the respondent informing her that her employment will be terminated on 19th March 2014. On 28th March 2018, almost five years after termination of the said fixed term contract of employment, respondent filed dispute No. CMA/DSM/KIN/373/18 before the Commission for Mediation and Arbitration hereinafter referred to as CMA on ground that she was unfairly terminated. The arbitrator at CMA dismissed the respondent's complaint as the arbitrator found that it had no jurisdiction over the dispute. Respondent filed Revision application No. 568 of 2018 before this court. On 30th October 2019, this Court (Z.G. Muruke, J) struck out the said revision application No. 568 of 2019 and on ground that CMA had no jurisdiction as parties agreed to submit themselves to arbitration in case of dispute. The court directed the respondent to take necessary action in appropriate forum if she was still interested in the matter.

After the said revision application No. 568 of 2019 was struck out, respondent referred the dispute to Hon. Madeline C. Kimei, the sole arbitrator. The applicant was unhappy on the way the said Hon.

Madeline C. Kimei, arbitrator was appointed by the respondent. Applicant alleges that existing circumstances gave rise to justifiable doubts as to impartiality of the said arbitrator. In the notice of application, applicant is seeking an order of this court to remove the said Madeline C. Kimei from arbitrating the dispute of the parties and remit the matter to the proper forum as the court may deem fit.

The notice of application is supported by the affidavit of Nyangi Georgina Wambura, counsel for the applicant. In her affidavit, Ms. Wambura deponed that after being served with the name of the sole arbitrator, on 23rd April 2020, applicant raised an objection on arbitrator's appointment because the said appointment was tainted with gross procedurally irregularities. That, even before hearing of the preliminary objection she raised, in May 2020 and without any prior agreement on the issue of costs, the respondent emailed the applicant that she has sent One Million Tanzanian Shillings (TZS 1,000,000/=) to the Arbitrator and that the latter has received the said money. That, having received the said money, the arbitrator proceeded to hear the preliminary objection by way of written submissions and overruled all preliminary objections by relying on the Arbitration Act No. 2 of 2020 that was not in operative at that time. Ms. Wambura, deponed further

that, after the ruling, the arbitrator scheduled the matter for hearing of the main application, but the applicant objected to pay costs of TZS 13,500,000/= as the amount is highly excessive and that there were uncertainties on the appointment of the arbitrator.

Respondent filed a notice of opposition and a counter affidavit. In her counter affidavit, respondent deponed that parties agreed to refer the dispute to the arbitrator and that she wrote a letter to the applicant requesting her to appoint an arbitrator, but after five months without any reply to her demand, she searched in the websites of arbitrators and came up with the name of Medaline C. Kimei. Respondent deponed further that, applicant is playing delay tactic and that applicant refused to pay arbitration costs on ground that the same is free of costs. Respondent deponed further that, it is the applicant who raised the issue of Arbitration Act No. 2 of 2020.

This application was argued by way of written submissions as that was the option of the parties and agreed by the court.

I have examined the affidavit and counter affidavit, and submissions made by the parties thereto, and find that the rival issue hinges on appointment of the said Medaline C. Kimei, as sole arbitrator and the alleged impartiality or unprofessionalism. But before I kick off, it

is worth to point out that this application has been made under section 93(2)(b) and 94(1) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019], sections 25(4)(b) and 26(1)(a) and (c) of the Arbitration Act No. 20 of 2020, Rule 24(1), (2)(a),(b),(c), (d), (e) and (f), 3(a),(b), (c) and (d) , Rule 28(1)(a),(b), (c), (d) and (e) of the Labour Court Rules GN. No. 106 of 2007. Section 93(2)(b) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] cited by the applicant in the notice of application provides:-

93(2) The provisions of the arbitration Act, shall apply to any agreed submission of a dispute to arbitration provided that-

(b) any reference to the High Court in the Arbitration Act shall be interpreted as referring to the Labour Court.

On the other hand, section 94(1) of Cap. 366 R. E 2019 (supra), gives exclusive jurisdiction to the Labour Court over any employment labour matter, while Rule 24(1), (2)(a), (b), (c), (d) (e) and (f), 3(a), (b), (c) and (d) of the Labour Court Rules GN. No. 106 of 2007 provides the manner how applications can be made to the labour Court. Rule 28(1)(a), (b), (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 relates to revisions and grounds thereof. I should point that, this Rule was wrongly cited because, in the notice of application, the applicant is not seeking an order of revision.

As pointed hereinabove, applicant is seeking an order of the court to remove the said Medaline C. Kimei, the sole arbitrator from arbitrating the applicant and the respondent on two grounds namely (i) the arbitrator was improperly appointed by the respondent and (ii) the said arbitrator has exhibited impartiality and professional misconducts.

It was submitted by the applicant that respondent appointed the aforementioned arbitrator without adhering to the procedure of appointment of the sole arbitrator. On the other hand, respondent submitted that applicant was afforded a chance to appoint the arbitrator, but she did not. According to the respondent, applicant was playing a delay tactic. It was argued on behalf of the applicant that, the arbitrator applied the provisions of the Arbitration Act, No. 2 of 2020 that was not operative. One quick response to that argument is that, in the application at hand, the applicant has relied on the same Act to move this court. I therefore see no logic of this complaint. Whatever the case, Arbitration Act No. 2 of 2020 came into force on 14th February 2020 and in terms of section 91, the Arbitration Act [cap. 15 R. E. 2019] was repealed. The issue of appointment of the arbitrator is well covered under the Section 18(1) and (2)(a) and section 19 of the Arbitration Act, No. 2 of 2020. Section 18(1) and (2)(a) of the said Act provides:-

"18.-(1) The parties may agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) In the event the agreement referred to in subsection (1) does not exist the following shall apply:

(a) if the arbitral tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than twenty eight days after service of a written request by either party,

It was submitted by the respondent that served the applicant with notice to appoint the arbitrator, but no response for five months. In my view, that was contrary to the provisions of the above quoted section. It was not expected for the respondent, after applicant has remained mute, not to take an action by appointing an arbitrator. In fact, section 19 of the Arbitration Act, No. 2 of 2020 provides an answer as to what should be done if one party decline to appoint an arbitrator. The said section provides:-

19.-(1) Unless the parties otherwise agree, where each of the two parties to an arbitration agreement is to appoint an arbitrator and one party refuses or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give a written notice to the party in defaults that he proposes to appoint his arbitrator to act as a sole arbitrator.

(2) Where the defaulting party does not within seven days of the notice-

(a) make the required appointment; and

(b) notify the other party of the appointment, the other party may appoint his arbitrator as a sole arbitrator whose award shall be binding on both parties as if he had been appointed by the two parties.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may, upon notice to the appointing party, apply to the Centre which may set aside the appointment.

In my view, since applicant did to respond after being asked by the respondent to appoint the arbitrator, she cannot now be heard complaining about appointment of the afore mentioned arbitrator. If applicant felt unhappy, she was, in terms of section 19(3) of the Arbitration Act, required to apply to the Tanzania Arbitration Centre that was established under section 77(1) of the Arbitration Act, No. 2 of 2020 as I will explain in detail herein below.

Applicant has moved this court under section 25(4)(b) and 26(1)(a) of the Arbitration Act, No. 2 of 2020 to remove the sole arbitrator appointed by the respondent from arbitrating the dispute between the two. In my view, this application was wrongly filed before this court. That conclusion is based on the provisions of sections 25(4)(b) and

26(1)(a) of the Arbitration Act, No. 2 of 2020. For clarity, section 25 of Arbitration No. 2 of 2020 is reproduced hereunder:-

25.-(1) The parties may agree the circumstances upon which the appointment of an arbitrator may be revoked.

(2) Where the agreement referred to under subsection (1) does not exist, the appointment of an arbitrator may be revoked-

(a) by the parties acting jointly; or

(b) by the decision of an arbitral tribunal or other institution or person vested by the parties with powers in that regard.

(3) Revocation of the appointment of an arbitrator by the parties acting jointly shall be agreed in writing.

(4) Nothing in this section shall affect the power of the court to-

(a) revoke an appointment under section 20; or

(b) remove an arbitrator on the grounds specified in section 26.

Applicant further cited section 26(1) (a) of the Arbitration Act, No. 2 of 2020 as enabling provision. For clarity I have decided to reproduce the whole of section 26 as hereunder:-

26.-(1) A party to arbitral proceedings may, upon notice to the other party, to the arbitrator concerned and to any other arbitrator, apply to the Centre to remove an arbitrator on any of the following grounds:

(a) that there are circumstances which give rise to justifiable doubts as to his **impartiality**;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; or

(d) that he has refused or failed to-

(i) properly conduct the proceedings;

(ii) use all reasonable dispatch in conducting the proceedings; or

(iii) make an award and substantial injustice has been or will be caused to the applicant.

(2) Where there is an arbitral tribunal or other institution or person vested by the parties with power to remove an arbitrator, the Centre shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award pending an application to the Centre under this section.

(4) Where the Centre removes an arbitrator, it may make such directives as it thinks fit with respect to-

(a) his entitlement to any fee or expense; or

(b) the repayment of any fees or expenses already paid.

(5) The arbitrator against whom the application is brought shall be entitled to be heard by the Centre before it makes any order under this section.

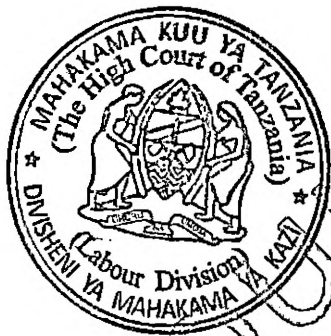
It is clear, in terms of section 26(1) of the Arbitration Act, No. 2 of 2020 that, applicant was supposed to file the application to the Tanzania Centre for Arbitration and serve a notice of application to the respondent and the arbitrator. That is only the way the arbitrator may be afforded right to be heard in terms of section 26(5) of the Arbitration Act, No. 2 of 2020. It was no proper for the applicant to file this application before this court seeking removal of the arbitrator based on impartiality. It is evident clear that, the arbitrator is not party to the application before this court and in no way, she can be afforded right to be heard on the allegations levelled against her.

The provisions relating to removal of the arbitrator as quoted hereinabove, does not mention the court but the Centre. Applicant in citing section 93(2)(b) of the Employment and Labour Relations Act[Cap. 366 R. E. 2019) that any reference to the High Court in the Arbitration Act shall be interpreted as the Labour Court and the citing of section 94(1) of the Employment and Labour Relations Act[Cap. 366 R. E. 2019) that gives exclusive jurisdiction to the Labour Court on labour matters, in my view, was a misconception. I am of that view because, the High Court is not mentioned in the provisions relating to either appointment or removal of arbitrator. That is the duty of the Tanzania Arbitration

Centre in terms of section 77(3)(d) of the Arbitration Act. No. 2 of 2020. Applicant may wish also to read the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021, GN. No. 148 of 2021 on conducts of arbitrators and take necessary action if she feels there is any.

For all said and done, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam this 7th day of March 2022.




B.E.K. Mganga
JUDGE