

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

MISC. APPLICATION NO. 85 OF 2022

*From the Ruling of Commission for Mediation & Arbitration of Pwani at
Kibaha Dated 01 March 2019 in Labour Dispute No.
CMA/DSM/PWN/KBH/89/2019*

GODFREY E KAMELA & 35 OTHERS.....APPLICANTS

VERSUS

KIBAHA EDUCATION CENTRE.....RESPONDENT

RULING

K. T. R. MTEULE, J

21st July 2022 & 11 August, 2022

This ruling concerns Miscellaneous Application No. 85 of 2022 which was filed by the applicants asking for extension of time to file an application for revision against the decision of CMA Kibaha Pwani in Labour Dispute No. CMA/DSM/PWN/KBH/89/2019 and any other necessary orders the Court may deem just and fit to grant.

At this juncture, I feel obliged to explain the undisputed facts of the background of the matter. The genesis of this matter can be traced back in 2019 when the Applicants' disciplinary authority ended their employment. The Applicants invoked two parallel processes, one running by a way of Labour Dispute in the CMA and at the same time appealed to

the Public Service Commission. In the Public Service Commission, the Applicants were reinstated with direction for their disciplinary authority to conduct the disciplinary hearing in accordance with the law. The commission directed further that the Applicants were to be paid nothing before the conclusion of their disciplinary matter. The Respondent preferred an Appeal to the President where the order of the decision of the Commission was set aside and that of the disciplinary authority restored for the Applicant's Employment to be ended.

Along with this process through Public Service Act, the CMA issued its decision that the Applicants were terminated lawfully and fairly hence they were not entitled any payment from the CMA. The Applicants want to challenge the CMA decision, but they are time barred hence they are applying for extension of time to lodge the revision Application.

Before arguing the application, the point of law was raised by the court *suo moto* on 2nd May 2022 and asked the parties to address it as to whether the Court is clothed with jurisdiction to entertain the matter, the respondent being a public authority.

On the date of hearing, Mr. Evans Nzowa, Advocate appeared and argued on behalf of the applicants while Mr. Raymond Mweli and Justine Kaseka, State Attorneys, appeared and argued on behalf of the respondent.

Mr. Nzowa submitted that the Public Service Act, divided public servant into 3 groups. One group is comprised of executives, and these are under S. 4 and 5 of the Public Service Act. They include C.S.P.Ss, the second groups is composed of officer grade, these are defined under S. 3 of the Act and the third group comprises operational service. They are defined as a cadre of supporting staff not employed in the executive or officer grades. Nzowa stated that the applicants fall under the 3rd category of operational services, including watchmen, some are livestock caretakers, and typists.

Citing Section 32 of the Public Service Act, Nzowa submitted that public servants shall continue to be governed by the Employment and Labour Relations Act apart from the Public Service Act. He stated that applicants were dismissed from employment due to disciplinary reasons and found guilty by their disciplinary authority for failure to submit Form IV Certificates. According to him, the law applicable in disciplinary matters for the staff under operational service is Employment and Labour Relations Act (ELRA). He is of the view that under **Rule 59 of the Public Service Regulations of 2003, GN. No. 168 of 2003**, procedure shall be laid as provided in the **Security of Employment Act** which was repealed and replaced by the **Employment and Labour Relations Act**.

Nzowa submitted that according to Employment and Labour Relations Act,

and the Code of Practice for Staff of this cadre are subjected to CMA as their forum of dispute resolution. In this respect, he is of the view that CMA had jurisdiction to determine the matter.

Arguing against Nzowa's submissions, Mr. Mwelil started by narrating the historical background of the matter. He submitted on the issue as to whether the CMA had jurisdiction to determine the matter. Taking into account the history of the matter, Mwelil cited Section 17 of the Law Reforms Fatal Accidents and Miscellaneous Provisions Act, Cap 310 and submitted that whoever is not satisfied by the decision of the President has a right to lodge Judicial Review before the High Court seeking for prerogative orders of certiorari, mandamus and prohibition. According to Mwelil, after the decision of the President, the Applicants has to apply for judicial review and not a labour dispute or a revision application.

As to whether the CMA had jurisdiction, Mr. Mwelil cited Section 4 of the Employment and Labour Relations Act Cap. 366 R.E 2019 which defines a Labour Court as the Labour Division of the High Court established under Section 50 of the Labour Institutions Act Cap. 300 and such definition does not embody CMA. He further submitted there is no provision under the Government Proceedings Act, Cap. 5 nor under the Employment and Labour Relations Act Cap. 366 and not even in the Labour Institutions Act Cap. 300 which confers jurisdiction to CMA to determine conflict where

the government is involved.

Mr. Mveli submitted that the issue of jurisdiction can never be assumed, there must be a clear provision of the law for it to exist and not otherwise. According Mr. Mveli, S. 6 (4) of the Government Proceedings Act provides that all suits against the government shall be instituted in the High Court by delivering a claim in the registry of the High Court within the area where the claim arose. In this respect, according to him, CMA is neither a court nor a Registry of the Court neither a Division of the Court to assume such jurisdiction.

It was further submitted by Mr. Mveli that in suing the Government, the plaintiff or applicant must comply with the requirement of joining the Attorney General which is obvious under S. 6 (4) of the Government Proceedings Act. He stated that when the government sued, Attorney General must be joined as a part of the case, and the matter must be heard by the High Court. In his view, due to this interpretation and considering that the employer herein is a Public Service Office, the applicants were not right to bring the matter before the CMA as it lacks jurisdiction.

Mr. Mveli submitted further that at the time the matter was filed at CMA, the **Public Service Act** was already amended by the **Written Law**

Miscellaneous Amendment Act of 2016 which excludes CMA to deal with matters relating to public servant regarding employment. He averred that according to **Section 3 of the Act**, a public servant for the purpose of the Act means a person holding or acting in a public service office. He added that what is a public service office is defined as a paid public office in the United Republic charged with formulation of public policy and delivery of public service other than parliamentary office and an office of a member of council, board, panel, committee or another similar body, whether or not corporate established by any written law.

In Mr. Mwelil's view due to this definition, Kibaha Education Center is a public service office because its establishment is focused on providing education to the public, to oversee public service therefore its staff members are public servants.

Mr. Mwelil argued that according to the public service management and **Employment Policy of 1998 as amended in 2008**, it is obvious that when talking about the public servants it will include the staff under operational service and in that respect all the public servants are responsible to follow the public service requirements as per **Section 32A of the Written Law, Miscellaneous Amendment Act, which is Act of 2016**, which directs that all public servants cannot resort to labour laws without exhausting local remedies provided under the **Public**

Service Act.

According to Mwelil in case of conflict of laws between the **Public Service Act and the Employment Laws**, according to **S. 34 A**, the **Public Service Act** is given supremacy and therefore the applicant being operational staff had duty to comply with Public Service Act before resorting to labour laws. He thus prayed for the application to be struck out.

The Applicant's Counsel made a rejoinder in which he claimed to have never been issued with a decision of the appeal. However, he did not dispute the assertion that the decision of the President can only be challenged by a way of judicial review in the High Court. However, he maintained that CMA does have jurisdiction over all the matters involving employees of operational service.

From the submissions, this Court is called upon to determine one major issue as **to whether this Court has jurisdiction to entertain this Application.**

Two questions emerged from the parties' submissions. The debated questions is whether the applicants being employees under category of Operational Service they are not subjected to the Public Service Act.

To answer this question, I find it worth to explore on the meaning of a

Public Servant. Section 3 of the Public Servant Act provides as quoted hereunder: -

"Public servant for the purpose of this Act means a person holding or acting in a public service office".

What is a *public service office* can be construed from the same Section 3 of the Public Service Act, which states;-

"Public service office for the purpose of this Act means: -

a) A paid public office in the United Republic charged with the formulation of government policy and delivery of public service other than: -

i. a parliamentary office;

*ii. an office of a member of a council, **board**, panel, committee or other similar body whether or not corporate established by or under any written law;*

iii. an office the emoluments of which are payable at an hourly rate, daily rate or term contract;

iv. an office of a judge or other judicial office;

v. an office in the police force or prisons service;

b) any office declared by or under any other written law to be a public service office".

From the above provisions, what needs to be addressed is whether the Applicant being in operational service fall outside the definition of a public servant. From the words of the provision, a public servant works in an institution which provides public service except the services listed from item (a) to (v). It is obvious that the Applicant is not providing the exempted services and therefore her employees are public servants. This matter has been a subject of discussion in the Court of Appeal in the case of **Tanzania Posts Corporation versus Dominic A. Kalangi, Court of Appeal Civil Appeal No. 12 of 2022**. In this case, the public entity which was involved is the Tanzania Posts Corporation which is established and governed by a specific Law to provide postal services to the public. In this case, the Hon. Justices of Appeal had the following to say: -

"In the premises, it can hardly be gainsaid that, having been established by an Act of Parliament and being wholly or substantially owned by the Government, the Tanzania Posts Corporation is a public service institution whose principal duty is among others, to provide the public with a national and international postal and other service. (See section 8 of the said Act). This is in line with section A. 1 (52) of the Standing Orders for the Public Service, 2009 (GN. No. 493 of 2009) made under section 35 (5) of the Public Service Act, which provides in part that: -

*"For purposes of the Public Service Act - Public Service means the system or organization entrusted with the responsibility of overseeing the provision or directly providing the general public with what they need from their government or any other institution on behalf of the government as permissible by laws and include the service in the civil service; the health service; the executive agencies, the Public institutions service and the **operational service**",*

From the above-quoted provisions public service encompasses operational services as per *Section A. 1 (52) of the Standing Orders for the Public Service, 2009 (GN. No. 493 of 2009) made under section 35 (5) of the Public Service Act*. Therefore, staff working in operational service cannot be exempted from being a public servant.

From the above legal reasoning since it is undisputed that the Respondent is a public service and the dispute arose after amendment of Public Service Act which took place in 2016, then I am of the view that applicants are subjected Section 32A of the Written Laws, Misc. Amendment Act of 2016 which directs public servant to exhaust internal remedies under Public Service Act, before resorting to Labour laws. On that basis the applicant's counsel's argument that the applicants being under operational service cannot be public servant lacks basis.

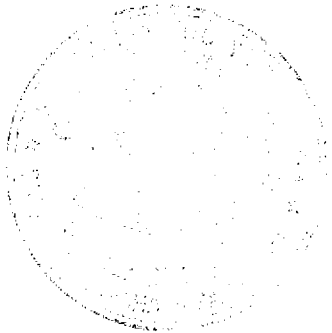
It is therefore my finding that neither this court nor the CMA has

jurisdiction to entertain a dispute involving employees of the Respondent for they are public servants.

This Application is therefore dismissed.

It is so ordered.

Dated at Dar es salaam this 11th Day of August, 2022



Handwritten signature of Katarina Revocati Mteule.

KATARINA REVOCATI MTEULE

JUDGE

11/08/2022