IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 59 OF 2022

(Arising from an Award issued on 15th August 2016 by Hon. Alfred Massay, Arbitrator in Labour dispute No. CMA/DSM/ILALA/159/2009 at Ilala)

NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED ..... 1ST APPLICANT

ATTORNEY GENERAL AND TREASURY REGISTRAR (Formerly CONSOLIDATED HOLDINGS CORPORATION) ..... 2ND APPLICANT

VERSUS

LWAWIRE ROBERT KATULA AND 37 OTHERS ..... RESPONDENTS

JUDGMENT

Date of the last Order: 29/06/2022
Date of judgment: 12/8/2022

B. E. K. Mganga, J.

On 27th February 2009, Lwawire Robert Katula and 36 others who are the respondents in this application, filed Labour dispute No. CMA/DSM/ILALA/159/2009 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid TZS 2,347,835,097/= being payment for (i) terminal benefits that they were underpaid and (ii) P.P.F underpayment. In the Form referring the dispute

to CMA (CMA F1), it was indicated that the dispute arose on 4th February 2009. The said CMA F1, was signed by Lwawire Robert Katula and attached the list signed by other 37 persons. It was further shown in the said CMA F1 that the dispute relates to discrimination and termination of employment. On fairness of reasons, it was shown that termination of employment was unfair because the exercise violated the repealed Labour Laws which were still applicable. On fairness of procedure, it was indicated that they were neither represented nor consulted and further that terminal benefits were paid based on bias.

On 14th December 2011, five issues were drawn by the parties and the arbitrator namely; (1) whether termination of employment of the complainants was lawfully, procedurally and substantively; (2) whether computation of termination benefits was proper; (3) whether complainants were entitled to the half salaries arrears from the date of suspension to the date of discharge of criminal cases number 1702/1998 and 508/1999 respectively; (4) whether complainants are entitled to reinstatement to work; and (5) what other reliefs are the parties entitled.

On 6th January 2012, Barnabas Luguwa, Advocate for the herein respondents prayed the Arbitrator to satisfy himself whether, CMA has

jurisdiction to entertain the matter because he believed that the dispute hinged on the Voluntary Agreement the parties entered before termination of employment. Mr. Luguwa informed the arbitrator that, Voluntary Agreement was a subject matter of the then Industrial Court and it was dully registered before the said Industrial Court. He submitted further that, parties were referring to the said Voluntary Agreement which was appended to their pleadings and that the dispute cannot be determined without interpreting the said Voluntary Agreement and other Rulings of the Industrial Court of Tanzania especially the Ruling by Hon. Mwipopo, J (as he then was). Mr. Luguwa noted that the High Court remitted the dispute to CMA after satisfying itself that CMA had pecuniary jurisdiction but did not deal with the issue relating to voluntary Agreement. The consolidated Holding Corporation, the herein 2nd applicant, concurred with submissions made by Mr. Luguwa, learned counsel for the respondents. To the contrary, the National Insurance Corporation Limited of Tanzania, the 1st applicant, was of the view that there was neither dispute on interpretation nor implementation of the voluntary Agreement. It was submitted on behalf of the 1st applicant based on CMA F1 that, the dispute was on discrimination, termination of employment, underpayment of terminal dues

and short remittance of the P.P.F contributions because respondents filled Part B of the CMA F1. The arbitrator having heard submissions of the parties, held that it had jurisdiction over the matter. Respondents filed before this court an application for revision seeking the court to revise that Ruling, but the court remitted the matter to CMA to continue with hearing on ground that CMA had jurisdiction based on what was pleaded in the CMA F1.

After the CMA record was returned to CMA for hearing, on 16th October 2013, parties submitted that, for convenience and due to complexity of the matter, they may be allowed to file written sworn witness statements and thereafter witnesses be summoned for cross examination. The arbitrator granted their prayer, as a result, parties filed written sworn witness statements to prove their case. Respondents filed the written sworn witness statements attached with documents that they intended to rely upon as evidence. Having each party filed written sworn witness statement, witnesses were called for cross examination and thereafter the parties filed written submission to clarify what they thought were matters of controversy and the position of the law. In the written final submissions, the herein applicants, raised *inter-alia* an issue that the dispute was not

filed properly in terms of Rule 5(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007.

Having considered the written sworn witness statements and submissions made thereof, on 15th August 2016, Hon. Alfred Massay, Arbitrator, issued an award that the dispute was properly filed before CMA and that termination of the respondents were fair because they were consulted through TUICO, a Trade Union in which they were members. The arbitrator found further that, terminal benefits of the respondents were computed at half monthly salary since they were facing criminal charges. Having so found, the arbitrator ordered applicants to make computation based on full salary and pay golden handshake to the respondents. Based on those findings, the arbitrator awarded the respondents to be paid (i)TZS 69,551,876/= being underpayment of half salaries made to Maligisa and 24 others from 2003 to 2004 at increment of 10% and 25% into their salaries, (ii) TZS 20,962,210.34 being underpaid renchment arrears, (iii) TZS 75,182,251/= being underpaid PPF contributions, and (iv) TZS 300,000,000/= being complainant's half salaries because the Arbitrator noted that there was an execution application relating to that amount pending in the District Court of Ilala District before Hon. Mkasiwa, District

Magistrate. Again, on 18th November 2016, Hon. Alfred Massay, Arbitrator, delivered a ruling clarifying, after computation, the amount each respondent was awarded in the award. In the said ruling, the arbitrator indicated that he awarded a total of TZS 1,336,887,641/= to the respondents. The said ruling clarifying the amount each respondent was awarded shows that respondents were awarded their claims of salary arrears from 1997 to January 2009.

Applicants were aggrieved by the said award hence this application for revision. In the affidavit sworn by Daniel Nyakiha, State Attorney in support of the application raised seven (7) grounds as follows: -

1. *That, the award is unlawful, illogical and contains material irregularity on the face of the record as the arbitrator erred in law and fact to order the respondents to be entitled to terminal benefits computed at their full salaries whilst they were fairly terminated through retrenchment.*
2. *That, the Honourable Arbitrator erred in law and facts for failure to consider the evidence adduced that the affairs of the 1st Applicant ended when the respondent entered into voluntary Agreement with the 1st Applicant.*
3. *That, the Honourable Arbitrator erred in law to award the Respondents basing on the conclusion of Criminal case faced the Respondents whilst all the terminal benefits and arrears are reliefs which were concluded when the Voluntary Agreement was signed.*
4. *That, the Honourable arbitrator erred in law and facts by making justification that the computation of the terminal benefit be made in full salary as other*

employees subject to were first(sic) suspended under half payment before retrenchment process.

5. *That, the Honourable Arbitrator erred in law and facts by proceeding to hear and determine the dispute without leave while knowing the 1st Applicant was already specified.*
6. *That, the Arbitrator erred in law and facts to order additional payments of half salaries to Maligisa and 24 others which leads into double payment.*
7. *That, the Honourable Arbitrator erred in law and in facts by making misleading interpretations on the ruling of His Lordship Mwaipopo (sic) delivered on 11th July 2007.*

Opposing the application, respondents filed the counter affidavit sworn by Lwawire Robert Katula.

By consent of the parties the matte was disposed by way of written submissions.

It was submitted by Mr. Daniel Nyakiha, learned State Attorney on the 1st and 2nd ground that, the arbitrator held that termination of the respondents was fair because they were consulted and further that they entered Voluntary agreement, but the arbitrator went ahead by awarding the respondent terminal benefits apart from the one they signed in the Voluntary agreement. Learned State Attorney submitted that, the said Voluntary Agreement was biding the parties. State Attorney cited the case of ***Mainline Carriers Ltd v. Delfrida Filbert Libaba and 7 Others***,

Labour Revision No. 264 of 2019, HC(unreported) to support his argument that once an employee is paid retrenchment package in terms of the collective bargain, he/she ceases to be entitled to further compensation. Mr. Nyakiha submitted further that, if the respondents were dissatisfied by the voluntary Agreement, they were supposed to file the matter at CMA for mediation before conclusion of the whole process and prior to accepting payment. Mr. Nyakiha cited section 38(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and the case of ***Resolution Insurance Ltd v. Emmanuel Shio & 8 Others***, Revision No. 642 of 2019, HC (Unreported) to cement on his submissions.

On the 3rd ground, Mr. Nyakiha, learned State Attorney submitted that the said Voluntary Agreement was signed in March 2008 and that restructuring process of the 1st applicant became complete on 4th February 2009 and marked termination of employment of the respondents. He submitted further that, respondents were discharged from criminal cases on 22nd May 2009 and that there was no separate Voluntary Agreement apart from the one entered for all employees of the 1st applicant who were retrenched. He submitted further that, respondents' terminal benefits were rightly calculated based on the Voluntary Agreement and cited the case of

Bank of Tanzania v. Mukolakaa Nkurlu and Peter Kandili, Civil Appeal No. 99 of 2001, CAT, (unreported) to implore the court to hold that respondents are not entitled to any further claim.

On the 5th ground, Mr. Nyakiha, submitted that in 2009, the 1st applicant was specified and was put to the purview of the Bankruptcy Act [Ca. 25 R.E. 2002]. He argued that based on that, respondents were duty bound to seek leave before filing the dispute against the 1st respondent. Learned State Attorney cited the provision of section 9 of Cap. 25 R.E. 2002 (supra) and the case of ***Abubakari S. Marwilo and 172 Others v. National Insurance Corporation and 2 others***, Civil Appeal No. 12 of 2019, CAT (unreported) to support his arguments. He went on that, Treasury Registrar became the official receiver prior respondents filing the dispute at CMA. Learned State Attorney submitted further that, respondents were supposed to file the dispute against the official receiver and not the 1st Applicant and cited the case of ***Hamza F. Kimbengele v. Tanzania Posts Corporation***, Civil Appeal No. 10 of 2011, HC(Unreported), ***National Milling Corporation and Another v. John Paul,*** Civil Appeal, No. 71 of 2002, HC(unreported) to support his submissions.

On the 6th and 7th grounds, Mr. Nyakiha submitted that, in his ruling dated 11th July 2007, Hon. Mwipopo, J(as he then was), ordered Maligisa and 24 others be paid as to what Bachwa and Others will be paid on termination. State Attorney argued that, the arbitrator erred to relate the Ruling by Hon. Mwipopo, J (as he then was) to the issue of half salaries. State Attorney submitted further that, Maligisa's issue arose prior restructuring and retrenchment of the respondents and added that Maligisa and 24 others were already reinstated. State attorney maintained that, at the time of retrenchment, respondents were on half pay and that they consented to the calculations of their retrenchment benefits that were made.

The respondents in their written submissions enjoyed the service of Barnabas Luguwa, learned advocate. In his written submissions opposing the application, Mr. Luguwa submitted that in 2002 the Board of the 1st applicant approved salary scales but did not implement it. Due to that failure, one Nassoro Gogo representing 1633 employees of the 1st applicant filed Trade Enquiry No. 52 of 2002 demanding implementation of the new salary scale. He went on that in the said Trade Inquiry, the Industrial Court of Tanzania awarded employee be paid TZS 3,053,765,000.46 being

difference of salary arrears according to the approved scale. He went on that, in 2005 there was a need for the 1st applicant to retrench her employees, as a result, parties signed Voluntary Agreement and file Trade Enquiry No. 2 of 2005 before the Industrial Court of Tanzania. The Industrial Court awarded the employees to be paid TZS 3,800,000,000/=. Mr. Luguwa submitted further that, the government intervened and gave the 1st applicant TZS 5,200,000,000/= so that employees would end (i) Trade Enquiry No. 52 of 2002 that was filed by Nassoro Gogo and (ii) Trade Enquiry No. 2 of 2002 that was filed by TUICO. As compromise, the Treasurer Registrar, Consolidated Holding Corporation(CHC), NIC, the 1st applicant and TUICO resolved that for the said TZS 5,200,000,000/= to be paid, employees should withdraw the two matters and all employees including the respondents should sign retrenchment agreement with the breakdown of the terminal benefit of every employee that was recorded in accordance with the Voluntary Agreement. Counsel submitted further that; representatives withdrew the two Trade Enquiry from the Industrial Court of Tanzania. He also submitted that, the said voluntary agreement did not discriminate employees who were facing criminal charges in terms of payment of salaries. He argued that, during retrenchment, all employees

including the respondents, were issued with termination letter, but the applicant, instead of paying retrenchment benefits based on full salary, paid them on half salary. Counsel for the respondent submitted further that, respondents were discriminated and cited the case of ***George Mapuda & Wema Abdallah v. DAWASCO,*** Labour Revision No. 240 of 2020, HC(Unreported) to bolster his point. He concluded that, the arbitrator correctly ordered payment of the terminal benefits of the respondents.

On the 3rd ground, counsel for the respondents submitted that respondents were terminated on 4th February 2009 and filed the dispute at CMA on 27th February 2009, but the criminal case respondents were facing was concluded in 2010. Counsel for the respondents went on that salary arrears claimed by the respondents were for the period not later than the day they received their termination letter. Mr. Luguwa, learned counsel for the respondents submitted further that the said salary is not part of retrenchment package. He insisted that respondents were claiming arrears that accrued prior retrenchment which is their right.

Responding to the 4th ground, Mr. Luguwa, submitted that in 1998, the 1st applicant was specified and that the claims of the respondent was

underpayment of terminal benefits and that, in terms of section 35(3) of Cap. 25 R.E. 2019 (supra) the said claim does not qualify to be debt provable in bankruptcy. To cement his submissions, counsel cited the case of ***Mango Yahaya and 18 Others v. Jessie Mnguto (Liquidator Tanzania Sisal Authority and 2 Others***, Civil Appeal No. 24 of 2007, CAT (unreported).

Responding to the 6th and 7th ground, Mr. Luguwa, learned counsel for the respondents submitted that, on 14th September 2001, the Conciliation Board ordered reinstatement of Maligisa Manyangu and 24 others but the 1st applicant appealed before the Minister for Labour, who, on 26th August 2002, dismissed the appeal. He went on submitting that, in 2007, Maligisa Manyangu and 24 filed Civil case No. 31 of 2007 but the said case was dismissed on 10th June 2008 (by Hon. Makaramba, J, as he then was) for want of prosecution. Counsel submitted further that, on 5th August 2008, 1st applicant reinstated Maligisa Manyangu and 24 others on half salary pay pending conclusion of criminal case No. 508 of 1999 at Kisutu RM's Court. Mr. Luguwa elaborated that, the said Maligisa Manyangu and 24 others were unhappy with how the 1st applicant treated them, as a result, they filed execution proceedings at Ilala District court where half of

their arrears of salaries from the date of dismissal to the date of retrenchment were ordered to be paid and the balance has been resisted. He argued that, due to that resistance, Maligisa Manyangu and 24 others filed a Civil Revision which is subjudice at the Dar es Salaam District Registry. In his written submissions, Mr. Luguwa argued that the said half salaries of Maligisa Manyangu and 24 others were not included in the award because they were already paid and the balance is the subject of the pending litigation. Mr. Luguwa argued further that, there is no double payment because Maligisa Manyangu and 24 others were not claiming these benefits at CMA.

In rejoinder, Mr. Nyakiha, State Attorney for the applicants submitted that, in CMA F1, respondents indicated that they were unfairly terminated and went on that respondents are bound by that pleading. State Attorney reiterated what he submitted in chief that arbitrator erred to award the respondents reliefs that were not covered in the Voluntary Agreement and that they were at liberty to sign the said voluntary agreement or to file a complaint at CMA before signing.

At the time of composing the judgment, I went through written submissions by the parties and the CMA record and find that the CMA F1

was signed by Lwawire R. Katula and that there is a list of names signed by individuals without stating that they mandated the said Lwawire R. Katula to sign the said CMA F1 on their behalf. I also discovered that there are discrepancies in the original award that is in the CMA record and the ones that were served to the parties. More so, I discovered that, parties filed written sworn witness statements attached with annextures and that the CMA record does not shows that parties prayed the said annextures to be admitted as exhibits, and in fact, they were not admitted. I noted that in their submissions, parties relied on those attachments and the arbitrator considered them in the award. Further to that, I noted that, respondents were awarded *inter-alia,* claims of salary arrears from 1997 to 2009 but there was no application for condonation. I also noted that, the arbitrator relied on the opening statement and final submissions and further that, in the award, the arbitrator considered and gave an order relating to execution application that was pending in the District Court of Ilala to order the applicant to pay TZS 300,000,000/=. For all theses, I asked the parties to address the Court the effect of these irregularities and whether CMA had jurisdiction over the matter.

Responding to the issues raised by the court, Ms. Joyce Yonaz, State Attorney, submitted that, CMA F1 was signed by Lwawire R. Katula but the list attached thereto does not contain consent by other respondents for him to sign the said Form on their behalf. Ms. Yonaz submitted that, CMA F1 was signed in violation of Rule 5(2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and that, due to that irregularity, CMA F1 became defective and that the dispute became incompetent.

On the 2nd issue, Ms. Yonaz submitted that it is true that the award that was served to the parties, the one attached by the applicants in support of the application, differs from the original award that is in the CMA record. She went on that, interestingly, all the awards, namely the ones that were supplied to the parties and the one in the CMA record were signed by the same arbitrator on the same date and stamped with CMA stamp.

On the issue relating to annextures on the written sworn witness statements, State Attorney conceded that, parties used written sworn witness statement to prove their case attached with annextures. She conceded further that, the CMA record does not show that parties prayed the said annextures to the written sworn witness statements to be

admitted as exhibits for them to form part of evidence to be relied upon as the basis of the decision in the award.

Addressing the issues raised by the court, Mr. Daniel Nyakiha, State Attorney, submitted that, it was not proper for the arbitrator to consider opening statements because, in terms of Rule 24(1) to (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, opening statements are only intended to help the arbitrator to know the nature of the dispute. He added that in terms of Rule 24(2) of GN. No. 67 of 2007(supra), open statements are not evidence.

On the value of final submissions relied upon by the arbitrator, Mr. Nyakiha submitted that, the arbitrator erred to rely upon them. He argued that in terms of Rule 26(1) of GN. No. 67 of 2007(supra), closing submissions are for clarifications of issues in dispute and that, they are not evidence.

Submitting on whether the arbitrator had jurisdiction to refer to TZS 300,000,000/= or order applicant to pay that amount while aware that there was a pending execution application in the District Court of Ilala at Ilala relating to that amount, Mr. Nyakiha submitted that, the arbitrator had no jurisdiction. He submitted further that, in terms of Rule 10(1) of the

Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007, the arbitrator had no jurisdiction to make orders relating to execution. More so, the said amount of TZS 300,000,000/= or prayer to enforce execution of that amount was not amongst the prayers of the respondents in CMA F1. Mr. Nyakiha State Attorney cited the case of ***Magnus K. Laurean v. Tanzania Breweries Ltd***, Civil Appeal No. 25 of 2018, CAT (unreported) to support his submission that the arbitrator had no jurisdiction to order the applicants to pay TZS 300,000,000/= relating to an execution application that was pending at Ilala District Court.

On the issue relating to condonation, Mr. Nyakiha, State Attorney submitted that, there was no application for condonation. He submitted that, in CMA F1, respondents indicated that the dispute arose on 04th February 2009, but in the written sworn witness statements, it came clear that their claims arose many years way back before the date mentioned in the CMA F1. Learned State Attorney went on that, respondents were awarded to be paid salaries from 1997 to January 2009. He concluded that, claims from 1997 to January 2009 were not condoned because respondents indicated that the dispute arose on 04th February 2009.

On the use of written sworn witness statements, Mr. Nyakiha State Attorney submitted that, Rules 23 to 27 of GN. No. 67 of 2007(supra), does not give power to the arbitrator to conduct arbitration proceedings by using written sworn witness statements. He submitted that, Rule 25(1) of GN. No. 67 of 2007 (supra) provides that evidence shall be adduced orally through examination in chief, cross examination, and re-examination. He, therefore argued that the arbitrator exceeded his powers by ordering the dispute to be proved by written sworn witness statements. Mr. Nyakiha submitted in the alternative that, should the Court find that the arbitrator had power to order the dispute to be proved by written sworn witness statements, then, documents attached to the written sworn witness statements were supposed to be admitted as exhibits, but they were not. He cited the case of ***Ecobank Tanzania Ltd v. Future Trading Company Ltd***, Civil Appeal No. 82 of 2019, CAT (unreported) to support his argument that admissibility is not automatic upon the documents being filed. He concluded that witnesses were supposed to tender those documents as exhibits, but they didn't.

Both Ms. Yonaz and Mr. Nyakiha State Attorneys submitted that the cumulative effect of these irregularities is that CMA proceedings were

vitiated. They therefore prayed that CMA proceedings be nullified, the award arising therefrom be quashed and set aside.

Responding to the issues raised by the court, Mr. Barnabas Luguwa, Advocate for the respondents submitted that Lwawire Robert Katula and 37 Others, the herein respondents, were terminated on 4th February 2009 by a letter of termination and that they filed the dispute at CMA on 27th February 2009. He submitted that, at the time of filing the dispute at CMA, respondents attached the list of names of persons who appended their signatures thereto. He went on that; the attached list was tittled "**WAFANYAKAZI WENZAKE LWAWIRE ROBERT KATULA**". Mr. Luguwa submitted that, Lwawire Robert Katula signed CMA F1 and filed the dispute at CMA on behalf of his co- respondents. He argued further that, currently there is a new form to enable parties to mandate their representative, but the said form was not existing previously. He argued that, at that time, a mere list sufficed to file the dispute at CMA. Counsel submitted further that, in terms of Rule 5(2) of GN. No. 64 of 2007 (supra), one person who has been mandated by others to file the dispute at CMA, may sign CMA F1. Counsel for the respondent strongly submitted that the catchword in the said rule is that the person signing must be mandated by others. It was

further submitted by Mr. Luguwa that under Rule 5(3) of GN. No. 64 of 2007(supra), a list of employees who has mandated the person to sign on their behalf must be attached to the CMA F1 and that, the list must be signed by the employees whose names appear on it. Counsel for the respondents argued further that, the aforementioned provision was complied with, because in Labour Statutes, there is no specific document called "mandate paper" and argued further that, the dispute was properly filed at CMA. Mr. Luguwa, Advocate for the respondents was quick to add that, CMA is not bound by the provision of Civil Procedure Code hence none joinder of the parties is not a ground for the case to be dismissed.

Responding to the issue relating to the use of the opening statements, Mr. Luguwa submitted that, opening statements are road maps guiding the Court and CMA what will be the issues. He therefore argued that the arbitrator is bound, when composing the award, to show what was said in the opening. But during his submissions, counsel for the respondents conceded that opening statements are not evidence and that, in labour disputes, the CMA F1 is the pleadings. He concluded that the arbitrator addressed himself properly on what was stated in the opening statement.

Submitting on the issue relating to the value of closing arguments or submissions, Mr. Luguwa submitted that in closing arguments parties analyze evidence and fortify that evidence with authorities. He submitted further that; the arbitrator is bound to follow final submissions. But during his submissions, he conceded that final/closing arguments are not evidence.

Respondent to the issue as to whether, the arbitrator had jurisdiction to order the applicant to pay TZS 300,000,000/= relating to a pending execution application in the district court of Ilala at Ilala, Mr. Luguwa submitted that, that issue arose during closing submissions and that it is not reflected in the written sworn witness statements of the parties. Counsel for the respondents avoided to submit whether the arbitrator had jurisdiction or not, but he merely submitted that it was just a statement in the award that the said amount should be paid if not yet paid and that, that statement did not affect the award.

On the issue relating to condonation, Mr. Luguwa submitted that, respondents were facing criminal charges when retrenchment was taking place and that some of them were terminated i.e., Maligisa Manyangu & 24 Others. He submitted further that, there was a decision of the Conciliation

Board and that of the Minister and that due to those decisions, respondents filed execution application before Ilala District Court claiming to be paid TZS 300,000,000/= as salary claims from date of termination to the date of reinstatement. He went on that, Mr. Maligisa Manyangu & 24 others were reinstated on 05th August 2008. Mr. Luguwa submitted further that; Maligisa Manyangu & 24 others were claiming salary arrears from 05th August 2008 to 04th February 2009. It was submissions by counsel for the respondents that, Lwawire Robert Katula & 14 others were on suspension from November 1998 to 04th February 2009. Counsel submitted further that that Lwawire Robert Katula & 14 Others were claiming salary arrears from November 1998 to 04th February 2009 and conceded that, in the award, respondents were awarded to be paid salary arrears from 1997 to 2009. During his submissions, Mr. Luguwa conceded further that, Rule 10(2) of GN. No. 64 of 2007(supra) provides that disputes not relating to fairness of termination of employment are supposed to be filed within 60 days from the date the dispute arose. He quickly submitted that the Security of Employment Act did provide that, while under interdiction, employees were not supposed to claim salary arrears i.e., half deductions. When asked by the court as under what law the respondents filed the dispute at CMA, he

readily conceded that it was under the Employment and Labour Relations Act [Cap. 366 RE. 2009]. He was quick to submit that Cap. 366 R.E. 2019(supra) provides that a person under interdiction should be paid full salary but respondents were paid half salary from 2007 to January 2009. He maintained that there was no need for condonation because the dispute was filed within time.

The court probed further Mr. Luguwa whether, CMA had jurisdiction to award respondents to be paid TZS 75,182,251/=being PPF contributions that respondents were awarded. On this, Counsel for the respondents readily conceded that the arbitrator had no jurisdiction.

On whether it was proper for the parties to use written sworn witness statements, Mr. Luguwa, Advocate for the respondents submitted that the procedure at CMA is to adduce evidence in chief, cross examination, and re-examination. He went on that, the trial arbitrator decided that evidence in chief be by way of witness statements and that the use of written sworn witness statement did not prejudice the parties. He added that, the use of written sworn witness statements is a practice to be encouraged and not to be discouraged because a written sworn witness statement under oath is as good as giving oral evidence. He went on that; the procedure is as good

as giving oral evidence because all stages of hearing were adhered to. He was quick to add that, the procedure of taking evidence at CMA differs from the one adopted by the Courts. Mr. Luguwa submitted that **Ecobank's case** (supra) is distinguishable because the said case considered the written sworn witness statement that is used in the High Court Commercial Division, where there are Rules which does not apply at CMA. He submitted further that, the law applicable at CMA provides that parties should give evidence in chief, cross examination and re-examination but does not provide the manner of giving evidence in chief. Counsel went on that; Evidence Act does not apply at CMA and that the rules of production and admission of documents at CMA is different because neither the Evidence Act nor the Civil Procedure Code is applicable. Mr. Luguwa went on that, the documents that were attached to the written sworn witness statements are evidence because the written sworn witness statements were admitted in evidence. He therefore, prayed that CMA proceedings should not be nullified based on these grounds.

Responding to the issue relating to the discrepancies in the original award that is in the CMA record and the one that was served to the parties, Mr. Luguwa conceded that the original award in the CMA award is not the

final one. He submitted that parties were supplied with the final award. Counsel submitted further that, it seems the arbitrator read the award in the CMA record and made corrections and thereafter served the parties with clean copy. He concluded that, there are discrepancy, but the same is not fatal. Counsel for the respondent wound up his submissions by praying that the application be dismissed, and the CMA award be upheld.

I have carefully examined the CMA record and considered submissions of the parties and find that, it is undisputed that in 1998 and 1999, respondents, who were employees of the 1st applicant faced criminal charges in court and were interdicted at a half monthly salary pay. It is also undisputed that in 1998 there was structural change of the 1st applicant that resulted into signing the Collective Voluntary Agreement with her employees and consequently retrenchment. It is undisputed further that, the said Voluntary Agreement was registered before the then Industrial Court of Tanzania. It is further undisputed that respondents filed the dispute at the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid TZS 2,347,835,097/= being payment for (i) terminal benefits that they were underpaid and (ii) P.P.F underpayment showing that the dispute arose on 4th February 2009 as the date they were

terminated. As pointed hereinabove, in the Referral Form (CMA F1) respondents indicated, in relation to fairness of reasons for termination, that termination was unfair because the exercise violated the repealed Labour Laws which were still applicable. On fairness of procedure, respondents indicated that they were neither represented nor consulted and further that terminal benefits were paid based on bias.

I have closely examined written submissions by the parties and find that there was much reliance to the Voluntary Agreement the parties signed and registered before the Industrial Court of Tanzania. In short, their submissions seem to touch on the interpretation of the Voluntary Agreement. It can be recalled that Mr. Luguwa, learned counsel for the respondents questioned while at CMA, as to whether, CMA had Jurisdiction or not, but the arbitrator held that it had. It will be recalled further that respondents filed application for revision No. 51 of 2012 before this court. On 5th April 2013, Hon. R.M. Rweyemamu, J (as she then was) delivered her ruling that CMA had jurisdiction as she found that the dispute was not on interpretation or enforcement of the Voluntary Agreement. The matter was therefore returned to CMA to proceed at the hearing stage and final

determination. That being the position, and since there is an order of this court that CMA had jurisdiction, for obvious reasons, I will not discuss jurisdictional issue based on the said Voluntary Agreement. Reason for this is not far because (i) there is this court's order which I have no power to alter and (ii) in the pleadings that were filed at CMA (CMA F1) respondents indicated that the dispute relates to unfair termination and were claiming terminal benefits and not interpretation of the said Voluntary Agreement. Since respondents' pleadings were not based on interpretation of the Voluntary Agreement, then, parties were bound by their pleadings in the CMA F1 and they are not allowed to depart therefrom as it was held in the case of ***George Shambwe v. AG and Another*** [1996] TLR 334, ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)***, ***Civil Appeal No. 2 of 2020*** ,CAT (unreported). and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited***, ***Civil Appeal No. 8 of 2015,*** CAT (unreported). In the ***IPC's case,*** supra, the Court of Appeal held that: -

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules o f pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly*

made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

That being the position, I will proceed to dispose the application based on what was pleaded by the respondents in the CMA F1. As pointed hereinabove, this court raised issues, some touching the jurisdiction of the CMA. I will therefore start with these issues first before dealing with what were raised by the applicants.

On the issue relating to condonation, it was submitted by State Attorneys on behalf of the applicants that respondents did not file an application for condonation and that no condonation was granted. On the other hand, it was submitted by Mr. Luguwa, advocate for the respondents that the dispute was filed within time and that there was no need of application and grant of condonation. It was submitted by Mr. Luguwa, learned advocate for the respondents that respondents were claiming salary arrears from 05th August 2008 to 04th February 2009 following their

interdiction in November 1998. It was correctly conceded by Mr. Luguwa, learned Counsel for the respondents that in the award, respondents were awarded to be paid salary arrears from 1997 to 2009. Submissions by Mr. Luguwa, advocate for the respondents that there was no need for condonation because the dispute was filed within time, is without substance. From where I am standing, I am of unreservedly opinion that, the claim of salary arrears from 1997 to 2009 was filed out of time because it was filed out of the sixty (60) days provided for under the provisions of Rule 10(2) of GN. No. 64 of 2007(supra). Respondents were supposed to file an application for condonation in terms of Rule 11(1), (2), (3) and (4) of GN. No. 64 of 2007(supra). Since the dispute was filed out of time and without an application for condonation, then, CMA lacked jurisdiction and the arbitrator was supposed to dismissed it. See ***Barclays Bank Tanzania Ltd v. Phylisiah Hussein Mcheni,*** Civil Appeal No. 19 of 2016 CAT (unreported). Initially Mr. Luguwa, learned counsel for the respondents tried to base his submissions on the Security of Employment Act, but when he was probed by the Court, he conceded that respondents filed the dispute at CMA under the Employment and Labour Relations Act [Cap. 366 RE. 2009]. Since the law is clear and unambiguous, then, respondents

were required to file an application for condonation supported by an affidavit giving reasons as to why they failed to file the dispute within the time prescribed under the law. This issue sufficiently disposes the whole matter but for sake of completeness, I will discuss some other issues.

On the issue whether the Arbitrator had jurisdiction to award the respondents TZS 75,182,251/= being PPF contributions, Mr. Luguwa advocate for the respondents, correctly conceded that CMA had no jurisdiction that jurisdiction. I therefore hold that it was an error on the part of the arbitrator to award the respondents this amount.

On the issue whether arbitrator had jurisdiction to award the respondents to be paid TZS 300,000,000/= after noting that there was a pending application for execution before the District Court of Ilala (Hon. Mkasiwa, District Magistrate) relating to that amount if the same amount was not already paid, Mr. Nyakiha, learned State Attorney submitted that CMA had no jurisdiction. On his side, Mr. Luguwa, learned counsel for the respondents argued that the issue relating to that amount arose during closing submissions and that it is not reflected in the written sworn witness statements of the parties. As pointed hereinabove, Mr. Luguwa, learned counsel for the respondents avoided to submit whether the arbitrator had

jurisdiction or not, but he merely submitted that it was just a statement in the award that the said amount should be paid if not yet paid and that, that statement did not affect the award. With due respect to Mr. Luguwa, learned counsel for the respondents, that was not a mere statement but in my view was an order. I am of that view because the award reads in part: -

> *"The second category of the complainants is that of Maligisa Manyangu and others…this group was suspended in 1999 and charged in the criminal case number 508/199…**This group claimed half salaries from 1999 to the date of termination**. **In their opening statement they conceded that such claim is pending for execution**. NIC also shared that view in their final submissions that the matter is at Ilala District before Hon. Mkasiwa District Magistrate for execution of about Tshs. 300,000,000/=(sic). **As there is no dispute between the parties such claims should also be paid if the payment has not been done**." (Emphasis* is mine).

In my view, that was not a mere statement. It was an order. I therefore agree with the learned State Attorney that the arbitrator issued an order relating to execution of an award that was not before him and had no jurisdiction because execution application was pending before the District Court of Ilala District. At the time the arbitrator was issuing that order, he also had no jurisdiction over enforcement of the award because that is the domain of the Deputy Registrars in terms of Rule 48(1), (2), (3)

and (4) of Labour Court Rules, GN. 106 of 2007. I therefore safely conclude that the arbitrator had no jurisdiction to award respondents to be paid TZS 300,000,000/=.

On competence of the dispute, it was submission of Ms. Joyce Yonaz, State Attorney that, CMA F1 was signed by Lwawire R. Katula who attached the list thereto but without consent of other respondents authorizing him to sign the said CMA F1 on their behalf. Ms. Yonaz submitted further that, CMA F1 was signed in violation of Rule 5(2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and that due to that irregularity, CMA F1 was defective and the whole dispute became incompetent. On his part, Mr. Luguwa, learned counsel for the respondents submitted that a mere list sufficed to file the dispute at CMA. Mr. Luguwa submitted further that, in terms of Rule 5(2) of GN. No. 64 of 2007 (supra) Lwawire Robert Katula was mandated by his co-respondents to sign CMA F1 on their behalf. Counsel for the respondent correctly submitted, in my view, that, the catchword in the said rule is that the person signing must be mandated by others and those mandating him must append their signatures to the document mandating that other person. The said Rule 5 of GN. 64 of 2007 (supra) provides: -

"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 sub rule (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."

In the application at hand, respondent attached the list signed by 37 other persons titled "**WAFANYAKAZI WENZAKE NA LAWRENCE KATULA"** as correctly submitted by Mr. Luguwa, learned counsel for the respondents. I have carefully examined the said list and find that, in my view, the same is not in compliance with the above quoted Rule. Reasons for this conclusion is two folded namely, one; the list is titled "*WAFANYAKAZI WENZAKE NA* ***LAWRENCE KATULA"*** who is not a part to these proceedings. In other words, Lawrence Katula is not amongst the respondents in this application. The person who was allegedly mandated by the respondents is **Lwawire Katula** and not **Lawrence Katula**. In my view, Lwawire is not synonymous to Lawrence and no submissions were made before me or CMA that there was typing error. Two, there is no

indication that the said Lawrence Katula was mandated by the respondents to sign and file CMA F1. In my view, even if it can be assumed that the list refers to Lwawire Katula as there was typing errors of which it is not the case, it was not sufficient for the list just to indicate "WAFANYAKAZI WENZAKE NA LAWRENCE KATULA". In my view, this did not give mandate to the said Lawrence Katula who is not a party and was not a party at CMA to sign and file the CMA F1. In my view, it was a mere introduction to whoever happened to read the list, that the persons who signed the said list were co-employees of the said Lawrence Katula. As correctly submitted by counsel for the respondents, the catchword in the above quoted Rule is that the person must be mandated by other employees but there was no that mandate given to Lwawire Katula. In the contrast, the record shows that, on 26th March 2009 L. R. Katula and 37 withdrew Labour dispute No. 18 of 2009 that was pending before this court. The Notice to withdraw the said dispute reads: -

"*IN THE HIGH COURT OF TANZANIA*

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR DISPUTE NO. 18 OF 2009

L.R. KATULA AND 37 OTHERS……. COMPLAINANTS

VERSUS

NATIONAL INSURANCE CORPORATION……1ST RESPONDENT

CONSOIDATED HOLDING CORPORATION……. 2ND RESPONDENT

NOTICE OF WITHDRAWAL

Made under Rule 34(1) of the Labour Court Rules, 2007

TAKE NOTICE that L.R. KATULA AND 37 OTHERS, the complainants herein, have referred the dispute to the Commission for Mediation and Arbitration and thus hereby prays for an order withdrawing the complaint, with no order as to costs, and with leave to re-file the same in the event. The mediation proves futile.

Dated at Dar es Salaam this 26th day of March, 2009.

Sgd

LWAWILE ROBERT KATULA,

COMPLAINANTS' REPRESENTATIVE

Presented for filing this 26th day of March, 2009

Sgd

REGISTRY OFFICER"

Attached to the said notice is the list signed by 38 persons. The said list is titled: -

"SISI AMBAO TUMEORODHESHA MAJINA YETU HAPA CHINI NA KUWEKA SAINI MBELE YA MAJINA YETU NI WALALAMIKAJI KATIKA SHAURI NAMBA 18/2009 LILILOPO MAHAKAMA KUU DIVISHENI YA KAZI, ***TUNAMUIDHINISHA MWAKILISHI WETU NDUGU LWAWIRE ROBERT KATULA ALIONDOE SHAURI HILI NAMBA 18/2009 MAHAKAMA KUU KWA NIA YA KULIRUDISHA BAADAYE****." (Emphasis is mine)*

In my view, the above was a sufficient mandate to Mr. Lwawire Robert Katula to withdraw the matter that was pending before this court. Respondents in the quoted list emphatically indicated that they mandated Lwawire Robert Katula to withdraw dispute No. 18 of 2009 that was pending before this court. To the contrary, at the time of filing the dispute at CMA, respondents signed the list just stating that they were co-employees of Lwawire Robert Katula. This in my view, cannot amount to be a mandate to the said Lwawire Robert Katula to sign and file the CMA F1 on their behalf. It is just an introduction that they were "Wafanyakazi wenzake na Lawrence Katula".

It was submitted by Mr. Luguwa, learned counsel for the respondents that there is no specific document called "mandate paper" and that, the dispute was properly filed at CMA because CMA is not bound by the provisions of Civil Procedure Code hence none joinder of the parties is not a ground for the case to be dismissed. With due respect to counsel for the respondents, the issue that was raised by the court is not none joinder of parties, rather, absence of mandate to the 1st respondent to file the dispute at CMA on behalf of other respondents. As pointed hereinabove, there was no compliance with the provisions of Rule 5(2) of GN. No. 64 of 2007

(supra). It is my view, as it was correctly submitted by Ms. Yonas, State Attorney that CMA F1 was defective for want of mandate and that the dispute was incompetent. I therefore conclude that there was no dispute that was properly filed by the respondents because CMA F1 was defective for want of consent or mandate.

It was submitted by the two learned State Attorneys that Rule 25(1) of GN. No. 67 of 2007 (supra) does not give power to the arbitrator to order the dispute to be proved by written sworn witness statements. It was submitted in the alternative that, should the Court find that the arbitrator had power to order the dispute to be proved by written sworn witness statements, then, documents attached to written sworn witness statements were supposed to be admitted as exhibits unlike as it happened in this application. It was submitted by Mr. Luguwa, learned counsel for the respondents that the procedure at CMA is to adduce evidence in chief, cross examination, and re-examination and that the use of written sworn witness statement did not prejudice the parties. It was further submitted by Mr. Luguwa, advocate for the respondents that the use of written sworn witness statements is a practice to be encouraged and not to be discouraged because a written statement under oath is as good as giving

oral evidence. Much as I agree with Mr. Luguwa that the use of sworn written witness statement is as good as giving oral evidence, the same should be used within the ambit of the law. In my reading of the law, I have found no provision granting power to the arbitrator to determine the dispute by using written sworn witness statements. As correctly submitted by the parties, Rule 25 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2007 governs how evidence can be adduced at CMA. This Rule does not show that the parties can file written sworn witness statements in disposing the issue in controversy between them.

The procedure of proving a case by written sworn witness statement initially was not provided for in the Civil Procedure Code [Cap. 33 R.E. 2019] until in 2021 when it was introduced by amending rule 22(1) of Order VIII which now provides that the trial shall proceed orally or by witness statements. Order XVIII Rule 2(1) of Cap. 33 R.E. 2019 now provides that in any suit, evidence in chief shall be given orally or by a witness statement. Rule 2(3), (4) and (5) of Order XVIII provides the contents of the witness statement. The said rule provides: -

"2 (3) A witness statement shall: -

(a) ***be made on oath or affirmation****;*

(b) ***contain the name, age, address and occupation of the witness****;*

(c) so far as reasonably practicable, be in the intended witness's own words;

(d) sufficiently identify any document to which the statement refers without repeating its contents unless it is necessary in order to identify the document;

(e) not include matters of information or belief which are not admissible and where admissible, shall state the source of matters of information or belief;

(f) neither contain lengthy quotation from documents or engage in legal or other arguments;

(g) ***include a statement by the intended witness that he believes the statements of fact in it to be true****;*

(h) ***be dated and signed or otherwise authenticated by the intended witness****;*

(i) be in numbered paragraphs; and be in the language of the court.

(4) Where the witness ***is not conversant with the language of the court, but can make himself understood and can understand the written language of the court, the statement need not be in his own w****ords: Provided that, these matters are indicated in the statement itself and recorded so as to express as accurately as possible the substance of his evidence.*

*(5) The witness statement shall be substantially in the form made under section101(1) of the Code." (*emphasis is mine*)*

It is mandatory in terms of Rule 5(1), (2), (3), (4) and (5) of Order XVIII of the Civil Procedure [Cap 33] that a witness whose statement has

been filed must attend during hearing for formal production of his statement and tendering of exhibits or cross examination. In his or her attendance before the court, the witness must swear or affirm. Once the sworn statement is formally produced in court, it shall form part of the record and it shall be read loudly by or on behalf of the witness and thereafter the witness may be cross examined. If the witness fails to appear for production of his statement, tendering exhibits or cross examination, the statement shall be struck out. The said Rule provides: -

> *5.- (1) A party on whose behalf a witness statement has been filed shall cause the attendance of his witness during the hearing for the purpose of formal production of his statement, and tendering of exhibits or cross examination, if any.*
>
> *(2) When a witness appears for formal production of his statement and tendering of exhibits, he shall be sworn in the manner prescribed by the law in force as to swearing of witnesses.*
>
> *(3) Once the witness statement has been formally produced in court, it shall form part of the record of the trial and it shall be read loudly by or on behalf of the witness.*
>
> *(4) The witness whose statement has been formally produced may be cross-examined and re-examined.*
>
> *(5) Where a witness fails to appear for production of his statement, tendering of exhibit or cross examination, if any, the court shall strike out his statement*

from the record, unless it is satisfied that there is good cause to be recorded by the court for such failure.

As pointed hereinabove, the rules applicable at CMA does not provide that the dispute can be proved using written sworn witness statement. If at all the arbitrator wanted to use written sworn witness statement as an innovation as it was argued by Mr. Luguwa learned counsel, he was supposed to equip himself on the procedure thereof by looking how it is conducted before the High Court Commercial Division or elsewhere. The procedure before the High Court Commercial Division is as provided in the Civil Procedure Code [Cap. 33 R.E. 2019] quoted hereinabove. At least that was the practice that the arbitrator was supposed to adopt at that time.

I have examined the CMA record and find that witnesses prayed their witness statements to form part of the record, but they did not tender exhibits, as such, in my view, it was an error on part of the arbitrator to refer to documents that were attached to the witness statements while those documents were not exhibit hence not evidence. It was Mr. Luguwa's submissions that documents that were attached to the written sworn witness statements are evidence because the written sworn witness statements were admitted in evidence. In other words, he was of the view

that, those documents were automatically admitted as exhibit upon reception of the written sworn witness statements as evidence. As pointed hereinabove, documents attached to witness statements were not tendered as exhibit and in my view, they are not evidence. Submissions by Mr. Luguwa, that once a witness statement is received, then, any document attached thereto automatically becomes an exhibit is problematic and impractical. One; counsel did not explain how the court will treat any object other than documents mentioned in the witness sworn statement but not brought in court altogether with the witness statement. Counsel did not explain whether, all other physical objects other than documents will automatically also become exhibit without being seen by the court and afforded the other party right to object. In my view, that invitation is intended to turn the court into a rubber stamp and make decisions based on assumptions and not on facts and law. That invitation cannot be accepted. More so, if documents attached to the witness sworn statements becomes evidence automatically upon the witness sworn statement being admitted, then, how will the other party be afforded right to object if he/she wishes. It is my view that, the invitation by counsel is also intended to deprive the opponent that right, hence violation of the principle of fair

hearing. The invitation by counsel for the respondents is not in line with the requirement of the law as quoted hereinabove. On various occasions, the Court of appeal was faced with a similar issue namely, whether documents attached to the witness statement automatically becomes exhibit. See the ***Ecobank case*** (supra) and ***Total Tanzania Ltd v. Samwel Mgonja,*** Civil Appeal No. 70 of 2018. In ***Samwel Mgonja's case*** (supra) in resolving that issue the Court of Appeal held that: -

> *"…a witness statement is a written testimony made by a witness before a commissioner for oath for the purpose of giving evidence in-chief before appearing in court for cross-examination. Essentially, it is the testimony in-chief of that witness regarding the case… Among other things, it ought to be accompanied by the intended exhibits to be tendered during trial. Therefore, a witness statement is only a statement of that witness which is treate as evidence in-chief and such* ***treatment does not extend to the documents attached to it****.*
>
> *A witness, whose statement was filed in the trial court, ought to be caused to appear before the trial court or through a video link for cross examination. Upon appearance, he is either affirmed or sworn-in. Thereafter, he* ***identifies and adopts his witness statement and the normal procedure of admissibility of any document annexed to his witness statement,*** *in terms of sections 63, 64, 64A, 65, 66, 67, 68 and 69 of the Evidence Act, Cap. 6 RE 2019, has to be followed. That is,* ***if the witness wants to tender a particular document, pleaded and attached to his witness statement,***

he ought to make a prayer for tendering it as exhibi*t. And the adverse party should be given a chance to object or concede to its admission.*

If it is admitted, the trial court ought to comply with the endorsement of such document pursuant to Order XIII Rule 4 of the CPC and such admitted document pursuant to Rule 7 (1) of Order XIII of the CPC forms part of the record of the trial court proceedings. In case it is rejected, the reason for its rejection ought to be given (see Order XIII Rule 3 of the CPC). Further, the rejected document does not form part of the record of the trial proceedings and it ought to be returned to a person who intended to tender it (see Order XIII Rule 7 (2) of the CPC). It follows from that procedure that exhibits attached to the witness statement do not automatically form part and parcel of the court exhibits unless and until they are admitted in evidence and endorsed accordingly by the trial court.

In ***Japan International Cooperation Agency v. Khaki Complex Limited*** *[2006] T.L.R 343 we insisted that the trial court should ensure compliance with Order XIII Rule 7 of the CPC and where there is contravention the Court will always frown on it. We said: -*

> *"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers on record."*
> (Emphasis is mine)

That said and done, I reject the invitation by Mr. Luguwa that documents that were attached to the witness statements are evidence and that they were properly considered by the arbitrator.

On the value of opening statements, I should briefly state that in terms of Rule 24(1) to (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, opening statements are not evidence. In fact, Rule 24(2) of GN. No. 67 of 2007(supra), clearly provides that the arbitrator has a duty to emphasize to the parties that what is contained in their opening statements are not evidence unless admitted between the parties. It was wrong for the arbitrator to rely on matters stated in the opening statement in relation to TZS 300,000,000/= that he awarded the respondents.

I have held hereinabove that CMA lacked jurisdiction to determine respondents claims of salary arrears for being time barred and further that arbitrator lacked jurisdiction over an application for execution that was pending before the District Court of Ilala District. I have also found that the dispute was improperly filed hence incompetent because CMA F1 was defective as there was no proper mandate issued to Mr. Lwawire Robert Katula by other respondents for him to file the dispute on their behalf. I have further held that the procedure adopted by the arbitrator to determine the dispute by way of witness statement and reference to

documents not admitted as evidence was improper. All these vitiated the CMA proceedings. For the foregoing, I hereby nullify CMA Proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam this 12th August 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 12th August 2022 in the presence of Elias Mwendwa and Abeid Buzohela, State Attorneys for the applicants and Edward Bachwa, Ambrose Kibumu and Uroki, who are amongst the respondents.

B. E. K. Mganga
JUDGE