

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

REVISION NO. 421 OF 2021

AMINA M. ABDALLAH APPLICANT

VERSUS

**BOARD OF TRUSTEES OF THE NATIONAL
SOCIAL SECURITY FUND (NSSF) RESPONDENT**

JUDGMENT

S.M. MAGHIMBI, J.

The applicant herein sought to challenge the ruling of the Commission for Mediation and Arbitration for Ilala (“CMA”) in Labour Dispute No. CMA/DSM/ILA/R/825/2017 (“the Dispute”) which struck out the dispute on the ground that one; the applicant’s complaint was conducted in accordance with the Public Service Act, Cap. 289 R.E 2019 hence if aggrieved, the complainants were to challenge through disciplinary authority established under that law. The second ground was that the complainant had lodged her appeal to both the CMA and the Public Service Commission where the matter is still pending. Aggrieved by the said ruling, the applicant has lodged the current revision seeking for the court to:

1. This Honourable Court be pleased to call for records and revise the ruling in dispute No. CMA/DSM/ILA/R/825/2017 between Amina M.

Abdallah and the Board of Trustees of the National Social Security Fund (Hon. U.N. Mpulla the Arbitrator) dated 15th September, 2021 and quash the decision thereon and make an order that deems fit.

2. Any other and further orders as this Honourable Court will deem just and equitable to grant.

On 26th day of January, 2022, the respondent herein lodged a Notice of Preliminary Objections on three points of law that:

1. The Applicant has not exhausted all the remedies that are available to her under the law;
2. That the Applicant has not followed the procedures of filing a matter against the government; and
3. That the Applicant's Application constitutes an abuse of the court process.

While constructing my ruling on the objections rose, I realised that the first objection could not be argued on preliminary basis because it is the basis in which the applicant had lodged this application. I therefore overruled the objection to be determined as substantive grounds of revision. In her affidavit in support of the application, the applicant raised the following legal issues:

1. Whether the Hon. Arbitrator erred in determining the preliminary objection which had already been determined by the CMA.

2. Whether the Hon. Arbitrator erred in determining the preliminary objection by relying on facts and evidence.
3. Whether the Hon. Arbitrator erred in contravening the High Court's Order which directed that the dispute shall proceed on merits.

The application was disposed by way of written submissions, the applicant's submissions were drawn and filed by Ms. Raya Nassir, learned Counsel while the respondent's submissions were drawn and filed by Mr. Baraka Mgya, learned State Attorney. I appreciate the submissions filed by parties which I will consider in due course of constructing my judgment.

On my part, I find the first and third issue to be addressing the same issue, hence I will determine the two issues together. The first issue is whether the Hon. Arbitrator erred in determining the preliminary objection which had already been determined by the same CMA and the third issue is whether the Hon. Arbitrator erred in contravening the High Court's Order which directed the dispute to proceed on merits. The issues revolve around a similar parameters because in determining the issues, not only will I have to determine the arbitrator's error in re-opening an issue which has been determined by the CMA, I will also have to determine whether, despite the High Court order that the matter should proceed as per the previous ruling of the same CMA, the procedure taken by arbitrator to re-

opened the objections without regard to the a superior order of the High Court was proper.

In her submissions to support the two grounds, Ms. Nassir submitted that the Hon. Arbitrator erred by determining the objection which was already determined by CMA before Arbitrator Mahindi P.P on 16/11/2017 hence making the decision *Functus Officio*. She supported her submissions by citing the case of **Ally Linus & Others Versus Tanzania Harbours Authority [1998] TLR 11**, whereby the Court of Appeal of Tanzania held that:

"It is not a matter of courtesy but a matter of duty to act judicially, that requires a judge not to lightly dissent from the considered opinion of the brethren. This is necessary to avoid giving the parties and the general public a false impression that: Results of cases in courts of law perhaps depend more on the personalities of Judges than the law of this Land."

She then argued that the above cited decision is quite relevant in this instance matter, as the conduct of the CMA to provide two contradicting rulings in the same dispute is a breach of that duty, one that should not be encouraged. She submitted further that since the CMA was *functus officio* as it had already deliberated on that same matter, it no longer had the power to rule otherwise. She supported this submission by

citing the case of **Bibi Kisoko Medard Vs. Minister for Lands Housing and Urban Developments and Another [1983] TLR 250** in which the late Mwakibete J (as he then was), held that:

"in a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

She further cited the case of **Olam Tanzania Ltd Vs Halawa Kwilabya DC Civil Appeal No. 17 of 1999** where it was stated that:

"Court Orders are made in order to be implemented, they must be obeyed. If orders made by the Court are disregarded or if they are ignored, the system of Justice will grind to a halt or it will be chaotic that everyone will decide to do only that which is convenient to them".

On whether the Arbitrator erred in contravening the High Court's order which directed that the dispute shall proceed on merit; Ms. Nassir submitted that before Preliminary Objection was argued, the Applicant informed the CMA that the issue was already determined by the CMA on 12th May 2021, the CMA ruled that since the matter was before the High Court and it was directed to proceed as per the arbitrators Ruling, the CMA cannot rule or proceed otherwise. That again on 31st May 2021, the Respondent filed another Preliminary Objection on the issue that the

application is bad in law for failure to exhaust available remedies and that the matter is bad in law for being res judicata. The Preliminary Objection was argued by way of written submissions in which the CMA ruled to the contrary whilst there was a High Court Order that directed the CMA to proceed as per the previous Arbitrator's Ruling and not to hear again the Objections which were already raised and determined.

Ms. Nassir argued that the Arbitrator cannot in his own two Rulings decide differently. That in one hand he stated that he had no jurisdiction since the High Court directed him to proceed as per the arbitrators Ruling dated 12th May, 2021. That again, on 15th September, 2021 he ruled otherwise in which he erred in contravening the High court's order which directed that the dispute shall proceed on merits.

It was Ms. Nassir's submission that it is just and fair to revise the proceedings and decision of the CMA, quash it and accordingly set the same aside and allow the matter to proceed on merits and that was also her prayer.

In reply, Mr. Mgya submitted that the record is clear, the objection determined by Hon. Mahindi in 2017 is not the same objection that was determined in 2021. He argued that the allegations are false and meant to confuse this Court. That the objection raised in 2017 was based on

Section 32A of the Public Service Act, Cap. 298 R.E 2019 ("PSA") which required Public Servants to exhaust all remedies provided under the law before resorting to remedies under the labor laws. That the other objection was based on jurisdiction of the CMA over labor disputes involving public servants.

Mr. Mgaya submitted further that the previous objection was concerned with fundamental issues of jurisdiction while the subsequent one was based on procedural law that governs public servants, the PSA. That the clear distinction precludes any assertion that the respondent filed two identical objections before this Honorable Court. He concluded that the concept of *functus officio* does not apply here as its conditions have not been met. He supported his submissions by citing the case of **Cipex Tanzania Limited Vs. Tanzania Investment Bank, Civil Appeal No. 127/2018** where *functus officio* was defined by Hon. Judge Masabo as:

"The term functus officio is a judicial context, simply connotes that once a judge or magistrate has performed his official duty, he is precluded from re-opening the decision."

He then submitted that the arbitrator was not re-visiting a previously determined preliminary objection based on the issue of jurisdiction rather, a new preliminary objection based on procedural law hence he was not *functus officio*.

On whether the arbitrator erred in contravening a High Court order to hear the dispute on merits, Mr. Mgaya submitted that the decision of the arbitrator to strike out the dispute is not only correct, but it also keeps up with the current law. He submitted further that the High Court has now been overridden by a decision of the Court of Appeal in the case of **Dominic A. Kalangi vs Tanzania Posts Corporation (Civil Appeal 158 of 2020) [2022] TZCA 153 (28 March 2022); which has revoked the Commission's jurisdiction to hear labor disputes involving civil servants. He then argued that the decision of the Court of Appeal is binding upon all lower courts, supporting his argument by citing the decision of this court in the case of **Ayasi Rashid Mbisa vs Jamil Twalha Rashid Mbisa (Misc. Land Appeal 36 of 2019) [2020] TZHC 3768 (19 November 2020)**; He concluded that the decision of the Court of Appeal countermands this court's previous order because it binds all courts, hence the arbitrator's decision was correct. His prayer was for the dismissal of this application.**

In rejoinder, on the first issue, Ms. Nassir opposed the Respondent's submission in Paragraph 2.1.1.3 that the Preliminary Objection raised and determined in the year 2017 was on the issue of jurisdiction. She argued that Mr. Mgaya forgot that the decision of Hon. Mpulla of 2021 decided

on the issue of Jurisdiction referring to the Ruling of CMA dated 15/9/2021 at Paragraph 4 of page 8 which in her argument, led to two conflicting decisions reached before the CMA.

On the contention that the principle of *functus officio* is not applicable in the instant case, her reply was that the contention is simply lacking in merit. Relying on the same decision cited by the Respondent, of **Cipex Tanzanian Limited Vs. Tanzania Investment Bank** (Supra) she argued that the quotation made applies to the Applicant's side since the Hon Arbitrator re-opened the decision decided by Hon Mahindi and made another decision to the contrary.

She then submitted that in this instant case, the CMA had already ruled that it had jurisdiction to entertain the matter and that it was correctly brought before the Commission, even if the preliminary objections are not identical as claimed by the Respondent, a contention the Applicant sternly opposes, the desired result by the Respondent is still the same, that is challenging the jurisdiction of the Commission in entertaining the matter. That the challenge was already determined by the Commission through its previous ruling, thus, the CMA became *functus officio*.

Making rejoinder on whether the arbitrator contravened the order of the High Court, Ms. Nassir submitted that The Respondent has deviated

his submission from the raised ground of revision since it is clear that Hon Judge Aboud ruled that the matter be remitted to the CMA to proceed on merit as per the Arbitrator's Ruling annexed and marked "AM-3" to the affidavit. She argued that the Respondent has not submitted anything in respect of the said ground, but rather deviated and discussed on issue which is not subject of the revision. On the cited case of Tanzania Posts Corporation vs Dominic A. Kalangi, a decision which has ousted the jurisdiction of the CMA to decide disputes regarding public servants, she argued that this decision was delivered in 2022. Further that the decision does not include NSSF employee who were governed by their own specific laws and the dispute at the CMA was instituted way back in 2017 hence relying on this decision would prejudice the Applicant's right.

Having heard the parties' submission, at the onset of my finding, and for reasons that will soon be apparent, I agree with Ms. Nassir that the arbitrator erred in determining an objection that was already determined by his counterpart. I have read Mr. Mgaya's submissions trying to justify the error by twisting around words to make the two objections different, arguing that one was a matter of procedure and the other one was an issue of law, with respect, and his line of argument is evasive.

It is apparent on the record that the issue that was before the CMA in both objections was on the jurisdiction of the CMA to determine the matter involving a civil servant. The proper forum to table the matter for determination is an issue of jurisdiction and not an issue of procedure as Mr. Mgaya would want the court to believe. As correctly argued by Ms. Nassir, the issue was determined by Hon. Mahundi and it was an error for the subsequent arbitrator Hon. Mpula to re-open it. Worse still, he went ahead and determined an objection after the High Court had directed the parties to proceed with the dispute as per the ruling of Hon. Mahindi. In my strong view, it was a requirement for the subsequent arbitrator to peruse the previous ruling of the CMA where he would have seen that the ruling ordered the dispute to proceed. He would have further seen that it is also exactly what the High Court subsequently ordered the parties in its ruling dated 31/05/2019, that the matter to proceed as per the ruling of the CMA.

From the above finding, not only did the arbitrator (Hon. Mpulla) act on a matter that was determined by the same CMA where he was *functus officio*, he also acted contrary to the order of the High Court, a gross error on his part. In the cited of **Scholastica Benedict Vs. Martin Benedict [1993] TLR 1 CA**, His Lordship Nyalali CJ (as he then was) had this to say;

*"As a general rule, a primary court, **like all other courts, has no jurisdiction to overturn or set aside its own decisions as it becomes functus officio, after making its decisions.** That is why the proceedings subsequently instituted in the primary court by the appellant in civil case No. 36 of 1972 above mentioned were faulted by both the District Court of Bukoba and the High Court at Mwanza. The only exceptions to this general rule include the setting aside of ex-parte decisions, and reviews of decisions induced by fraud or misinformation."* (Emphasis is mine).

On the above set principle, I will urge the CMA not to entertain the conduct of overruling their own decisions simply because one arbitrator thinks he has a better version of the finding than the previous one. The principle of functus officio applies on all decisions whether one finds them to be wrong or not, let the higher court determine that.

I have noted Mr. Baraka's argument that there is a decision of the Court of Appeal in the case of **Tanzania Posts Corporation** which ousted the jurisdiction of the CMA, again, Mr. Mgaya's argument is out of context. He admitted that the decision of the Court of Appeal came out in 2022 while the decision of this Court was delivered on 31/05/2019, three years before that decision. We cannot use the current decision to rectify something which happened three years before it was delivered, cautious

though, this does not imply that the law was different or that jurisdiction is justified, it is just that what is before me is a matter of procedure and not substance of the law.

I am also convinced that Mr. Mgaya did not take time to grasp and understand the gist of the revision at hand. The issue here is not whether the CMA has jurisdiction or not, in here, the applicant is challenging the conduct of the arbitrator to re-open and determine a matter that was already determined by his colleague and subsequently confirmed by this Court. That is an error which I am called to justify, and not whether the CMA had jurisdiction to entertain the matter because that issue was determined by this court in Revision No. 598/2017 on which the Court found the revision to be meritorious because it was pre-maturely filed. The matter was ordered to proceed as per the ruling of the CMA hence Hon. Mpulla's duty was to proceed accordingly and not to re-open the objections and dismissing the matter.

My concern is also on the respondent's rush to have the matter re-opened. If they had their first chance and raised objections which were overruled, they were to wait for the matter to be determined on merits and raised those issues on revision and not to jump up and down raising objections un-procedurally. The acts have cost the parties five years' time of unnecessary litigations while the merits of the matter have not been

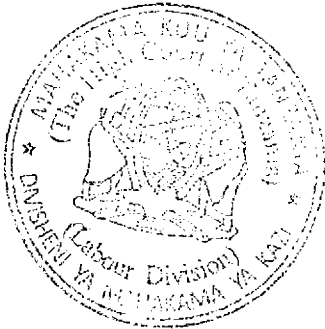
touched. This practise should be condemned and it is high time that the CMA start taking control of their proceedings and ensure that matters are disposed in expedited matter hence serving the purpose of the law establishing them.

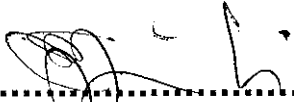
For the respondent also, I have noted she is represented by a State Attorney, being advocate No. 1, the State Attorney should conduct in a manner that is accordance with the law by assisting the court to expeditiously dispense justice. They should not to deploy delaying tactics by raising multiple objections on the same matter ignoring the laid down procedures which may result in obstructing the ends of justice.

Before I pen down, I must also emphasize that my duty here is only in so far as the conduct of the CMA arbitrator, to re-open a matter determined by the same CMA, is concerned. I am only to determine whether the conduct was erroneous and not to determine whether or not the CMA has jurisdiction to entertain the matter because that was already determined by the CMA in 2017 and this court's (Hon. Aboud, J) order which subsequently ordered the parties to go back to the CMA to proceed as per that ruling of the CMA. I cannot go further than that because I have to respect and abide by what my Sister Judge determined and not to make my own new findings.

The above said and on the findings I have made above, I agree with Ms. Nassir that the arbitrator erred in determining the matter that was already determined by the same CMA and he further erred by acting contrary to the order of this Court. Consequently, I allow this application, the ruling of the CMA dated 15th September, 2021 is hereby set aside. Parties are remitted back to the CMA to proceed with the matter as per the order of this Court (Hon. Aboud J) dated 31/05/2019.

Dated at Dar es Salaam this 22nd day of July, 2022.




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S.M. MAGHIMBI
JUDGE