

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

**REVISION APPLICATION NO. 217 OF 2022**

(Arising from an Award issued on 1/6/2022 by Hon. Nyang'uye H.A, Arbitrator, in Labour dispute NO.  
CMA/DSM/TEM/610/2021/69/2021 at Temeke)

**DAVID PETER GABRIEL ..... APPLICANT**

**VERSUS**

**LAKE CEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of the last Order: 10/10/2022*  
*Date of Judgment: 25/10/2022*

**B. E. K. Mganga, J.**

Facts of this application in brief are that, on 10<sup>th</sup> March 2020 David Peter Gabriel, the applicant entered a one-year fixed contract of employment with Lake Cement Ltd, the respondent, expiring on 9<sup>th</sup> March 2021. In the said fixed term contract of employment, the parties agreed that applicant will be under probation for three months. The said probation period was ending on 10<sup>th</sup> June 2020. It happened that respondent extended another probation period for more three months'

running from 10<sup>th</sup> June 2020 up to 9<sup>th</sup> September 2020. On 3<sup>rd</sup> September 2020, respondent terminated employment contract of the applicant allegedly, due to unsatisfactory performance and poor communication.

Applicant was aggrieved with the said termination, as a result, he filed labour complaint No. CMA/DSM/TEM/610/69/2021 before the Commission for Mediation and Arbitration henceforth CMA at Temeke on ground that respondent breached the contract. In the Referral Form (CMA F1), applicant indicated that he was claiming to be paid (i) TZS 12,023,333/= being salary for the remaining period of the contract, (ii) TZS 2,100,000/= being compensation for medical expenses he incurred and (iii) TZS 20,000,000/= being compensation for legal fees he paid his lawyer all amounting to TZS 34,123,333/=.

Having heard evidence of the parties and submissions thereof, on 1<sup>st</sup> June 2022, Hon. Nyang'uye, H.A, Arbitrator issued an award dismissing the complaint by the applicant on ground that there was no breach of contract, rather, applicant was terminated due to poor performance. Further aggrieved, applicant filed this application seeking the court to revise the

said award. In the affidavit in support of the Notice of Application, applicant raised three grounds namely:-

- 1. That the Commission erred in law and facts in not considering that the respondent in not giving the Applicant notice of termination of employment contract, breached the contract.*
- 2. That the Commission erred in law and facts in not considering that extension of probation was contrary to the employment contract and applicable laws, that respondent in extending the probation period breached the employment contract.*
- 3. That the Commission erred in law and facts for failure to take into account the whole evidence on record and the laws applicable.*

In opposing the application, respondent filed the Notice of Opposition and the Counter affidavit affirmed by Amina Hamadi Siwa, her Human Resources and legal officer.

When the application was called on for hearing, Mr. Emmanuel Ally, learned advocate appeared and argued for and on behalf of the applicant while Mr. Ditrick Mwesigwa, learned Advocate, appeared, and argued for and on behalf of the respondent.

Submitting on the 1<sup>st</sup> ground, Mr. Ally, learned counsel for the applicant, argued that Applicant was not served with notice of termination as required by the contract hence the arbitrator erred for not holding that failure of the respondent to serve notice of termination amounted to

breach of contract. He went on that, the contract (exhibit P1) provides that either party desiring to terminate the contract will serve the other, a notice of 30 days in writing. He submitted further that, the defence of the respondent was that applicant was terminated while under probation hence no need of notice. He strongly submitted that probation did not do away with the requirement of notice and cited the case of **Mohamed Kijida V. Everything Dar. Co. Ltd**, Labour Revision No. 694 of 2019 HC (unreported) and **Salkaiya Seif Khamis V. JMD Travel Services (SATGURU)**, Revision No. 658 of 2018, HC (unreported) to support his argument that parties are guided by their agreed terms.

On the 2<sup>nd</sup> ground, Mr. Ally learned counsel for the applicant submitted that, the arbitrator erred in not holding that extension of probation was contrary to the law and amounted to breach of contract and that, there was no room for extension of probation period under the said fixed term contract (exhibit P1). In his submissions, counsel for the applicant conceded that Rule 10(5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 allow extension of probationary period.

Arguing the 3<sup>rd</sup> ground, counsel for the applicant briefly submitted that arbitrator did not consider evidence adduced and the applicable law. He therefore concluded his submissions by praying that applicant be compensated the remaining period of the contract, health insurance that was not covered, because applicant used his money and general damages to the tune the Court may consider.

Resisting the application, Mr. Mwesigwa learned counsel for the respondent, submitted on the 1<sup>st</sup> ground that, applicant had 3 months' probation which was extended after assessment (exhibit D1) and the 2<sup>nd</sup> assessment (exhibit D2) and finally applicant was terminated. He argued that respondent complied with the law. Mr. Mwesigwa cited the case of ***Digital Grid Solution V. Omary Manywele***, Revision No. 602 of 2019, HC (unreported) to support his argument that probation is a practical interview. He strongly submitted that applicant did not perform and was given chance to improve but failed. On failure of the respondent to serve applicant with the notice of termination, counsel for the respondent submitted that a notice cannot be issued to a probationary employee

because he is not covered with Part E of the employment and Labour Relations Act[ Cap. 36 R.E. 2019].

Responding to submissions made on behalf of the applicant on the 2<sup>nd</sup> ground, Mr. Mwesigwa, learned counsel for the respondent, briefly submitted that the arbitrator did not error and that respondent did not breach the contract.

On the 3<sup>rd</sup> ground, counsel for the respondent submitted that arbitrator evaluated evidence and considered evidence of the parties. He submitted further that; cases cited by Counsel for the applicant are distinguishable because they relate to confirmed employee while the applicant was a probationer. He therefore prayed the application be dismissed.

In rejoinder, Mr. Ally, learned counsel for the applicant submitted that exhibit D1 and D2 did not comply with the provisions of Rule 10(8) of GN. No. 42 of 2007(supra). He maintained that applicant was not given time to respond to concerns raised by the respondent. He distinguished ***Manywele's case*** (supra) arguing that it related to unfair termination and not breach of contract hence not applicable.

I have examined evidence of the parties in the CMA record and considered submissions made before me and find that it is undisputed that applicant was terminated prior confirmation. There is no dispute that the fixed term contract (exhibit P1) provided that applicant will be under probation for three months, which, in fact, expired on 10<sup>th</sup> June 2020. In his evidence, David Peter Gabriel (PW 1) testified that he was only served with extension of probation period for another three months on 13<sup>th</sup> August 2020. With due respect to him, I have examined the notice of probationary period extension (exh. P2) dated 10<sup>th</sup> June 2020 that was tendered by the applicant himself and find that he received it on 10<sup>th</sup> June 2020 the very date his probationary period was coming to an end. Reasons for extension of probation period was loudly stated that, was to provide applicant a chance to improve performance and demonstrate ability to meet expectation of the respondent. Evidence is clear that before being served with extension of probation period, on 1<sup>st</sup> June 2020, a review of applicant's performance was done in the presence of the applicant as it is evidenced by the probation Review document (exhibit D1). Evidence shows that applicant signed exhibit D1 on 1<sup>st</sup> June 2020. Exhibit D1 shows on job

knowledge/ quality of work, approach at work etc., that it was recommended that before going to the next level, depending on how applicant learn things and how to operate the machine, he needed improvement because he had very initial knowledge, poor communication with site people, very casual approach in operation of cement mill and raw mill. It was further recommended that he still needed more input(theoretically and practically for smooth operator which requires more time. As pointed out hereinabove, exhibit D1 was signed by applicant's supervisor, training officer and applicant on 1<sup>st</sup> June 2020. Therefore, it is not correct as applicant alleged in his evidence that he was served with extension of probation period in August 2020 and as was submitted by Mr. Ally learned counsel that applicant was not given time to respond to concerns raised by the respondent.

Again, after extension of probation period as per exhibit P2 due to reasons advanced in exhibit D1, on 11<sup>th</sup> August 2020 another performance review was conducted and applicant fully participated as evidenced by the probation Review document exhibit D2 that was signed by the applicant on the same date. It is recorded in the said exhibit D2 as follows:-

*"...As on today we still found he still needed more training to understand the operation, so he can able manage the plant operation which we found not in current scenario and also it is difficult to learn within short probation period time".*

On employment gap related to the work assigned (weakness) it is recorded:-

*" - communication gap during work with site people,*

- low visibility at site*
- found "No" easily open for new learning".*

It was submitted by Mr. Ally learned counsel for the applicant that in extending probation period, respondent breached the contract of the applicant. With due respect to counsel for the applicant, that is not the correct position of the law. It is my view that, even if the contract of the parties is silent on extension of the probation period, the employer is entitled to extend the said period. I am of that view because, parties are not only governed by their contract but also labour laws, which is why, more often, when there is disagreement, they resort to apply labour laws. It was correctly conceded by counsel for the applicant that Rule 10(5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN.42 of 2007 provides that an employer can extend probationary period

of the employee. The said Rule is loud and clear. In my view, respondent had a right to extend probationary period of the applicant and rightly did so.

From the foregoing, I safely conclude that submissions by Mr. Ally learned advocate that applicant was not given a chance to respond to concerns raised by the respondent is unjustifiable. It is my further opinion that, there was no breach of contract by the respondent, rather, due to poor performance, applicant breached the contract, and the respondent was entitled to terminate his employment. I am of that view because, it is not expected an employer to continue to keep a person who does not perform and who cannot improve all along being paid salary which he has insignificantly contributed for.

It was submitted by Mr. Ally, learned counsel for the applicant that applicant was not served with the notice of termination of employment hence respondent breached the contract. It is my view, that extension of probation period was a red flag and sufficient notice to the applicant that if no improvement, his contract will be terminated. It should be recalled that applicant was on practical interview during the probation period and by his

poor performance and inability to improve, he failed the interview. See ***Digital Grid Solution V. Omary Manywele***,(supra), ***David Nzaligo vs National Microfinance Bank Plc*** , Civil Appeal No. 61 of 2016) [2019] TZCA 540 and ***Stella Temu vs Tanzania Revenue Authority*** [2005] TLR 178. I therefore find that there is no justification to fault the arbitrator.

For all explained hereinabove, I hereby uphold the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 25<sup>th</sup> October 2022.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 25<sup>th</sup> October 2022 in chambers in the presence of Emmanuel Ally, Advocate for the applicant and Winner Julius, Advocate holding brief of Ditrick Mwesigwa, Advocate for the respondent.



B. E. K. Mganga  
**JUDGE**