

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

REVISION APPLICATION NO. 285 OF 2022

BETWEEN

ROBERT MUKONO KIMEMIA APPLICANT

AND

BACKLITE MEDIA LIMITED..... RESPONDENT

JUDGEMENT

Date of last Order: *06/03/2023*
Date of Judgement: *17/03/2023*

MLYAMBINA, J.

By way of revision, the Applicant is challenging the Commission for Mediation and Arbitration (herein referred as 'CMA') decision delivered by Honourable Abdallah, M Arbitrator dated 21st July, 2022 in a *Labour Dispute No. CMA/DSM/KIN/283/2021*. The application emanates from the following background; the Applicant was employed by the Respondent since 22nd January, 2016 as a General Manager in four years fixed term contract. It is alleged that; on 01st September, 2020 the Applicant was promoted to the position of Executive Director and issued with a permanent contract. The Applicant strongly alleged that he did not resign from employment. On his part, the Respondent firmly stated that the Applicant orally resigned and proceeded to issue him with a letter conforming his resignation on 26th July, 2021.

Aggrieved by the Respondent's decision, the Applicant filed the dispute at the CMA claiming for constructive termination. The CMA held that it had no jurisdiction to determine the application. Aggrieved by the CMA's decision the Applicant filed the present application on the following grounds:

- a) Whether the Arbitrator erred in law and fact in failing to examine the evidence presented by the Applicant that proved the Applicant and the Respondent applied for a new work permit that was unfairly withheld by the Respondent to deprive the Applicant his rights.
- b) Whether the Arbitrator erred in law and facts in holding that the Applicant was not entitled to his terminal benefits while he was not found guilty of misconduct or to have resigned and the Respondent admitted did pay him.
- c) Whether the Arbitrator erred in law and fact in holding that the Applicant was not entitled to repatriation cost and subsistence allowance while the Respondent admitted was employed from Kenya and was never repatriated.
- d) Whether the Award issued is bad in law for entertaining matters which were not at issue.

The application was argued by way of written submissions. Both parties were represented. Mr. Lucas Elingaya, Learned Counsel appeared

for the Applicant whereas Ms. Prisca Chogero, Learned Counsel was for the Respondent.

On the first ground, Mr. Elingaya challenged the Arbitrator's failure to determine the issue on the validity of the reason for termination. He stated that; the Arbitrator erred not to determine the issue in dispute and make findings on it.

According to Mr. Elingaya, the omission sufficiently makes a serious material irregularity as the Arbitrator had a duty to determine whether the Respondent had a good reason for terminating the Applicant from his employment. As indicated in the CMA Form No.1, as well as the framed issues, the Applicant's complaint was for constructive termination. Therefore, it was expected the arbitral award to have a finding on the validity of the reason for termination.

Mr. Elingaya submitted that; the irregularity contravenes a legal principal that Courts should determine each and every issue that has been framed and failure to do so renders the decision improperly procured and a nullity for material irregularity. To support his preposition, Mr. Elingaya cited the case of **Sheikh Ahmed Said versus**

inyema Masjid [2005] TLR 61, in

which it was held that:

It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. It is necessary for a trial Court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect.

Also, Mr. Elingaya cited the case of **Gaia Eco Solutions (T) Ltd v. Fadhili M. Ulaya**, Revision Application No. 443 of 2018, High Court Labour Division at Dar es Salaam (unreported) where Madam Judge Muruke at page 7, 1st paragraph referred to a principle established in the case of **Kukal Properties Development Limited v. Maloon and Others** 1990-1994 E.A 281, Court of Appeal of Kenya; in which it was held that:

A judge is obliged to decide on each issue framed. Failure to do so constitutes a serious breach of procedure.

Mr. Elingaya further submitted that; failure to address all the issues framed contravene a fundamental duty of an Arbitrator placed under *Rule 24 of the Labour Institution (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007* as well as a statutory requirement

of the contents of the award as set out under *Rule 27 (3)(b) of GN 67 of 2007* which requires that; an award must contain among others "*the issues or issue in dispute.*"

It was also submitted by Mr. Elingaya that; the issue of work permit was not the reason for the termination of the Applicant's employment. According to DW1 and as per Exhibit P11, through the letter confirming resignation, the Respondent alleged that the Applicant resigned orally from his employment. There were no issues of work permit or performance of the Applicant, all these were raised at the CMA by the Respondent in its effort to deprive the Applicant of his rights. There were no reasons for terminating the Applicant's employment as per Exhibit P11. He therefore, urged the Court to revise the CMA's award.

On the second ground, it was strongly submitted by Mr. Elingaya that; the Arbitrator abandoned and ignored the testimony and evidence by the Applicant. He stated that this was clearly unfair, reviewing all the Exhibits P5A, P5B, P6, P7 and P10, sufficiently prove the Applicant's work permitted was renewed than not.

Mr. Elingaya submitted that; the Applicant's testimony regarding the work permit were never substantially contradicted by the

Respondent before the CMA. He said the Arbitrator was seriously biased just to generalize and conclude that the Applicant had no valid work permit while abandoning to address the evidence that shows the work permit was withheld by the Respondent.

Turning to the third ground, the Applicant was neither found guilty of any misconduct nor alleged and proved to have committed a misconduct nor proven to have resigned. As a matter of fact, the CMA did not state in the award reasons for termination. He argued that it was improper for the Arbitrator to denying the Applicant his statutory entitlements. It was further argued that according to *Section 44(1), (2) of the ELRA*, the employer should pay the employee remuneration for the work done, annual leave, notice pay, severance pay, transport allowance and a certificate of service. He insisted that the Applicant was denied his terminal benefits.

As regards to the fourth issue, it was submitted that; there was no dispute that the Applicant was recruited from Kenya as per Exhibit P1 and P2. He stated that; the Arbitrator erred in interpreting the provisions of *Section 43(1) (a)(b) of ELRA*. The reasons for the Applicant to travel to Kenya was not related to termination of his employment contract. The

Respondent did not state or prove if they repatriated him after termination of the employment.

Mr. Elingaya added that; the Applicant's personal belonging are still here in Tanzania. He submitted that; the Court of Appeal of Tanzania has explained the right of an employee who has already left his place of work without being repatriated in the case of, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal 35 of 2017, Court of Appeal of Tanzania at Mtwara (unreported).

Coming to the last issue, Mr. Elingaya submitted that; the issue of cause of action to arise in Kenya as stated by Hon. Arbitrator on page 19 of the award was not part of the issue in dispute or argued by the parties. He stated that; the issue was raised by the Arbitrator in her own reasoning and determined in her own reasoning. He submitted that; if the Arbitrator wanted to raise the issue of cause of action as an issue for determination, should have afforded the parties the right to be heard and address her on the issue of cause of action as to whether it raised in Kenya or Tanzania.

Mr. Elingaya submitted that; the Arbitrator ruled to have no jurisdiction to hear the matter while she heard the same and determined it.

It was the submission of Mr. Elingaya that; if the Arbitrator had no jurisdiction as she alleges, she could not have determined the matter from the first place. He insisted the Arbitrator misdirected herself. In the upshot, Mr. Elingaya urged the Court to revise and set aside the CMA's award.

In response to the first ground, Ms. Chogero submitted at length that; the Applicant had no valid contract as rightly found by the Arbitrator. The counsel also submitted at length on the issue of constructive termination of which I find no value of the same at this juncture.

As to the second ground, Ms. Chogero strongly submitted that the Respondent did not withhold the Applicant's work permit and there is no evidence to such effect. Regarding the payment of terminal benefits, Ms. Chogero strongly submitted that; the Applicant is not entitled with the same because he had no valid contract.

Turning to the last issue, Ms. Chogero insisted that the issue of CMA's jurisdiction was framed by the Arbitrator and he properly

determined the same. She further submitted that the Applicant had no valid contract. Thus, the application be dismissed for lack of merit.

In rejoinder the Mr. Elingaya reiterated his submissions in chief.

In this application all grounds of revision will be addressed jointly. The Applicant challenges the Arbitrator's failure to determine the issues framed. That, the issue as to the reason for termination was not determined by the Arbitrator. In the application at hand the following issue were framed at the CMA:

- i. Endapo kulikuwa na mahusiano ya kiajira kati ya Mlalamikaji na Mlalamikiwa;
- ii. Endapo Tume ina mamlaka ya kusikiliza mgogoro, kama hoja namba moja haijathibitika;
- iii. Endapo kulikuwa na sababu zilizopelekea Mlalamikaji kuacha kazi.
- iv. Ni ipi stahiki ya kila upande.

The Arbitrator in her award determined the first, second and fourth issue. The fourth issue remained undetermined. On this aspect, I subscribe to the decision in **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** (*supra*) with the findings that; the CMA/Court is duty bound to determine each and every issue framed and agreed by the parties.

However, in the circumstances of this case, in determination of the first and second issues framed, the Arbitrator concluded that she had had no jurisdiction to determine the dispute on the ground that the Applicant's contract was void. She stated that; there was no valid contract between the Applicant and the Respondent. Therefore, the parties lacking a valid employment contract, the CMA was seized with jurisdiction to determine the dispute in terms of *Section 14 of the Labour Institutions Act [Cap 300 Revised Edition 2019]*.

Therefore, in the circumstance of this case, it is my view the Arbitrator was correct not to determine the third issue framed. As indicated in the CMA F1, the dispute before the CMA was about constructive termination. Thus, following the findings that the Arbitrator had no jurisdiction to determine the matter brought before her, the Arbitrator had no authority to proceed to determine the merit of the dispute. The merit of the application would have been determined if the Arbitrator had jurisdiction to determine the whole matter. As said, the Arbitrator had no jurisdiction to determine the whole dispute.

The Applicant further invited this Court to determine the dispute on merit. All grounds of revision invite the Court to examine the records and decide the dispute on merit. This Court declines the Applicant's

prayer on the following reasons: *First*, the decision as to whether the CMA had jurisdiction to determine the dispute or not is still intact. It has not been challenged in any Court of law. Even in his grounds of revision before this Court, the Applicant did not challenge the findings about the CMA's jurisdiction to determine the matter.

Second, the Court cannot proceed *suo motto* to determine on jurisdictional issue which was not brought as a ground of this revision application. The Court is only limited to what has been pleaded by the parties. This is the Court's position in the case of **Melchiades John Mwenda v. Gizelle Mbaga (Adminitratix of the Estate of John Japhet Mbaga-deceased) & 2 Others**, Civil Appeal No. 57 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported), p. 24 where it was held:

It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for.

Third, this Court cannot step in the shoes of the CMA and determine what was not decided thereto. It is a trite law that a higher Court cannot determine issues which were not decided by the lower Court. This is the Court's decision in the case of **Tanzania Breweries Limited v. Mohamed Kazingumbe**, Civil Appeal No. 53 of 2008,

Court of Appeal of Tanzania at Dar es Salaam (unreported), in which it was held:

We would not wish to speculate on what would have been the decision of the High Court on these three grounds. As a result, we cannot purport to render our decision on what was not decided by the High Court. What is in our power is to order the High Court to hear and give a conclusive reasoned decision on the three grounds of appeal and make consequential orders, which incidentally were not asked here.

In the premises, for the reasons advanced above, it is my view that all grounds of revision in this application lack merit. Consequently, the application is hereby dismissed.

It is so ordered.



Y.J. MLYAMBINA

JUDGE

17/03/2023

Judgement pronounced and dated 17th March, 2023 in the presence of learned Counsel Peter Clavery holding brief of Luka Elingaya for the Applicant and Peter Clavery holding brief of Prisca Chogelo for the Respondent.



A handwritten signature in blue ink, consisting of a series of loops and curves, positioned above the printed name.

Y.J. MLYAMBINA

JUDGE

17/03/2023