**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 203 OF 2023**

**BETWEEN**

**ANDREW MWAKYUSA KAMINYOGE ..... 1ST APPLICANT**

**REHEMA YARED HONGOLI ..... 2ND APPLICANT**

**SCHOLASTICA DEUS MKONDA ..... 3RD APPLICANT**

**VERSUS**

**EUROPE INC INDUSTRIES LIMITED ..... RESPONDENT**

# JUDGEMENT

**Date of last Order:** *12/10/2023*
**Date of Judgement:** *27/10/2023*

**MLYAMBINA, J.**

The Applicants were the employees of the Respondent employed on different dates and different positions. It is alleged that; on 09/09/2020, the Respondent placed a written announcement in the notice board inviting the employees to take leave without pay due to the alleged economic crisis of the Respondent. The Applicants were not ready to take the said leave. To the contrary, the Respondent's Human Resource Office deceived them by filing the leave forms and letting the Applicants to sign the alleged forms without being aware of the contents therein. After being served with the leave forms, it was when the Applicants became aware that they signed unpaid three months leave

without their consent. Aggrieved, the Applicants referred the matter to the Commission for Mediation and Arbitration (herein CMA). For the reasons which will be apparent in this decision, the matter at the CMA was dismissed.

Again, being dissatisfied by the CMA's decision, the Applicants filed the present application on the following grounds:

i. That, the Arbitrator erred in law to hold that the filed dispute was premature as long as the duration of the disputed leave without pay had not expired.

ii. That, the Arbitrator failed to determine issues before it and made a legal conclusion on a new legal issue that the dispute was filed prematurely without availing parties right to address such point of law.

The matter proceeded by way of written submissions. Before the Court, the Applicants were represented by Mr. Noel Nkombe and Mr. Brian Mwemezi, Learned Counsel. On the other hand, Ms. Ester Poyo, learned counsel appeared for the Respondent.

Arguing in support of the first ground, Mr. Nkombe and Mr. Mwemezi submitted that the leave without pay purported to have been

applied to the Applicants was made by way of misrepresentation which was one of the issues for determination at the CMA. They argued that the Arbitrator wrongly relied to the case of **Hashim Ally Digello and Others v. Alha Krust Limited**, Revision No. 435 of 2022. That, in the cited case, the decision was whether the notice of representation before the Court was proper. The circumstances thereto are distinguishable to the case at hand.

It was strongly submitted by Mr. Nkombe and Mr. Mwemezi that the Applicants' dispute was centered on misrepresentation provided under *Section 18 of the Law of Contract Act [Cap 345 Revised Edition 2019]* (herein LCA) as well as *Section 6(f) of the Law of Limitation Act [Cap 89 Revised Edition 2019]* (herein LLA) which provides that the action in breach of contract accrues on the date of the breach. They were of the firm position that the cause of action in this case arose when the Respondent made representation. They stated that the law does not require the Applicants to wait until the contested leave expired for them to institute a labour dispute. Mr. Nkombe and Mr. Mwemezi maintained that the Arbitrator was duty bound to determine whether the purported leave was obtained by misrepresentation or not. They added that the dispute was not prematurely filed.

Regarding the second ground, it was submitted that the issue as to; *whether the dispute was prematurely filed or not* was not an issue at the CMA. The Arbitrator raised such issue *suo motto* and proceeded to determine the same without availing the parties the right to be heard. It was the Counsel's argument that such decision was arrived without affording the parties the right to be heard. It is fatal and renders such decision a nullity. To support their submissions, Mr. Nkombe and Mr. Mwemezi put reliance to the case of **Oysterbay Villas Limited v. Kinondoni Municipal Council and the Attorney General**, Civil Appeal No. 110 of 2019, Court of appeal of Tanzania at Dar es Salaam (unreported) and the case of **National Housing Corporation v. Tanzania Shoe Company Limited and Others** [1995] TLR 251.

It was further submitted by Mr. Nkombe and Mr. Mwemezi that the dispute was for both breach of contract and interpretation, but the Arbitrator raised an issue of unfair termination and required the Applicants to adduce evidence thereto contrary to *Section 39 of the ELRA* which requires the employer to prove first in disputes of unfair termination. They therefore urged the Court to allow the application, quash and set aside the CMA's Award for being unlawful, illogical and irrational.

In response to the application, at the outset, Ms. Poyo argued that the provisions of *Rule 28 (a), (b), (c), (d) and (e) of the Labour Court Rules GN. No. 106 of 2007* (herein LCR) clearly states the grounds under which proceedings and decisions of CMA may be subjected to revision. She mentioned that the grounds include; issues of jurisdiction, material irregularity, legality of the proceedings and error material to the merit of the case. Ms. Poyo argued that the award and proceeding subject of revision does not fall under the mentioned circumstances, henceforth, the application lacks merit.

It was generally replied that at the CMA, the following issues were framed for determination:

i. Whether there was unfair termination of the Complainants.
ii. Whether there was a breach of agreement based on misrepresentation.
iii. To what relief (s) are the parties entitled to.

It was submitted that it was absurd for the Applicant to submit that the issue of unfair termination was never framed before the CMA. She stated that the submissions that the issue before the CMA was only breach of contract based on misrepresentation and interpretation is a gross intent of the Applicant's Advocate to mislead the Court. Ms. Poyo

went on to submit that the matter was ruled to have been prematurely filed in response to the first issue framed.

Ms. Poyo maintained that the Respondent had never terminated the Applicants by neither issuing them termination letter nor barred them to enter at the work premises as claimed. She stated that the Applicants reported back to work on 25/10/2020 while the matter was still pending for determination at the CMA, hence they could not be allowed to continue working until final determination of their filed dispute.

In response to the allegation of the right to be heard, it was strongly submitted by Ms. Poyo that the case of **Oysterbay Villas Limited** (supra) is distinguishable to the case at hand because the parties herein were afforded the right to be heard. She went on to submit that the case of **Hashim Ally Digello** (supra) referred by the Arbitrator is very relevant and quite similar to the case at hand. That, in the referred case, the subject matter was on breach of employment contract and the Claimants instituted their claim prior to the conclusion of the retrenchment process.

Ms. Poyo added that; the issue of proper filing of notice of representation was also discussed thereto. Similar circumstances of this

case also happened to the case of **Modern Driving School Limited v. Godius Elia Mtenga,** Labour Revision No. 66 of 2021, High Court of Tanzania Labour Division Arusha Sub Registry (unreported).

Ms. Poyo strongly contended that the Applicants' submission that the determination of the first issue ought to have waited for the determination of the second issue. Thus, there is no provision of law binding the Arbitrator on which issue to determine first when composing an Award. In the upshot, Ms. Poyo urged the Court to uphold the CMA's decision and dismiss the application for lack of merit.

Rejoining the application, Mr. Nkombe and Mr. Mwemezi submitted that the grounds for revision in this application is based on the irregularities and the existence of error material to the merits of the subject matter before such responsible person. That, those grounds are also provided under *Rule 28(1)(c), (d) of the LCR*. They further contended that in the impugned Award, the Arbitrator did not state when the period of maturity commenced. Whether it was after the Applicants were given their leave without pay or after the end of their leave period.

Mr. Nkombe and Mr. Mwemezi went on to reiterate their submissions in chief.

I have dully considered the submissions of the parties, CMA and Court records as well as relevant laws. I find the Court is called upon to determine two issues which will be jointly determined; *whether the matter was timely filed at the CMA and whether the parties were afforded with the right to be heard on each of the particular issue.*

The issue of time limitation involves the jurisdiction of the Court or Tribunal or the Commission. Therefore, the same issue must be determined prior going to the merits of any application. This was also stated in the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula,** Civil Appeal No 161/1994 Court of Appeal of Tanzania at Mwanza Sub Registry (unreported) whereby the Court held that:

> ... the question of Limitation of time is fundamental issue involving jurisdiction ...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to Court as and when he wishes.

The time limit for referring disputes at the CMA is governed by the provision of *Rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 (GN. No. 67/2007)* which provides as follows:

10 (1) Disputes about the fairness of a employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.

(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute arose.

The CMA F1 which initiates disputes at the CMA indicates that; initially, the Applicants referred a complaint seeking for interpretation of appropriateness of the purported leave without pay. Such complaint was filed at the CMA on 25/10/2020. It is further revealed that on 11/02/2021, the Applicant's Counsel prayed before the CMA to withdraw the referred complaint on the ground that there was no filing of notice of representation. It was also observed that the mediation process proceeded in respect of one Complainant while they were seven in number. Since there was no objection from the Respondent, leave to withdraw such complaint was granted and the Applicants were given seven days leave to refile the complaint.

The records further shows that the Applicants complied with the order and refiled their dispute. When the Applicants refiled the complaint, in the CMA F1 they claimed for interpretation of the

agreement as well as breach of contract. As per *Rule 10 (supra)*, the disputes of unfair termination must be referred to the CMA within 30 days from the date of termination while other disputes are supposed to be filed within 60 days from the date when the cause of action arose. Since the dispute filed was for interpretation of a leave agreement, it is my view that such dispute was timely filed at the CMA.

The leave application form (exhibit P1 and P5) indicates that the Applicants were given unpaid three months leave on 25/09/2020 and such leave was supposed to end on 24/12/2020. The complaint was filed at the CMA on 25/10/2020, which was one month from the date of the commencement of the disputes leave. On that basis, it is my view that the dispute of interpretation of agreement was timely referred at the CMA. It is my observation that the cause of action arose when the Applicants were served with the leave forms.

In respect of the dispute of breach of contract, the Arbitrator was of the view that the same was prematurely filed. The Applicants contends that they were not afforded the right to be heard and such issue was *suo moto* raised by the Arbitrator while composing the Award. On such aspect, I join hands with the Respondent's Counsel submissions that the Arbitrator determined such issue while addressing the first

issue. As to whether there was termination of the complainants, it was not an independent issue.

In the circumstances of this case, much as the records suffice to determine as to whether the matter was timely filed or not, it is my view that the Applicants ought to have been afforded the chance to respond on the same. As analyzed above, in the first complaint which was withdrawn, the Applicants did not claim for breach of contract. They included the claim of breach of contract in the refiled application. Under such circumstances, it is my view that, the Arbitrator should have called the parties to address the appropriateness of including the dispute about breach of contract and address if such dispute was timely filed at the CMA. The right to be heard is emphasized in numerous Court decisions including the case of **Abbas Sherally & Another v. Abdul S.H.M Fazalboy,** Civil Application No. 33 of 2002, where it was held that:

> The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.

It has long been settled that a decision affecting the individuals rights which is arrived at, by a procedure which offended against principles of natural justice, is outside jurisdiction of decision-making authority.

As regards to the allegation as to *whether there was misrepresentation or not,* such issue was not determined by the trial commission. Therefore, this Court cannot step in the shoes of the CMA and proceed to determine the same. This is the Court of Appeal position in the case of **Mantra Tanzania Limited v. Joaquim Bona Venture,** Civil Appeal No. 145 of 2018 (unreported) where it was observed that:

> On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate Court cannot step into the shoes of the lower Court and assume that duty. The remedy is to remit the case to that Court for it to consider and determine the matter.

In the result, I find the present application has merit. The CMA's Award is hereby quashed and set aside. The matter is remitted back to the CMA to afford the parties the right to be heard on whether the complaint of breach of contract was timely filed as well as for the CMA

to proceed determining the interpretation of the leave agreement and whether there was misrepresentation or not.

It is so ordered.

**Y.J. MLYAMBINA**

**JUDGE**

**27/10/2023**

Judgement pronounced and dated 27th October, 2023 in the presence of Counsel Mr. Brian Mwemezi for the Applicant and Esther Poyo for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

**Y.J. MLYAMBINA**

**JUDGE**

**27/10/2023**