IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 19 OF 2020

(Originating from CMA/KLM/MOS/ARB/28/2020)

BOLOTI ESTATE.....APPLICANT

VERSUS

MOHAMED SELEMANI MWANGI

& 19 OTHERS.... .....RESPONDENTS

JUDGMENT

MUTUNGI .J.

The respondents were employed by the applicant in various capacities including guarding, weeding and processing in the farm. The respondents worked on the applicant's farm which they allegedly leased from a company known as CCPK for growing of coffee and the said lease Agreement ended on 12/12/2019. Consequently on the same day the applicant ended the employment of the Respondents. The Respondents claimed thereafter were promised to collect their benefits on 20th December

2019. As they did not get such benefits, they decided to file complaints at the CMA.

At the end of the hearing, the CMA decided in favour of the Respondents. It was found that respondents were terminated on 12/12/2019. The sole reason being the economic hardship experienced by CCPK and the Agreement between CCPK Limited and the Applicant coming to an end. In view thereof the respondents were to be served with termination notices considering in the eyes of law were employees. They were also entitled to terminal notices, severance pay and leave. Aggrieved by such decision the Applicant dully represented by Mr. William Waziri learned advocate has preferred the instant revision application made under section 91(1)(a), 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, No 6 of 2004, Rule 24(1)(2)(a)(b)(c)(d) and (f), 3(a),(b),(c) and (d) and Rule 28(1),(d) and (e) of Labour Court Rules, Government Notice Number 106 of 2007. On 16th February 2021. When the matter was called up for hearing the parties agreed to proceed by way of written submissions.

The Applicant's counsel on the outset prayed the notice of application, chamber summons and affidavit to be adopted and form part of his submission. He proceeded to

state that CCPK (Central Coffee Pulperies of Kilimanjaro) leased BOLOTI estate from Lukani Losaa AMCOS (cooperative societies) for growing of coffee plantations. The lease which ended due to economic hardship faced by CCPK.

He argued that according to Rule 10(1)(2) of Labour Institution (Mediation and Arbitration Rules 2007) the Respondents had to refer the dispute with the commission within 30 days from 12/12/2019 when the contract between CCPK Limited/Boloti Estate and Lukani Losaa AMCOS come to an end or else to file a condemnation form stating the reasons for their lateness. Short of this the CMA entertained the dispute which was time barred.

The learned counsel elaborated further the respondents agreed to work for a contract of unspecified period of time provided for by **Section 11(1)(a) of ELRA** as shown in their daily work sheet and they failed to prove that they had other type of employment other than one agreed upon. The applicant's advocate further stated, the employment history can be traced from 2015 to 2019 when the respondents each appeared in person and they were termed as casual workers or employees. They were employed on daily basis and worked for three days or

fewer than that in a week and assignments varied according to the seasons. Among their work tasks was weeding, harvesting, irrigation, pruning and processing in the farm. He contended that in farming activities the number of employees varied; during the annual crop circle the number of employees is high (in August, September and October) compared to other months of the year.

He further averred the respondents were free to work anywhere else since their work was subject to availability of assignments. For that some of them terminated their contracts sometimes in February October and December 2019. The respondents were not restricted and were free to choose to come at work or not.

In lieu of the work arrangement they did not work consecutively in a year, hence they were not entitled to be paid annual leave as awarded by the Arbitrator. Be as it may, the Arbitrator awarded 30 days annual leave payment instead of 28 days as per section 31(1) of ELRA. As regards severance pay and compensation, Mr. William contended the Arbitrator erred in awarding the same since the Respondents were not entitled having worked on weekly and not permanent basis.

The learned advocate further stated, the Arbitrator erred to compensate twenty respondents instead of 4 respondents who were present and signed during the last day of operation (on 12th December 2019). He stated, the Arbitrator was wrong to award benefits to a number of employees who were not working with applicant like Saulo Swai and Clemence Alphonse. He complained they wanted to identify the claimants at the CMA but the Arbitrator refused. In their understanding14 had already terminated their contract for reasons known to them at different times and four of them left on 12th December 2019.

He further explained the Arbitrator declared it was on 12th December 2019 when CCPK and Boloti Estate ended the contract and therefore it was the last day the Respondents worked for the same. At that time it was only four respondents who were present as per the employer's records. He argued that since the Arbitrator quoted section 15(6) of ELRA the employer managed to produce written particulars to prove the number of working respondents until 12th December 2019 who were Mohamed Seleman, Godlove Kimaro, Anasaa Munuo, and Neema Kimaro.

Regarding the termination notice, the learned advocate stated, the Arbitrator was wrong to award compensation of 30 days instead of 4 days contrary to section 41(1)(b)(ii) of ELRA. This is because the termination notice as per the respondent's scenario was required to be not less than 4days and the notice was given orally to the Respondents as proved in their submission during Arbitration. He stated it was wrong for the Arbitrator to award payments to Respondents not entitled nor making a complete assessment.

The learned advocate concluded by praying, this court does revise the Arbitral award and award fairly and equitably.

Contesting the submission, the Respondents prayed their counter affidavit be adopted and proceeded to narrate the CCPK leased the farm by the name BOLOTI Estate. They didn't know the name of CCPK Ltd only to learn the same at the CMA and upon such knowledge they prayed under **Rule 25(1)(2) of Labour Institution (Mediation and Arbitration) Rules of 2007 G.N No. 64** to change the name the prayer which was granted. It was difficult to know the company's name because they were never issued with contracts of service or termination letters.

The respondents further averred that on 12th December 2019 it is when the Manager and Director made an announcement, they had ended the lease contract with the owner of the farm. To this they prayed for terminal benefits and letters to end the employment. After a discussion they were asked to go home so that the applicant gets an opportunity to prepare their benefits, until 20.12.2019 nothing fruitful came up. The Respondents contended that from 20/12/2019 to 17/01/2020 is 27 days and for that, there was no need of the condemnation form. They contended 12/12/2019 was the time the lease contract ended and hence they were waiting for letters to end their employment which they expected to receive on 20/12/2020 a date they were to report back.

The respondents responding on the nature of their employment stated, the Applicant had admitted they were employed orally for an unspecified period of time as per section 14(1)(a) of ELRA which to them reflects permanent employees which cannot be changed to periodic workers like daily or weekly workers. They further argue, the presence of daily work sheets is just a record to show the attendance of employees and for preparation of the salaries and the same is used for permanent

employees. It cannot be used as proof of the mode of employment contract. The contract must be in a written form and signed by all parties and an employee to be given a copy as per section 14(2) and 15(1) of ELRA.

The Respondents further disputed the fact they were casual workers or seasonal employees. They averred they were permanent workers and most of them were watchmen and have worked for more than twelve months to four years continuously.

The Respondents went on to dispute the fact that, some of them were not present until 20th December 2020. The truth of the matter is that, they were all present and when things turned sour with employees wanting to remove the applicant's properties, the Applicant called TPAWU union secretary to calm them down.

The Respondents disputed the fact that Saulo Swai and Clemence Alphonce were not employees. They stated that they were employees of BOLOTI estate as proved by the farm Manager (one Jerome Michael Mtuku) before the CMA and they are in the list of the daily work sheet. Clemence was one of their witnesses at the CMA as shown in the proceedings and all appeared at CMA. The discrepancy is only on the way the names were written but

these were one and the same person. Instead of Elia Sauli Swai it is written Saulo Swai and Clemence Alfonce Ulomi is Clemence Ulomi.

Conclusively, the respondents prayed the revision application be struck out and the award by CMA be upheld.

I have gone through the CMA records and submissions by the parties, I find the issues for determination are: -

1. *Whether the CMA was competent to entertain the dispute.*
2. *Whether the Respondents were employees of the Applicant.*
3. *Whether the respondents were lawfully terminated.*
4. *Whether the reliefs awarded were proper in law.*

Concerning the issue whether the CMA was competent to entertain the dispute, this is one among the complainants by the Applicant. The Applicant states the respondents filed the dispute out of time counting from 12th December 2019 when the contract ended to 17th January 2020 when they filed the same. The respondents on the other hand claim it was 20/12/2019 when the employer made a final decision to terminate them.

Upon visiting the CMA records, the Arbitrator found the dispute ignited on 20th December 2019 when the Manager directed them to go and collect their terminal benefits. For ease of reference at page 8 of the Arbitral Award the same is quoted: -

> *"Tume baada ya kuchambua Ushahidi huo inaona kwamba tarehe 12/12/2019 kabla Mkurugenzi Natai kufika, Bwana Jerome Ntuku-Meneja wa Shamba aliwataarifu wafanyakazi wafike kuchukua haki zao tarehe 20/12/2019. Japokuwa Jerome Ntuku-Meneja anakana kuwaambia hivyo, lakini hakuna Ushahidi wa kumnasua kwa sababu hana kitabu cha mahudhurio wala maandishi yoyote ya kukanusha tarehe hiyo. Tume inakubaliana na yanayosemwa na walalamikaji kuwa ni sahihi...*
>
> *Kwa hiyo ninaamua kuwa meneja wa mlalamikiwa aliwaelekeza aliokuwa anawasimamia wafike kuchukua haki zao tarehe 20/12/2019, na ndipo siku hiyo aliwageuka na kuwaambia hakuna chochote wanachodai."*

From the above piece of evidence, I support the findings of the CMA that the dispute arose at the time when the farm Manager promised the respondents to collect their terminal benefits, and when the same was not fulfilled they filed the dispute at the CMA. For that the CMA was competent to entertain the matter, since the applicant had made the final decision to terminate them on 20.12.2019. The respondents were to be issued with the termination letters and this was expected on 20.12.2019 failure of which this is the date when their employment ended. It is also very clear that, what transpired on 12/12/2019 was a notice to end the company's operations and this was done orally, they were simply told to go home but were yet to receive their termination letters. It follows counting from 20/12/2019 to 17/1/2020 the dispute was still well within time consequently the CMA was competent to entertain the matter.

Coming up to the second issue on ***Whether the Respondents were employees of the Applicant***

The Applicant contended that the Respondents were casual employees who were working for unspecified period of time on weekly basis, for that it was wrong for the Arbitrator to award them annual leave, severance

payments and compensation. The applicant admitted further, they had agreed together with each Respondent to work for a contract of unspecified period of time as per section 14(1)(a) of ELRA.

On the strength of the above evidence, can it be said that there was no employer-employee relationship?

The term employee under section 4 of the Employment and Labour Relations Act, Act No 6/2004 has been defined to mean an individual who-

(a) Has entered into a contract of employment;

or

(b) Has entered into any other contract under which—

(i) The individual undertakes to work personally for the other party to the contract; and

(ii) The other party is not a client or customer of any profession, business, or undertaking carried on by the individual; or

(c) Is deemed to be an employee by the Minister under section 98(3).

Section 61 of ELRA provides for presumption of an employee it reads: -

61. For the purposes of a labour law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present-

(a) The manner in which the person works is subject to the control or direction of another person;

b) The person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organization, the person is a part of that organization;

(d) The person has worked for that other person for an average of at least forty five hours per month over the last three months;

(e) The person is economically dependent on the other person for whom that person works or renders services;

(f) The person is provided with tools of trade or work equipment by the other person; or

(g) The person only works for or renders services to one person.

This court on numerous occasions set out the standard interpretation of section 61 of the Act No. 7 of 2004. In the case of **Director Usafirishaji Africa v. Hamisi Mwakabala & 25 Others, Labour Revision No. 291 of 2009 High Court Dar es Salaam (unreported)** Rweyemamu, J (as she then was) cited with approval the case of **Summit Lodge Limited vs. Daniel Jeremiah Mngale, Labour Revision No. 130 of 2018 High Court Arusha (unreported)** which held: -

> *"Under the law a person who renders services to any other person including for a specific task is presumed to be an employee until the contrary is proved if one or more of the scenarios itemized under section 61 of the LIA exists."*

The record is crystal clear some of the employees had worked for more than one year as admitted by the farm Manager one Jerome Michael Ntuku at page 17 of the typed proceedings. He also admitted they worked for twelve hours a day.

At page 11 of the Arbitral award it is stated: -

"Kwa kuwa walalamikaji katika kesi hii wamekuwepo katika kazi zao za ulinzi, kufyeka, kumwagilia, usafi na kiwandani kwa muda mrefu bila ukomo, hivyo ni wazi kwamba mkataba wao ulikuwa wa muda usiojulikana kama ulivyotajwa katika kifungu cha 14(1)(a) cha Sheria"

I support the findings of the Honourable Arbitrator because first, in view of the provisions of section 61 (a)-(g) of Act, No 7 of 2004, the Respondents ought to have been categorized as employees as they depended on the employment economically, their work and hours of work were under control of the Applicant and second, the Applicant admitted they were under the contract of unspecified period of time, which is provided for by section 14(1) of the Employment and Labour Relations Act that, "A contract with an employees shall be of the following types;

(a) A contract for an unspecified period of time.

(b) .....

(c) ....." *[Emphasis mine]*

As to the complainant that, some of the respondents were not the applicant's employees, having painstakingly gone through the Arbitral record I find as submitted by the Respondents, Clemence Alphonce Ulomi was one of the

witnesses at CMA, and the Respondents are in the list of the daily work sheets. It is a glaring fact that the Applicant was not certain as per the evidence at page 16 of the Arbitral proceedings. Jerome Michael testified that by 12/12/2019 they were only 8 employees but later on there is an allegation that there were less than that. The foregoing notwithstanding it was upon the applicant to provide proof of her employees even for those they acknowledged as envisaged by **section 15(6) of the ELRA Cap 366** that: -

> *"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."*

The respondents on the other hand were alledging they had been employed by the applicant and paid a numeration weekly. The period for the various duties varied from one year to four years and were yet to be given contracts of employment as per **section 15(1) of ELRA and 14(2)** which states: -

> *(2) A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania.*

In light of the foregoing, the court is settled the respondents were employees of the applicant.

Trickling down to whether the respondents were lawfully terminated, it has come to light that the applicant's had to handle over the farm to the owners Lukani Lossa Amcos Ltd. It was thus expected the applicant to issue the respondents notices, then the procedure for termination would follow. The respondents were not issued with any letters or reasons for their abrupt termination. In that regard apart from establishing sufficient reasons for termination, the employer is duty bound to observe the procedures for termination of the employment contract. Since the applicant did not adhere to the procedures envisaged by section 38 and Rule 23(1)(9) (of the code of good practice) Rules G.N. 42 of 2007 the termination in this case was unfair.

As to the reliefs awarded, since the respondents were employees then, the benefits which accompany the employees after termination ought to be paid to the Respondents. These being severance pay, leave payment and 12 months compensation and payment in lieu of notice. The same were well calculated by the Arbitrator as found at pages 13-15 of the Arbitral Award and I find no reason to order otherwise.

For the foregoing, I find the application devoid of merits and consequently proceed to dismiss the same.

It is so ordered.

B. R. MUTUNGI
JUDGE
27/5/2021

Judgment read this day of 27/5/2021 in presence of Mr. William Waziri Advocate for the Applicant and Mr. Khalib Lusiando (from TIPAU) for the Respondents.

B. R. MUTUNGI
JUDGE
27/5/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
27/5/2021