IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO.5 OF 2021

(Arising from Award of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in Labour Dispute with Reference No. CMA/KLM/RMB/ARB/100/2020)

THE REGISTERED BOARD OF TRUSTEES OF TANZANIA YOUNG MEN'S CHRISTIAN ASSOCIATION.....APPLICANT

VERSUS

GAUDENCE P. KITUTU..... RESPONDENT

JUDGMENT

22/10/2021 & 17/12/2021

SIMFUKWE, J.

The Registered Board of Trustees of Tanzania Young Men's Association hereinafter referred to as the Applicant filed this application after being aggrieved with the ruling of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/KLM/MOS/RMB/ARB/100/2020** of Moshi dated 23rd December, 2020. The application was brought under

section 91 (1)(a), Section 91 (2) (a) (b) (c) and **Section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA);** read together with **Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d) and Rule 28 (1) (a) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007**. The Applicant prayed for the following orders:

1. *That, this Honourable Court be pleased to call for the entire records, inspect and examine the record of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in Labour Dispute No. CMA/KLM/RMB/ARB/100/2020, and revise the findings and an award delivered by Honourable Mwakyusa L. L on 23rd December, 2020, for being improperly procured, illegal, irrational, irregular, tainted with erroneous and acted beyond jurisdiction.*
2. *That, this Honourable Court be pleased to quash the said Award and make any other relevant and appropriate order(s) in the circumstances of this application, as this Honourable Court shall deem fit and just to grant in the interest of justice.*
3. *Costs of the Application be provided for.*

The application was supported by an affidavit sworn by Mr. Tumaini Materu learned counsel of the Applicant, which was contested by the counter affidavit sworn by Mr. Julius Damas Focus learned counsel for the Respondent.

Before summarizing the submissions, I find it worth to narrate the background of the dispute briefly. The gist of the dispute is to the effect that, the respondent was employed by the applicant on 1st April 2019 as a business teacher at St. Magret Secondary School under a contract of three years (3). The agreed monthly salary was Tshs. 650,000/=. On 23rd December 2019 a notice of termination was issued to the respondent, whereby he was informed that his employment contract will come to an end on 31st January 2020 on a reason that the report of Zonal Chief School Quality Assurance of Northern Eastern Zone directed the Applicant to employ a qualified business teacher. On 4th January 2020 the Respondent was reminded about the end of his employment contract, through another notice of termination of employment. It was alleged that the Respondent was not a qualified teacher. On 7th January 2020 the Applicant convened a meeting with all staffs of St. Margret Secondary School, one of the agenda of the said meeting being a report of the Zonal Chief School Quality Assurance Officer of Northern Eastern Zone. That, the Respondent did not attend the said meeting. On 20th January 2020 the Applicant convened another meeting with all the staffs of St Magret Secondary School, whereby the Respondent attended the said meeting. The agenda was the same like that of 7th January, 2020. Then on 4th February, 2020 the Applicant received a demand notice from the Respondent whereby the Respondent claimed a total amount of Tanzania shillings 25,450,000/= as compensation for breach of employment contract. On 16th June 2020 the Respondent filed Labour Dispute against the Applicant which was withdrawn by the Respondent. On 13th July 2020 the Respondent filed another

Labour Dispute which was decided in favour of the Respondent whereby the Respondent was awarded Tanzanian shillings 17,550,000/=. Aggrieved with the Arbitral award, the Applicant preferred to file this instant application for revision against the CMA award on the following grounds: -

i. *That, the Honourable Arbitrator erred in law and fact for holding and finding that, the Respondent did not follow fair procedure for termination of the Respondent's employment contract.*

ii. *That, the Honourable Arbitrator erred in law and fact when ordered the Applicant herein to start the case by giving evidence while the Respondent preferred the breach of employment contract as a nature of the dispute and not unfair termination.*

iii. *That, the Honourable Arbitrator erred in law and fact for failure to resolve the issues properly.*

iv. *That, the Honourable Arbitrator erred in law and fact for failure to address and taking into consideration the closing arguments of the parties in an Award delivered on 23rd December 2020.*

v. *That the Honourable Arbitrator erred in law and fact for failure to compose an Award properly on the standard required by the law.*

vi. *That, the Honourable Arbitrator erred in law and fact for entertaining the labour dispute which is out of time. (sic)*

vii. *That, the Labour dispute CMA/KLM/RMB/ARB/100/2020 was*

incompetent before the CMA, because there was no any document annexed or tendered at CMA to prove if at all there was an order for extension of time.

viii. *That the Honourable Arbitrator erred in law and fact for failure to evaluate and address properly the evidence given during the hearing.*

ix. *That, an award of CMA was against the weight of the evidence as a whole.*

x. *That, an award of the CMA was irrational, illegal, improperly procured and tainted with errors.*

xi. *That, an award of the Honourable Commission is totally confused and it is tainted with irregularity.*

xii. *That, the Honourable Arbitrator erred in law and fact for awarding one month salary in lieu of notice, despite of the fact that the Respondent was given notice not less than 30 days.*

xiii. *That, the Honourable Arbitrator erred in law and fact for awarding the Respondent the remained months salaries without taking into consideration that, the matter did not fall under the category of the breach of the employment contract, but rather unfair labour practice.*

The application was argued by way of written submissions. Both parties

complied to the schedule of which I am very grateful.

Mr. Tumaini Materu started his submissions by narrating the background of the dispute of which I find no need to reproduce here as it has already been covered herein above. The learned counsel adopted the contents of his affidavit to form part of his submissions in support of the application for revision.

Mr. Materu submitted among other things that, there are material irregularities and legal issues on the way CMA Form No. 1 was filled compared to the proceedings and an award of the Commission for Mediation and Arbitration, which are sufficient to revise the said award of the CMA in Labour Dispute No. CMA/KLM/RMB/ARB/100/2020. It was stated further that before the CMA, Labour Disputes are instituted by way of filing CMA Form No. 1 which is in a prescribed form as provided **under section 88 (1) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019.**

Mr. Materu raised another concern in respect of burden of proof. That the nature of the dispute opted by the Respondent was breach of contract of which the one who alleges is the one who is required to give evidence first. In this case, the Arbitrator ordered the Applicant (employer) to start to give evidence, which was improper. In support of his argument the learned counsel cited the case of **UPENDO MALISA vs KASSA CHARITY SECONDARY SCHOOL, LABOUR REVISION NO. 68 OF 2019,** HC Labour Division at Mtwara, whereby at page 14 the Court held that:

"Having framed that issue of course from the pleadings CMA Form No. 1 it was the applicant who was supposed to begin, as opposed to where the issue is on unfair termination, where the employer must begin. This means the nature of dispute was breach of contract as opposed to unfair termination of employment. That said, the first issue is therefore resolved in negative. This means the applicant was duty bound to prove the breach of the contract of employment and not otherwise."

Mr.Materu also cited the case of **JAMES RENATUS vs CATA MINING COMPANY LIMITED, Labour Revision No. 1 of 2021, High Court, Labour Division at Musoma,** where the court at page 7 and page 8 of the typed judgment, distinguished the claim of unlawful termination and breach of contract.

The learned counsel also referred to **section 39 of Employment and Labour Relations Act** (supra) which provides that the employer should start adducing evidence if the complaint is on termination of employment. He commented that it is very clear that the Honourable Arbitrator misdirected herself on burden of proof when he ordered the Applicant to start while the nature of the dispute was breach of contract. He was of the view that this procedural irregularity has the effect of invalidating the proceedings and an award of the Commission for Mediation and Arbitration.

Regarding the irregularity in filling CMA Form No., it was Mr. Materu contention that, the CMA award is totally confused and tainted with irregularity because the document which initiated the said labour dispute

(CMA Form No. 1) was defective as the Respondent combined two distinct claims which cannot happen at the same time.

The learned counsel referred the court to paragraph 3 of Form No. 1 which provides for the nature of the dispute, and argued that the same requires the Complainant to choose kind of dispute which fits his/her claim and the Marginal notes direct the Complainant to complete part B of the CMA Form No. 1 if the dispute concerns termination of employment. He thus commented that, the Respondent filled the nature of the dispute in the CMA Form No. 1 to be breach of contract, and at the same time he completed part B of the CMA Form No. 1, which provides for additional information on termination of employment. He was of the view that this rendered the said CMA Form No. 1 to be defective, and implies that the said award was improperly procured as it emanated from the defective CMA Form No. 1.

To support his argument, he cited the case of **BOSCO STEPHEN vs NG'AMBA SECONDARY SCHOOl, Labour Revision No. 38 of 2017,** (HC) at Mbeya (unreported); at page 14 it was held that:

"I thus agree with Mr. Mwanry's stance that by filing this part, the form becomes defective. This is because it has the effect of combining two distinct claims which cannot happen at the same time. Under the circumstances, as much as the proceedings and Award of the CMA are a nullity for deliberating on a matter not formally placed before the CMA, they are also founded under a nullity for being initiated by a defective pleading that is CMA Form No. 1. Basing on this observation, I quash the

Award, proceedings and CMA Form No. 1 in Complaint No. CMA/MBY/82/2016. The Applicant may wish to institute fresh proceedings in the CMA subject to limitation rules."

Basing on the cited case, Mr. Materu prayed the court to quash an Award, proceedings and CMA Form No. 1. in this case. He added that the two claims (breach of contract and termination of employment) combined by the Respondent in CMA Form No. 1 are distinct claims, because each claim has a different procedure and relief. The time limit for the claim of unfair termination is 30 days from the date of termination, and it is the employer who start to prove his claim and the reliefs are provided under section 40 of **ELRA**, while the claim for breach of contract the time limit is 60 days from the date of termination, and it is the employee who start to prove his claim and the reliefs are provided under **section 73 of the Law of Contract Act, Cap 345 R.E. 2019**, which is payment of compensation of the remaining period of employment contract. He contended that to combine these two distinct claims in one labour dispute is fatal. He invited the court to consider the case of **JAMES RENATUS vs CATA MINING COMPANY LIMITED**, Labour Revision No. 1 of 2021, HC at Musoma (unreported).

Another noted irregularity and illegality of the proceedings and an award as submitted by Mr. Materu is in relation to time limitation. He faulted the Arbitrator for entertaining a labour dispute which was filed out of time because the CMA records and an award revealed that, the Respondent's employment contract was terminated on 31st January 2020

and the Respondent filed his labour dispute on 13th July 2020 out of time as reflected at page 1 of the typed award and at page 15 of the typed Arbitration proceedings.

The learned advocate challenged paragraph 27 of the counter affidavit of the Respondent, where the respondent has attached a ruling for condonation in labour dispute No. CMA/KLM//RMB/M/136/2020, to prove that he was granted condonation to file his dispute out of time. It was submitted that the said Ruling was supposed to be attached in the list of documents to be relied upon before the CMA and not at this stage. He thus argued that since the CMA record is silent on the existence of the Ruling for condonation, then the said labour dispute was filed out of time. He further opined that the said ruling cannot be relied upon by the Court because it does not appear anywhere in the records of the CMA in labour dispute number CMA/KLM/RM 13/ARB/100/2020. He added that time limitation is a statutory requirement which goes to the root of the court's jurisdiction. It is also a crucial aspect in the dispensation of Justice and the labour dispute filed out of time ousts the jurisdiction of the CMA to entertain it. Mr. Materu was of the view that the only remedy for the labour dispute which had been filed out of time is dismissal, as per **section 3 of the Law of Limitation Act, Cap. 89 R.E 2019,** but in this present situation where the ruling for condonation was neither attached nor tendered before the CMA, the remedy is to quash an award and proceedings of the CMA for being illegal and improperly procured.

Also, Mr. Materu challenged the genuineness or authenticity of the said

ruling of condonation at this stage of revision, because the appropriate time was during the trial before the CMA. Furthermore, he argued that it is very difficult to take judicial notice because such ruling does not emanate from the Court, and it was not discussed anywhere in an award or arbitration Proceedings of the CMA.

It was Mr. Materu's argument that if the Respondent intended to rely on such ruling for condonation, he should have attached the said Ruling in the list of documents before the CMA, failure of which is fatal and renders the said labour dispute No. CMA/KLM/RMB/ARB/100/2020 to be incompetent since there is no evidence on record to prove that such labour dispute was filed out of time subject to the leave of the CMA. To support his argument, he cited the case of **WORLD VISION TANZANIA vs FELIC1AN RUTWAZA, Labour Revision No. 8 of 2017**, (HC) at Bukoba (unreported), whereby the High Court struck out the application for being incompetent before it, for a reason that the Applicant failed to attach a copy of an order granting leave to refile that application. Also, he referred to the case of **Blue Star Service Station vs. Jackson Museti [1997] TLR 310,** in which at page 11 it was held that; *it is necessary for a party to attach the order for extension of time.*

The learned advocate submitted on another ground of revision that the CMA award was irrational because at page 7 the Arbitrator agreed that the reason for termination was valid and fair as per exhibit **RE1** which is a Report of the Zonal Chief School Quality Assurance Officer Northern Eastern Zone but the same exhibit (**RE1)** was disregarded at page 10 of

the typed award on the reason that the assessment which form basis of the said report was done on 7th and 8th, March 2019 before the Respondent was employed. The learned counsel disputed this finding by arguing that the fact that assessment was done before the Respondent was employed, does not justify that the Respondent had qualification for teaching business subject as required by the said report (exhibit **RE1**). Also, it does not justify that unqualified teacher employed after assessments conducted on those dates are not covered by the said report. (Exhibit KKI)

It was further contended that there is no dispute that the Respondent had no qualification for teaching business subject, as he had certificate in other field and not in the field of education. The evidence on record revealed that the Respondent admitted that he had no qualification for teaching business subject, but had a Degree of Bachelor of Arts in Procurement and Supply Management, issued by Sokoine University of Agriculture on December 2009. To substantiate his allegation, Mr. Materu referred the court to page 11 and 13 of the typed CMA proceedings.

The learned advocate was of the view that since the evaluation/ assessment of the school performance and quality education was done by government body (Zonal Chief School Quality Assurance Officer Northern Eastern Zone which is under the Ministry of Education, Science and Technology), it was sufficient to prove that the directions found in the said report (exhibit RE1) binds the employer/Applicant. That, if the Applicant neglected to comply with the direction of the said report its

licence for running ST. MAGRET SECONDARY SCHOOL would be cancelled.

He also argued that since the Respondent had no qualification of teaching business subject as require by said report (Exhibit RE1), the only remedy was termination of his employment since it was impossible for the Respondent to perform his obligation under the contract, and it was impossible for the Applicant to go against the educational regulatory authority of the Country. He prayed this Honourable Court, to quash the said impugned award and proceedings of the Commission for Mediation and Arbitration.

On the second ground of revision in which he challenged the holding and finding that, there was valid employment contract, while there was no free consent; the learned counsel made reference to paragraph 35 of the affidavit sworn by Applicant's advocate. He argued that there was no free consent of the parties at the time of concluding such employment contract (exhibit RE8) because the evidence revealed that, the Applicant mistakenly believed that the Respondent was qualified business teacher, by relying on the information and teaching skills provided in the Respondent's curriculum vitae. Also, the Applicant mistakenly believed that the Respondent could teach business subject, because he pursued business studies at the University while it was not accepted as qualification for being a teacher based on the report (exhibit RE1). He thus commented that there was mistake of fact on part of the Applicant in regard to the Respondent's qualification for teaching business subject. The Applicant realized that the Respondent was not qualified business teacher when she

received the said report (exhibit RE1). Thus, there was no free consent in the said employment contract (exhibit RE8).

It was also stated that there was a mistake of fact on part of the Respondent, because he believed that his experience and skills in teaching conferred him a qualification of teaching business subject to enable him to continue with his employment contract, while in reality it was not.

The learned counsel referred to **section 10 of the Law of Contract Act, Cap. 345, R.E. 2019,** which provides for elements of a valid contract. The said section provides that: -

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

It was submitted that the legal effect of the contract entered by parties under the mistake of fact is that such contract become void. When a contract become void, this implies that the party cannot sue or enforce rights contained in such contract.

Section 20(1) of the Law of Contract Act (supra) provides that: -

> *"Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is*

void."

Mr. Materu humbly prayed before this Honourable Court to declare that the said employment contract (exhibit RE8) was not valid, and thereby nullifying the said employment contract and quashing an award of the Commission for Mediation and Arbitration, which awarded the Respondent payment of the remained months' salaries based on void employment contract (exhibit RE8).

To support the above averment, he called upon this Honourable Court to consider the case of **Sheikh Bros Ltd v. Ochsner [1957] E.A.** 86 whereby the Eastern Africa Court of Appeal held that:

> *"Mutual mistake within s. 20 having been found to exist at the date of the licence agreement it necessarily follows that the licence agreement is not a contract within s. 10. Neither can it be an agreement enforceable by law."*

In the above cited case, it was found that both parties were under the same mistake at the time of making the contract, that the estate was capable of producing an average of 50 tons per month. At the time of making the agreement both parties gave their free consent. The free consent was based on the common but false assumption that performance would be possible. Therefore, mutual mistake was established within the meaning of **section 20 of the Indian Law of Contract Act** which is *pari materia* with **section 10 of the Law of Contract Act, Cap 345, R.E. 2019.**

Based on the above provision of law and case law, it was Mr. Materu's opinion that it is very clear that mutual mistake nullified free consent which is a necessary ingredient of the valid Contract. In the case cited hereinabove at paragraph 4.6 revealed that mutual mistake rendered the contract incapable of performance and, therefore void.

Furthermore, he invited this Honourable Court to consider **section 56(1) and (2) of the Law of Contract Act, Cap. 345, R.E. 2019** which provides that: -

"56(1)- An agreement to do an act impossible in itself is void;

(2) - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Mr. Materu went on to state that it is very clear that it was impossible for the Respondent to continue with the employment contract, because the report (exhibit RES8) directed the Applicant and its school to employ qualified business teacher. This is due to the fact that the Respondent had no qualification for teaching business subject as he possessed certificate in other field and not in the field of education.

That, since an agreement to do an act impossible in itself is void, the Respondent's employment contract was void, because the Respondent agreed to do an act which is impossible in itself. The Respondent had no qualification for teaching business subject based on the guidelines and directives provided by the Ministry of Education, Science and Technology through the report of the Zonal Chief School Quality Assurance Officer

Northern Eastern Zone.

That, the Respondent is not willing to accept such fact, and he needs to benefit and to take an advantage over the void employment contract (exhibit RE8), something which is not acceptable under the law. It was submitted further that, if the Respondent is allowed to take an advantage over the void contract, it will be against the principal objects of the labour law. The principal objects of the labour law are to promote economic development through economic efficiency, productivity and social justice. However, if the Respondent is allowed to benefit illegally from the void contract, it will discourage economic development as there will be no economic efficiency, productivity and social justice.

Mr.Materu referred to **section 3 of the Employment and Labour Relations Act No. 6 of 2004, Chapter 366 R.E. 2019** which provides for principal objects of the labour law that:

"The principal objects of this Act shall be-

(a) to promote economic development through economic efficiency, productivity and social justice."

On the 3rd ground of revision, as deponed under paragraph 34 of Applicant affidavit, Mr. Materu challenged the validity of the employment contract on two grounds, first the employer as indicated in the employment contract (exhibit RE8) is ST. MAGRET SECONDARY SCHOOL, which had no capacity to enter into the employment contract with the Respondent in its name. Secondly, the said employment contract lacked capacity to a contract as one of essential element of the valid contract.

Thus, it is not enforceable under **section 10 of the Law of Contract Act, (supra).**

On the 4th ground of revision, the learned advocate challenged the Arbitrator's findings that there was a valid employment contract while the name of the Applicant was not indicated in said contract (exhibit RE8). He made reference to paragraph 33 of the affidavit of the Advocate of the Applicant. Furthermore, there was no evidence on record tendered by the Respondent before the CMA, to prove the relationship between the Applicant and St Magret Secondary School, and the relationship between him and the Applicant and failed to prove existence of the written contract between him and the Applicant. The learned advocate suggested that, the Respondent failed to discharge his duty of proving his claims against the Applicant before the CMA. He thus called upon the Court to quash the CMA award and proceedings.

On the 5th ground of revision, the learned advocate faulted the Arbitrator's findings that there was valid employment contract, while it was impossible for the Respondent to perform his obligation since he was not a qualified business teacher. Also, it was impossible for the Applicant to continue with the Respondent's employment contract, because the Zonal Chief School Quality Assurance Officer of Northern Eastern Zone which is the Authority under the Ministry of Education and Vocational Training directed ST. MAGRET SECONDARY SCHOOL to employ a qualified business teacher. He referred to paragraph 36 of the affidavit sworn by Applicant's advocate.

On the Sixth (6) ground of revision as found under paragraph 32 of the affidavit of the Advocate of the Applicant, Mr. Materu faulted the Arbitrator's finding that the Applicant did not follow fair procedure for termination of the Respondent's employment contract. He argued that all the procedures were followed because on 23rd December 2019, the Respondent was given a notice of termination of the employment contract, which informed him that his employment contract will be terminated on 31st January 2020. The reasons for termination were given thereto and the said notice of termination was tendered by the Applicant's witness and admitted before the CMA as exhibit RE2. Also, the Respondent was reminded with the same on 4/1/ 2020 through another notice of termination of employment contract.

It was argued further that on 7/1/2020 and on 20/1/2020, the Applicant convened meetings which were tendered and admitted before the CMA as exhibit RE4 and exhibit RE5 respectively. The Respondent attended one of the meetings on 20/1/2020 and one of the agenda discussed in the said meeting was report of the Zonal Chief School Quality Assurance Officer of Northern Eastern Zone. The learned advocate thus commented that the Respondent was duly informed about the date for termination of his employment contract. He added that there was consultation prior to termination (exhibit RES).

Thus, the Honourable Arbitrator erred in law and fact for finding and holding that, the Applicant did not follow fair procedure in terminating the Respondent's employment contract, while there was sufficient evidence on record to prove that the Applicant complied with the procedure for termination of the Respondent's employment contract.

It was alleged further that, since the said employment contract (exhibit RE8) was entered under mutual mistake of fact, and it was impossible for the Respondent to continue with his obligation under the said employment contract; the notice of termination was a proper way for informing the Respondent about the termination of his employment contract.

On the seventh (7) ground that the Honourable Arbitrator erred in law and fact for holding that there was a breach of employment contract without any supportive evidence; it was submitted that since the Respondent's employment contract was void, the same implies that issues framed by the Honourable Arbitrator were supposed to be answered in the negative. That, in a void contract, a party cannot enforce rights emanated from that contract.

On the eighth (8) ground that the labour dispute was incompetent before the Commission because the Respondent withdrew his previous labour dispute unconditionally and filed another labour dispute with the same claim. In support of this ground, it was submitted among other things that there was no order of the Commission to refile the said dispute, thus the Respondent was precluded from refiling his labour dispute. Mr. Materu supported this position by referring to the case of **East African**

Development Bank vs Blue Line Enterprises Limited, Mis. Civil Cause No. 177 of 2007 (unreported). The learned counsel insisted that the law and common practice requires that a party who wish to withdraw the case with intention to refile, must seek leave of the court or Commission for Mediation and Arbitration. Otherwise, he will be precluded from bringing a similar dispute under the doctrine of Res judicata. Mr. Materu invited the Court to consider a case of **Jennings- Bramly Vs A and F Contractors Ltd and another [2003] 2 E.A 452** in which it was held that:

> *"A party who withdraws a suit without first securing leave to institute a fresh suit thereby bars himself from instituting a fresh suit. The Court's discretion to grant leave to institute a fresh suit as envisaged under Order XXIII rule 1(2) can only be exercised at the time when the withdrawal order is made and not after."*

On the nineth (9) ground; that the Arbitrator erred in law and fact for awarding the Respondent Tanzania shillings 17,550,000/= without any relevant evidence on record; Mr. Materu submitted that, the awarded amount was not supported by evidence. That, evidence on record revealed that, the Respondent was given notice of termination and he attended several meetings with the Applicant whereby one of the agenda discussed was termination of his employment contract based on the report of the Zonal Chief School Quality Assurance Officer. That, the same proved that the Applicant followed fair procedure and that there was a valid reason for termination of the Respondent's employment, and thus the Respondent is not entitled to any relief. He reiterated that, the amount

awarded to the Respondent was based on the remaining period of a void contract, thus, the Respondent is not entitled to be paid Tanzania shillings 17,550,000/=.

On the tenth (10) ground, that the Honourable Arbitrator erred in law and fact when ordered the Applicant herein to start the case by giving evidence while the Respondent preferred breach of employment contract as a nature of the dispute and not unfair termination; this ground was a repetition of the first ground herein above.

The eleventh ground was also a repetition of the fourth ground.

On the twelfth (12) ground, that the Honourable Arbitrator erred in law and fact for failure to address and take into consideration the closing Arguments of the parties in an Award delivered on 23rd December 2020; Mr. Materu submitted inter alia that there is no part of the award which contains final closing arguments despite the fact that final closing arguments were duly filed. He contended that lack of final closing arguments of the parties in the said award invalidate the same for lack of one of the components of the award pursuant to **Rule 26 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, GN No. 67 of 2007.**

On the thirteenth (13) ground which is to the effect that the dispute was filed out of time, it was submitted that the Respondent's employment contract was terminated on 31st January, while the Respondent filed his dispute on 13th July 2020. The learned counsel referred to **Rule 10 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules** (supra) which provide a time limit of 60 days to file other disputes which do not concern fairness of employee's termination before the CMA.

That, it is very clear that the said labour dispute was filed out of time.

On the fourteenth (14) ground, that the Honourable Arbitrator erred in law and fact for failure to evaluate and address properly evidence given during the hearing; it was submitted that the Honourable Arbitrator did not evaluate evidence on record. That, if she had chance to evaluate the evidence adduced before her, she would have arrived into a different findings and conclusion other than the one in the award. That, she would have found that there was no breach of employment contract and the Respondent is not entitled to the reliefs claimed.

Mr. Julius Focus started his reply by adopting all the contents alluded in his counter affidavit to form part of his submissions. The learned counsel also invited this Court to take note that before the Commission two facts were undisputed by the Applicant; the fact that the respondent had a valid fixed term contract of three years with the Applicant; second that the Applicant herein decided to terminate the said contract without involving or agreeing with the Respondent, hence a breach of contract resulting into damages on part of the Respondent.

Replying to the grounds of revision, Mr. Focus argued the 1st, 10th and 13th grounds together. He submitted that the learned counsel for the Applicant appearing in this Court is the one who appeared before the Commission for Mediation and Arbitration and he never objected the mode in which evidence was taken which implies that he agreed on the order made by the Arbitrator. That, had the award been in his favour, the learned counsel would have not objected, thus his submission is unfounded.

Concerning the cited cases by the learned counsel for the Applicant, Mr. Focus stated that the same were for persuasion only as they were from the High Court. The learned counsel for the Respondent stated further that the Applicant has not shown how she was prejudiced with the order of the Arbitrator when she started to adduce evidence. He said this Court be enjoined to invoke the principle of overriding objective (oxygen principle) as provided under **section 3A of the Civil Procedure Code [Cap 33 R.E 2019]** which requires courts to do away with technicalities and determine disputes on merit for attainment of justice.

On the contention that the Respondent's CMA Form No. 1 was defective, Mr. Focus replied that the same was not fatal due to the reasons that the only dispute which was indicated is that of breach of contract and not unfair termination. That, the filling of both parts did not occasion to miscarriage of justice on part of the Applicant since evidence which was adduced before the CMA was that of breach of contract. Even the framed issues concerned breach of contract. Mr. Focus added that, the Applicant ought to have raised the issue before the Commission and that raising it at this stage aims at defeating justice. He prayed before this Court to treat that ground as an afterthought.

Regarding the ground that the complaint was filed before the Commission out of time, Mr. Focus replied that the assertion is purposely misconceived. That, the Respondent was granted condonation to refer the dispute out of time. That, it is on record that copy of the CMA ruling granting the Respondent condonation was annexed to the counter affidavit filed in this Court to show that the dispute was filed before the CMA after the Respondent was condoned to do so. He urged this Court to

consider the said ruling since the condonation form was duly filled and filed before the CMA (CMA form No. 2). That, the Applicant has not disputed the same as it was heard before Mediation.

Concerning the cited cases by the Applicant's counsel, Mr. Focus submitted that the same are distinguishable given the fact that before mediation commenced before the CMA, the Respondent filled form No. 2 for condonation. That, neither the Arbitrator nor the counsel for the Applicant objected continuation of the labour dispute for arbitration before the Commission for being out of time. Mr. Focus was of the view that, the argument was an afterthought and that the same intends to deprive the Respondent's rights.

On the issue that the award was irrational for the reasons that the Arbitrator stated that the reasons for termination were valid and fair but proceeded to decide in favour of the respondent, Mr. Focus submitted that the Respondent had an employment contract of three years with the Applicant and that the Zonal report did not in any way terminate the said contract, rather it was the employer. The learned counsel was of the opinion that, the Hon. Arbitrator was correct in her holding for the reason that fixed term contract had to come to an end by wishes of the parties who entered into the contract nevertheless the Applicant did not bother to follow that path as provided under **Rule 8 (2) (b)** of the Employment and Labour Relations **(Code of Good Practice) GN . 42 of 2007** which states that: "

Where there is no breach, to terminate the contract lawfully is by getting the employee to agree to early termination."

Mr. Focus added that, the Applicant employed the Respondent while the

said Zonal report was already in place and she had knowledge about the education qualifications of the Respondent. Moreover, the said reasons advanced by the learned counsel for the Applicant were not included in his affidavit.; Mr. Focus prayed that the same should be ignored.

On the second ground that the arbitrator erred for holding that there was a valid contract; Mr. Focus replied that during the hearing the General Secretary of the Applicant appeared and testified that it was true that the Applicant had three years fix term employment contract which was admitted as exhibit RE8. Furthermore, the Applicant cannot at this juncture claim that the said contract was entered under a mistake of fact as the Respondent was vetted by the Applicant prior to that contract. Concerning free consent, it was the Respondent's submission that the Applicant was neither forced nor induced to enter into the said contract, hence was entered with free consent. That, the contention raised by the Applicant would have merit if the Respondent had presented himself as a qualified teacher which was not the case in the present case.

On the third and fourth grounds that the Employer indicated on the employment contract had no capacity and therefore no valid contract; Mr. Focus submitted that the Applicant's General Secretary one Stewart Lyatuu testified before the Commission that it was true that the Respondent had three years fixed term contract with the Applicant, which is shown at paragraph 5 of the affidavit of the learned counsel for the Applicant. It was submitted further that the heading of the said employment contract reads: **"TEACHING AGREEMENT BETWEEN THE YMCA EMPLOYER AND GAUDENCE P. KITUTU (RESPONDENT)";**

which means that the contract was duly entered between the Applicant as an employer and the Respondent as an employee. Mr. Focus prayed that this ground should be disregarded.

On the fifth ground that the Arbitrator erred for holding that there was a valid employment contract, Mr. Focus submitted that the holding by the Hon. Arbitrator was correct because the Applicant's General Secretary who is responsible for overseeing the administration issues at national level admitted and even went further to state that the Respondent's contract was there. That, if the parties are not in dispute on the existence of any contract it would be bad in law if the court holds that there was no contract. The learned counsel supported his submission by citing the cases of **Sultan Palace Zanzibar vs Daniel Laizer and Another, Civil Application No. 104 of 2004** and **Benda Kasanda Ndasi vs Makafuli Motors Ltd, Labour Revision No. 25 of 2011,** HC Labour Division Dsm (unreported) where the Court stated inter alia that:

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment issues."*

Basing on the case law above, the learned counsel submitted that the Zonal Report did not invalidate or terminate the Respondent's contract. That, it was the duty of the employer to make sure that the contract was mutually ended.

On the sixth ground Mr. Focus submitted that the Applicant never gave notices she contemplated in her submission because the only notice which was given to the Respondent was that of termination which was received

on 31st January, 2020 when the Respondent came back from leave. That, the Applicant did not provide a dispatch book to prove that it was true that the said notices were served to the Respondent. It was submitted further that it was not enough to conduct meetings of all staffs because the said meetings discussed other issues that would not suffice to end one's contract. That, the Respondent was left with no option on how his contract had been terminated because the Employer issued orders only instead of discussing on how he would have ended the contract or changed Respondent's roles in his institution as required by **Rule 8 (2) (b) of GN 42/2007** (supra) as the fixed term contract cannot be terminated basing on meetings except by settlement between parties to the particular contract.

On the seventh and nineth grounds, it was replied that since both parties agreed on existence of the admitted contract between them. That, it is injustice and bad in law at this juncture for the Applicant to advance reasons of void contract which the learned counsel for the Respondent was of the view that, it was an afterthought. It was stated further that the reason advanced by the learned counsel for the Applicant that there was no evidence on record to justify the award of Tzs 17,550,000/= is meritless because the Principal officer of the Applicant admitted that the Respondent had a fixed term contract of three years (36 months), and had served only ten months leaving 26 months with unpaid salaries making a total of 17,550,000/=.

On the eighth ground that the Respondent withdrew his previous complaint and filed a new one without seeking any leave or order, It was submitted that the same was misconceived as the Respondent made Application for condonation as required under labour laws and that he

was accordingly condoned to file the same after withdrawal. Thus, file CMA/KLM/RMB/ 100/ ARB/2020. Reference was made to paragraph 27 of the Respondent's counter affidavit. Mr. Focus contended that, the cited Order and Rules are also misinterpreted by the learned counsel as it does not couch what has been stated. The learned counsel quoted **Order XXIII Rule 1 (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019** which provides that:

> *"Order XXIII Rule 1 (1) At any time after institution of suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*
>
> *(2) Where the Court is satisfied-*
>
> *(a) that a suit must fail by reason of some formal defect; or*
>
> *(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim."*

From the above Order, it was submitted that it is evident that a party may withdraw his suit but be at liberty to institute fresh suit and not as advanced by the learned advocate. That, even the cited cases are distinguishable to this case.

On the eleventh ground that the framed issues were not resolved properly, the Respondent submitted that all issues were responded by the hon. Arbitrator and that the reason that the contract was void is not maintainable because it was not shown before the CMA when Applicant's witnesses were testifying and that raising it at this revision stage, warrants

to be ignored. It was stated further for the Respondent that, the Arbitrator did not base the Award on unfair termination as submitted by the Applicant, rather it was on breach of contract as the evidence on record can reveal.

On the twelfth ground that closing arguments were not included in the decision, the Respondent submitted that the Hon. Arbitrator did include the summary of evidence of both parties starting from page 3 to page 6 of the typed award, and discussed the arguments put forth by the parties but not as envisaged by Applicant's counsel herein.

On the fourteenth ground that the Arbitrator did not properly evaluate evidence before him, Mr. Focus submitted that the same was worthless because as an employer before having employed the Respondent, knew that he was not a qualified teacher the fact which also was revealed in his academic qualification and the curriculum vitae (CV) submitted by the Respondent. Hence, the Applicant proceeded to employ the Respondent on that basis. He commented that the Hon. Arbitrator was right and correct in her holding because the Applicant was not forced or induced when hiring the Respondent. He cited the case of **Musoma Urban Water Supply and Sanitation Authority vs Raphael Ologi Andrea, Labour Revision No. 21 of 2019** where the Respondent was awarded salaries of the remaining period in the contract.

The learned counsel for the Respondent prayed that this application be dismissed for being meritless and hopeless, only brought to frustrate the award to be enjoyed by the Respondent.

In his rejoinder, Mr. Materu for the Applicant submitted among other things that the issue of validity of employment contract was disputed during the hearing before the CMA, and it was framed as an issue for

determination of the labour dispute which formed the basis of this revision.

On the issue that the Applicant terminated the said employment contract without involving or agreeing with the Respondent, Mr. Materu strongly disputed such fact on the reason that the Respondent was involved in the process of termination of his employment through two meetings and a notice. He added that it is very clear on records of the CMA that the Respondent's employment contract was void for lack of free consent, lack of capacity to contract by the party (employer) and the terms of contract were impossible for performance. He was of the view that such contract is taken as if it never existed. Thus, the Respondent is not entitled to be paid for the remaining period of employment contract.

On ground No. 1, 10 and 13, Mr. Materu re-joined that the fact that **section 39 of the Employment and Labour Relations Act** does not provide for the burden of proof for other legal dispute does not mean that the arbitrator is allowed to order the employer to start the case. That, when there is a lacuna in the labour laws in aspect of burden of proof for the claim of breach of contract, the CMA is allowed to apply the general principles from other law governing such aspect, and such law is the **Evidence Act.** He referred to **section 112 of the Evidence act, Cap 6 R.E 2019** which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. He commented that, it was the Respondent who filed the labour dispute at the Commission for Mediation and Arbitration, and he was the one who alleged about breach of the employment contract. Thus, the Hon. Arbitrator erred in law for shifting the burden of proof to the Applicant / employer contrary to the law.

Mr. Materu insisted that burden of proof is the matter of procedure which goes to the root of the case. That, it is irregular/ illegal to shift the burden of proof to a party who is not legally bound to prove the particular fact/claim. That, in this case since the burden of proof was shifted to the employer contrary to the law, an award of the Commission for Mediation and Arbitration was tainted with irregularities/illegality. That, there was miscarriage of justice on part of the Applicant when the burden of proof shifted to the employer, because the Applicant was compelled to prove facts which were not alleged by her. Further, that the decision of the Hon. Arbitrator would be different if the burden of proof was not shifted to the Applicant.

Regarding the argument that the above ground of revision was an afterthought, it was submitted that the issue of procedural irregularity cannot be termed as an afterthought as it goes to the foundation of the case.

Concerning the application of the overriding objective principle to cure the above irregularity, Mr. Materu argued that overriding objective cannot apply blindly against the mandatory provision of the procedural law which goes to the foundation of the case. He supported his argument by citing the case of **Mondorosi Village Council & 2 others vs Tanzania Breweris Limited & 4 others,** Court of Appeal of Tanzania at Arusha (unreported).

On the issue that combining two labour disputes in CMA Form No. 1 was not fatal simply because the dispute indicated in CMA Form No. 1 is breach of contract and the issues raised were for breach of contract and evidence tendered was for breach of contract; Mr. Materu opposed such an argument and submitted that by filling part A and B of Form No.1, the

same implied that two distinct disputes were combined in one form contrary to the law as the same ousts the jurisdiction of the Commission for Mediation and Arbitration. Thus, the cases of **Bosco Stephen**, **James Renatus** and **Upendo Malisa** (supra) are relevant to this matter.

Concerning the issue that the Respondent's labour dispute was filed within time, Mr Materu strongly opposed such argument the said ruling for condonation was not annexed in the Respondent's list of documents before the CMA. That, the same was not tendered as exhibit to prove that the said dispute was filed out of time with the leave of the CMA. The learned counsel stated that failure to attach the said ruling was fatal. He referred that case of **World Vision Tanzania vs Felician Rutwaza, Labour Revision no. 8 of 2017,** HC at Bukoba and **Blue Star Services Station vs Jackson Museti [1997] TLR 310.** Mr. Materu also opposed the argument that the ruling for condonation attached in the Mediation file as mediation is not part of arbitration. That, the law prevents what transpired in mediation to be in the arbitration record if parties did not agree in writing.

On the issue that the Respondent was employed after assessment had already been conducted, Mr. Materu argued that at the time of assessment there was a business teacher who had no academic certificate in the field of education.

On the second ground, Mr. Materu reiterated his submission in chief.

Responding to ground No. 3 and 4, Mr. Materu argued that the name indicated in the employment contract was an employer is a school and not the Applicant. That, school has no capacity to enter into agreement.

Responding to ground No.5, the learned counsel for the Applicant submitted that the issue was not existence of employment contract but rather the validity of the employment contract. He reiterated that there was no valid contract.

On ground No. 6, it was re-joined that it was not true that the Respondent was given notice on 31/01/2020 because all notices written to the Respondent were given to him timely and there was no reason for hiding those notices. Mr. Materu reiterated that the Respondent was informed about the termination of his employment contract and he was invited in the meeting held by the Applicant. That, the Respondent participated in the said meeting, whereby among other issues discussed in the said meetings was report (exhibit RE1) and termination of the employment contracts for unqualified teachers.

Mr. Materu opposed the case of **Sultan Palace Zanzibar** (supra) cited by the learned counsel for the Respondent, that the same was distinguishable to the present case.

On ground No. 7 and 9 Mr. Materu maintained that the issue in this case is validity of contract and not existence of contract. That, the contract in this case was void ab initio.

On ground No. 8 which is in respect of leave to re-file the labour dispute after withdrawing the previous one. Mr. Materu maintained that, even if the Respondent was condoned in the previous application, after withdrawing the said application the Respondent was supposed to seek leave of the Commission to refile the same.

Concerning ground No.11, the Applicant reiterated that the issues were not properly resolved at the Commission for Mediation and Arbitration.

On Ground No. 12 and 13, the Applicant reiterated her submission in chief

that closing arguments of parties were not included in the award of the Commission.

In conclusion, the Applicant prayed that this application should be granted, and an award and proceedings of the Commission for Mediation and Arbitration be quashed.

I have carefully gone through the pleadings of the parties, rival submissions of the learned counsels of both parties and the CMA record. The CMA record is to the effect that the learned Arbitrator raised four issues for determination, which were:

1. *Iwapo kulikuwa na uvunjwaji wa mkataba*
2. *Iwapo uvunjwaji wa mkataba ulifuata utaratibu*
3. *Iwapo kulikuwa na mkataba halali wa ajira*
4. *Ni nafuu gani kila upande unastahili.*

Literal translation of the above quoted issues is:

1. Whether there was breach of contract.
2. Whether termination of contract complied to the procedures.
3. Whether there was a valid employment contract
4. What reliefs are the parties entitled to?

Without prejudice to numerous grounds of revision which were raised by the Applicant, thorough examination of submissions in support and against the application reveals that the main issue in controversy is the validity of employment contract between the Applicant and the Respondent. The rest of arguments of the Applicant most of them are technical which do not extend to the root of the case and some of them lacks support from the CMA record. Guided by the spirit of the overriding objective principle, I am convinced to direct my efforts on the issue of

validity of contract which suffices to dispose of the application on merit. Thus, the issue for determination before this Court is **whether there was a valid employment contract between the Applicant and the respondent herein.** This issue was among the issues which were raised before the CMA.

While deliberating on the issue whether there was a valid employment contract between the Applicant and the Respondent, the CMA stated among other things that the employer had agreed to the qualifications of the Respondent that's why she decided to enter into agreement with the Respondent. In conclusion the Commission stated that, I quote:

> *"Kimsingi Tume haiwezi kuingilia makubaliano ambayo mlalamikaji na mlalamikiwa waliingia* ***labda kama kungekuwa na sheria iliyo vunjwa.*** *" Emphasis added*

The Applicant faults the CMA award on reasons among others that the contract between the Applicant and the Respondent was void ab initio. The learned counsel for the Respondent based his argument on exhibit RE1 (a report of Zonal Chief School Quality Assurance Officer Northern Zone), which directed the Applicant to employ qualified business teachers. It was Mr. Materu's contention that the CMA did not resolve the issues raised properly. On the other hand, the learned counsel for the Respondent was of the view that since the Applicant was aware of the qualifications of the Respondent that he was not a qualified teacher, their contract was valid. That, due to the fact that their agreement was a fixed term contract, the Applicant should have discussed first with the Respondent on how to terminate their contract instead of issuing notices to him.

It is on record that the Respondent do not dispute the Zonal Report on

quality assurance issued to the Applicant. The fact that the Respondent was not a qualified teacher also is not disputed. The Applicant do not dispute the fact that she employed the Respondent while knowing that he was not a qualified teacher.

Coming to the question of validity of employment contract between the Applicant and the Respondent; **section 10 of the Law of Contract Act, Cap 345 R.E 2019,** provides that all agreements are contracts if they are made by:

1. Free consent of parties **who are competent to contract**
2. For a lawful consideration and
3. With a lawful object and are not on the verge of being declared void.

(Emphasis supplied)

Section 3 of Tanzania Teachers' Professional Board Act, No. 6 of 2018 defines a teacher as:

> *"a person who pursued a teacher training course in teacher's college or university recognized by the Board under this Act to teach pupils or students in pre- primary, primary, secondary and teachers and adult education Institution."*

Section 28 (1) (a), (b), (c) and (2) (b) of Tanzania Teachers' Professional Board Act (supra) provides that:

> *"28 (1)* ***A person shall not teach*** *at any school or employ any teacher, unless such person or employee-*
>
> *(a) is registered in accordance with the provisions of this Act;*
>
> *(b) has been granted provisional or temporary registration; or*
>
> *(c) is under the direct supervision of a registered teacher.*
>
> *(2) Any person who contravenes provisions of this section commits*

an offence and upon conviction shall be liable-

(b) in the case of an employer, to a fine of not less than one million shillings but not exceeding five million shillings or to imprisonment for a term not exceeding six months or to both."

The above quoted provisions of the law prohibit unqualified persons to be employed as teachers. The provisions are coached in mandatory terms whose violation attracts penal sanctions.

In that regard, for an employment contract of one to be a teacher to be valid, he must be a qualified teacher as stipulated under **section 28 (1) (a), (b) and (c) of Act No 6 of 2018** (supra). Thus, I concur with the learned counsel for the Applicant that an employment contract between the Applicant and the Respondent herein was **void *ab initio.*** The Respondent was not competent to enter into the said agreement contrary to **section 10 of the Law of Contract Act** (supra) as he was not competent to be employed as a teacher. From the facts of this case, it is evident that elements of a valid contract were not fulfilled.

Www. Investopedia.com defines a void contract to be a formal agreement that is effectively illegitimate and unenforceable from the moment it is created.

In this case it seems that the Respondent contradicts a void contract with a voidable contract. For the sake of clarity, **a void contract** is one that was never legally valid to begin with (and will never be enforceable). On the other hand, **a voidable contract** may be legally enforceable once underlying contractual defects are corrected.

Therefore, the Applicant was justified to terminate an illegal contract of employment and there was no basis for further negotiations of contract of employment based on a **void contract.** Furthermore, this

Court is of settled view that the Applicant was prudent enough as she notified the Respondent and held two meetings with him for the sake of explaining the reason for ending their employment agreement. Surprisingly, the Respondent resorted to filing a labour dispute before the CMA claiming compensation for breach of contract.

I am in agreement with the learned counsel for the Applicant that the CMA did not resolve properly issues which were raised before it, as a result erred to decide in favour of the Respondent. The learned Arbitrator misdirected himself on the issue of breach of contract while the alleged contract was void ***ab initio*** as rightly submitted by the learned counsel for the Applicant. An illegal or void contract as stated herein above is unenforceable in law.

In the event, I do not hesitate to find the Applicant to have sufficiently established the grounds raised for the revision, warranting this Court to fault the CMA award. I therefore, revise, set aside the CMA award and grant this application with no order as to costs.

It is so ordered.

S. H. SIMFUKWE

JUDGE

17/12/2021.

Delivered and dated at Moshi, this 17th day of December, 2021.

S. H. SIMFUKWE

JUDGE

17/12/2021.