

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

REVISION NO. 410 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Temeke in Labour Dispute No.
CMA/DSM/TMK/260/2022, Ngalika, E.: Mediator, Dated 11th October, 2022)

BETWEEN

KOBA SAID MDOE APPLICANT

VERSUS

R & K TRUCKING CO. LIMITED RESPONDENT

JUDGEMENT

03rd – 27th April, 2023

OPIYO, J.

Koba Said Mdoe prayed for this Court to revise and set aside the proceedings and the decision of the Commission for Mediation and Arbitration (CMA) in a Labour Dispute No. CMA/DSM/TMK/260/2022 by Ngalika, E (Mediator) dated 11th October, 2022 on legality, propriety, rationality and correctness of the decision.

Historically, the respondent was employed by the applicant on 05th October, 2010 on unlimited term. On 25th August, 2020 he was suspended and on 19th July, 2022 was terminated orally and was told to appear to workplace. The applicant instituted a labour dispute alleging



unfair termination on 03rd August, 2022. The same was dismissed for being time barred. Being dissatisfied, the applicant filed this application for revision.

This application is supported by the applicants' affidavit stating grounds for revision that: -

1. Whether time is barred to institute a labour dispute before the Commission for Mediation and Arbitration (*sic*).
2. Whether it was proper for the mediator to hold that the application was out of time to file a labour dispute.
3. Whether the mediator in his ruling did consider CMA Form No. 1 page No. 5 of the referral of a dispute to the Commission for Mediation and Arbitration.

The application proceeded orally. Both parties were represented by Learned Advocates. Mr. Agustin Bruno Leka was for the applicant whereas Miss Mariam Shelimo appeared for the Respondent.

Mr. Leka submitted that the case was for unfair termination. He stated that the applicant's CMA Form No. 1 shows the date for termination to be 19th July, 2022 and explains that the dispute arose on 25th August, 2020 when he was suspended. He continued that according to G.N. No.

64 of 2007 the dispute has to be referred to the CMA 30 days from the date of termination that the day the employer made a final decision to terminate the employee. He submitted further that the application at CMA was filed on 03rd August after the applicant's termination on 19th July, 2022 and so for him the applicant was within time limit prescribed.

On the second point Mr. Leka submitted that, the matter was at mediation stage and so in his view the mediator was supposed to mediate rather than dismissing the dispute. To cement his point, he cited the case of **Suzana Mwanyava Vs. Cardinal Rugambwa Hospital, Revision Application No. 191 of 2022, HC, Labour Division, DSM, Hon. Mganga J.** He then prayed for revision so as the matter could be remitted back to CMA for determination.

In reply, Miss Shelimo submitted that in CMA F1 the applicant stated that the dispute arose on 25th August, 2020 and filed a dispute on 03rd August, 2022. She contended that rule 10 of The Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 provides that the dispute has to be filed within 30 days. On her opinion if the dispute arose on 25th August, 2020 the applicant was to file the matter on 24th September, 2020. For her, the applicant was out of time and so the CMA was right in holding the dispute was out of time.



She submitted further that the advocate for the applicant did not dispute that the applicant was out of employment since 25th August, 2020. She tiled her point by referring the case of **Ngorongoro Conservation Area Authority Vs. Amiyo Tlaa Amiyo and Another**, Revision Application No. 28 of 2019 which held that CMA F1 is tantamount to plaint. For her, the mediator was right to determine the same as there was a defect.

On the second issue Miss Shelimo submitted that the mediator was right to hear the preliminary objection and decide that it was out of time. In support she cited the case of **Saimon Frank Mzee Vs. SBC Tanzania Limited**, Revision No. 378 of 2022, HC, Labour Division, Mlyambina, J. She submitted that preliminary objection can be raised at any stage and so CMA was right to determine the same. She then prayed for application to be dismissed.

In rejoinder, Mr. Leka substantially reiterated what he has submitted in the submission in chief.

After perusal of both parties' submission, issues which the court have been have asked to determine are: -



1. *Whether the Mediator had a right to hear and determine the preliminary objection*

2. *Whether applicant's application at CMA was time barred*

Dealing with the first issue, the applicant in his affidavit did not state anything concerning mediator's jurisdiction on hearing and determining the preliminary objection. The law clearly states that affidavit as one of document in the application moves the Court. This was held in the case of **Director of Public Prosecutions Vs. Dodoli Kapufi & Another**, Criminal Application No. 11 of 2008, Court of Appeal of Tanzania at Dar es Salaam at page 9 that: -

"It is established law that, a party contemplating to move the Court formally by a written application can only do so by lodging a notice of motion supported by an affidavit or affidavits."

So, the applicant bringing this matter now in submission without having pleaded it afterthought that the court is entitled to decline entertaining. However, the issue being on the jurisdiction that can be raised at any stage as it goes to the root of the matter, I will take time to look it the strength is gathered from the authoritative decision of the Court of Appeal in the case of **R.S.A. Limited Vs. Hanspaul Automechs**



Limited Govindererajan Senthil Kumal, Civil Appeal No. 179 of 2016, CAT cited by the counsel for the applicant where it held that:-

"Thus, since the jurisdiction to adjudicate any matter is a creature of statute, an objection in that regard is a point of law and it can be raised at any stage. In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the close of the hearing."

In his submission, he stated that the mediator's work is only to mediate and not hearing of the preliminary objections. He referred the **Suzana Mwanyavas (supra)** by this court to back up his point. Scrutinising Going back to the case cited, the Court found that its argument based on the case of **Barclays Bank T. Limited Vs. Ayyam Matessa**, Civil Appeal No. 481 of 2020, [2022] TZSA 189 to which, with due respect, to My learned Brother, Hon. Mganga, J., I subscribe to a different interpretation. In my considered view, the decision by the court of appeal in the above case did not bar all kinds of the decisions by the mediator. It only barred making an award, the task that is indeed solely reserved for an arbitrator. For easy reference, the Court of Appeal stated that: -

*"From the above provisions, it appears to be clear to us that, the **jurisdiction to pronounce an award** for unfair termination of*

service is exclusively conferred to the arbitrator and the Labour Court (emphasis is mine)."

In the matter at hand the mediator did not pronounce an award but determined if he/she had jurisdiction to proceed with mediation. In the case of **R.S.A. Limited Vs. Hanspaul Automechs Limited Govindererajan Senthil Kumal (supra)** such determination was made paramount for any decision maker. It made it mandatory when jurisdiction is challenged for the Court to determine it first. It stated that: -

"It is settled law that, an objection on a point of law challenging the jurisdiction of the Court can be raised at any stage, it cannot be gainsaid that it has to be determined first before proceeding to determine the substantive matter ..."

It is only through that determination, that, one will know if he or she is mandated to proceed with the matter. That is what is in line with the legislature's intention under rule 15 of the Labour Institutions (Mediation and Arbitration) G.N. No. 64 of 2007 which gave the mediator the powers to require parties to prove when it appears that jurisdiction issues has been raised. The provision states that:-



"Where it appears during mediation proceedings that a jurisdictional issue relating to mediation has not been determined, the mediator shall require the referring party to prove that the Commission has the jurisdiction to mediate the dispute."

For this I am highly persuaded by observation of my learned Brother, Hon Mlyambina, J. in the case of **Saimon Frank Mzee Vs. SBC Tanzania Limited** (supra) at page 19 that:-

"Therefore, on the light of foregoing analysis, it is my considered view that, mediators having mandate to determine jurisdictional issues before the dispute is mediated they equally has mandate to determine a preliminary objection as to whether the matter is res judicata or not because res judicata issue is one of jurisdictional issues"

The above observation readily guide my finding that, the mediator in this matter had jurisdiction to hear the preliminary objection raised on time limitation as it is also one of the jurisdictional issues. This helps the mediator to know whether the application before him/her was timely filled.

On the determination of the second issue, the applicant filed for the labour dispute for unfair termination of employment. The law under rule



10(1) of G.N. No. 64 of 2007 provides for the time limit to file the application for unfair termination that: -

"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."

Records show that, the application at CMA was filed on 03rd August, 2022 indicating that the dispute arose on 25th August, 2020 but also stating that the termination of employment contract was on 19th July, 2022.

The advocate for the respondent at CMA did not dispute that the applicant herein was employed by the respondent. Also, that the dispute arose on 25th August, 2020, but when she raised the preliminary objection she did not state what did the employer did to the employee from that date or produce any document to prove termination of the applicant on the date mentioned as to when dispute did arise.

Section 15(5) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] provides: -



"The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment."

The law is very clear that it is the duty of the employer to keep records of the employee. The law also provides that for any legal proceeding an employer has a duty to prove by producing documents of employment. This is found under subsection 6 of the same section 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 advocate for the respondent did not bring at CMA any document to prove that the dispute between the employer and the employee arose on 25th August, 2020 and that on the same day he was terminated. That makes the employer to have fail to prove that the application was time barred.

For that matter, I find the preliminary objection raised at CMA to had no merit and therefore, the CMA erred by finding merit in it and upholding it. I thus, proceed to quash and set aside the decision of the CMA upholding the preliminary objection that the matter was time barred.



This file should be remitted back at CMA to continue with the mediation before a different mediator. This being a labour matter, each party has to bear their own costs.



A handwritten signature in black ink, appearing to be 'M. P. Opiyo', written over a horizontal line.

M. P. OPIYO,
JUDGE
27/04/2023