IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., MDEMU, J.A., And ISSA, J.A.)

CIVIL APPEAL NO. 327 OF 2021

LEAH D. KAGINE ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF
BUGANDO MEDICAL CENTRE ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Mwanza)

(Rumanyika, J.)

dated the 19th day of December 2018

in

Labour Revision No. 109 of 2017

.....

JUDGMENT OF THE COURT

6th & 14th December 2023

NDIKA, J.A.:

On appeal is the decision of the High Court of Tanzania, Labour Division at Mwanza (Rumanyika, J., as he then was) vacating the award made by the Commission for Mediation and Arbitration at Mwanza ("the CMA") in favour of the appellant, Leah D. Kagine, against the respondent, the Registered Trustees of Bugando Medical Centre. By that award, the CMA had upheld the appellant's unfair termination claim and ordered the

respondent to reinstate her to former position as Principal Human Resources Officer.

The context in which the appeal arises is as follows: the appellant was initially employed by the respondent as a Personnel Officer with effect from 1st April 2001 vide a letter of appointment dated 18th April 2001 (Exhibit P1) on "permanent and pensionable" terms. It should be noted that in terms of section 14 (1) (a) of the Employment and Labour Relations Act, Cap. 366, the contract should be categorised as one for an unspecified period. Exhibit P1 states in its main body as follows:

> 18.04.2001
> To Ms. Leah D. Kagine,
> Bugando Medical Centre,
> P.O. Box 1370
> **MWANZA.**
>
> **LETTER OF APPOINTMENT OF MIDDLE AND SENIOR STAFF**
>
> I am authorised to inform you that you are appointed as a **Personnel Officer** in Bugando Medical Centre with effect from **1st April 2001.**
>
> You will be on a probation period of 12 months and during this period your services may be terminated in the event of incompetence.
>
> The salary attached to your post will be at the rate of **Shs. 81,570.00** per month in the Salary Scale of **TGS. 5.**
>
> Bugando Medical Centre may terminate your appointment at any time by giving one month's notice in writing or by paying you an amount equal to one month's salary in lieu of notice.

Your appointment is subject to termination without notice in the event of insubordination, misconduct, or inefficiency.

You are at liberty to terminate your appointment by giving one month's notice in writing or by paying to the Bugando Medical Centre an amount equal to one month's salary in lieu of notice.

Your obedient servant,

(Sgd) Dr. C.R. Majinge

DIRECTOR – BMC

The appellant rose through the ranks and became Principal Human Resources Officer in December 2004. In May 2007, she sought and obtained leave without pay for two years to attend to pressing family matters. The leave was extended on 10th April 2009 for a period of three years.

On her return to work in April 2012, she was offered an appointment as the Director of Administration and Human Resources on a three-year fixed-term contract with highly improved terms and conditions vide a letter dated 13th April 2012 (Exhibit P10). The letter stipulates in its operative part as follows:

13th April 2012

Leah Dawson Kagine
P.O. Box 200
IRINGA.

LETTER OF APPOINTMENT ON CONTRACT TERMS

I am authorised to inform you that you are appointed as **Director of Administration and Human Resources** in Bugando Medical Centre with effect from the date stated below, on the following principal terms and conditions:

1. **Salary: Shs. 2,620,000.00** per month in the salary scale of **PGSS. 21** progression within the scale will depend on good performance....
2. **Terms of service:**
    a) Contract
    b) Your contract will be for [the] period of **36 months** at the end of which the contract may be renewed by mutual consent. This contract is [effective] from **13th April 2012 to 12th April 2015.**

    Three months before the end of the contract you may apply for renewal of the contract; however, the Board of Governors [has] the right to approve or disapprove the application.

    On satisfactory completion of your contract, you will qualify for a gratuity calculated at the rate of **20%** ... of the total substantive [salaries] drawn by you during the period of the engagement.
3. Probationary period **06 months.** Your appointment will be terminated if you do not successfully complete your probationary period.
4. [Not relevant]
5. [Not relevant]
6. [Not relevant]
7. The appointment may be terminated by giving three months prior notice in writing or by paying Bugando Medical Centre one month's salary in lieu of notice.

8. Other conditions of service will be in accordance with personnel and other regulations and operational instructions issued from time to time.
9. Your appointment does not entitle you to privileges to overseas leave or passages.
10. During your employment you are required to contribute to the following schemes: [Not relevant]

    This offer of appointment is subject to your being certified medically fit by our medical staff clinic.

    If you accept this offer of appointment, please sign the duplicate copy of this letter in the space provided and return it to Bugando Medical Centre.

Your sincerely,

(Sgd) Rt. Rev. Aloysius Balina

CHAIRMAN BOARD OF GOVERNORS

The appellant accepted the deal. The contract, as shown above, was due to end on 12th April 2015, but it was extended for one year to December 2016. It was later extended by default to April 2017. Subsequently, the respondent served the appellant a notice of termination of the contract on 27th December 2016 on the ground of operational requirements (Exhibit P11).

Discontented, the appellant instituted an unfair termination claim in the CMA. The matter was successfully mediated and settled culminating in the appellant being paid by the respondent a total of TZS.

82,834,988.00 as compensation consisting of eight months' remuneration, severance pay, gratuity at the rate of 20% for 48 months, repatriation costs, transport for personal effects, leave due but not taken, transport on leave and salary arrears.

Subsequently, the appellant approached the respondent seeking to be reinstated to her former position of Principal Human Resources Officer, contending that her earlier contract of service for unspecified period was still active. The respondent rebuffed the demand whereupon she, yet again, instituted an unfair termination claim in the CMA seeking reinstatement. The crisp issues before the CMA were: one, whether the parties had two separate contracts of service running concurrently. Two, whether the contract for unspecified period was terminated. Three, whether the termination of the aforesaid contract, if indeed terminated, was for fair and valid reasons.

Citing **Othman R. Ntarru v. Baraza Kuu la Waislamu Tanzania (BAKWATA)**, Labour Revision No. 323 of 2013 (unreported) decided by the High Court, Labour Division, the CMA reasoned that when an employee is on permanent and pensionable terms, a new appointment on a fixed-term does not automatically terminate the permanent and pensionable contract unless the employer's manual, code or policy provides otherwise.

The CMA concluded, therefore, that the signing of the fixed-term contract did not automatically terminate the earlier contract for unspecified period. The latter contract could only be terminated at the instance of the respondent as the employer by giving a one month's notice or paying one month's remuneration in lieu of notice, but none was ever given.

Addressing itself on the effect of the fixed-term contract on the initial unspecified term contract, the CMA took the view that the second appointment letter supplemented the first contract, but it did not supplant or supersede it. That was so because there was no clause in the second letter of appointment revoking the former appointment and that the respondent tendered no testimonial or documentary proof on the revocation of the initial appointment.

In conclusion, the CMA held that:

> *"Therefore, suffice to say that, [the] letter of appointment on permanent and pensionable terms [was] never terminated by the initiative of the employer or initiative of the employee or automatic termination. It is ... clear [in the] evidence that the completion of the subsequent ... appointment took back the applicant [the appellant herein] to the former position."*

Furthermore, the CMA rejected the respondent's contention that the appellant was relitigating a matter that had been settled once and for all in violation of the principle of *res judicata*:

> *"It has been proved that the first referral was based on [the] termination of the subsequent letter of appointment and [the] current referral is challenging the former and foundation of the relationship between the respondent and applicant. Therefore, the issue of res judicata cannot stand ..."*

Ultimately, the CMA held that the termination of the appellant's employment was substantively and procedurally unfair. Accordingly, it ordered the respondent to reinstate the appellant with immediate effect.

On revision, the High Court held that upon assuming the superior position of the Director of Administration and Human Resources on the fixed-term contract, the former contract for unspecified period was automatically terminated as the employment relationship between the parties could not be regulated by two contracts concurrently. The court added that, since the appellant was paid compensation in the sum of TZS. 82,834,988.00 to settle her unfair termination claim in respect of the subsequent appointment, the dispute between the parties was finally and

conclusively settled. It was the court's further finding that the appellant was, therefore, relitigating the matter, contrary to the *res judicata* principle, that was finally and conclusively determined. For all those reasons, the court vacated the CMA's award, as mentioned earlier.

For the appellant, Mr. Andrew I.J. Luhigo, learned counsel, filed five grounds of appeal, which he condensed into three complaints as follows:

1. *That the High Court erred in law by finding that the appellant's initial permanent and pensionable contract of service with the respondent was impliedly mutually terminated upon her acceptance of the higher position with the respondent under the new fixed-term contract of service.*
2. *That the High Court erred in law by failing to appreciate and give appropriate evidentiary weight to the appellant's uncontested testimony on the existence of an oral agreement between the parties that the initial permanent and pensionable contract of service shall revive upon termination of the second fixed-term contract of service.*
3. *That the High Court erred in law by finding that the appellant's referral to the CMA was barred by the principle of res judicata.*

At the hearing of the appeal, Mr. Luhigo stood for the appellant whereas Mr. Innocent J. Kisigiro, learned counsel, appeared for the respondent.

Beginning with the first complaint, Mr. Luhigo submitted that the mere fact that the parties executed the second contract of employment for a fixed term did not mean that their previous contract of employment for unspecified term was extinguished. He contended that the labour laws of the country do not prohibit parties having two contracts of employment running concurrently. Citing the House of Lords' decision in **Surrey County Council v. Lewis** [1987] IRLR 509, he urged us to draw inspiration from England where such dual contractual arrangements are recognized by the courts. He was insistent that the second appointment only had the effect of suspending the appellant's initial contract for unspecified period, which, then, became active upon termination of the fixed-term employment.

Mr. Kisigiro supported the High Court's position. He contended that, the appellant having accepted the fixed-term contract for the higher position and with lucrative remuneration and improved perks, she totally abandoned her previous employment. He elaborated that following signing the fixed-term contract, the appellant no longer worked under her former contract even for a single day and that she never claimed any benefits

under it. Her initial employment, he added, was effectively terminated upon the fixed-term contract being signed.

It was Mr. Kisigiro's further contention that, bearing in mind the statutory limitation on working hours, it was legally impracticable for an employee to operate concurrently on two contracts of service unless one is for a part-time engagement, which was not the case in the instant matter. At any rate, there was no proof that the appellant had two active contracts of service running concurrently.

We have dispassionately considered the contending submissions of the learned counsel on the issue at hand and examined the contents of the two contracts of service (Exhibits P1 and P10). To begin our deliberations, we wish to deal with Mr. Luhigo's claim that in the instant case, the employment relationship between the parties was regulated by two contracts of service that ran concurrently.

It is in the evidence that on her return after the expiry of her leave without pay, the appellant did not resume the performance of her duties under the first contract (Exhibit P1). Instead, she assumed a high-level position as Director of Administration and Human Resources as unveiled by Exhibit P10. Given these facts, the contention that the appellant had

two contracts of service running concurrently is plainly fallacious. It is the fixed-term contract (Exhibit P10) only that was active and operational, forming the main basis for regulating the employment relationship between the parties.

We recall that Mr. Luhigo urged us to draw inspiration from **Surrey County Council** (*supra*), which, he said, illustrated that dual contractual arrangements are recognized by the courts in England. Having read that decision, we have no doubt that the learned counsel cited it out of context and that it does not advance the appellant's case. The House of Lords, in that case, decided that an employee who had distinct, separate, part-time contracts with the same employer, running concurrently, could aggregate the hours worked under each contract to attain the requisite continuous service to claim unfair dismissal. It is evident that, in the instant case both positions held by the appellant under Exhibits P1 and P10 respectively were full-time positions. None of it was a part-time position. Certainly, they could not be performed by the appellant under respective contracts concurrently.

Turning to the contention by Mr. Luhigo that the fixed-term contract effectively suspended the initial contract, we would, at first, acknowledge

that when the parties executed the fixed-term contract, none of them had invoked the termination provisions under Exhibit P1 to end the contract. Nevertheless, having reflected on the letter and spirit of the fixed-term contract as well as its core factors and incidents, we do not think that the parties executed it while intending that the initial contract for unspecified period would, in the meantime, be suspended. Had the parties intended to do so, they would have expressly so stated in Exhibit P10 given the requirement under section 14 (2) of the Employment and Labour Relations Act that employment contracts must be in writing.

Moreover, the argument, featuring in the CMA's award, that the fixed-term contract sought to supplement, not to supplant, the initial contract ignores the fact that incidents in the former contract naturally and effectively changed the appellant's employment from one for an unspecified period to an engagement for a fixed-term but with improved terms and conditions. In the premises, we uphold the High Court's finding that upon execution of the fixed-term contract, the initial contract for unspecified period was automatically terminated. Consequently, the first ground of appeal falls by the wayside.

On the second point of grievance, Mr. Luhigo censured the High Court for failing to consider the appellant's testimony that the respondent through its Director General and Board Chairperson agreed with her that, upon expiry or non-renewal of her service as the Director of Administration and Human Resources under the fixed-term contract, she would be restored to her former position with the respondent. He contended that apart from the fact that the said testimony was not contested by cross-examination, the respondent did not introduce any evidence to counter her testimony. Relying on **Khalidi Mlyuka v. Republic**, Criminal Appeal No. 442 of 2019 [2021] TZCA 539 [29 September 2021; TanzLII], the learned counsel argued that, the High Court ought to have inferred, from the respondent's failure to cross-examine the appellant on that aspect, that what she averred was true.

Mr. Kisigiro countered that if, indeed, there was any agreement between the parties to that effect, such an understanding would have likely been reduced into writing. Citing section 101 of the Evidence Act, Cap. 6, he urged us to ignore the appellant's oral evidence because when the terms of a contract have been reduced into writing, no oral evidence

will be admitted for the purposes of contradicting, varying, adding to, or subtracting from the agreed terms.

It is, indeed, in the evidence that the appellant claimed that the respondent through its Director General and Board Chairperson agreed with her that upon expiry or non-renewal of her service as the Director of Administration and Human Resources she would be restored to her former position with the respondent under the contract for unspecified period. Mr. Luhigo is correct that this piece of evidence was not challenged. Without any hesitation, we acknowledge that an omission or neglect to assail the evidence-in-chief of a witness on a material or essential point by cross-examination would ordinarily infer an acceptance of that evidence as truthful, but that is subject to its being challenged as inherently implausible or probably untrue. In the instant case, Mr. Kisigiro predicated his challenge against the cogency and reliability of that oral evidence upon section 101 of the Evidence Act.

Before referring to section 101 of the Evidence Act cited by Mr. Kisigiro, we should first note that, section 100 (1) of the same Act provides that the terms of a contract, grant or any other disposition of property must be proved by such document as primary evidence or secondary

evidence in cases where secondary evidence is admissible under the Act. For ease of reference, we excerpt the said provision:

> *"**100.-(1) When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document,** and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself,** or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."* [Emphasis added]

The above provision excludes all evidence other than primary or secondary evidence to be admitted as proof of the terms of such contract, grant, or any other disposition of property. Section 101 of the same Act extends the principle under section 100 (1) specifically by excluding evidence of oral agreement, as proof of the contents of a document once they have been proved according to section 100, subject to six exceptions enumerated under the proviso (a) to (f). For clarity, we extract this provision in full:

*"**101. When the terms of a contract, grant or other disposition of property,** or any matter required by law to be reduced to the form of a document, **have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted,** as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms:*

Provided that-

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts."[Emphasis added]

The above provision creates what in legal parlance is known as the parol evidence rule. This is a rule of construction that bars admission of extrinsic evidence in form of any oral agreement or statement for the

purpose of contradicting, varying, adding to, or subtracting from the terms of a written contract, grant, or other disposition of property.

In the view of the above legal position, it is ineluctable that Exhibit P10, unveiling the terms and conditions of the engagement of the appellant under the fixed-term contract, constitutes proof of what the parties agreed upon as to the incidents of their employment relationship. The appellant's claim that there was an oral agreement for her to resume her previous position is inadmissible because it would alter or vary what the parties expressly agreed upon, particularly on how their contractual relationship could be terminated. Given the requirement under section 14 (2) of the Employment and Labour Relations Act that employment contracts must be in writing, the parties should have reduced into writing that verbal agreement, if at all they concluded it. It is significant that, the appellant did not make a case that the alleged oral agreement could be admissible under any of the six exceptions under section 101. We are, therefore, satisfied that there was no proof that the parties had agreed for the revival of the unspecified period contract upon the expiry of the subsequent fixed-term contract. The second ground of grievance equally fails.

In view of the position we have taken on the first and second grounds of complaint, the third ground of appeal is no longer dispositive of the appeal. We find no pressing need to consider and determine it.

In the final analysis, we find no merit in the appeal, which we hereby dismiss. This matter being a labour dispute, we let costs lie where they fall.

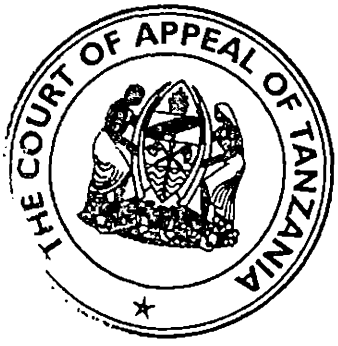
DATED at **MWANZA** this 13th day of December 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered on this 14th day of December, 2023 in the presence of Mr. Linus Munishi, learned counsel for the applicant, and Mr. Innocent Kisigiro, learned counsel for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL