

TANZANIA / JUDGMENT

bodi ya wadhamin

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT
DODOMA REVISION APPLICATION NO. 26974 OF 2023 (Originating from the award of the
Commission for Mediation and Arbitration at Dodoma in the Labour Dispute No. CMA/
DOM/111/2021/35/2022) BODI YA WADHAMINI JIMBO KATOLIKI DODOMA.....APPLICANT
VERSUS SOSPETER MWITA & 32 OTHERS..... 1st RESPONDENTS MAGINGA
BUSINESS CO. LTD..... 2nd RESPONDENT

JUDGMENT

Date of last Order: 29/10/2024 Date of Judgment: 13/11/2024 KHALFAN, J. Before the Commission for Mediation and Arbitration at Dodoma (hereinafter referred to as the "CMA"), the 1st respondents claimed against the applicant for the payment of TZS 115,545,973/= being salary arrears and gratuity payment. As it could be gathered from the record, sometimes on 10/2/2012, the applicant and the 2nd respondent entered into an agreement for running a school going by the name Nkuhungu secondary school owned by the 2nd respondent. In the said agreement, the applicant was the employer of the 1st respondents. It is revealed that, the applicant ran the said school for a period of 10 years from 2012 to 2022. The major source of the income was school fees paid by the students. It is on record that, the applicant and 2nd respondent agreed to share the revenue by 10% each while the remaining 80% was to be used to run the day-to-day activities of the school. It is on record that things did not go smoothly as agreed between the applicant and the 2nd respondent since there are allegations that the latter used to borrow money without paying back. This therefore, resulted the 1st respondents not being able to be paid their salary and other entitlements. It was through this financial mistrust between the applicant and the 2nd respondent that led to rescission of the agreement and the school was handed back to the 2nd respondent. The 1st respondents' claims against the applicant were mainly the salary arrears for teaching and non-teaching staff for June and December 2020 and gratuity payment which bring a total of TZS 115,545,973/=. The applicant disputed such amount claiming that, all the payments were made and if there were any claims, it was the 2nd respondent who was liable to pay because the agreement to run the school which was entered by the 2 applicant and the 2nd respondent; was frustrated. On the other hand, the 2nd respondent maintained that it is the applicant who is required to pay the outstanding amount as it was the employer of the 1st respondents. After hearing the parties, the CMA decided in favour of the 1st respondents as it ordered the applicant to pay the 1st respondents a sum of TZS 115,545,973/=. The applicant was displeased with the

CMA's decision hence she filed the instant application under section 91 (l)(a)(b), 2(a)(b),

(3) and (4) (a) and (b) of the Employment and Labour Relations Act [Cap 366 R.E 2019] and Rule 28(1) (c)(d) and (e) of the Labour Court Rules GN No. 106 of 2007 (hereinafter referred to as the Rules. The applicant is seeking one substantive relief, that this court be pleased to call the records of the proceedings and award in Labour dispute No. CMA/DOM/I 11/2021/35/2022 in order to satisfy itself as to the correctness, legality and or propriety of the proceedings and award thereto. This application is supported by an affidavit sworn by Fr. Revocatus Majuto principal officer of the applicant. On the other hand, the respondents filed their respective counter affidavits to contest the application. Essentially, the applicant's points of complaint are as follows: 3

1. The honourable arbitrator erred in law and fact to award the reliefs to 32 complainants who neither testified before the CMA and proved their claims.
2. The honourable arbitrator erred in law and fact in awarding the reliefs which were in form of specific damages which were not specifically proved.
3. The honourable arbitrator erred in law and fact by failure to hold that, the employment of the complainants was discharged by frustration by the 2nd respondent hence in case of any claims they ought to be paid by the 2nd respondent. This application was argued by written submissions. The applicant was represented by Mr. Constantino Gwivaha, learned advocate, the 1st respondents were represented by Mr. Sedrick Mbunda learned advocate while the 2nd respondent was represented by Ms. Vanessa Mlungwana, learned advocate. In his submission, Mr. Gwivaha faulted the arbitrator for awarding the reliefs to the 32 complainants (the 1st respondents) who neither testified before the commission nor proved their claims. The learned 4 advocate argued that, Sospeter Mwita was appointed to represent the 32 others before the CMA. Hence, the matter before the CMA was a representative suit. He argued that, it was wrong for Sospeter to testify on behalf of the other complainants who were teaching and non-teaching members. He argued that, the CMA misdirected itself in assuming the meaning of representative suit which only allows one to appear to sue or defend a suit on behalf of others but not testifying on behalf of others. To buttress his argument, the learned advocate referred to the case of National Agriculture and Food Corporation vs. Mulbadaw Village Council and Others [1985] TLR 88. He argued that, the above authority has been referred to by numerous decisions such as Security Group (T) LTD vs. Samson Yakobo and 10 others Civil Appeal No. 76 of 2016 Court of Appeal of Tanzania at Dar es Salaam. He argued that, only if the complainants had common claim for instance unfair termination, would have justified one testifying on behalf of the others. In the instant matter, the respondents had individual claims including salary arrears and gratuity with different amounts from each individual which had to be specifically proved. 5 As to the second ground of complaint, the learned advocate for the applicant argued that, the 1st respondents did not specifically prove the claims which were specific damages. He referred to the case of Zuberi Augustino vs. Anicent Mugabe [1992] TLR 137 and Antony Ngoo & another vs. Kitinda Kimaro Civil Appeal No. 25 of 2014 in which it was observed that, specific

damages must be specifically pleaded and proved. He argued that, Sospeter who testified on behalf of the others never explained before the CMA how the amount of TZS 115,545,973/= was arrived at. What was testified before the CMA was rather a general statement. As to the third ground, the learned advocate for the applicant argued that, the CMA erred for not finding that, the employments of the complainants were discharged by frustration by the 2nd respondent hence in case of any claims they ought to be paid by the 2nd respondent. He argued that, among the ways through which the contract may come to an end, is frustration/impossibility. He argued that, the employment contract which was signed by the applicant and the respondents was frustrated by it being taken by a third party. He referred to the decision in the case of *6 M/S Kanyarwe Building Contractor vs. Attorney General & another*

[1985] TLR 161. He urged the court to find that, since the school was taken by its owner (the 2nd respondent), then it is her responsibility to pay the 2nd respondents. In reply, to the 1st ground of complaint, the learned advocate for the 1st respondents, argued that there was no dispute regarding the 1st respondents' claims rather the issue was who between the applicant and the 2nd respondent was supposed to pay the 1st respondent. He readily conceded that, before the CMA, Sospeter Mwita represented the 32 complainants who testified on behalf of the other complainants. The learned counsel submitted that this is normal for a representative suit. He argued that, before the CMA, there was no claim but merely remedies. He referred to the case of *Security Group (T) LTD vs. Samson Yakobo & 10 others* Civil Appeal No. 76 of 2016, in which one of the grounds of complaint was the fact that only one employee testified on behalf of others, the Court of Appeal observed that, since there was common claim; evidence needs not to be adduced by all of them. He therefore pointed out that, the case of *National Agriculture and Food Corporation vs. Mulbadaw Village Council and Others* (supra) is distinguishable from the circumstance of the matter at hand. He maintained that, in this matter Sospeter and others had common interests. As to the second ground, the learned advocate for the 1st respondents forcefully argued that, the 1st respondents were able to prove their claims. He pointed out that, the amount for payment of salaries claimed by the 1st respondents was known to everyone as it was stated in the contract. He therefore argued that the cases referred to by the learned advocate for the applicants were distinguishable from the circumstance of this matter. In reply to the third ground of the complaint, the learned advocate for the 1st respondents argued that, the case referred to by the learned advocate for the applicant in *M/S Kanyarwe Building Contractor vs. Attorney General & Another* (supra) was not related to the matter at hand because the applicant herein was the one who breached the contract. He submitted that, the applicant was aware of the consequences of handing over the school to the 2nd respondent herein and therefore she was required to finalise the contract with the 1st respondents. He referred to the decision of this court in the case of *Zetaki Investment Co. Ltd vs. Bank of Africa Tanzania Ltd* Civil Case No. 3 of 2020. In his part, the learned advocate for the 2nd respondent, first raised a concern regarding the competence of the instant application. He argued that, there was no notice of representation as required by Rule 43(1) of the Rules which requires a representative who

acts on behalf of a party to give notice to the registrar. He maintained that in the instant matter, the applicant did not comply with the requirement of the said notice. He also raised a claim that, the law firm R. K Rweyongeza & Co representing the applicant, was the same firm that drafted the contract between the applicant and the 2nd respondent (exhibit XI). He argued that, that act was a gross professional misconduct which constituted conflict of interest. He argued that, the remedy to such situation was that the whole proceedings as well as this application are a nullity. As to the merits of the application, the learned advocate for the 2nd respondent specifically replied on the third ground of the complaint on the alleged frustration. He strongly opposed the claim that the contract was frustrated. He argued that, it was the applicant who was liable to pay the outstanding amount. 9 In rejoinder, the learned advocate for the applicant essentially reiterated his submission in chief as far as the 1st respondents are concerned. The learned advocate did not bother to comment on anything regarding the two concerns raised by the learned advocate for the 2nd respondent. I will however address them first before going to the merits or otherwise of the application. The first concern should not detain me longer than it is necessary. Indeed, the applicant did not file notice of representation as required by the Rules. But I find such omission not to have caused any injustice to the parties. Since the address for the service of the applicant has been indicated throughout the application as well as in the submission; therefore, I do not find any merits on such concern and it is accordingly overruled. As to the second concern on the conflict of interest, it is not in dispute that, the applicant and the 2nd respondent entered into an agreement to run the school as stated above. Therefore, there is no question about that, and the issue of conflict of interest does not arise. I do find such claim as an afterthought as the same should have been raised at the earliest stage possible. The 2nd concern lacks merits and it is also overruled. I will now proceed to determine the application on merits. Having considered the parties' rival submissions and the record of the CMA, I will determine the 1st and 2nd grounds of complaint jointly as they interrelated. It is not in dispute that, the 1st respondents were claiming an assortment of payment ranging from salary arrears and gratuity. The evidence of the PW1 namely Sospeter who according to the record, testified alone for the 1st respondents as captured on page 11 and 12 of the typed proceedings reads thus: "...tunadai mishahara ya mwezi Juni 2024 waiiamua kiasi cha miiioni kumi na saba, iaki nane na theiathini na moja e/fu na mia moja sitini, (Shs 17,831,160/-) wafanyakazi wasio waaiimu miiioni nane iaki saba arobaini na sita mia nane arobaini (Shs 8,740,840/=) mishahara ya mwezi Disemba miiioni kumi na nane na arobaini e/fu (Shs. 18,040,000/=). Gratuity katika makundi/Mafungu matatu zi/izokuwa zimebaki na haziku/ipwa miiioni ishirini na li saba, mia tano kumi na tatu e/fu na mia sita (Shs 27,513,600/=), gratuity zilizositishwa milioni ishirini na nane iaki tano e/fu nne na mia nne hamsini (Shs 28,504,450/=) na fungu ia tatu ia watumishi wasio waiimu kwa miaka tisa (9) kiasi cha milioni kumi na tano iaki nane na sabini na sita e/fu (Shs. 15,876,000/=) hivyo kufanya jum/ a kuu kwa kiasi cha milioni mia moja kumi na tano iaki tano arobaini na tano e/fu mia tisa na sabini na tatu (Shs 115,545,973/=)." I have deliberately reproduced the above piece of evidence from the sole witness who testified for all the 1st respondents. It is apparently

clear that, there were different claims for different groups of workers as shown above. I am also convinced that, in view of the authorities referred to by the learned advocate for the applicant, since the complainants' claims were in form of specific claims, they were bound to prove them strictly. Now the question that begs an answer is whether the nature of the complainants' claim could only be proved by the evidence of Sospeter. I am of the considered view that, since each of the complainants had different claims depending on his/her category of employment, it was necessary for 12 each of them to appear before the CMA and prove their claim. For instance, one may ask how much each complainant was entitled, who were teaching staff and non-teaching staff among the complainants, who was entitled to gratuity and how much. I therefore find the decision of Security Group (T) LTD vs. Samson Yakobo & 10 Others (supra) in which reference was made to the case of Agriculture and Food Corporation vs. Mulbadaw Village Council and Others (supra) referred by the learned advocate for the 1st respondents is distinguishable with the facts of this case. Even if I were to agree with the learned advocate for the 1st respondents that, it was proper for the sole witness to appear and testify on behalf of other complainants, the issue is whether his evidence proved their claim. I have gone through the evidence adduced by the sole witness; he never tendered any document apart from the minutes of the meeting dated 4/12/2020 as exhibit DI. In its decision, the learned arbitrator referred to paragraph 2.1 of exhibit DI and was of the view that, the 1st respondents proved their claims. I have carefully read the said document but there is nowhere the amount of TZS 115,545,973/= is reflected in the said document. Rather, it was a meeting to discuss the complaints but at 13 the end; there is nowhere the applicant agreed to pay the complainants the stated sum. As to the claim for gratuity as shown above, the learned arbitrator on page 13 of the award referred to an exhibit which was not on the record. The employment contracts for the 1st respondents were not tendered. Hence, the learned arbitrator referred to the document which was not on the record. He rather referred to the evidence of PW2 that payment of the gratuity was being made in phases depending on the availability of funds. The question that begs an answer is what was exactly the outstanding amount and how the same was arrived at. The 1st respondents did not give evidence to prove such claim and therefore the learned arbitrator erred in awarding such amount. The learned advocate for the 1st respondents claimed that the claims were known. With respect, those claims are not known since there was no sufficient evidence tendered to substantiate them. Therefore, the award by the CMA at the sum of TZS 115,545,973/= is accordingly quashed and set aside for lack of proof. Finally, the third ground of complaint on frustration should not detain me longer than it is necessary. The 1st respondents' claims were in respect of the salary arrears for June and December 2020 as well as gratuity. In 14 his evidence, PW1 narrated that handing over of the school to the 2nd respondent was done on 18/12/2020 and the employees were informed on that date. By the time the applicant issued notice to the 1st respondents that the school was handed over to the 2nd respondent, the applicant was still an employer and was required to settle any outstanding claims to the 1st respondents before handing the school over back to the owner. Therefore, the question of frustration does not arise in the instant matter. Basing on the

above discussion, the application succeeds to the extent that amount of TZS 115,545,973/= awarded to the 1st respondents was without proof and the same is accordingly quashed and set aside. Since this is a labour matter, I will not make an order as to costs. Ordered accordingly. DATED at DODOMA this 13th of November, 2024. 15

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