

TANZANIA / JUDGMENT

# dar es salaam gymkana club vs ombeni palangyo 2023 tzhcld 1499 29 november 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION  
APPLICATION NO. 226 OF 2023 (Arising from Award issued on 18th August, 2023 by Hon. Msina  
H.H., Arbitrator in Labour Dispute No. CMA/DSM/ILA/470/21/194/21) DAR ES SALAAM  
GYMKANA CLUB ..... APPLICANT VERSUS OMBENI PALANGYO  
..... RESPONDENT

## JUDGEMENT

Date of Last Order: 27/11/2023 Date of Judgement: 29/11/2023 B. E. K. Mganga, J. Brief facts of this application are that, on 23rd October 2019, applicant and respondent signed two years fixed term contract of employment commencing on 01st October 2019 expiring on 30th September 2021. In the said fixed term contract, respondent was employed as Finance Manager. On 25th June 2021, applicant served respondent with a three months none-renewal of contract notice. It is undisputed by the parties that after the said notice of non-renewal of 1 the contract, respondent continued to work with the applicant until expiry of the fixed term contract. It is also undisputed that, on 29th October 2021, respondent filed Labour dispute No. CMA/DSM/ILA/470/21/194/21 before the Commission for Mediation and Arbitration henceforth CMA. In the Referral Form (CMA F1), respondent indicated that he was unfairly terminated by the applicant. On fairness of procedure, respondent indicated in the said CMA F1, that procedures for termination of his employment was unfair because he was condemned unheard. On validity of reason for termination, he indicated that the reason for termination was not communicated to him. Based on the foregoing, respondent indicated in the said CMA F1 that he was praying to be reinstated without loss of remuneration. Having heard evidence of the parties, on 18th August 2023, Hon. Msina, H. H, arbitrator, issued an award stating that applicant had no reason for not renewing the fixed contract of the respondent and that applicant wrongly relied on clause 4(a) and (b) of the fixed term contract for not renewing the said fixed term contract. The arbitrator further held that, there was legitimate expectation for renewal of the said contract and further that applicant did not give reason for the said none-renewal of the said fixed term contract. In short, the arbitrator held that termination was unfair both substantively and procedurally. 2 Based on those

findings, the arbitrator awarded respondent to be (i) be reinstated and (ii) be paid TZS 86,965,553/= being salary compensation from the date of termination to the date of the award with monthly accrual to the date of full payment. Applicant was aggrieved with the said award hence this application for revision. In the affidavit sworn by Elizabeth Michael, the Human Resources Manager of the applicant, she prayed the court to determine:-

1. The legality and correctness of the commission's finding that there was expectation or renewal of fixed term contract.
2. The legality and correctness of the commission's finding that as the respondent did not commit any misconduct, then there was no reason for non-renewal of the fixed term contract.
3. The legality and correctness of the commission's finding that applicant was supposed to give reason for non-renewal of the respondent's fixed term contract.
4. The legality and correctness of the commission's finding that the respondent is to be reinstated without loss of salary and be paid monetary compensation of TZS. 86,965,553/= being his salary from 01st October, 2021 to 18th August, 2023.
5. The legality and correctness of the commission's award in raising suo motu the new issue of non-renewal of contract and determining it without affording parties an opportunity to be heard on the same. Respondent opted to resist this application by filing both the Notice of Opposition and his counter affidavit. 3 I should point out that by consent of the parties, this application was argued by way of written submissions. In complying with submissions orders, applicant enjoyed the service of Mr. Robert Mosi, Advocate while respondent enjoyed the service of Mr. Thomas Joseph Massawe, Advocate. Mr. Mosi, counsel for the applicant submitted on the 1st and 5th that the arbitrator misinterpreted clause 1 of the contract by construing the word shall in the said clause to mean that gave rise to legitimate expectation for renewal of the contract. Counsel for the applicant submitted that clause 1 of the said contract was clear that amendment or renewal was subject to mutual agreement of the parties. He went on the contract was terminated automatically after expiry of the agreed period. Counsel for the applicant submitted further that the said clause, does not imply that the contract in question must be renewed upon expiration. To cement on his submissions, he referred the court to the case of Rosamistika Siwema (administratrix of the estate of Joseph Mandago) vs Add International Tanzania, Revision No. 498 of 2019 at page 11 (unreported) that it was wrong to assume that the contract would be automatically renewed. 4 Mr. Mosi submitted further that in the award the arbitrator raised suo moto a new issue of non-renewal of the contract without affording parties right to be heard and continued to determine it. He clarified that, issues that were drafted and agreed by the parties are (i) whether the complainant was terminated from his employment by the respondent, (ii) whether the complainant was unfairly terminated and (iii) what reliefs are the parties entitled to. He further submitted that arbitrator was supposed to call the parties and hear them on the new raised issue. He added that the arbitrator was supposed to determine the

dispute based on issues that were framed and agreed by the parties. To bolster his submissions, he cited the case of Said Mohamed Said vs. Muhusin Amiri and Another, Civil Appeal No. 110 of 2020, CAT(Unreported). Counsel for the applicant further submitted that, respondent did not plead non-renewal of his contract in the CMA F1. He concluded that issuance of the notice of a notice of non-renewal is not a requirement of the law, but it was just a courtesy. To support his submission, counsel for the applicant cited the case of Dotto Shaban Kuingwa vs. CSI Co. Ltd, Revision No. 5 of 2020, HC,(unreported). On the 2nd and 3rd grounds, counsel for the applicant submitted that the findings by the arbitrator that respondent did not commit any 5 misconduct was a misdirection because the fixed term contract between the parties came to an end automatically after expiry of the agreed period. Counsel for the applicant cited the provisions of Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 to that effect. He added that, the contract between the parties was not terminated based on misconduct of the respondent. On the 4th ground, counsel for the applicant submitted that, the order for reinstatement of the respondent and payment of TZS. 86,965,553/= to respondent was uncalled for because the contract was terminated automatically upon expiry of the agreed period. He therefore prayed the CMA award be revised, quash and set aside. Resisting the application, Mr. Massawe, counsel for the respondent submitted that, generally that there was legitimate expectation for renewal of the contract and that the arbitrator correctly gave the award in favour of the respondent. Counsel submitted further that the issue of legitimate expectation for renewal was within the 1st issue that was framed by the parties hence arbitrator cannot be criticized. It was further submitted by counsel for the respondent that applicant misconstrued clause 4(1) of the said fixed term contract and that she could have left the contract to expire without issuing the notice. To 6 cement on his submissions, he cited the case of Denis Kalua & Saidi Mng'ombe vs. Flamingo Cafeteria,(2011-2012)LCCD1 to support the findings of the arbitrator. He concluded that, having found that termination was unfair, in term of section 40(1) of the Employment and Labour Relations Act[cap. 366 R.E. 2019], the arbitrator correctly awarded respondent to be paid TZS 86,965,553/=. He therefore prayed the application be dismissed for want of merit. In rejoinder, counsel for the applicant reiterated his submissions in chief and cited the case of Charles Christopher Humphrey Kombe t/a Kombe Building Materials vs. Kinondoni Municipal Council, Civil Appeal No. 19 of 2019, CAT(unreported) on the need to call the parties and hear them on a new issue. I have examined evidence of the parties in the CMA record and considered their submissions in this application and find that, it is undisputed that the parties had two years fixed term contract (exhibit D1) that expired on 30th September 2021. It is also undisputed that, clause 1 of exhibit D1 provided that the said contract was renewable on mutual agreement by the parties. The said clause provides:- "1. Commencement 7 This contract shall commence from 01st October, 2019 to 30th September, 2021. This contract shall be renewable, amendable or extendable by mutual agreement of both parties hereto in which event this contract shall be amended in writing to reflect the renewal, extension or amendment whichever shall be the case." There is no evidence showing that the parties agreed to renew the said contract or, that, respondent communication with the applicant so that they can renew the said

contract. What is clear is that, on 25th June 2021, applicant served the respondent with a notice of non-renewal of the said contract (exhibit D2). The said notice is loud and clear that respondent was notified that there will be no renewal of the contract upon expiry of the agreed period. The said notice reads in part:- RE: NOTICE OF NON-RENEWAL OF EMPLOYMENT CONTRACT FOR YOUR POSITION AS A FINANCE MANAGER AT DAR ES SALAAM GYKHANA CLUB This is to inform you that, this letter serves as a confirmation that, Dar es Salaam Gymkhana Club is not renewing your employment contract signed on 23rd September, 2019. Your agreement expires on 30th September, 2021 (as indicated in section 1 of the contract). This letter serves as timely notification that the Management has decided not to renew your employment agreement with the Club. Section 4(a) of the signed contract has been well observed. You have been provided with three months' notice before ending of your employment contract..." The said exhibit D2 cannot be regarded as notice of termination of employment of the respondent for this court to hold that respondent 8 was unfairly terminated. In fact, respondent admitted in his evidence in chief that after being served with the said notice, he continued to work with the applicant. It is clear from evidence of the parties that respondent worked with the applicant until when the agreed period expired. Therefore, the contract of the respondent expired automatically as provided for under Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. In addition to the foregoing, exhibit D2 served to the respondent is not a requirement of the law as both parties to the employment contract knew from the beginning when it was supposed to expire. See the case of Ibrahim s/o Mgunga & Others vs African Muslim Agency (Civil Appeal 476 of 2020) [2022] TZCA 345 (13 June 2022). In Mgunga's case (supra) the Court of Appeal held inter-alia that:- "...we entirely agree with the learned High Court Judge that, although the respondent was not bound under the law to serve the appellants with the notice of non-renewal of their contracts... he did so out of courtesy to remind them that their contracts would expire..." I have read the award and find that the arbitrator held that respondent had legitimate expectation for renewal of the said fixed term contract. With due respect, there is no evidence to support that findings. In his evidence, respondent(PW1) said nothing in relation to legitimate 9 expectation. More so, that was not part of his pleading in the CMA F1. The arbitrator was bound by pleadings of the parties, and she was not supposed to depart therefrom. See the case of Astepro Investment Co. Ltd vs Jawinga Co. Ltd (Civil Appeal 8 of 2015) [2018] TZCA 278 -Tanzlii, YARA Tanzania Limited vs Ikuwo General Enterprises Limited (Civil Appeal 309 of 2019) [2022] TZCA 604 -Tanzlii, Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168-Tanzlii, Salim Said Mtomekela vs Mohamed Abdallah Mohamed (Civil Appeal 149 of 2019) [2023] TZCA 15 -Tanzlii, Charles Richard Kombe T/a Building vs Evarani Mtungi & Others (Civil Appeal 38 of 2012) [2017] TZCA 153-Tanzlii and Barclays Bank T. Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 [2020] TZCA 1875-Tanzlii, to mention but a few. In fact, in the referral Form (CMA F1) respondent only indicated that he was condemned unheard and that reason for termination of his employment was not communicated to him. I have carefully examined evidence of the respondent(PW1) and find that he said nothing in relation to the claim that he was terminated unheard or that reason for termination of his

employment was not communicated to him. In short, respondent departed from his own pleadings. Since respondent departed from his 10 own pleadings, the claim that he was unfairly terminated was not proved. It was correctly submitted by counsel for the applicant the arbitrator raised a new issue namely legitimate expectation of renewal of the contract at the time of composing the award. The record shows that on 16th March 2022 only three issues namely (i) whether the complainant was terminated from his employment by the respondent, (ii) whether the complainant was unfairly terminated and (iii) what reliefs are the parties entitled to, were framed, and agreed by the parties. It was an error on the part of the arbitrator to raise the issue of legitimate expectation to renew the contract without affording the parties right to be heard. See the case of Charles Christopher Humphrey Kombe t/a Kombe Building Materials vs Kinondoni Municipal Council (Civil Appeal 19 of 2017) [2022] TZCA 205 and Alisum Properties Limited vs Salum Selenda Msangi (Civil Appeal 39 of 2018) [2022] TZCA 389 (24 June 2022). The argument by counsel for the respondent that the issue relating to legitimate expectation is within the 1st issue at any rate, cannot be valid because these are distinct issues. Having held that the contract of the parties expired automatically upon expiration of the two years period agreed, I hold that the arbitrator 11 erred to award respondent to be reinstated and to be paid TZS 86,965,553/=. For the foregoing, I hereby allow the application, revise, and quash the CMA award. Dated at Dar es Salaam on this 29th November, 2023. B. E. K. Mganga JUDGE Judgment delivered on this 29th November 2023 in chambers in the presence of Philip Irungu, Advocate for the Applicant and Ombeni Pallangyo, the Respondent. B. E. K. Mganga JUDGE 12

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