

TANZANIA / JUDGMENT

eunice ndesario urio another vs mamlaka ya elimu na mafunzo ya ufundi stadi another 2023 tzhcld 1395 16 august 2023

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LABOUR DIVISION AT PAR ES SALAAM REVISION APPLICATION NO. 425 OF 2022 EUNICE NDESARIO URIO ^APPLICANT SCOLASTICA MATHIAS MBENA 2nd APPLICANT VERSUS MAMLAKA YA ELIMU NA MAFUNZO YA UFUNDISTADI ■ 1st RESPONDENT MWANASHERIA MKUU WA SERIKALI 2nd RESPONDENT (Arising from the decision Commission for Mediation & Arbitration o f DSM at Temeke Dated 1st November 2022 in Labour Dispute No. CMA/DSM/TMK/193/2022)

JUDGEMENT

Date of last Order: 10/ 08/2023 Date of Judgement: 16/ 08/2023 MLYAMBINA, 3. In this application for revision, the Applicants are seeking for this Court to call for the record of Labour Dispute No. CMA/DSM/TMK/193/2022 from the Commission for Mediation and Arbitration of Dar es Salaam (herein CMA). The object is to interpret the Labour Dispute relating to Collective Bargain Agreement (CBA) by declaring that the CMA has jurisdiction to mediate the dispute and free from external influence. He further claimed that CMA had no jurisdiction to arbitrate by deciding such kind of labour Dispute. The historical background of this application is traced from the affidavit of the Applicant, counter affidavit of the Respondent and CMA record. The Respondent was employed by the Applicant on different position and diverse date. On 3rd January 2013 they signed an agreement namely Collectively Bargain Agreement (CBA) with the intention of improving social welfare of the employees at working place. Aggrieved with employer's decision of not implementing CBA, the Applicant referred the matter to the CMA. The Respondent herein challenged the application by raising the preliminary objection regarding jurisdiction. The Mediator maintained that being a dispute of public servant, then the CMA had no jurisdiction. Hence the present application. Along with the Chamber summons, the Applicants filed an affidavit sworn by Eunice Ndesario Urrio and Scholastica Mathias Mbena. After explaining series of events leading to this application, the Applicants alleged that the Arbitrator erred in law by holding that the CMA had no jurisdiction over the matter as the Respondent was a public servant. Paragraph 21 of the Applicants affidavit contains four major legal issues as reproduced hereunder:

- i. Whether the Arbitrator was right in his findings by holding that the CBA dispute ought to be interpreted by Public Services Commission fall under Public Services Act, which impliedly oust the power of labour laws to deal with Public Servant dispute. ii. Whether the Commission had no jurisdiction to entertain the matter relating to CBA. iii. Whether the Labour laws are inferior in comparison to Public Services Act, in deciding labour matter filed to the CMA. iv. Whether the Mediator was right in his decision without affording parties with the right to be heard. The Application was challenged through the counter affidavit sworn by Mr. Mathias Damian Kulwa, Respondents' Legal Officer. He strongly disputed the Applicant's allegation. The application was disposed of by way of written submissions. The Applicant was represented by Mr. Michael Mgombozi, Personal Representatives, while the Respondent was represented by Ms. Happiness Nyabunja, Principal State Attorney. I appreciate, their rival submissions which will be duly considered while composing this

judgement.

Before I embark to the main application, I find worth to address the Respondent concern that the Applicant are bringing new issues as if the matter was decided on merit. This makes me to go through the CMA record, specifically the impugned Award with Reference No. CMA/DSM/TMK/193/2022. At page 1 paragraph 2, the issue raised at CMA was; whether the CMA has jurisdiction to entertain a dispute of Public Servant contrary Section 32A of the Public Services Act [Cap 298 R.E 2019]. However, at revision stage, the Applicant raised four issues as indicated at paragraph 21 of the Applicants' affidavit. It is well established principle that parties are bound by their own pleadings. This principle has been expounded in numerous cases including the case of: *Astepro Investment Co Limited v. Jawinga Company Limited*, Civil Appeal No. 08 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported) citing the case of *James Funge Ngwagilo v. The Attorney General* [2004] TLR 161 it was held that: ...parties are bound by their own pleadings...the function of the pleading is to give notice of the case to a party must therefore, so state his case that his opponent will not be taken by surprise. If is a/so to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the Court will be called upon to adjudicate and determine the matter in dispute. The case of *James Funge Ngwagilo* (supra) draws a demarcation in my mind on what to deal with in this application. For that reason, It is my observation that this Court could have legal task of resolving other issues if the same would have been addressed by the parties at trial CMA. Having the above legal stances, I will turn to address ground No. 2 which seems to be relevant with the issue contested by the parties at the trial CMA. In addressing as to whether the CMA had a mandate to entertain a dispute of Public Servants, the Applicant contended that the interpretation of Section 32 of the Public Services Act(supra) provides that employee under Operation Services will be governed by the Employment and Labour Relations Act For that reason, Mr. Mgombozi was of the view that CMA had jurisdiction over CBA, and it has mandate to determine the matter on merits. Challenging the application, the Respondent maintained that the present application emanated from ruling, whereby the Applicant prayed for extension of

time, but it was dismissed for want of jurisdiction. According to Ms. Happiness, the Applicant has brought new issue as if the application was determined on merit. She further added that; since the issue of jurisdiction was raised, the Mediator was right in addressing it. To support her authority, the Respondent cited the case of Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 Others, Civil Appeal No.8 of 1995. From the above disputed question, the centre of debate between the parties; is whether the Commission had a mandate to entertain a dispute of public servant? Basing on the parties' submissions, I find the relevant question to be answered is; whether Applicant being an employee under category of Operational Service is not subjected to the Public Service Act (supra), as contested by the Applicant. For sake of understanding, this Court finds worth to give the meaning of a Public Servant. Section 3 of the Public Servant Act (supra) provides as quoted hereunder: Public servant for the purpose of this Act means a person holding or acting in a public service office. Also, the phrase public service office is defined under Section 3 of the Public Service Act (supra) as follows: Public service office for the purpose of this Act means: -

- a) A paid public office in the United Republic charged with the formulation of government policy and delivery of public service other than: -
 - i. a parliamentary office; ii. an office of a member of a council, board, panel, committee or other similar body whether or not corporate established by or under any written law; iii. an office the emoluments of which are payable at an hourly rate, daily rate or term contract; iv. an office of a judge or other judicial office;
 - v. an office in the police force or prisons service;
- b) any office declared by or under any other written law to be a public service office. From the above provisions of Section 3 of the Public Service Act (supra), what needs to be addressed is; whether the Applicant falls outside the definition of a Public Servant This shortfall has been addressed by the Court of Appeal in the case of Tanzania Posts Corporation v. Dominic A. Kalangi, Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania at Dar es Salaam (unreported). In this case, the public entity which was involved is the Tanzania Posts Corporation which is established and governed by a specific Law just like the instant corporation. In this case, the Hon. Justices of Appeal had the following to say: In the premises, it can hardly be gainsaid that, having been established by an Act of Parliament and being wholly or substantially owned by the Government, the Tanzania Posts Corporation is a public service institution whose principal duty is among others, to provide the public with a national and international postal and other service. (See Section 8 of the said Act). This is in line with section A. 1 (52) of the Standing Orders for the Public Service, 2009 (GN. No. 493 of 2009) made under Section 35 (5) of the Public Service Act (supra), which provides in part that: For purposes of the Public Service Act - Public Service means the system or organization entrusted with the responsibility of overseeing the provision or directly providing the general public with what they need from their government or any other institution on behalf of the government as permissible by laws and include the service in the civil service; the health service; the executive agencies, the Public institutions service

and the operational service... From the above-quoted provisions together with highlighted portions, is that the employees of the Respondent are public servants. Also, the above quotation has clearly indicated that any public institutions services including the operational services falls within the confines of a public Service. Three facts re undisputed: One, the Respondent is a public servant. Two, the dispute arose after amendment of the Public Service Act (supra) which took place in 2016. Three, CMA Form No.2 shows that there was a delay of 1 year and 4months and the dispute was filed at CMA on 31st May

2022. That's means, the dispute arose after amendment. In such circumstances, I am of the view that the Applicants were subjected by Section 32A o f the Written Laws; Misc. Amendment Act o f 2016 which directs public servant to exhaust internal remedies under the Public Service Act (supra) before resorting to other laws. On that basis, the Applicant's allegation regarding application of Employment and Labour Relations Act (supra) in this matter lacks merits. In premises, I have no hesitation to hold that CMA had no jurisdiction to entertain the matter. Henceforth, this Revision Application No.425 o f2022 is hereby dismissed for lack of merits. Each party to take Judgement pronounced and dated 16th day of August, 2023 in the presence of the Applicants, Michael Mgombozi, Personal Representative for the Applicants and in the absence of the Respondent.

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/eunice-ndesario-urio-v-mamlaka-ya-elimu-na-mafunzo-ya-ufundi-stadi-JurisdictionofCMA-tanzlil-2023--6a3ea52c3b1caa9129825575

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