

TANZANIA / JUDGMENT

florence k kasimila vs st johns university of tanzania 2021 tzhcld 412 9 september 2021

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9 September 2021

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION PAR ES SALAAM CONSOLIDATED
REVISION NO. 442 & 455 OF 2020 BETWEEN FLORENCE K. KASIMILA.....
APPLICANT/RESPONDENT VERSUS ST JOHN'S UNIVERSITY OF TANZANIA..... RESPONDENT/
APPLICANT

JUDGEMENT

S.M. Maqhimbi, J. This is a consolidated decision of revision no. 422 of 2020 & no. 455 of 2020. The present applications emanate from the same decision of the Commission for Mediation and Arbitration ("CMA") award delivered by Hon. Mbena M.S, Arbitrator on 17/05/2019 in Trade Dispute No. CMA/DSM/ILA/554/17/535 ("the Dispute"). Both parties filed their application after being aggrieved by the CMA's award to the extent that will be explained later in this judgment. In this decision Florence K. Kasimila will be referred to as "the employee" and, St. John's University of Tanzania shall be referred to as "the employer". Before the order for consolidation, the employee had filed Revision No. 442 of 2020 while the employer filed Revision No. 455 of 2020. During hearing which was conducted by way of written submissions, Mr. Stanslaus Ishengoma, learned Advocate represented the employee while Mr. Riston Malingumu, learned advocate represented the employer. Having considered the submissions of both parties, I have noted that in his submission in support of the application, Mr. Malingumu raised an issue of irregularity in the CMA's proceedings. Owing to that, I find it only prudent that I first determine the issue before going to the merits of the application. In his submissions, Mr. Malingumu brought to the attention of this court that during proceedings at the CMA, he raised preliminary objections on points of law that were allegedly not determined by the Arbitrator. He identified the raised preliminary as follows:-

- i. That, the CMA had no jurisdiction to entertain this matter for being brought out of time.
- ii. That, the suit has been instituted against the improper party hence incompetent. This necessitated me to go through the CMA proceedings where I found that as rightly pointed out by Mr. Malingumu, the preliminary objections mentioned above were raised but not determined by the Arbitrator. In my view such an omission is a serious procedural

irregularity in the CMA's proceedings. First, as a matter of practice, preliminary objects needs to be determined first before going to the merit of the application. In some circumstances the preliminary objection may be determined jointly with the main application as it was ordered by the previous Arbitrator in this application. Unfortunately the matter was transferred to another Arbitrator he overlooked such order and proceeded with the merit of the application. However, even in cases where the objections and merits of the application are to be determined jointly, the court will still have to determine the objection first before going into the merits of the case. Second and most importantly, the objections raised were going into the roots of jurisdiction of the tribunal to sit and determine the matter in the first place. The employer alleged that the application was time barred, therefore the tribunal was duty bound to see if she had jurisdiction after determining that the matter was filed within time. Short of that, she would not have jurisdiction to determine that matter. There was also an objection about the employer herein being the improper party to be sued. The employer alleged that the dispute was firstly filed by the employee at the CMA on 20/05/2017 against St. 3 John's University of Tanzania - St. Marks Centre SJUT-SMC). When the dispute was referred to arbitration the respondent was St. John's University of Tanzania Chief Mazengo Campus (SJUT-CMC) arguing that there are two different personalities. The CMA was hence duty bound to determine whether they were dealing with the proper party before proceeding with arbitration. Having made those observations, the next question is the remedy available to such a serious omission by the tribunal. It is trite law that I cannot determine the objections that were raised at the trial Court (CMA) which have not first been dealt with by the first instance court. What I am called to do is see whether the findings of the CMA were correct, hence if the objections were raised, I would have had to see whether the determination of those objections; as would have been made at the tribunal; was correct. But in this case, the CMA totally ignored to determine those objections, that denies me jurisdiction to determine those objection as the first instance court. This necessitates me to remit the file back to where the objections were initially raised so that they may be determined. Consequent to the above, the award of the tribunal is hereby set aside. The dispute file is remitted back to the CMA with a directive that 4 the CMA first determine the objections raised to see whether they are clothed with jurisdiction to determine the dispute and whether the employer sued is the proper party to be sued. In case the objections are overruled then the CMA shall proceed to determine the merits or otherwise of the dispute. Dated at Dar-es-salaam this 09th day of September, 2021 AGHIMBI JUDGE 5

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