

TANZANIA / JUDGMENT

karibueli j molla vs tanzania zambia railway authority tazara and another 2023 tzhcld 1208 24 march 2023

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24 March 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM LABOUR DISPUTE
NO. 08 OF 2022 KARIBUELI J. MOLLA COMPLAINANT
VERSUS TANZANIA ZAMBIA RAILWAY AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT

RULING

Date of last Order: 15/03/2023 Date of Ruling: 24/3/2023 B. E. K. Mganga, J

Brief facts of this application are that Karibueli J. Molla, the complainant was an employee of the Tanzania Zambia Railway Authority (TAZARA), the 1st respondent. It is undisputed facts between the parties that, on 1st February 1978, the complainant secured employment from the 1st respondent. It is also undisputed that the complainant continued to work with the 1st respondent up to 31st August 2017 when he retired at the compulsory age of 60 years having worked for 25 years and 8 months. It is alleged by the complainant that upon his retirement, he was not fully paid his retirement benefits by the 1st respondent and that 1st respondent did not submit to the National Social Security Fund and the National Insurance Corporation monthly deductions made from his salaries. On 28th October 2022, complainant filed a statement of complaint complaining that upon his retirement, the 1st respondent wrote a voucher showing that he was entitled to be paid TZS 38,499,164.69 but he was paid TZS 27,111,142/= only, hence he is claiming to be paid TZS 11,388,022.69. The Complainant is also claiming to be paid TZS 5,314,410.64 being monthly pension for 56 months' payable at the rate of TZS 94,900.19 per month. In total the complainant is claiming to be paid a total of TZS 16,702,433.33 from the 1st respondent being terminal benefit and pension. The complainant is praying the court to order the respondents to pay him TZS 16,702,433.33 being his terminal benefits and pension and further order the respondent to pay him TZS 94,900.19 monthly as his monthly pension. On 28th November 2022, respondents filed the response to the statement of complaint. In their response, respondents stated that complainant was paid TZS 27,111,142/= being retirement benefits and that TZS 11,388,022.69 was wrongly included in the voucher because the said amount is payable by the National Social Security Fund and the National Insurance Corporation. Respondents stated further that, they are working on the matter to ensure that complainant can be paid TZS 11,388,022.68 by the National

Social Security Fund and the National Insurance Corporation. Respondents denied the allegations relating to failure to submit monthly deductions made from complainant's salaries to the National Social Security Fund and the National Insurance Corporation. Together with the said response to the statement of complaint, respondents filed the notice of preliminary objection that (i) the Court has no jurisdiction and (ii) the matter is time barred. When the matter was called on for hearing of the aforementioned preliminary objections, Mr. Francis Wisdom, State Attorney appeared and argued the preliminary objections for and on behalf of the respondents while Mr. Godwin Ndonde, the Personal Representative, appeared and argued for and on behalf of the complainant. At the time of arguing the two preliminary objections, Mr. Wisdom, State Attorney dropped the preliminary objection relating to limitation of time and argued the one relating to jurisdiction of the court only. State Attorney submitted that in the statement of complaint, complainant 3 indicated that he was an employee of the Tanzania Zambia Railways (TAZARA), the 1st respondent hence he was a public servant. Learned State Attorney submitted further that, applicant was a Public Servant because TAZARA is a Public Corporation hence her employees are regulated by the Public Service Act. To support his submissions, learned State Attorney cited the case of Benjamin T. Mangula & 20 Others v. Tanzania Zambia Railway Authority & Attorney General, Revision No. 418 of 2022 HC (unreported). He went on that, in terms of Section 32A of the Public Service Act, [Cap. 298, R.E. 2019] applicant was supposed to exhaust remedies available under the said Act prior filing this dispute before the court. Mr. Wisdom submitted further that complainant is claiming to be paid TZS 11,388,022.69 being arrears of his pension after retirement. Learned State Attorney submitted further that, Section 44 of the Social Security Act Cap. 135 as amended by the Written Laws (Miscellaneous Amendments) Act No. 6 of 2019, provides that a dispute between a member and the scheme must be referred to the Division. He went on that, Section 75 of Act No. 6 of 2019 defines Division to mean the Division within the Ministry 4 for the time being responsible for Social Security matters. He therefore prayed that the dispute be struck out since the Court has no jurisdiction. Responding to submissions made on behalf of the respondents, Mr. Ndonde, personal representative of the complainant, submitted that, complainant is praying to be paid TZS 11,388,022.69 being balance relating to deductions made by the 1st respondent from complainant's salary but did not submit the said amount to the National Social Security Fund (NSSF). Responding to the jurisdictional issue raised by the respondents, Mr. Ndonde submitted that, an employee including the complainant, has a right of filing the dispute before this Court without complying with the provisions of Section 32A of the Public Service Act, because the Labour Court has jurisdiction on all labour matters in the country. He added that, at the time of filing this dispute, complainant was no longer employee of the respondent because he retired in 2017 hence, he was no longer a public Servant. He however, conceded that claims by the complainant relate to what happened when he was a Public Servant. He was quick to submit that, the Public Service Act[Cap.298 R.E. 2019] and the Rules made thereon, regulates issues relating to employee facing disciplinary and how those issues should be handled. He argued further that, the dispute at 5 hand does not relate to disciplinary issues. He added that, there is no provision in Cap. 298 R.E. 2019 (supra) providing how to handle matters arising or relating to recovery of benefits of the retired employee. Mr. Ndonde submitted further that, Section 32 of the Public Service Act[Cap. 298 R.E.2019] provides

that an employee in operational service shall continue to be governed by the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. He went on that; Operational Service is defined under Section 3 of Cap. 366 R.E. 2019(supra) to mean a cadre of supporting staff not employed in the Executive or Officer grade. He submitted further that, Complainant was under Operational Service and that he was not covered by the provisions of Section 32A of Cap. 298 R.E. 2019(supra) and concluded that the Court has jurisdiction. Mr. Ndonde submitted further that; it is not true that complainant was supposed to file his claims to the National Social Security Fund(NSSF). He argued in alternative that, even if that is the position of the law, the other appropriate option was for the complainant to file this dispute before this Court as he did. He therefore maintained that the Court has jurisdiction and prayed that the preliminary objection be dismissed. 6 In rejoinder, Mr. Wisdom reiterated his submissions in chief and submitted further that, Section 32A of Cap.298 R.E. 2019 overrides Section 32 of the same Act. He went on that, even an employee in the Operational cadre must exhaust remedies available in the Public Service Act [Cap.298 R.E. 2019]. State Attorney submitted further that, Section 32 of Cap. 298 R.E. 2019(supra) provides that operational service will continue to be governed by Cap. 366 R.E.2019 (supra) and argued in the alternative that, complainant was supposed to file the dispute before the Commission for Mediation and Arbitration(CMA). From submissions of the parties, it is undisputed that the complaint was employed by the 1st respondent. It is also undisputed fact that the complainant retired upon reaching compulsory age of retirement. It is also undisputed that the complainant was paid retirement benefits to the tune of TZS 27,111,142/= and that he was not paid TZS 11,388,022.69 namely the amount that relates to Social Security Contributions. Based on that, applicant has filed a statement of the complaint before this court claiming to be paid the said amount. It is clear from the documents filed by the complainant that he has filed a complaint before this court. I am of that settled mind because, 7 complainant cited the provisions of Rule 6 of the Labour Court Rules, GN. No. 106 of 2007. In fact, Rule 6(1) of GN. No. 106 of 2007 provides that a party initiating referral proceedings to the Court shall file a statement of complaint as prescribed in Form 1. The said Form 1 is titled "STATEMENT OF COMPLAINT". I have read the provisions of Section 94 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] that provides the jurisdiction of the court and find, in my view, that, the matter filed by the complainant does not fall in that jurisdiction. I have formed that opinion because section 94(1)(d) of Cap. 366 R.E. 2019 (supra) provides that the Court has jurisdiction to decide complaints, other than those that are to be decided by the arbitration under the provisions of the Act. Further to that, section 94(1)(e)of Cap. 366 R.E. 2019(supra) provides that the Court has jurisdiction to decide any other dispute reserved for decision by the Labour Court The term "complaint" is defined under section 4 of Cap. 366 R.E. 2019(supra) as hereunder:- "complaint" means any dispute arising from the application, interpretation or implementation of -

- (a) an agreement or contract with an employee;
- (b) a collective agreement; 8
- (c) this Act or any other written law administered by the Minister;

- (d) Part VII of the Merchant Shipping Act” I have examined the statement of complaint filed by the complainant and find that the matter does not fall in the definition of the term complaint quoted hereinabove. I therefore hold that the matter is not a complaint that can fall in the jurisdiction of the court in terms of section 94(1)(d) of Cap. 366 R.E. 2019 (supra). I have surveyed the provisions of Cap. 366 R.E. 2019(supra) to see whether the matter is a dispute reserved for determination by the Labour Court under Cap. 366 R.E. 2019 (supra) and find that it is not. Disputes that are reserved for determination by the court are (i) non-compliance with constitution by a federation or registered organization as provided for under Section 53 of Cap. 366 R.E.2019(supra); (ii) dispute relating to cancellation of registration of a registered organization or federation as provided for under Section 55 of Cap. 366 R.E.2019(supra) ; (iii) an application by the Registrar of organization for dissolution of any organization that contravened the provisions of section 45 of the Act as provided under Section 56 of Cap. 366 R.E.2019(supra); (iv) an appeal by the person aggrieved by the decision of Registrar of organization, as 9 provided under Section 57 of Cap. 366 R.E.2019(supra); (v) a dispute relating to interpretation or application of an order relating to exercise of organizational right as provided under Section 64(5) of Cap. 366 R.E.2019(supra); (vi) a dispute relating to termination of organizational right as provided under Section 65 of Cap. 366 R.E.2019(supra); (vii) a dispute relating to recognition as exclusive bargaining agent of employees as provided under Section 67(6), (7)and(8) of Cap. 366 R.E.2019(supra); (viii) a dispute relating to termination or rescind of recognition agreement where a party to a collective bargain breaches the agreement as provided under Section 69(3) of Cap. 366 R.E.2019(supra); (ix) a dispute concerning collective bargain as provided under Section 74(b) of Cap. 366 R.E.2019(supra); (x) a dispute filed by the employer after the employee has refused to give consent for the employer to deduct salary for matters provided for under subsection (4) of section 83 after end of the strike or lockout as provided under Section 83(6) of Cap. 366 R.E.2019(supra); (xi) application for injunction or compensation when strike or lockout is not in compliance with the law as provided under Section 84(1) of Cap. 366 R.E.2019(supra); (xii) an application for a declaratory order restraining any person from taking part in protest or any conduct relating to protest and a 10 declaratory order relating to proportionality of any proposed action or protest as provided under Section 85(4) and(5) of Cap. 366 R.E.2019(supra); and (xiii) an application for review by any person aggrieved by the grant, amendment or withdrawal of an exemption by the Minister to any employer or class of employer from any employment standards as provided under Section 100(6) of Cap. 366 R.E.2019(supra). It is therefore clear in my mind that, the claim of TZS 11,388,022.69 by the complainant being his entitlement from Social Security, does not fall in the jurisdiction of this court. For the foregoing, I hold that the matter does not fall in the jurisdiction of the Court under the provision of section 94 of cap. 366 R.E. 2019(Supra). It was submitted by counsel for the respondents that the complainant was supposed to file his claims to the Social Security Regulatory Division in terms of Section 44 of the Social Security (Regulatory Division) Act Cap.135 as amended by the Written Laws (Miscellaneous Amendments) Act No. 6 of 2019. On the other hand, it was submitted on behalf of the complainant that even if that is the position of the law, this court still have jurisdiction over the matter. 11 I have read the

provisions of section 44(3) Cap. 135 (supra) and I entirely agree with submissions made on behalf of the respondents that the complainant was supposed to file his complaint to the Division. Section 44(3) and (4) of Cap. 135 as amended by the Written Laws (miscellaneous Amendments) (No. 6) Act, 2019 and find that it provides as follows:- “44(3) subject to subsection(1), a dispute between a member or beneficiary and a scheme, a scheme and a scheme, or a member and a manager shall be referred to the Division.

- (4) Every scheme shall establish and internal mechanism for handling members complaints before they are referred to the Division for review.” The word “Division” is defined under section 3 of the Act to mean the Division responsible for Social Security within the Ministry for the time being responsible for social security matters. From the foregoing, since the complaint is claiming to be paid balance of his entitlements as pension relating to the amount that was deducted from his salary as contribution to the Social Security Fund and the National Insurance Corporation, his claims fall in the jurisdiction of the Division as quoted hereinabove and not before this court. It is my view that submissions on behalf of the complainant that even if the law provides that the jurisdiction is vested to another authority the court still have 12 jurisdiction cannot be accepted. I am of that view because jurisdiction is a creature of a statute. Once a statute gives jurisdiction to a certain organ, that jurisdiction cannot be taken away by the judiciary or any authority by implication. In fact, the Court of Appeal has reminded us several times on that aspect. See. Frank Lucas Ntende vs Republic (Criminal Appeal 266 of 2019) [2022] TZCA 626, Muzzammil Mussa Kalokola vs The Minister of Justice & Constitutional Affairs & Another (Civil Application 256 of 2019) [2021] TZCA 656, Jacqueline Ntuyabaliwe Mengi vs Abdiel Reginald Mengi & Others (Civil Application 332 of 2021) [2021] TZCA 583, Bryson Bwire Mbonde vs Tanzania Revenue Authority (Civil Appeal 88 of 2018) [2021] TZCA 280 and R.S.A. Limited vs Hanspaul Automechs Limited & Another (Civil Appeal 179 of 2016)
- [2021] TZCA 96 to mention but a few. Therefore, since the law provides that the matter should be referred to the Division, then, in no way, this court can cloth itself with that jurisdiction. On the other limb of the preliminary objection, it was argued on behalf of the respondent that the court has no jurisdiction because complainant has not exhausted remedies available under the Public Service Act [Cap. 298 R.E. 2019]. It was argued on behalf of the complainant that 13 the provisions of that Cap. 298 R.E. 2019 (supra) cannot apply in the circumstances of this matter because applicant has retired and there were no disciplinary proceedings against him for the provisions of Cap. 298 R.E. 2019 to apply. It was argued further on behalf of the complainant that the Complainant was working in the operational cadre hence not covered by the provision of section 32A of Cap. 298 R.E. 2019 (supra). It was by the Court of Appeal in the case of Tanzania Posts Corporations vs Dominc A. Kalangi (Civil Appeal 12 of 2022) [2022] TZCA 154 that both this court and the Commission for Mediation and Arbitration (CMA) have no jurisdiction over the matter involving a public servant prior for the said public servant to exhaust remedies available under the

Public Service Act. That is the position of the law as it stands. But, in the application at hand, the complainant was no longer a public servant because he retired on 31 st August 2017 though his claims emanate from his employment as a public servant. It my view that the argument that complainant was working in the operational cadre hence not covered by the provision of section 32A of Cap. 298 R.E. 2019(supra) is a matter to be decided by hearing evidence of the parties. In short, at this moment, there is no evidence that thus court can used to conclude that the complainant was working in the 14 operational cadre. That being the case, I will not decide the preliminary objection based on whether the complainant was a public servant or not. I will not also consider submissions and rejoinder thereto by counsel for the respondents. That notwithstanding, it suffices to comment that submissions by counsel for the respondents that section 32A of Cap. 298 R.E. 2019 (supra) overrides the provisions of section 32 of the same Act is not correct. I should also point that it is indicated in section 32 “[to be amended]” but it has not been amended from 2019 when the Act was revised. It is my view, that necessary steps should be taken by responsible authority because it is not healthy that provision to remain as it is. As pointed hereinabove, I will not venture on arguments of the parties in relation to the provisions of the Public Service Act[Cap. 298 R.E. 2019] because what I have discussed herein above have disposed the matter. Discussions relating to the two provisions of Cap. 298 R.E. 2019(supra) and their application in relation to a retired employee will be made in the opportune time. Counsel for the respondents prayed that upon sustaining the preliminary objection, the court should strike out the complaint. With due respect, once the court finds that it has no jurisdiction, the remedy 15 available is to dismiss the matter and not to strike it out. Normally, the matter is struck out if the court has jurisdiction but after finding that the matter is incompetent. The matter that has been struck out for being incompetent can be properly refiled thereafter before the same court. Once the court has no jurisdiction, the matter cannot be refiled. Therefore, the proper remedy in the matter at hand, is to dismiss it because the complainant has no room to refile it before the court. That said and done, I hereby dismiss this application for want of jurisdiction. Dated at Dar es Salaam on this 24th March 2023. B. E. K. Mganga JUDGE Ruling delivered on this 24th March 2023 in chambers in the presence of Karibueli J. Molla, the Complainant and Francis Wisdom, State Attorney for the Respondents. B. E. K. Mganga JUDGE 16

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Prepared on 14 October 2026 · Esheria