

TANZANIA / JUDGMENT

MISC NO 30794 OF 2024 PETER DAVIS MKONGWA VRS SERENGETI BREWERIES LIMITED 0001

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR-ES-SALAAM MISC. LABOUR APPLICATION NO. 30794 OF 2024 CASE REFERENCE NO. 202412051000030794 PETER DAVID MKONGWA..... APPLICANT
VERSUS SERENGETI BREWERIES LIMITED..... RESPONDENT

RULING

Date of last Order: 13/ 02/2025 Date of Ruling: 21/ 02/2025 MLYAMBINA, J. The intriguing issue in this ruling, as suo /770ft/raised by the Court, by way of preliminary objection is; whether the High Court Labour Division is vested with original jurisdiction to grant interim injunction. Briefly, under certificate of urgency, the Applicant is seeking, among other orders that, this Court be pleased issue an interim injunction order against the Respondent from ceasing the Applicant's employment contract until final determination of Labour Dispute No. CMA/DSM/TMK/220/2024/104/2024 that is pending before the Commission for Mediation and Arbitration (herein CMA). The application was brought under the provisions of Rule 24(1),(2)(a),(b),(c),(d),(e) and (f), 24(3)(a),(b),(c) and (d), 24(9), 24(1)fa, 55(1) and(2) o f the Labour Court Rules, GN. No. 106 o f2007, Section 68(e) and 95, Order XXXVI Rule 6(1)(a) and (b), Order XXXVI Rule 6(2) and (J), Order XXXVII Rule(1)(b) and Order XXXVII Rule (2)(1) o f Civil Procedure Code[Cap. 33 R.E 2019]and Section 94 (f) (ii) o fthe Employmentand Labour Relations Act[Cap. 396 Revised Edition 2019][herein ELRA]. Prior ruling, the Court raised suom otua legal objection on its jurisdiction. Before considering the parties submissions, I find no dispute that injunction is judicial process whereby a party is required to do, or to refrain from doing any particular act. It is a remedy in the form of order of the court to a particular person that either prohibits him from doing or continuing to do a particular act (prohibitory injunction) or orders him to carry out a certain act (mandatory injunction). The primary purpose of granting interim relief is maintain status quo at the time of institution of the proceedings and prevent any change in it until the final determination of the matter. I also do agree that this Court determined on merits the extent and applicability of the injunction in the case of Rashid Mwale v. Kentan Logistics Limited, Miscellaneous Application No. 10622 of 2024 (<https://tanzlii.org/1>). However, upon going through

various authorities, I find there is still a dire need to address the issue as to; whether this Court is vested with jurisdiction to grant injunction. Indeed, there is no dispute that it is a trite law that in order for injunction to issue three conditions or principles of which the Court granting injunction must be satisfied and such conditions or principles are used as a yard stick guiding the Courts in our jurisdiction to issue injunction. These conditions were laid down in the most celebrated and daily cited case of *Atilio v. Mbowe* (1969) HCD 284 in which it was held: It is generally agreed that here are three conditions which must be satisfied before such an injunction can be issued:

- (i) there must be serious question to be tried on the facts alleged and a probability that the Plaintiff will be entitled to the reliefs prayed; (ii) the Court's interference is necessary to protect the Plaintiff from the kind of injury which may be irreparable before his legal right is established; (iii) that on the balance of convenience there will be greater hardship and mischief suffered by the Plaintiff from withholding injunction than will be suffered by the Defendant from the granting of it. It is also a general principle of law that it is the discretion of the Court to issue injunctive order. But the discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrary. See *T.A Kaare v. General Manager Mara Cooperative Union* (1984) Ltd, TLR 17 as well as the case of *Lu heng and 2 Others v. Mukhangu Noah Maina*, Misc. Civil Application No. 65 of 2022, High Court of Tanzania at Dar es Salaam (Reported on Tanzlii) cited with approval in the case of *Charles D. Msumari & 83 Others v. The Director of Tanzania Harbours Authority*, HC-Civil Appeal No. 18 of 1997 (unreported) where at page 8 the Court had the following to say: Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same. They have to show they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired. When probed by the Court on whether the Labour Court is vested with jurisdiction to grant interim injunction, Counsel Edward Michael Ngatunga for the Applicant was of submission that Section 94 (ii) (f) of the ELRA (supra) is among the provisions upon which this Court has been moved to grant the application. In that section, this Court is mandated to give interim injunction. Also, Counsel Edward Ngatunga was of the submission that in the case of *Rashid Mwale* (supra), this Court granted injunction pending determination of the matter before the CMA. He was therefore of the position that this Court has jurisdiction to grant injunction. Not only that, the High Court by virtue of its inherent power, it is mandated to give such order if there is no direct specific rule that prescribe what will be done in case there is a pending matter before the CMA, at the same time, the employer intends to render the application before the CMA

nugatory. In those circumstances, it was the humble submission of Counsel Ngatunga that this Court has jurisdiction to grant interim injunction so that the CMA can determine the dispute before it without being interfered by the action of the employer. Thus, there is no specific rule which gives mandate to the CMA to give interim injunction on the matter before it. In response, Counsel Elizabeth Mlemeta was of submission that under Section 94 (1) (f) (ii) (supra) the Court is vested with jurisdiction to grant injunction. The act of the Applicant filing the matter before CMA means that even the interim injunction is supposed to be granted by the CMA. Counsel Mlemeta was of further view that Section 38 (3) of ELRA (supra), bars retrenchment to take place while there is a matter before the CMA. That means, the matter is premature now. The High Court will have jurisdiction upon the application been referred to it for Revision under Section 91 (2) of ELRA (supra). In that regard, Counsel Mlemeta maintained that the matter is misconceived before this Court. As raised, the Court lacks jurisdiction to grant the Sought interim injunction. In rejoinder, Counsel Edward Ngatunga submitted that under paragraph 26 of the Applicant's affidavit, the Applicant narrated that while the matter is pending before CMA, the Respondent's Human Resource Director told him that they will continue with the process of retrenchment regardless there is a pending dispute before CMA. So, this action of the Respondent triggered the Applicant to file this application because under CMA rules there is no provision which guides the CMA in case the employer continues with the retrenchment process while the case is pending before CMA. According to Counsel Ngatunga, the gist of filing this application is due to the reason that the Respondent did not stop the retrenchment process started on 30th December, 2024. The Applicant had no other option than filing this application. Counsel Ngatunga was therefore of opinion that the application was filed to the competent Court. I have critically considered the rival arguments of the parties together with the entire records, in order to determine the issue; whether this Court has jurisdiction to grant interim injunction orders pending determination of the referral before the CMA. The records are loud that the Applicant is praying to issue an interim injunction order restraining the Respondent from retrenching him from his employment. The Respondent is of the firm view that this Court has no jurisdiction to grant the orders sought. On his part, the Applicant though Counsel Edward Ngatunga maintains that this Court has jurisdiction to grant the orders sought. The Court's power to grant the orders sought is vested under Section 94 (1) (f) (ii) of the ELRA (supra). The circumstances under which the order may be granted are not provided in the labour laws. Thus, this Court by virtue of Rule 55(1) of GN. No. 106 of 2007 must resort to other laws. Thus, the conditions are provided under Section 68 (c) and Order XXXVII of the Civil Procedure Code (supra). Further to that, the principles upon which the order sought may be granted were set in the landmark decision of *Attilio v. Mbowe*

(1969) HCD 284 where the following three conditions were established:

1. That, there is a serious question to be tried and the Plaintiff is likely to succeed;
2. That, the Court's interference is necessary from the irreparable loss;

3. That, on balance of convenience there will be greater hardship on the part of the Plaintiff if injunction is not issued. The case of *Ramla Aziz Msuya v. Equity Bank (Tanzania) Limited & 2 Others*, Misc. Land Application No. 20 of 2021, High Court of Tanzania, Dar es Salaam District Registry, made elaboration in respect with the above conditions, of which I entirely subscribe to it. As regards to the first ground, it was stated as follows: For condition one (prima facie case and probability of success), there is no need for wasting time. The law is settled that the test here is for the Applicant to disclose the facts in the Plaintiff, and the supporting affidavit and trying as much as it can to solicit the Court that the same raised a serious question to be determined by the Court and on the face of it, and also facts which disclosed that there is a likelihood for the Plaintiff to succeed. This is an important question which has to be determined by the Court. In the case at hand, there is no doubt that in the supporting affidavit of the application, the Applicant pleaded facts to pursue the Court to grant the application. But there is no dispute between the parties, the main complaint is before the CMA. Therefore, this Court is not in the position to critically assess if the order will be granted or not because it is within the mandate of the CMA. This Court will have a room to interfere with the decision of the CMA by way of revision. This is the law's position under Section 38(2) & (3) of the ELRA (supra) which provides as follows:
- (2) Where in the consultations held in terms of sub-section
- (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.
- (3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the Award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment. As regards to the second condition, it is my view that, in employment matters the Court has to weigh the interest of both parties i.e employer and employee. The supply and demand of both parties are at stake. It is my further view that, if the employee is found to have been unfairly retrenched, he/she will have a remedy in terms of Section 40 of the ELRA (supra). To the contrary, if the employer suffers any loss arising in the circumstance of this case, there is no any remedy awardable to him. In consideration of such aspect, Section 38 (3) of the ELRA (supra), allows the employer to proceed with the retrenchment exercise when mediation fails, and the employee is dissatisfied with the arbitral Award. In the case at hand, since there is no order of stay of proceedings before the CMA, it is obvious that the matter is pending with arbitration proceeding. Thus, if the order sought will be granted, the Court will definitely interfere in one way or another the decision intended to be made by the CMA. On the basis of the above arguments, I join hands with Counsel Elizabeth Mlemeta that this Court has no jurisdiction to grant this application. It is my further observation that, the CMA must conduct labour cases, particularly cases of this nature which involves retrenchment exercise expeditiously in order to safeguard the interest of both parties. The arbitration proceedings must be finalized within a reasonable time so that the orders sought

therein will have a meaning for achieving broader economic goals that is earmarked in the 2050 Tanzania Development Goals Vision. The CMA's power to order injunctive order was at large discussed in the case of Justice Masengo and Others Revision Application No. 338 of 2022 High Court Labour Division at Dar es Salaam. The Court stated as follows: As rightly submitted by Mr. Rweikiza, there is no clear provision which empowers the CMA to grant injunctive order or to make a declaratory order in respect of any provision of the Act as it is specifically conferred to the Labour Court under Section 94(l)(f)(j)(ii) of the ELRA. Now the Court is posed with a question as to; whether the CMA is empowered to determine applications for breach of contract but they cannot make any orders therein to declare or stop such breach or any other order incidental thereto. It is my further view that though the Court is vested with inherent jurisdiction to issue injunction orders, to bar the CMA to make declaratory or injunctive orders in respect of breach of contract would defeat the purpose of empowering them to hear applications for breach of contract. The remedies for breach of contract are not specifically provided in the labour laws. Even in breach of contract, in case of a terminated contract, it is the Award of the remaining salaries of the period of the contract which have been adopted through case laws. Taking the above approach, even the orders in question, in my view, are within the powers of the CMA, so long as CMA have jurisdiction to determine disputes on breach of contract. In doing so, it will enhance the purpose of enacting labour laws and ensure disputes are handled at the earliest stage of institution and not in a prolonged litigation. That is what can be termed judicial economy. Filing an application for interim injunction before the CMA will avoid multiplication of cases for a quicker labour dispute resolution and expedited labour relief. Also, in this case, since the main complaint is before the CMA, the application to stop the employer to proceed with retrenchment exercise pending determination of the matter is also within the mandate of the CMA before the Arbitrator who have comprehensive understanding of the matter, it is also for the sake of consistence and efficiency. Moreover, as reasoned before section 38(3) of ELRA (supra), bars an employer from retrenching an employee when the dispute has been referred for arbitration, until the award is issued. Therefore, even if it is true that while the matter is pending before CMA, the Respondent's Human Resource Director told him that they will continue with the process of retrenchment, the Applicant still can seek for interim injunction before the CMA. Moreover, though there is no provision which guides the CMA in case the employer continues with the retrenchment process while the case is pending before CMA, there is case law guiding the same including the case of Justice Masengo (supra). In the result, I sustain the objection raised by the Court and declare that this Court has no jurisdiction to entertain this application. Henceforth, the application is hereby dismissed. It is so ordered. Y JUDGE 21/02/2025 Ruling delivered virtually and dated 21st February, 2025 at 3:00pm in the presence of Counsel Edward Michael Ngatunga for the Applicant and Elizabeth John Mlemeta for the Respondent. Right of Appeal explained.

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