

TANZANIA / JUDGMENT

robenson munene gakono vs african plantation kilimanjaro ltd 2023 tzhc 17995 15 june 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT MOSHI
LABOUR REVISION NO. 14 OF 2022 (Arising from Labour Dispute No. CMA/KLM/MOS/
ARB/57/2021) ROBENSON MUNENE GAKONO APPLICANT VERSUS AFRICAN
PLANTATION KILIMANJARO LTD RESPONDENT

JUDGMENT

15/05/2023 & 15/06/2023 SIMFUKWE, J Robenson Munene Gakono hereinafter referred to as the applicant filed this application after being aggrieved with the Award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/KLM/ MOS/ARB/57/2021 of Moshi dated 13th May, 2021. The application was brought under sections 91 (1)(a), 91 (2)(a)(b) (c) and 94(1)(b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA); read together with Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), (3)(a)(b)(c) and (d) and Rule 28 (1)(a)(c)(d) and (e) of the Labour Court 1 Rules, GN No. 106 of 2007. The application was supported by an affidavit sworn by the applicant, which was contested by the counter affidavit sworn by Cleopatra Mambo, Principal Officer of the respondent. The Applicant prayed for the following orders:

1. That, this Honourable Court be pleased to call for the entire records, inspect and examine the record of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in the Labour Dispute Number CMA/KLM/MOS/ARB/57/2021 and revise the findings and an award delivered by Honourable Arbitrator M. Batenga on 13th May, 2021, for being improperly procured, illegal, irrational, irregular, tainted with erroneous (sic) and acted beyond jurisdiction.
2. That, this Honourable Court be pleased to quash the said Award and make any other relevant and appropriate order(s) in the circumstances of this application, as this Honourable Court shall deem fit and just to grant in the interest of justice.

3. That, this Honourable Court be pleased to order the payment of the remained (sic) nine months of the employment contract to the Applicant, as well as payment of repatriation cost and subsistence allowance to the Applicant.
4. Costs of the Application be provided for. 2 The factual background of the dispute is to the effect that the applicant was employed by the respondent for a fixed term contract of two years as a Processing and Quality Assurance Manager from 1st January 2020 to 30th January 2022. However, his employment contract was terminated due to the reason of non-renewal of his work permit as the applicant was a foreigner. On 9/8/2021 the applicant approached the CMA claiming for payment of salaries of the remaining period of employment, repatriation costs and subsistence allowance. After considering evidence of both parties, the Commission for Mediation and Arbitration dismissed the claim in favour of the respondent herein for the reason that the employment contract between the applicant and the respondent was void and unenforceable. Thus, he did not deserve to be paid salaries of the remaining period of contract. Also, the CMA found that since the applicant was terminated at the place where he was recruited, he was not entitled to repatriation costs. The applicant was aggrieved, he preferred this application under 9 grounds which he adopted only two grounds during his submission as it will be seen later. The application was argued by way of written submissions. Both parties complied to the schedule of which I am very grateful. Mr. Tumaini Materu, learned counsel argued the application for the applicant, while Mr. Charles Mwanganyi, learned counsel opposed the application for the respondent. Mr. Materu started his submission by narrating the background of the dispute of which I find no need to reproduce as it has already been covered herein above. On the outset, the learned counsel adopted the contents of the affidavit deposed by the applicant 3 together with all the annexures annexed to the said affidavit to form part of this written submission. Thereafter, he opted to submit on the following grounds; On the first ground of revision which is found under paragraph 30(ix) of the Applicant's affidavit, the learned counsel challenged the award on the reason that the same was irrational, illegal, improperly procured and tainted with errors. The learned advocate explained that the award was illegal because the Arbitrator determined the labour dispute on merit and dismissed the applicant's claim while it had no jurisdiction to adjudicate the matter which do not fall under labour dispute. He stated further that the last employment contract entered between the respondent and the applicant on 20th December 2019 and started to operate on 1st February 2020 to 30th January 2022, became void at the time when the applicant's work permits expired. Mr. Materu admitted that the applicant had no valid work permit during the termination of his employment contract. Thus, the employment contract entered between the applicant and the respondent became illegal after expiration of the work permit. That, under section 26(1) of the National Employment and Promotion of Services Act, Cap 243, R.E. 2002, as well as section 9(1)(a) of the Non-Citizens (Employment Regulations) Act, 2015 and Regulation 3(1) of the Non-Citizens (Employment Regulation) Regulations, 2016, the law does not allow any foreigner from engaging in any paid work within Tanzania without work permit. Mr. Materu was of the opinion that absence of work permit implies that there was no lawful/valid employment

contract between the applicant and the respondent. That, there 4 was no employment relationship within the ambit of section 14(1)(a) and (b) (i), (ii) and (iii) of the Labour Institutions Act, 2004, Cap 300 R.E 2019. Thus, the CMA had no jurisdiction to entertain the said dispute on merit. He insisted that the Arbitrator erred by determining the dispute on merit and dismiss the applicant's claim as he ought to strike out the said labour dispute in order to give an opportunity to the applicant to file a fresh claim of unfair labour practice which the CMA has powers to entertain. The learned counsel referred the court to the case of Edith Nababi Vs. Kemebos English Medium Boarding Primary School, Labour Revision No. 10 of 2021 (Unreported) where this Court at page 8 held that: "Among the documents which are needed in the application according to section 10 (2) (b) of Non-Citizen (Employment Regulation) Act and the Second schedule thereto is employment contract of the respective employee. This means that the employment contract of non-citizen employee is voidable upon obtaining work permit. Since the work permit was never obtained it means the respective employment contract was not valid. The employment relationship was illegal. The CMA after finding out that the applicant, who is non-citizen, was working without working permit, it was supposed to end there and hold that it has no jurisdiction to determine the matter since there was no valid employment contract." 5 The learned counsel continued to opine that the act of the Arbitrator to entertain the matter on merit barred the Applicant from filing a fresh and competent labour dispute, thus, unfair labour practice and tort. He submitted further that since there was an avenue to file a fresh competent labour dispute, the proper remedy was to strike out the said applicant's claim. Reference was also made to the case of Serengeti Breweries Limited Vs. Hector Sequeiraa, Revision No. 287 of 2015 at page 5 of 7 (Unreported) which decided that the rights under employment agreement can be enforced regardless of the invalidity of work permit through the claim of unfair labour practice. It was stated that the position has never been extinguished by the Court of Appeal, because the Ruling in the case of Serengeti Breweries Limited vs. Hector Sequeiraa, Civil Application Number 373/18/2018, Court of Appeal of Tanzania (Unreported) was based in application for extension of time. Mr. Materu prayed this court to find that the CMA had no jurisdiction to determine the matter on merit and thereby quash and set aside an award of the CMA for want of jurisdiction. Under the second ground of revision which is found under paragraph 30(iv) of the applicant's Affidavit; it was argued that the Arbitrator erred in law in holding and finding that the applicant was recruited in Tanzania thus not entitled to repatriation costs and payment of subsistence allowance. Expounding this ground, the learned counsel submitted that the applicant herein is a citizen of Kenya and was employed in Tanzania 6 by the respondent in the year 2016 after obtaining the work permit. That, at the time of recruitment, the applicant was not a resident of Tanzania. He explained further that, before he entered into the contract, the applicant was living in Kenya and he made an application for the post while in Kenya. That, the applicant was still in Kenya during the negotiation on the terms of employment contract. Mr. Materu was of the view that the applicant is entitled to payment of repatriation costs and subsistence allowance. In his conclusion, Mr. Materu implored this Court to agree with the applicant and allow his application by quashing an award and the proceedings of the labour dispute filed before the

CMA. In reply Mr. Mwanganyi the learned counsel for the respondent, on the outset adopted the counter affidavit and its annexures to form part of his submission. The learned counsel noted that any foreigner who has been employed in Tanzania shall be granted a maximum of five years' work permit and after expiry, the Minister will no longer issue another five years' work permit except when he is pleased and upon meeting the required exceptions. That, the present applicant during his time of contract, the respondent managed to apply for work permit which was granted for one year only to make a total of five years required by the law. Thus, from 11th March 2021 the applicant had no effective work permit therefore, it was difficult for him to continue working with the respondent. Mr. Mwanganyi continued to elaborate that, it was agreed that after expiry of 30 days of grace period and if the exemption was not ready, the applicant should have gone back home until when notified on the permit issue but the permit was not granted. That, after the efforts for application for the permit had proved futile, from April 2021 to early July 2021 the applicant had nothing to do with the respondent. Thus, the option reached was for the respondent to end the contract with the applicant on the reason and circumstances of frustration of Contract. That, on 30th day of April, 2021 the respondent wrote a letter to the Applicant informing him the non renewal of working permit and end of contract due to the reason of frustration of contract. The respondent followed the agreed procedures for termination of employment as agreed in the employment contract and successfully paid the applicant the statutory rights accordingly. However, the applicant filed the dispute before the CMA which was dismissed hence, this appeal. Mr. Mwanganyi rebutted the first ground of revision. He explained that the impugned award was rational, legal, properly procured, well-reasoned, with no errors on it. Responding to the allegation that the CMA had no jurisdiction to adjudicate the matter; Mr. Mwanganyi submitted that the applicant's working permit expired before the remaining period of contract hence the contract became void at the time when the applicant's working permit expired. The learned counsel stated that Mr. Materu conceded that absence of working permit implies that there was no lawful/valid employment contract. He went further by contending that the CMA had no jurisdiction to determine the said dispute. He faulted the applicant for instituting the Labour Dispute and subsequently aver that the CMA had no jurisdiction. Nevertheless, Mr. Mwanganyi stated that the issue of jurisdiction was not even deponed in the Applicant's affidavit in support of the application. That, it was a mere statement from the bar. 8 The learned counsel referred this court to the holding of the Arbitrator at page 12 where he stated that: "Since the Contract of employment between the complainant and the Respondent was void and unenforceable, the Commission finds that there was no breach and the claim of compensation for the remaining period of contract is unjustified... For the grounds discussed above the Commission finds this complaint without merit." Mr. Mwanganyi supported the above findings of the Hon. Arbitrator as the same was correct, rational and reasoned. He distinguished the case of Edith Nababi vs Kemebos English Medium Boarding Primary School (supra) to the facts of this case by arguing that in this case the Arbitrator was determining the issue whether there was a breach of contract, for which he found that since it was contingent contract which is unenforceable under the law, the claim had no merits and unjustified. That, she did not in

any way hold that the Applicant was working without permits or not as argued rather, she was discussing the claim of the Applicant that his contract was breached. Whereas, he found that the contract was void ab initio for it being contingent. Responding to the argument that the Arbitrator should have not determined the application on merit and dismiss the claim of compensation on the reason that the contract was contingent; the learned counsel referred to the holding of the Commission and stated that if the Arbitrator could proceed to determine the merits of the dispute he could have discussed on the procedures for breach, (sic) what reliefs are the parties entitled; but 9 after he had found that the contract was contingent, the Arbitrator proceeded to dismiss the claim. He observed that, the findings were proper and rational. That, if the Applicant feels that his claim based on unfair labour practice, he could have instituted such claim subject to limitation for it being different cause of action. He insisted that the CMA dealt with what was stipulated in the CMA Form No. 1 which is breach of contract. Mr. Mwanganyi went on to submit that section 14(1) of the Employment and Labour Relations Act, categorically provides the functions of the Commission. That, in order to determine whether there was breach of contract one should first determine whether there was a valid contract, which was within the jurisdiction of the Commission. Reference was made to the case of Victor Emmanuel Shubin vs. Ernest & Young, Labour Revision No. 406 of 2020 HCT DSM, in which the court at page 16 of the typed judgment determined the dispute on whether there was breach of contract on the reason of expired working permit. It was emphasized that the Arbitrator was within her jurisdiction to hold that the contract was contingent and consequently dismissed the claim. On the issue of repatriation costs, Mr. Mwanganyi submitted that if his fellow counsel feels that the CMA had no jurisdiction to hold that the contract was contingent, he should have not even submitted in this ground. Nevertheless, from the evidence adduced before the Commission, clause 4.0 of Exhibit R-1 the Complainant was recruited in Moshi. Hence, the Hon. Arbitrator was correct to find that the applicant was not entitled to repatriation costs and subsistence allowance. That, repatriation costs are paid from where you were recruited and not place of domicile as wrongly submitted by the learned counsel for the applicant. He cemented his argument with section 43(1) (c) of the Employment and 10 Labour relations Act. It was further stated that according to the provision of section 43(3) of ELRA the word "recruit" means the solicitation of any employee for employment by the employer or the employer's agent. It was insisted that from clause 4 of the employment contract, the applicant does not fall within the ambit of repatriation and subsistence allowance. Mr. Mwanganyi cited the case of Attorney General and 2 others V Eligi Edward Massawe and 104 others; CAT, Civil Appeal No. 86 of 2002 which held that: "The employee whose employment has been terminated have to mitigate the loss by proceeding home and claim what they incurred above what has been paid as terminal benefit." The respondent's counsel urged the court to dismiss this application for it being devoid of merits. From the above submissions, affidavit in support of the application, counter affidavit and evidence on CMA record, I am of considered view that issues for determination are:

1. Whether the CMA award was illegal for lack of jurisdiction?

2. To what reliefs are the parties entitled to? The learned counsel for the applicant raised almost nine grounds of revision. However, he opted to submit only on two grounds of revision which covers the above raised issues. On the first issue of jurisdiction; it is a trite law that jurisdiction is fundamental and can be raised at any stage even on appeal. That being the case, I am of considered opinion that Mr. Mwanganyi misdirected himself by stating that the issue of jurisdiction was never deponed and that it cannot be discussed as it is a mere statement from the bar. Be as it may, the applicant's counsel made it clear that the CMA award was illegal on the reason that the Arbitrator had no jurisdiction to dismiss the application after finding that the employment contract was void. Having made clear the contested issue, I now turn to the issue of jurisdiction itself. On the first ground of revision, Mr. Materu submitted that the award of the CMA was illegal because the Arbitrator determined the labour dispute on merit and continued to dismiss it while it had no jurisdiction. He said that the last employment contract became void at the time when the applicant's work permits expired. Thus, there was no employment pursuant to section 14(1) (a) of the Labour Institutions Act. It was the opinion of Mr. Materu that the remedy was for the CMA to strike out the dispute in order to give opportunity to the applicant to file a fresh claim of unfair labour practice. He supported his argument with the case of Serengeti Breweries (supra). On his part, Mr. Mwanganyi strongly disputed the above argument. He averred that the functions of the CMA are provided for under section 14(1) of the Labour Institutions Act. The learned counsel submitted that since the applicant is the one who instituted the Labour dispute before the CMA, he cannot say that the CMA had no jurisdiction. He was of the view that in determining whether there was breach of contract, the CMA must first determine whether the contract was valid or not. He suggested that if the applicant's claim was on unfair labour practice, he should have filed such claim before the CMA. 12 As rightly submitted by Mr. Mwanganyi for the respondent, the jurisdiction of the CMA is provided for under section 14(1) (a)(b)(ii) of Labour Institutions Act. For ease reference the provisions reads: 14.-(1) The functions of the Commission shall be to-
- (a) mediate any dispute referred to it in terms of any labour law;
 - (b) determine any dispute referred to it by arbitration if-
 - (i) a labour law requires the dispute to be determined by arbitration; (ii) the parties to the dispute agree to it being determined by arbitration; In compliance to the above provision, the applicant herein instituted the labour dispute and according to CMA F1 he complained that his employer breached the employment contract without following the procedure. He claimed for compensation of the remaining contractual period, repatriation costs and subsistence allowance. The CMA in resolving the issue as to whether there was a breach of employment contract by the respondent, decided that the contract of employment between the parties was void and unenforceable because the applicant's work permit expired before the end of contract. Thus, it found that there was no breach of contract and the claim of compensation for the remaining period of employment contract was unjustified. 13 According to what the applicant presented before the CMA and what the Arbitrator decided

at the end vis a vis the available evidence on the record, I am of considered opinion that the allegation that the CMA had no jurisdiction is misplaced. First, the CMA decided on what was tabled before it by the applicant which was claim of breach of contract; Second, it is not disputed and the learned counsel for the Applicant conceded that the last employment contract became void at the time when the applicant's work permits expired. Thus, the Arbitrator's option of dismissing the claim of breach of contract was justifiable as there was no contract at all. Third, in order to determine on whether there was breach of contract or not, it was necessary for the Arbitrator to first determine the issue as to whether the contract was valid. Lastly, since it is the applicant who instituted the dispute of breach of contract before the CMA, it is awkward to see that he is blaming the CMA for determining the issue which it had no jurisdiction. The applicant had an option to file the alleged claim of unfair Labour Practice in lieu of breach of contract. Basing on what has been discussed above, I don't hesitate to conclude that Mr. Materu's argument that the CMA had no jurisdiction has no legs to stand. Turning to the next and last ground of revision in respect of claims of repatriation costs and subsistence allowance; this ground will answer the second issue raised above. Mr. Materu suggested that the applicant was the citizen of Kenya and he was living in Kenya at the time of recruitment. Thus, he deserved to be paid repatriation costs. 14 This argument was strongly disputed by Mr. Mwanganyi who asserted that according to Exhibit R1 the applicant was recruited at Moshi. While discussing the issue of repatriation costs, the CMA found that the complainant was recruited in Moshi. Thus, he is not entitled to repatriation costs. Repatriation costs are provided for under section 43(1)(a) of the ELRA which provides that: "43. -(1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either:

- (a) transport the employee and his personal effects to the place of recruitment." In this case, Clause 4.0 of the employment contract, reads that: "Your place of recruitment is at Moshi, Tanzania." From the above clause, as rightly submitted by the Hon. Arbitrator, the applicant's place of recruitment is Moshi and, in that regard, he does not deserve repatriation costs in line of section 43(1)(a) of the Employment and Labour Relations Act. During cross examination at page 16, of the proceedings of the CMA, the applicant admitted that he was recruited at Moshi. 15 That said and done, I am convinced with the findings of the CMA. Consequently, I hereby dismiss this application and uphold the CMA award. Since this is a labour dispute, no order as to costs. It is so ordered. Dated and delivered at Moshi this 15th day of June, 2023. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE
15/06/2023 16 17

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