

TANZANIA / JUDGMENT

suleiman m komba vs chama cha walimu tanzaniacwt 2022 tzhcld 979 3 october 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 118 OF 2022 (Arising from decision issued on 10th June 2021 by Regional
Tribunal of CWT at Dar es Salaam) SULEIMAN M. KO
MBAAPPLICANT VERSUS CHAMA CHA WALIMU
TANZANIA(CWT)..... ..RESPONDENT

RULING

K. T. R- MTEULE, J. 10th August 2022 & 3rd October 2022 This ruling is in respect of a preliminary objection raised by the respondent challenging the competence of the application. The applicant Suleiman M. Komba filed this application against the decision issued by the Regional Tribunal of CWT at Dar es Salaam on 10th June 2021 seeking for declaratory orders in the following terms: -

1. That the respondent failed to comply with its constitution in its process of removal of the applicant and in arriving to the decision of removing the applicant from his position on 09th Day of June 2021 and by conducting election which filled the applicant position on 17th Day of July, 2021, i
2. That, the respondent failed to comply with its constitution by refusing to hear the applicants appeal lodged on 26th July 2021.
3. That, this Honourable Court be pleased to set aside the respondents decision removing the applicant from his position on 09th Day of June 2021 and election held on 17th Day of July 2021 to fill the applicants position.
4. That, this Honourable Court be pleased to set aside the respondents decision dated 31st Day of January 2022 refusing to hear and determine the applicants appeal.
5. That, this Honourable Court be pleased to make an order reinstating/restoring the applicant into his position before removal as the member of the National Executive Committee representing Dar es salaam Region.
6. That, any other relief that this Court may deem fit to grant to be granted. Against the application, the respondent raised a preliminary objection to the effect that; -

- i) That the applicants application is incompetent before this Honorable Court by contravening mandatory provision of 2 Section 53 (2)(a) of the Employment and Labour Relation Act, Cap 366 R.E 2019. ii) That the applicant's application is bad in law for wrong citation of enabling provision. iii) This Hon Court lacks jurisdiction to entertain this application. The preliminary objection was argued by written submission where the applicant was represented by Mr. Othman Omary Othman while the respondent is represented by Mr. Michael Nyambo, Advocate. During the hearing of the preliminary objection; the respondent raised a new point of objection not contained in a notice of preliminary objection that the application does not comply with Rule 23 (1) and (2) of the Labour Court Rules G.N No. 106 of 2007. The applicant contested that they were surprised by the point of law raised by the respondent outside the formally filed preliminary objection. I will comment on this point later on. I will firstly address the two points raised formally in the filed preliminary objection. Arguing in support of the preliminary objection the respondent's Counsel opted to abandon second point of preliminary objection but submitted on the first and the new issue raised. 3 Starting with the first point of law, Mr. Michael Nyambo submitted that Section 53 (2) (a) of the Employment and Labour Relations Act, Cap 366 R.E 2019 requires that before the Labour Court hears an application prescribed in subsection (1) of the Act, it shall satisfy itself that the organizations or federation's internal procedures have been exhausted. He stated that since the application was made under Section 53 (1) (a) (b) (i) & (ii) of the Act, which make it mandatory for the applicant to comply with Section 53 (2) (a) of the same Act, therefore applicant ought to comply with the same. It was further submitted by Mr. Nyambo that the applicant had not yet exhausted the internal remedies which are found in the respondent's organization as a mandatory requirement as per Article 7.1 (c) of the respondent's constitution. According to Mr. Nyambo, this article provides for an appeal to the Higher Committee for a person who is aggrieved by the decision of the regional council. Mr. Michael Nyambo submitted that the applicant on his own will filed the appeal to the National Council (Baraza la Taifa) of the respondent as per paragraph 13 of the applicant's affidavit which was not a procedure since he skipped the higher regional committee. He stated that, such irregularities has been informed to the applicant by the letter with 4 reference No. AB, 205/320/01/23 as Annexure "A-13", that he jumped to last appellate stage and skipped higher Committee. To support his contention, Mr. Nyambo cited the case of Ezekiel T. Olouch versus Chama cha Walimu Tanzania (CWT) Miscellaneous Application No. 196 of 2017 where the court held the matter prematurely before it for having skipped the appellate stage ifi the organization. He thus suggested the court to find the same since the provision of Section 53 (1) and (2) make this requirement mandatory due to the use of the word shall. On the second point of preliminary objection Mr. Michael Nyambo submitted that the applicant's application is contrary to Rule 23(1)(3) of the Labour Court Rules as the same was filed without statement of complaint. In reply Mr. Qthman Othman submitted that the respondent's Counsel misconceived the reason of having Baraza Kuu la Mkoa and Kamati ya Utendaji ya Taifa. He stated that Article 7 (1) (c) of the respondent's constitution provides for the right to appeal in two scenarios, first, where the aggrieved person is a leader where his appeal lies to Baraza la Taifa and secondly where

the aggrieved person is a mere member then his appeal lies to Baraza la Mkoa. He stated that the Applicant is a 5 leader and thus, his appeal was properly referred to Baraza la Taifa, where he was denied right to be heard. In his view since the respondents Advocate is claiming that the applicants appeal lies to Baraza la kuu la Mkoa and thereafter to Kamati ya utendaji ya Taifa and since these two organs are not provided in the Respondents constitution as appellate bodies for the Applicant, it clear that the Respondents claim cannot be sustained without evidence and therefore it cannot be disposed of by way of preliminary objection. According to Mr. Othman, the position that matters of facts/evidence cannot be disposed of by way of preliminary objection was settled in the case of National Investment Company Ltd vs. Kathleen Armstrong, Misc. Application No. 318A of 2013: High Court of Tanzania (Labour Division) at Dar es salaam (unreported). He averred that the case of Ezekiel T. Oluoch vs. Chama cha Walimu Tanzania (CWT) Misc. Labour Application No. 196 of 2017 (unreported) cited by the Respondents Advocate is highly distinguishable with our present case because in that case the Applicant never filed an appeal to challenge the decision removing him from his position while in our case the Applicant exercised his right according to his position's under the Respondents constitution and thus, the only 6 opportunity was to come to this Honourable Court as he was denied an opportunity to be heard by the Respondent. It is Mr. Othman's view that in light of the above quoted part of the Court Appeal's decision, the 1st point of preliminary objection cannot be disposed of as preliminary objection for being in respect of unascertained facts and therefore it is submitted that the 1st point of preliminary objection is highly misconceived and without merits and thus, this Honourable Court is prayed to overrule the Respondent's preliminary objection with costs. Mr. Othman submitted that even if it is found that internal procedures were not exhausted, which is disputed, still this Court is empowered to entertain the applicant's application because it is in the best interest of the respondent that its constitution be respected and complied with. This is the position of the law, in terms of section 53 (2)(b) of the Employment and Labour Relation Act, Cap. 366 R.E 2019. In such circumstances he of the view that the power of this Court is not affected by the Applicant's failure to exhaust internal procedures. It was further submitted by Mr. Othman that by taking into account the length of time that had lapsed, unfair treatment of the Applicant's appeal by the Respondent's Secretary General, and the denial of the 7 right to be heard all demonstrated massive non-compliance of the Respondent's constitution by its principal officers, and this justifies this Honorable Court's intervention in terms of the referred provision of the law, and therefore, the Applicant's present application has qualified both requirements, contrary to the arguments advanced by the respondent's Counsel. He therefore submitted that the point of preliminary objection raised is highly misconceived and without merits and thus, this Honorable Court is prayed to overrule it with costs. Regarding the new point preliminary objection,. Mr. Othman submitted that there is not any compromise when it come to the requirement of notice to the adverse party before hearing of the preliminary objection. The position of the law on this area was emphasized in the case of Mahesh Kumar Raojibhai Patel versus. Karim Shamshuddin Suleman, Commercial case No. 80 of 2015, High Court of Tanzania (Commercial Division) at Dar es salaam

(unreported). He stated that the Respondent's new point of preliminary objection was not preceded by notice and therefore, improperly raised and, they thus prayed that the same be expunged and dismissed from the record of this Honorable Court. 8 Further it was argued that the new point of preliminary objection is also highly misconceived and without merits because Rule 23 (1) and (3) of the Labour Court Rules, 2007 relied by the respondents Counsel does not apply in the present situation because the present case does not involve employer/employee relationship. The cited rules cover disputes arising out of employment relationship. In the light of the above discussion and the law, Mr. Othman is of the view that it is clear that, our present case arose from contravention of Trade Union's Constitution, that is to say, the dispute between the Applicant and the Respondent did not arise out of employment relationship and thus, not subject to the requirement of filing statement of complaint to this Court, and therefore, the new point of preliminary objection is highly misconceived and without merits. He prayed for this Court to overrule it with costs. Having considered parties' submission regarding preliminary objections I find that this Court has a duty to determine whether the preliminary objections raised has any merit? In determining the raised points of law starting with the first one, I find it worth to point out that the requirement to exhaust local organizational remedies prior to lodging a matter in this court is guided by Section 53 (1) (a) (b) (i) & (ii) of the Employment and Labour Relation 9 Act, Cap 366 R.E 2019. I find it worthy to reproduce the disputed provision which provides; -

53. ~(1) Where a federation or registered organisation fails to comply with its constitution, the Registrar or member of the federation or registered organisation may apply to the Labour Court for any appropriate order including-
- (a) setting aside any decision, agreement or election;
 - (b) requiring the organisation or federation dr any official thereof to- CO comply with the constitution; (ii) take steps to rectify the failure to comply;
 - (c) restraining any person from any action not in compliance with the constitution.
- (2) Before the Labour Court hears an application prescribed in subsection (1), it shall satisfy itself that-
- (a) the organisations or federation's internal procedures have been exhausted; or
 - (b) it is in the best interests of the organisation or federation that the application be heard notwithstanding that any internal procedures have not been exhausted. io Basing on the above cited rule any party to the application owes a legal duty to exhaust internal remedies before opting any other measure to the Court. Turning back to the application at hand, it is not disputed that Article 7.1 (c) of the respondents constitution requires a person aggrieved with a decision to appeal to the Higher Committee namely "Kikao cha juu". The article enumerates rights and duties of a member where at paragraph (c) the right to appeal is provided for. For clarity, I reproduce article 7.1 (c) hereunder: "7.1 (c) Kukata rufaa kwenda katika kikao cha juu ya Chama, endapo mwanachama hakuridhika na uamuzi uliotolewa

dhidi yake. Kwa matatizo ya kichama isipokuwa kwa ngazi ya mkoa, rufaa itaishia katika Baraza la Mkoa. Kwa matatizo ya Kiongozi isipokuwa viongozi waliochaguiwa na mkutano MKUU wa Taifa, rufaa ya mwisho itaishia katika Baraza la Taifa." Parties are disputing on the interpretation of the above article. While the respondent understands it to allow two levels of appeal to a leader, the applicant believes that there is only one level which is the National council (Baraza la Taifa) and skips the regional council. From what I construe for the parties' submissions, the applicant appealed to the National Committee directly and not at the level of the regional committee. The applicant was informed that it was an irregularity to skip the regional council vide a letter with reference No. AB, 205/320/01/23 as per Annexure A-14 and he was instructed to follow the proper procedure by referring the matter to higher Committee. The applicant does not agree on this procedure. I have read the article carefully, the last words "rufaa ya mwisho itaishia katika Baraza la Taifa" indicates that there are more than one level of appeal for a person who is a leader. In my view, the applicant skipped one level of appeal. This constitutes non exhaustion of local remedies according to the constitution of the respondent's constitution. What amounts to premature filing of a matter has been expounded in the case of Joshua Nassary vs. Speaker of the National Assembly of the United Republic Of Tanzania and Another, Miscellaneous Civil Case No. 22 of 2019, High Court of Tanzania at Dodoma, (unreported). It was held for premature claim to stand one must file the application without first exhausting the internal remedies. It is apparent in this matter that the applicant failed to exhaust internal remedies before filing this application in this Court. In such circumstances I agree with the respondent's Counsel regarding the principle in Ezekiah T. Oluoch v. Chama Cha Walimu Tanazania (CWT), Misc. Application No. 196 of 2017, High Court of Tanzania, at 12 Dar es salaam, (unreported) where failure to exhaust internal remedies was found to have rendered the matter premature before the court. The applicant tried the court to apply the principle of the best interest of the organization to dispense with the requirement of the exhaustion of local remedy in terms of Section 53 (2)(b) of the Act (supra). In my view, the applicant should have demonstrated the best interest of the organization or federation to justify exemption from exhausting internal remedies. In absence of shown interests then he cannot be exempted from such legal duty. In the case of Thabit Ramadhan Maziku and another vs Amina Khamis Tyela and another, Civil Appeal No. 98 of 2021 at page 4 citing the case of Bank of Tanzania Ltd V. Devran P. Valambia, Civil Application No 15 of 2002 (CAT) (unreported) it was held: "The aim of, a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily." The applicants counsel tried to establish that the points raised by the respondent is not a preliminary objection because it needs evidence to be ascertained. What I note from this point is that parties are contesting on the interpretation of Article 7 (1) (c) of the respondent's constitution. 13 In my view, this does not need evidence but just a matter of interpretation. From the above deliberation, it is my finding that filing of this application without exhausting internal remedy mechanisms is contrary to the respondents constitution and it renders the matter premature due to the provision under Section 53 of Cap 366. The raised issue is therefore answered affirmatively that the preliminary objection has merit.

The conclusion of this issue is sufficient to dispose of this matter. As such, I find it not necessary to determine the other point concerning contravention with Rule 23 (1) and (2) of the Labour Court Rules, G.N No. 106 of 2007. From the above reasoning I uphold the the first point of preliminary objection and find this application incompetent for having been filed prematurely. Therefore, I strike out this application for having been filed prematurely filed to allow the applicant to exhaust the internal remedies in the respondents organization. No order as to cost. It is so ordered. Dated at Dar es salaam this 3rd Day of October 2022
KATARINA REVOCATI MTEULE JUDGE 03/10/2022 14

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