

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**LABOUR REVISION NO. 17 OF 2021**

***(Arising from Labour Dispute No. CMA/MUS/34/2021)***

**BETWEEN**

**KILIE JAPHET MSIBA ..... APPLICANT**

**VERSUS**

**GRUMET RESERVE COMPANY LIMITED ..... RESPONDENT**

**RULING**

**A.A. MBAGWA, J.**

This ruling is in respect of a revision application against the decision of the Commission for Mediation and Arbitration for Musoma in CMA/MUS/34/2021 herein after referred to as second dispute.

The applicant, Kilie Japhet Msiba was, on 22<sup>nd</sup> May, 2019, employed by the respondent as housekeeper via employment contract dated 22/05/2019 which is Annexure KJM1. In the course of discharging her duties, the applicant fell sick (allergic) due to chemicals that she was exposed to in the discharge of her duties. Upon medical examination, she was advised to stop housekeeping works in order to avoid further contamination of chemicals. As such, the applicant requested to shift from housekeeping to waiting duties but the prayer was not seconded on the ground that the applicant was not

trained in that field. Following the applicant's persistent health situation, the respondent issued her with a termination letter titled 'KUACHIWA KAZI KWA SABABU ZA KIAFYA' dated 15<sup>th</sup> January, 2020 (Annexure KJM3). The said termination letter purported to be contract of termination of employment between the applicant and respondent. Further, the letter required both parties to append their signatures. According to the applicant, after she was served with the letter, she was told that her employment was already terminated thus it did not matter whether she signed or not.

Aggrieved by the respondent's move, the applicant refused to sign the said termination letter and consequently lodged her employment complaint which was registered as CMA/MUS/31/2020/74/2020 herein after to be referred to as first dispute on unfair termination.

Before the Commission for Mediation and Arbitration (CMA), the respondent refuted the allegations stating that she had never terminated the applicant rather it served the applicant with a proposed contract of termination for signature but the applicant declined to sign hence the termination was not concluded.

Based on the submissions and evidence brought by the parties, the Arbitrator (Mbeyale R) was satisfied that termination of employment had not been concluded and therefore the disputed was brought prematurely. As such, the CMA dismissed the complaints. At page 7 of the award dated 18/12/2020, the Arbitrator held;

*'Hivyo Tume inathibitisha kwamba madai ya kuachishwa kazi isivyo halali yaliletwa mbele ya Tume yakiwa hayajakomaa (premature)*

*kwani hatua ya usitishwaji wa ajira ilikuwa haijakamilika. Kwa mantiki hiyo, madai ya mlalamikaji yanatupiliwa mbali kwa ujumla wake kwakuwa Tume inakosa mamlaka ya kuyasikiliza kama ilivyoelezwa...'*

Relying on the CMA's decision that there was no termination of employment, the applicant, on 15<sup>th</sup> February, 2021, wrote to the respondent requesting her to resume her work. However, the respondent, through its letter dated 18/02/2021 replied the applicant in a manner which constructively meant that the applicant was no longer its employee.

Based on the respondent's reply via its letter dated 18/02/2021, the applicant decided to lodge the complaint in CMA/MUS/34/2021 (second dispute) based on unfair termination. The dispute encountered a notice of preliminary objection to the effect that the matter is *res judicata*.

Upon submissions by both parties, the Arbitrator (Esther Kimaro) was opined that the second dispute i.e., No. CMA/MUS/34/2021 was *res judicata* to CMA/MUS/31/2020/74/2020 as such, the application/ dispute was struck out.

The applicant was not amused by the decision which struck out her complaints hence she preferred the present revision application. The applicant filed a notice of application and chamber summons containing the following orders;

1. That this Honourable Court be pleased to exercise its revisional jurisdiction, call for and examine the records of the proceedings before the Commission for Mediation and Arbitration (CMA) of Musoma for purposes of satisfying itself to the correctness, legality, rationality and

propriety of the ruling made by the Commission for Mediation and Arbitration in the labour dispute No. CMA/MUS/34/2021 dated 22/07/2021, on the ground that;

- (a) The learned Arbitrator erred in law for striking out the application on the basis of being res judicata while the prerequisite elements for res-judicata were not fully established.
2. That this Honourable Court be pleased to quash the proceedings and set aside the ruling dated 22/07/2021 in the labour dispute CMA/MUS/34/2021 and an order that the applicant's dispute be heard on merits.
3. Any other order this Honourable Court may deem fit and just to grant

The application is supported by an affidavit sworn by the applicant, Kilie Japhet Msiba whereas on the adversary, the application is contested through and affidavit sworn by Godfrey Tesha, the applicant's advocate.

When the matter was called on for hearing, it was ordered by the court, upon consent of the parties, that the revision application be argued by way of written submission. I thank both parties for their insightful submissions.

The applicant strongly argued that the Labour Dispute No. CMA/MUS/34/2021 from which this revision arises was not res-judicata for the previous dispute to wit, Labour Dispute CMA/MUS/31/2020/74/2020 was not determined on merits. The applicant strongly contended that the decision in the first dispute was to the effect that termination of contract had not been concluded as such the dispute was brought to CMA prematurely. She insisted that the principle of res judicata cannot apply because the first dispute was not determined to its finality.

In rebuttal, the respondent opposed the application stating that the second dispute to wit, Labour Dispute No. CMA/MUS/34/2021 was res judicata because the first dispute was determined on merits. The respondent expounded that the CMA dismissed the complaints after it was satisfied that there was no termination of employment. The respondent continued that if the applicant was not satisfied with the award in Labour Dispute CMA/MUS/31/2020/74/2020 she ought to apply for revision to challenge it but not to institute a fresh complaint namely, CMA/MUS/34/2021.

I have carefully gone through the rival submissions along with the depositions and record of application. The key issue for determination is whether this application is merited that is to say whether the arbitrator was correct to strike out CMA/MUS/34/2021 for being res judicata.

Parties are at one that the first dispute was dismissed on the ground that the dispute was premature. However, they part company as the respondent maintains that it was determined on merits whereas the applicant is opined otherwise. For sake of clarity and precision, I find it apposite to let the record speak for itself. While dismissing the first dispute, the Arbitrator, at page 7, had the following to say;

*'Hivyo Tume inathibitisha kwamba madai ya kuachishwa kazi isivyo halali yaliletwa mbele ya Tume yakiwa hayajakomaa (premature) kwani hatua ya usitishwaji wa ajira ilikuwa haijakamilika. Kwa mantiki hiyo, madai ya mlalamikaji yanatupiliwa mbali kwa ujumla wake kwakuwa Tume inakosa mamlaka ya kuyasikiliza kama ilivyoelezwa...'*

From this excerpt of the award rendered on 18/12/2020, it appears the central complaint namely, whether the termination was unfair as contended by the applicant was not determined because it was ruled that contract of termination had not been concluded to warrant the CMA to decide whether it was unfair or not.

In the case of **Paniel Lotta vs Gabriel Tanala and others** [2003] TLR , the Court of Appeal, while interpreting section 9 of the Civil Procedure Code, set five conditions which must co-exist for the court to invoke the doctrine of res judicata namely, (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.

Upon a critical appraisal of the record, it is my considered opinion that the second dispute i.e., CMA/MUS/34/2021 from which this revision arise is not res judicata on the ground that one, the Commission did not determine whether the termination was fair or not, two, the Commission declared itself incompetent to try the matter i.e., CMA/MUS/31/2020/74/2020 and three, the present dispute arises from the letter dated 18/02/2021 whereas the former dispute arose from the letter titled '**KUACHIWA KAZI KWA SABABU ZA KIAFYA**' dated 15<sup>th</sup> January, 2020. In the excerpt quoted above, the Commission expressly pronounced itself that it lacked jurisdiction

to entertain the matter because the termination of employment had not been concluded.

*'Kwa mantiki hiyo, madai ya mlalamikaji yanatupiliwa mbali kwa ujumla wake kwakuwa Tume inakosa mamlaka ya kuyasikiliza kama ilivyoelezwa...'*

On the above observations, it is my unfeigned opinion that the question whether termination of employment was fair or not was not conclusively determined in the former dispute i.e., CMA/MUS/31/2020/74/2020 and therefore the doctrine of res judicata could not apply in the second dispute namely, CMA/MUS/34/2021.

On all the above account, I hold that CMA/MUS/34/2021 is not res judicata as such, this revision application is meritorious. Consequently, I set aside the ruling of the Commission for Mediation and Arbitration (CMA) by Esther Kimaro dated 22<sup>nd</sup> July, 2021. Instead, I order that this case file be remitted to the trial Commission for hearing of CMA/MUS/34/2021 on merits. Since the dispute is industrial in nature, I order no costs.

It is so ordered

The right of appeal is explained.



  
**A. A. Mbagwa**

**JUDGE**

**03/02/2023**