

- Res Judicata - Mediation is one form of hearing dispute & concluding it.
 - CPC applicable in case there are no provisions in the Labour Law to guide a matter. CMA to decide by principles.
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IN THE HIGH COURT OF TANZANIA
 LABOUR DIVISION OF THE HIGH COURT

AT TABORA

REVISION NO. 16 OF 2012

Amosye, A.K

SAID YASIN FADHIL & 9 OTHERS APPLICANT
 VERSUS
 A. T. T. LIMITED RESPONDENT

JUDGEMENT

21/5/2012 & 24/5/2013

S.A.N. Wambura, J.

The applicants have filed his application praying that:-

1. That this Honourable Court be pleased to call the records of proceedings of labour dispute No. CMA/TAB/DISP/07/2012 by the Commission for Mediation and Arbitration at Tabora, revise it and set aside the said decision on ground that there is material irregularity, and an error material to the merit of the subject matter involving injustice and for failure to exercise jurisdiction so vested.
2. Any other orders the Court may deem just and fit to grant.

The application was supported by the affidavit of one EVANS ROSSON 1173144, who also represented the applicants in this matter. The respondents A.T.T. Ltd. filed a counter affidavit sworn by one GODFREY RUSIMBI a Principle Officer of the respondents opposing the same.

At the hearing of the matter the respondents were represented by Mr. Mawo Advocate. Mr. Nzowa adopted the contents of his affidavit and made

length submissions on issues in paragraph four (4) of the same, which I will decide upon accordingly though not in the manner enumerated.

1. It has been submitted that the arbitrator erred in law and facts by holding that Dispute no. 7/2012 was res judicata while the nature of the dispute was different from that of Dispute No. 8/2012 because one was in respect of unfair termination filed under Part 3 of ELRA and the other was for under payment filed under Part 4 of the same. That the same has even been distinguished by the law in the time limits of filing these two matters. That the two disputes were filed on one day and given two different numbers. They were sent to one mediator and each was heard separately. While consensus was reached in Dispute No. 8 and issued with a certificate of agreement it was not resolved in Dispute No. 7 thus went for arbitration. That had the issues been the same they would have been consolidated at CMA a thing which was not done.

In his reply Mr. Matto submitted that it was an issue of unfair termination due to under payments which was pointed out in Form No. 1. They cannot be heard to oppose the same now. Mr. Nzowa alleged that this was done out of ignorance on the part of the applicants which should not be a reason of making things right.

Now just as much as the two claims are provided for in two different parts of the ELRA it does not mean that they cannot be joined in one form if they are claim against one party, filed by the same complainants. I believe it was wrong in the first place for CMA to allow the filing of the two claims separately. More so if they went for mediation before the same mediator then they ought to have been consolidated as a matter of practice, rather than solving one issue and leaving the other issue unsolved. The certificate before the mediator could itemize issues resolved and issues pending to be resolved.

Registry personnel should be enlightened on the filing procedures.

To respond to the issue as to whether the application was res judicata or not, I would wish look into the principles of the doctrine itself. The doctrine of res judicata is defined in Section 7 of the Civil Procedure Code Cap 33 R.E.2002 (herein after refined to as the CPC) where it states that:-

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit which such issue has been subsequently raised and has been heard and finally determined by such court."

In the case of **JAMES KATABAZI & 21 OTHERS VS. SECRETARY GENERAL OF THE EAC and THE ATTORNEY GENERAL OF UGANDA**, Reference No. 1 of 2007 (EACJ) it was held that for the doctrine to be applicable the following have to be observed.

- (i) Whether the matter is **directly and substantially** in issue in the two suits.*
- (ii) **Parties must be the same or parties under whom any of them claim, litigating under the same title and***
- (iii) **The matter must have been finally decided in the previous suit.***

[Emphasis is mine]

It is not in dispute that the parties in all the two suit are the same. Mr. Nzowa has alleged the two are different because one was yet to be heard while the former was finalized during mediation.

As this instance, I have to determine on the first condition, that is whether the two suits are directly and substantially based on the same issue. I believe I should not labour much on this. These claims arise out of the respondents act of declaring the applicants redundant. They challenged the same in two different

claims one for under payments of their entitlements and the other for unfair termination. They have resolved on the issue of under payments and have already been paid. What is the effect of this?

As submitted by Mr. Matto this agreement was reached amicably. If they still felt aggrieved they ought not to have accepted any payments waiting to be reinstated. They cannot amicably agree to accept conditions and payments which are only payable to employees who have been declared redundant and continue to claim unfair termination.

Thus to respond to the first, second and fourth grounds raised in paragraph four, I hold that the matter was res judicata as found by arbitrator. We cannot allow parties to come to court with a single claim then file another one at a later date simply because the law allows them to do so. That was not the intention of the legislature. The fact that the same could be filed at the same time as they did means they could have as well been consolidated. It is a pity that the form was not properly filled. But the applicants were represented by able advocates who could basically assist them accordingly.

However, even by not doing so and having reached an amicable settlement on one claim, it means it basically closed the door for further litigation. Parties were basically heard for hearing does not entail adducing lengthy evidence and recording it. Mediation is one form of hearing the matter and concluding it.

2. This moves us, to the third ground that the arbitrator failed to decide an issue raised in the dispute but raised his own issue while writing the award. Admittedly parties were not called upon to address CMA on this issue. But going through the proceedings it was indicative that this matter would arise, yet the applicants did not make any efforts to challenge the same. Being a point of law this issue could be raised at any point in time. The arbitrator has discussed the same at length quoting a number of decisions. In a recent case of **EMMANUEL MWAKISHA MIAWASI and 748 OTHERS VS. THE ATTORNEY GENERAL OF KENYA** Reference No. 2 of 2010 (EACJ) where

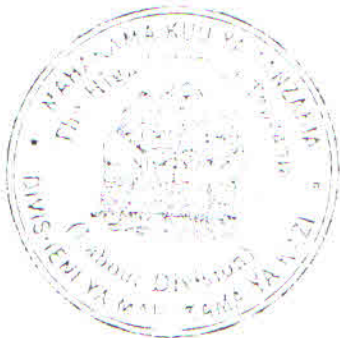
the applicants were claiming terminal benefits for services rendered to the defunct East African Community; it was held that although the objections raised were not raised at the scheduling conference, however, they were of trite points of law which could be raised at any stage and assist to save the courts time. I find no reason to fault the arbitrator. It is unfortunate that it came to his attention after he had heard the same.

3. It has also been alleged that the arbitrator erred in relying on the provisions of the CPC which is in-applicable in labour matters.

This means that I am also wrong in finding that the matter is res judicata relying on section 7 of the CPC as labour matters have their own proceedings. It is true that the CPC is inapplicable at CMA and Labour Court but only where there are specific provisions of the same. Otherwise we do apply provisions of the CPC as in matter of execution of awards. Moreover Rule 55 (1) of the Labour Court Rules, 2007 specifically provides so. Matters cannot be left to be filed repeatedly simply because there is no provision under the labour laws to take care of the situation. Litigations are accepted but they must also have an end.

Due to the reasons stated above I accordingly dismiss the application with no orders to costs.

Let me also point out at this juncture that I have noted that Mr. Nzowa who represented the applicants swore the affidavit and was the one who even issued a notice of application stating that he has been appointed by the applicants to represent them. I find that to be improper for it was the applicants who ought to have signed the notice which appoints him as their representative. As it stands it means that he has appointed himself to represent the applicants, raising other legal questions. I believe this will be taken into account and be avoided in future.



S.A.N. Wambura
JUDGE
24/5/2013