

# CRITICAL ANALYSIS ON THE PARTIES TO LABOUR DISPUTES IN THE CMA AND LABOUR COURT

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## ABSTRACT

Every legal dispute has parties. It is the correctness of parties to a legal dispute which aid the court or Quasi-judicial body to proper administration of justice. It is, therefore, essential for everyone to a legal dispute be it natural person or legal (artificial) persons,<sup>i</sup> to keep abreast with their rights and obligations as far as legal justice is concerned. In practice most of the litigants find themselves in legal traps of preliminary objections emanating on proper and necessary party to a lawsuit.<sup>ii</sup>

It is the common practice that complainants/ applicants' loose cases at CMA and LABOUR COURT due to procedural irregularity on a right person to sue or be sued in labour cases as the results the matter fall short to stuck out or dismissal as the case maybe. Now we take this precious time to write this paper to share the law and practice on problematic issue dealing with parties to labour disputes at the CMA and LABOUR COURT”

## INTRODUCTION

In Tanzania labour disputes are governed by the multiple of laws, depending on the nature of a particular labour dispute. However, their two main principal legislations and the subsidiary legislations made their under; the Employment and Labour Relation Act<sup>iii</sup>, and Labour Institutions Act<sup>iv</sup>, and that is to say; the Employment and Labour Relations (Code of Good Practice) Rules;<sup>v</sup> the Labour Institutions (Mediation and Arbitration) Rules;<sup>vi</sup> the Employment and Labour Relations (Forms) Rules;<sup>vii</sup> the Labour Institutions and Code of Conduct for Mediators and Arbitration Rules;<sup>viii</sup> the Labour Institutions (Mediation and Arbitration Guidelines) Rules;<sup>ix</sup>

The said couple of laws all together act as the spinal code in solving labour disputes in Tanzania.<sup>x</sup> It must be well understood that, it is the civil case which determine the distinctions of parties in particular legal dispute. For example in labour cases parties are usually referred as Complainant/Applicant (the referral party on one side) and the Respondent (on the other side). The above identified parties to labour disputes may either be Employee, Employer, worker, Trade union and Employer's Association.<sup>xi</sup>

It is a settled principle of law as far as labour laws is concerned that, a labour dispute to be referred in the CMA and Labour Court two parties must exist. Their existence must have a root in employment relationship. It goes without saying that one cannot lodge a complaint against a party with who had no contractual obligations in place.<sup>xii</sup>

Persons who enter into a contract or other transactions are considered parties to the agreement.<sup>xiii</sup> When a dispute results in litigation the litigants are called parties to the lawsuit. Tanzania law has developed principles that govern the rights and duties of parties. In addition, principles such as the standing doctrine determine whether a person is a rightful party to a law suit.

It is a fundamental principle or a trite law that all claims for all labour disputes must be referred to the Commission for Mediation and Arbitration by the parties themselves or mandated parties<sup>xiv</sup>. The reference must be made to the Commission in a prescribed form which is the

CMA F-1 which is completed and correctly filled in, to move the Commission to process the form in accordance with the law.

The prescribed form is to use the language of labour law and must be referred or filed within the statutory time limit for the claim or dispute in question<sup>xv</sup>. It should be well understood that an incomplete or incorrectly completed CMA F-1 cannot be accepted and if a party is out of time and CMA F-2 or other requirements provided by the law are not met then the claim is to be rejected or not accepted by the CMA<sup>xvi</sup>. When the dispute is referred, but is out of time without proper application it must be rejected on the grounds of lack of jurisdiction<sup>xvii</sup>. *It is a settled principles that the legal effects of irregularity into the affidavit is that the application was filed without any supporting affidavit it is thus incompetent and it must be struck out<sup>xviii</sup>. In the same way it is an agreed principle that the remedy for an incompetent application is to struck it out and NOT to withdraw it. In law, an incompetent application cannot be withdrawn, one cannot withdraw a nullity<sup>xix</sup>.*

The essential or fundamental or basic pieces of information which must be included in the CMA F-1 are the names and address of both parties and details of the claim<sup>xx</sup>.

In labour law it is essential to determine the parties to the dispute so that you can allocate the burden, risk, injury, rights, duties, obligation or resources efficiently for the purpose of making sure the decree, order or award rendered or made by the decision maker is recognized and protected by the law ready for execution or enforcement.

The Employment and Labour Relations Act<sup>xxi</sup> and Labour Institution Act<sup>xxii</sup> do not provide for the definition of parties to dispute in a labour matter maybe this was done purposely and with intent, so as not to limit the parties in labour dispute and on the other hand to allow flexibility and security in labour dispute but when looking to *The Labour Institutions (Mediation And Arbitration) Rules 2007<sup>xxiii</sup>*.

The term “PARTY” has been described as to “*Mean any party to the proceedings before the commission*” it is argued that this meaning does not provide a clear picture whether the word “*party*” refers to the *complainant, respondent, advocate, or personal representative or trade union*. The law does not provide as to if the word “*party*” here refers to a necessary party or proper party with respect to labour disputes.

Looking at the contents of Employment and Labour Relations forms.<sup>xxiv</sup> The form provides for the party (s) who can refer the dispute(s) to the CMA to be: (1) An employee (2) An Employer (3) A Union official or representative (4) An employer's Organization.

Therefore, it is crystal clear that the dispute to the CMA can be referred to it by an employee as per the contractual and legal recognition and /or protection set by the law or an employer as per the contractual and legal recognition and/or protection set by the law or a union official or representative as per the contractual and /or legal reorganization and protection set by the law and an employer's organization as per the contractual and/or legal reorganization and protection by the law.

The important factor here is the contractual and/or legal capacity to sue or complain or to refer the dispute to the CMA.

The ordinary understanding of labour law is all about the contractual relationship between the employer and employee or trade union and employers' association to use the language of labour law.

The purpose and intent here is to analyze that parties to the contractual relationship are the one who are capable to sue or be sued in the eyes of the law (Labour laws). The law (labour laws) recognize that (1).AN *EMPLOYEE* (2) AN *EMPLOYER* (3) AN *UNION* (4) AN *EMPLOYERS ORGANIZATION* can be sued or a complaint can be brought against them or can be referred to the CMA as a party to the dispute. The principle is that there must be a recognition and protection by the law. In the jurisprudence of labour law since this branch needs to take into consideration other branches of laws the clear cut demarcation must be shown between a legal person and natural person for the purpose and intent of understanding as to who can be sued or can sue.

Jurisprudentially it is well understood that there is existence of natural person and artificial person<sup>xxv</sup>. In order to know who can be sued or sue, jurisprudentially, you must ask yourself the following questions:

- (a) *Existence*
- (b) *The essence*
- (c) *The causation*

(d) *The boundaries or parameters*

(e) *The effect/outcome/results/consequence*

This is because in law allocation of legal rights and obligations must be done to the necessary party. The law provides that, there is an essential difference between a necessary party and a proper party to suit/claim or dispute. A necessary party is one whose presence is indispensable to the constitution of the suit/dispute, against whom the relief is sought and without whom no effective order can be passed. *A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding<sup>xxvi</sup>*. In other words, in the absence of a necessary party no decree can be passed, while in absence of proper party a decree can be passed so far as it relates to parties before the court or CMA. Two tests have been laid down for determining the question whether a particular party is a necessary part to proceeding.

(i) *There must be a right to some relief against the sua party in respect of the matter involved in the proceeding in question; and*

(ii) *It should not be possible to pass an effective decree in absence of such party*

This being the case in the contract of employment in order for the dispute to be proper before the CMA forum there must be the employer and employee or Trade Union or employer's association and not otherwise. This is the position as per Tanzania labour laws<sup>xxvii</sup>.

It is a clear that the parties to labour disputes are the **EMPLOYER**, the **EMPLOYEE**, the **TRADE UNION** and the **EMPLOYERS ASSOCIATION**. Under the employment ordinance<sup>xxviii</sup> *The ordinance provided that Employer means any person, or any firm, corporation or company, public authority, or body of persons who or which has entered into a contract of service to employ any person and includes any agent foreman, manager or factor of such person, firm, corporation, company public authority or body of persons who is placed in authority over such person employed and where an employee has entered into a contract of service with. Or with the Government or with any officer on behalf of the Government and any Government officer under whom such employee is working shall be deemed to be his employer.*

*Provided that no Government officer shall be personally liable under this ordinance for anything done by him, as an officer of the Government and in good faith.*

From the wording of section 2 of the Employment Ordinance is clear that in suing the Government as an employer, it was not necessary to sue the Attorney general as provided by the Government proceeding Act cap 16/1967 now revised. The law provided that an employee can sue an officer under which such employee is working. In the case of THABIT S/O NGAKA V/S THE REGINAL FISHERIES OFFICER<sup>xxix</sup> *Mfalila J.* Stated that it was the position of the law when the employee sued and an officer under which such employee was working with and when that officer loses a case the Government shall pay provided the officer acted in good faith.

But another school of thought was that it was improper to sue the Director General of the Natural security Department. In the case of **DANIEL DONALD SWEBE v/s THE DIRECTOR–GENERAL OF NATIONAL SECURITY.**<sup>xxx</sup> Where *Judge Mwaipopo* stated that it was wrong and improper for the employee to sue the Director-General or National security since the Attorney General was not his employer what he was supposed to do was to sue the Attorney General on behalf of the Government who is an employer. It can be argued that there is more than one school of thought trying to pinpoint who can to be sued in employment matters especially under the Employment Ordinance.

When reading carefully the above assertions: in law only two types of persons can institute legal proceedings (sue) or defend legal proceedings; natural and/or legal (artificial) persons. In the latter category of persons fall trustees who become a body corporate upon being granted a certificate of incorporation<sup>xxxi</sup>. At this juncture it is also of essence to note that when suing the artificial person which is statutorily established appears important first to have a look to specific legislation establishing the same; otherwise you may end up suing the non-existing body or wrong person. In the case of **M/S Express Design Ltd vs. National Social Security Fund**<sup>xxxii</sup>, in which was held that, the National Social Security Fund does not in the eyes of the law have independent existence. The provisions of section 53 of the Act, gives the National Social Security Fund its legal personality through the **Board of Trustees**, which in law is capable as a legal person of suing and being sued. The above concept of suing a non-existing party as far as labour disputes are concerned was greatly discussed in the case of **Commercial Bank of Africa Tanzania Limited vs. Dennis Rutahilwa and Comrade Auction Mart Company Limited**<sup>xxxiii</sup>, in which case *Mashaka, J* had this to say; the labour dispute filed against Commercial Bank of Africa or Commercial Bank Africa as seen on the award of the

CMA is a non-existing legal entity. The applicant was not a proper party sued at the CMA by the 1<sup>st</sup> respondent. The Commercial Bank of Africa or Commercial Bank Africa as seen on the CMA award legally is not the applicant, hence improper to impound his property for attachment. It is the responsibility of the one who prosecutes his case to prosecute the proper party and not otherwise. Suing a wrong party is a substantive error and not a technical or clerical mistake.

It is a good experience learnt from the Commission for Mediation and Arbitration (CMA) that litigants especially lay persons face a legal challenge particularly on how to sue between the registered institution and the Manager/Director of a particular organization in case that person was employed by the organization but working under the directions and supervisions of a person known as Director/ Manager. Under the circumstances lay persons who institute complaints in the CMA in most cases found themselves in legal trouble of suing the Director or Manager a person who cannot be sued in law. In the case of **Branch Manager National Bank of Commerce (NBC) Ltd Moshi vs. Digna Sawala**<sup>xxxiv</sup> the court had this to say; after going *in ex-abundant cautela* (with extreme eye of caution) through the records, particularly CMA form no. 1 and CMA award the name used for the employer is Branch Manager, National Bank of Commerce (NBC) Ltd. Moshi; but if one looks in the other documents eg. Notice of Termination of Employment, to the respondent was issued by National Bank of Commerce Ltd. (Office of the Head of Human Resources, P.O. Box 1863, Dar Es Salaam Tanzania). The court went on that is of the decision that Branch Manager NBC Moshi was not the employer of the employee the respondent rather her immediate supervisor, incapable of being sued in that capacity in the case at hand.

## **THE REMEDIES AVAILABLE IN THE CIRCUMSTANCES OF SUING THE WRONG PARTY AND NON-EXISTING PARTY AT CMA AND LABOUR COURT RESPECTIVELY**

It is a cardinal principle of law that when the case/ complaint is filed to the court of law or quasi judicial body is obliged to make a legal determination over the matter.<sup>xxxv</sup> Also the issue of legal determination of a particular complaint must result to the prevailing legal system of a

country. For that regards, Tanzania preface the adversarial legal system in which the court of law or tribunals like CMA are vested with power to entered decision in favour of one party to the suit at the detriment of another party. Actually in law what the court or tribunal do in reaching a final decision in administration of justice it is giving the deserving party a REMEDY; the term has been preferred as the means by which the violation of a right is prevented, redressed, or compensated.<sup>xxxvi</sup> So when the party to the complaint or labour dispute at the CMA or Labour Court sues the wrong or non-existing party the only legal remedy available is clearly analysed in many of labour cases and does not go far from the remedy available in civil cases at large. But going through few of them it is as follows:-

If the referring party to mean the Complainant/Applicant immediately after filing the complaint/application notice that has sued the wrong party or non-existing party may make application to the CMA or Labour Court to make an amendment to the referral form CMA F1 incase the matter is at the CMA and if it is at the Labour court amendment may be directed over the application to that effect or that party may venture in another wing of making application to withdrawal the complaint/application. However the two remedies explained herein above are available only if the opposite party has not raised a preliminary objection to the same defects or over the incompetence of the whole complaint/application. This position was clearly explained in the case of **M/S Express Design Ltd vs. National Social Security Fund**<sup>xxxvii</sup> *Makaramba, J.* had this to say; it is now settled that an amendment cannot be allowed to defeat a preliminary objection. Went further holding that this suit is un-maintainable for having been brought against a party who is not capable of suing or being sued and for that regard the matter is incompetent and therefore struck out.

In the case of **The Registered Trustees of the Catholic Diocese of Arusha vs. The Board of Trustees of Simanjiro Pastoral Education Trust**<sup>xxxviii</sup> *Rutakangwa, J.* (as he then was) in that case the one who was prosecuted did not have a legal personality simply by adding the word “catholic” instead of the Registered Trustees of the Diocese of Arusha and the Hon Judge proceeded to struck out the application. The same position was maintained in the case of **William Godfrey Urasa vs. TANAPA Arusha**<sup>xxxix</sup> Judges of High court had the view that there is no person called TANAPA and that defect is fatal and incurable in itself and proceeded to struck out the application.

If the issue of suing the wrong person or non existing person is not clearly settled at the CMA and discovered at the Labour court when exercising revision jurisdiction upon being moved by application or in its suo moto and under the circumstances the court arrives to the conclusion that the party is wrongly sued or does not exist in law. The only available remedy in administration of justice is to quash and set aside both the CMA proceeding and decision respectively.<sup>xl</sup>

Furthermore, sometimes it's possible to discover the issue of suing the wrong party or non existing party at the execution stage and when this happens it is impossible for the person to whom the award was issued in his favour (for the purpose of CMA is the referral party/ complainant) to make execution of the award at the High court labour division as the award is against the person who has no connection with award issued or against the person whom in law cannot bear the any responsibility arising from the award issued. Sometimes the award may be impossible to be executed simply because the party to whom the award is against does not exist in law. For that reason, renders the issued award useless. This position is clearly propounded in the case of **Commercial Bank of Africa Tanzania Ltd vs. Dennis Rutahilwa & Another**<sup>xli</sup> in which was held that, it is the responsibility of the one who prosecutes his case to ensure he prosecutes the proper party and not otherwise. Due to this omission, now the 1<sup>st</sup> respondent is left with an unexecutable award in his possession. In the case of **The Registered Trustees of Umoja wa Wazazi wa Tanzania vs. Uswege Msika and Two Others**<sup>xlii</sup> in which case under the execution proceedings the attachment order was set aside and order the release from attachment.

## CONCLUSION

It is important for the litigants (employee, employers and intermeddling on their behalf) in labour disputes both at the CMA and the Labour court to keep themselves by updating and educating through reading various legal materials and recommendations written by labour law practitioners. Also seminars and short course enlighten by elucidating different positions in legal matters as far as labour laws are concerned. Provided that those addressed aspects are conducted by the labour law practitioners. Furthermore, knowledge on parties to the labour disputes at the CMA and Labour court is very important as will help the parties not only to

know the proper person to sue or be sued rather timely disposal of labour disputes at CMA and Labour Court. Lastly it's upon suing the proper party to labour dispute rights and obligations can easily realized.

## ENDNOTES

<sup>i</sup> This was a holding in the case of *The Registered Trustees of the Catholic Diocese of Arusha vs. The Board of Trustees of Simanjiro Pastoral Education Trust* Civil case No. 3 of 1998

<sup>ii</sup> The of issue of necessary and proper party to legal proceedings when wrongly inserted attracts the preliminary objection. There prethora of cases but taking an example of recent case of *Commercial Bank of Africa Tanzania Limited vs Dennis Rutahiwa and Comrade Auction Mart Company Limited*, High Court, Labour Division, Misc. Application No. 226 of 2017.

<sup>iii</sup> Act No.6 of 2004

<sup>iv</sup> Act, No.7 of 2004

<sup>v</sup> GN.NO.42 Published on 16/2/2007.

<sup>vi</sup> GN.NO.64 Published on 23/3/2007.

<sup>vii</sup> GN.NO.65 Published on 23/3/2007

<sup>viii</sup> GN.NO.66 Published on 23/3/2007

<sup>ix</sup> GN.NO.67 Published on 23/3/2007

<sup>x</sup> ELRA No.6/2004 and LIA No.7/2004 and the Rules made thereunder are the main laws in resolving labour disputes at the CMA and Labour court.

<sup>xi</sup> See CMA F1 on details of the parties, this form made under under GN.No. 47/2017 issued 24<sup>th</sup> February, 2017.

<sup>xii</sup> The Law of Contract Act, Cap 345 R.E 2002;

<sup>xiii</sup> See N.N.N. Nditi, (2009) Ed, *General Principles of Contract Law in East Africa*,

<sup>xiv</sup> Section 86(1) (2)ELRA/6/2004 also in the case of *NICOMEDES KAJUNGU &1317 OTHERS V'S BULYANKULU GOLD MINE (T) LTD CIVIL APPEAL No.110/2008* where the court of Appeal Tanzania (TCA) emphasized that is a party who is mandated to refer the disputed to the CMA or the court. See section 86(7) ELRA/6/2004.

<sup>xv</sup> Section 86(1) (2) ELRA/6/2004 read together with Rule 5GN/10(1) (2) and rule 29GN/64/2007

<sup>xvi</sup> Section 86(1) (2) ELRA/6/2004, Rule 5,10, 11, 12 and 29NG/64/2007 also see the case of *M/S swift Motors Ltd V's PASCAL, EXAVELY and OTHERS APPLICANTION no.157/2008* The High Court of Tanzania labour Division stated that "When the CMA F-1 is improperly or incorrectly filled the remedy available is to struck out.

<sup>xvii</sup> See the case of *MUSSA VITALIS UROMU V'S GROUP 4 SECURITY (T) Revision NO.262/2009*. The High Court of Tanzania Labour Division emphasized that the proper procedure to deal with a time barred dispute filed without application for condonation is to reject it on ground of lack of jurisdiction.

<sup>xviii</sup> See The case of *PANGEA MINERALS LTD V/S JOSEPH LAMECK BRUNO Revision No.13/2011*

<sup>xix</sup> See the case of *JURIUS MACHANGO V/S AFRICAN BARRICK GOLD REVISION No.10/2010*

<sup>xx</sup> This is the center of the discussion in this paper

<sup>xxi</sup> Act No.6/2004 and its amendments

<sup>xxii</sup> Act No.7/2004 and its amendments

<sup>xxiii</sup> Made under section 15 (1) (e) LIA

<sup>xxiv</sup> This is made under the auspices of section 86(1) ELRA/6/2004

<sup>xxv</sup> Section 4, Act No.1 RE: 2002 This define person to mean any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated.

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<sup>xxvi</sup> United provinces V.s Atigabegum Air 1941

<sup>xxvii</sup> Section 4 ELRA/6/2004 and section 6ILIA/7/2004 Thus emphasis on who is an employee, employer, employers association and trade union being the necessary party to the dispute and not a manager, General manager, Trade union secretary or chairman of the employers association.

<sup>xxviii</sup> See amended section 2 (a) 82/62 of the ordinance cap 36

<sup>xxix</sup> (1973) LRT.No.24

<sup>xxx</sup> *Mbeya High Court Misc Application No.1/1992.*

<sup>xxxi</sup> See the case of the Registered Trustees of the Catholic Diocese of Arusha vs. The Board of Trustees of Simanjiro Pastoral Education Trust, Civil case No. 3 of 1998. Also was referred in the case of Tanzania National Parks Authority vs. Amon Kagwa Katunzi, High Court Lab.Div.Revision No. 18 of 2014

<sup>xxxii</sup> High Court civil case No. 46 of 2008 (unreported).

<sup>xxxiii</sup> High Court, Lab. Division at DSM, Miscellaneous Application No. 226 of 2017 (unreported).

<sup>xxxiv</sup> High Court, Lab. Division at Moshi, Revision No. 12 of 2016.

<sup>xxxv</sup> See the case of Alnoor Shariff Jamal vs. Bahadur Ebrahim Shamji, Civil Appeal No. 25 of 2006, Court of Appeal at Dar es Salaam.

<sup>xxxvi</sup> The definition of term remedy according to; the Law Dictionary featuring Black's Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> Ed.

<sup>xxxvii</sup> Civil case No. 46 of 2008, High Court of Tanzania at Dar es salaam District Registry (unreported).

<sup>xxxviii</sup> Civil case No. 3 of 1998 at the High court of Tanzania at Arusha.

<sup>xxxix</sup> Misc, Civil appeal no. 12 of 2000 High court of Tanzania at Arusha.

<sup>xl</sup> Branch Manager National Bank of Commerce (NBC) Ltd Moshi vs. Digna Sawala, Revision No. 12 of 2016, High Court Lab.Division.(unreported).

<sup>xli</sup> *Supra*

<sup>xlii</sup> Miscellaneous Application No. 19 of 2017, High court of Tanzania, Labour Division at Mbeya.