**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**

**LABOUR DISPUTE MISCN APPLICATION NO. 001/2020**

**ARISING FROM LDC NO.143/2019**

 **HIMA CEMENT LTD …………… APPLICANT**

**VERSUS**

 **UGANDA BUILDING CONSTRUCTION,**

**CIVIL, ENGINEERING, CEMENT**

**AND ALLIED WORKERS UNION ……… RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1. MR. RWOMUSHANA JACK**

**2.MS. HARRIET MUGAMBWA NGANZI**

**3.MS. ROSE GIDONGO**

**RULING**

This application is brought by Notice of Motion under section 33 of the Judicature Act cap 13, Order 5 Rules 1 & 3 ,of the Civil Procedure Rules SI 71-1., for orders that:

1. The memorandum of Claim in Labour Dispute Reference No. 143 of 2020: Uganda Building Construction, Civil, Engineering, Cement and Allied workers Union vs Hima Cement Limited be struck out and the matter be referred back to the Labour Officer ,
2. The costs of the Application be provided for.

**BACKGROUND**

On 4/2020, the Respondent notified the Applicant’s Human Resource Manager that 9 employees had enrolled with it and requested the Applicant to Clarify its position in regard to the enrollment of the members.

On the 16/06/2020, the Applicant informed the Respondent that the 9 employees who registered with the Respondent were not part of the roles stipulated in the memorandum of agreement as employees who were eligible to be enrolled into the union.

On 20/06/2020, the Respondent through her lawyers Amanyire& Mwebaze Advocates contacted the Applicant again and demanded that the Applicant remit the 3% deduction from the salaries of the 9 employees.

On 22/07/2020, the Applicant through its lawyers Sebalu& Lule Advocates, responded to the Respondents and insists that the 9 employees were not eligible to be included under the provisions of the memorandum of agreement.

On 20/09/2020, the Applicant was surprised to receive a notice of claim, filed by the Respondent in this Court on 7/09/2020, purporting to be arising from the Kasese District Labour Local Government vide Complaint No.8 of 2020. When the Applicant inspected the Court File it established that the Labour Officer reported that, the parties failed to agree, yet the Applicant had never been summoned to appear before any Labour officer in regard to this dispute and neither did the notice in this dispute ever been brought to the attention of the Applicant by the said labour officer or any other person.

The Applicants case:

The Applicants case, as contained in the notice of motion and supporting Affidavit is:

1. That the Respondent reported a labour complaint to the Labour Officer, Kasese District Local Government.
2. The Labour Officer did not take any action on the labour complaint in accordance with the law. He was required to by law to notify the Applicant about the respondent’s complaint and to summon the Applicant and the Respondent to appear before him and take action on the complaint.
3. The Labour Officer referred the complaint to the Industrial Court before taking any action on the Complaint in accordance with the law.
4. It was erroneous and unlawful for the Complaint to be referred to the industrial Court before being handled by the Labour officer in accordance with the law.
5. The parties have been denied an opportunity to mediate or conciliate the dispute in accordance with Labour Disputes (Arbitration and Settlement) Act, 2006.
6. It is necessary to prevent the abuse of law, for the memorandum of claim to be struck off the record and the matter to be returned to the Labour Officer.
7. It is in the interests of justice that the Application is granted.

The Respondents Case

The Respondents case as set out in the Affidavit reply is that:

1. That the Applicant was aware that the Complaint before the Labour officer Mr. Swaib Karafule, was sent to one Christine Napeyok, the Human Resource Officer of the Applicant via email which she acknowledged by email.
2. That it is not true that the Applicant was never summoned by the Labour officer because Mr. Ondoma Joel, the Respondent’s Chief Shop Steward and Christine Napeyok the Applicant’s Human Resource Officer were summoned by the Labour Office by telephone on 0774443694 and advised that parties to hold a phone conference, given the Covid 19 pandemic.
3. That the phone conference took place, and both parties stated their case as stated in the background to this application, but the parties disagreed.
4. Thereafter the labour officer resolved that the matter was a legal issue that required legal interpretation of Court, hence the reference it to this Court.
5. That it is therefore, not true that the labour officer never handled the complaint.

**Issues for determination**

**Whether the reference was competent before the Industrial Court**

It was submitted for the Applicant, that it is a requirement under section 4 of the labour Disputes (Arbitration and Settlement) of Disputes Act(LADASA), for the labour officer to handle a compliant within 2 weeks of receiving it in one of 5 ways:

1. Meet with the parties and endeavour to conciliate and resolve the dispute.
2. Appoint a conciliator to conciliate the parties in the dispute and inform the parties, in writing of the appointment of a conciliator.
3. Refer the dispute back to the parties with comments and proposals of the terms upon which a settlement of the dispute may be negotiated.
4. Reject the report and inform the parties accordingly
5. Inform the parties that the report comprises matters which cannot be dealt with under the Act.

Counsel asserted that it is mandatory for the labour Officer to handle the dispute reported to him in any of the five ways stated above and in the instant case the Labour officer did not do so and instead referred the dispute to this Court.

He further submitted that section 5 of the LADASA provides for ways in which the Labour officer can refer a matter to the Industrial Court. Section 5(1) provides that the labour officer can only refer the dispute at the request of the parties if after 4 weeks of receiving the dispute, the dispute has not been subjected to conciliation under section 4(a) or 4 (c) or if the conciliator appointed under 4(b) considers that there is no likelihood of reaching an agreement. Therefore the Industrial Court’s Jurisdiction can only be invoked by reference of a dispute in any of the ways provided under the LADASA and any matter that comes to the Court in a manner that is contrary to the law is a nullity which Court would have no jurisdiction to entertain. He cited, **Attorney General of the Republic of Tanzania vs African Network for Animal Welfare for East African Court of Justice- Appeal No 2011**, which it was stated thus:

*“Jurisdiction is a most, if not the most fundamental issue that a court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the foundation from which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first step in its judicial journey to hear and dispose of the case.”*

He also cited **Eng. Eric Mugenyi Vs Uganda Electritcity Generation Company Limited CA No. 157/2018,** which resolved that the Industrial Court is a Court of Reference and disputes can only be referred to it in accordance with the Law.

He contended that in the instant case none of the elements provided in the LADASA were met, before the dispute was referred to the Industrial Court. He however admitted that there was electronic correspondences between the Ondoma the Respondent’s representative and chief shop steward, who supposedly filed its complaint with the Labour Officer, a one Swaib Karafule(annex “A”) to the Affidavit of reply. The correspondences indicate that the labour officer forwarded Ondoma’s email to Ms. Christine Napeyok, the Applicant’s Human Resources Officer by email, and her email response notified the Labour officer that a similar compliant had been filed at the Ministry of Gender Labour and Social Development. The Labour officer then forwarded this response to the Respondent’s Mr. Ondoma and advised him to notify the Respondent’s General Secretary. There were no further correspondences after that. It was his conclusion that, apart from electronically sending the Complaint to the Applicant and being informed by the Applicant that the complaint was before the Commisioner Labour, the Labour Officer took no further action and instead asked Mr. Ondoma to notify the Respondent’s General Secretary.

He refuted the allegation that the Labour Officer summoned and heard the parties on phone, because the Respondent did not disclose the dates on which the phone correspondences purportedly took place. And the Labour Officer’s report does not indicate whether the said phone correspondences were conducted or not. He argued that these inconsistences were an indication that it was highly unlikely that the said correspondences actually took place. He also refuted the assertion that he labour officer who initially communicated by email could communicate such an important meeting by phone. He insisted that the said phone correspondences did not take place and there is no evidence to indicate that he handled the matter in accordance with the law.

He insisted that it was unlawful for the Labour officer to refer a dispute without handling it in any of the ways provided under the law and according to him, annex A to the Affidavit in reply, shows that complaint was reported on 24/08/2020 and according to Annexture B to the affidavit in reply, the report to the labour officer and the reference to the court was made on 1/09/2020 about 1 week after the complaint was received, which was contrary to the Section 5(1) of the LADASA.

He also contended that neither of the parties to the dispute, requested for the reference. According to him, the labour officer can only refer the dispute if one of the parties makes a request and not on his or her own volution.

He insisted that the dispute involves an abuse of Court process and Court should firmly reprimand the Respondents for wasting time and for forum shopping, having also filed the same complaint before the Commissioner Labour and went ahead to file it before the Labour officer Kasese and subsequently by collusion the claim is now in this Court.

He insisted that, the dispute is prematurely before this court and it should be referred back to the Labour office so that the Labour Officer can perform his duties as required by law. He prayed that the application is dismissed with costs.

In reply Counsel for the Respondent submitted that the labour officer took action in accordance with section 4 of the LADASA. He reiterated that the Labour officer was notified about the dispute by email and he notified the Applicant through it’s Human Resources Officer, Ms. Napeyok, by email but due to the COVID pandemic he chose to handle it the via phone conference. He insisted that a phone conference took place, but the parties disagreed.

Counsel refuted the assertion by the Applicant’s that the Applicant never received any notice of the Labour dispute meaning that they were never aware about the dispute before the Labour Officer. It was his submission that the complaint was served onto the Applicant’s Human Resources Officer by email, therefore they cannot claim ignorance.

He argued that the Labour officer is at liberty to refer a matter to the Industrial court if he or she realises that it involves substantial questions of law to be addressed and determined by court. According to him one of the reasons the Labour Officer referred the matter to this Court was because it involved matters of law to be determined by court. Citing **Eng. Eric Mugenyi Vs Uganda Electricity Generation Company Limited CA No. 157/2018(supra)** Counsel asserted even if the Respondent was not made aware of the complaint before, it was held that, that the labour officer in this case, had all the materials upon which the parties expressed themselves in the pleadings in the complaint. It follows that the reference arises from the attached claim and the Response of the respondent, because submission of the labour Officer to the Industrial Court cannot only arise from the complaint but includes a claim which he said was before him for the question to be referred.

The Applicant insisted that the employees were not among the members to join the union and being a legal issue upon disagreement the parties referred the matter to court.

He stated that the complaint before the Commissioner Labour was filed in error and the matter before this court has now overtaken it and the respondents have withdrawn it

In rejoinder, Counsel reiterated the position of the law that the labour officer is duty bound to take action on a complaint as provided for under section 4 of the LADASA. Counsel asserted that it was not in dispute that the Applicant was notified about the report of the Respondent and it is not in dispute that the Applicant notified the Labour Officer that a similar dispute was pending before the commissioner a labour.

According to him the point of contention is whether the labour officer took any further action after recibing the Applicant’s response. He asserted that he dis not and there is not evidence to indicate that he did.

He refuted the submission by counsel for the Respondent that section 5 of the LADASA only provides for reference by the parties and no the labour officer.he insisted that section 5 (1) clearly provides for a reference by a labour officer and these powers of reference can only be invoked when a party requests for a reference and the request is made 4 weeks after the complaint was reported to the labour officer. He refuted the submission that a labour officer can make a reference without informing the parties. he insisted that section 5(1) of the LADASA doesn’t empower the labour officer to reference to or before the lapse o 4 weeks a dispute to the Industrial Court where there is no request by any of the parties

He also refuted the proposition that the complaint before the labour commissioner was filed in error

**DECISION OF COURT**

**The point of contention is whether the labour officer can refer a matter to the Industrial Court without following the procedure Under sections 4(a),(c) and 5(1) of the LADASA.**

Section 4(a) and (c) of the LADASA empowers a labour Officer to take steps to deal with a complaint as set down under it and Section 5(1) provides for the steps to be taken before he or she can make a referral to the Industrial Court. The Court of Appeal, in **Eric Mugyenyi**(supra) held elaborated the procedure under section 5(1) as follows: *“… it presupposes that the matter was properly lodged before a labour officer whereupon it was sent for conciliation. In the alternative if the matter is not sent to the Industrial Court within 8 weeks from the time the report is made by the conciliator, any of the parties or both parties to the dispute may refer the dispute to the Industrial Court. The manner of dealing with the complaint is provided for under section 4 of the Labour Disputes (Arbitration and Settlement) Act. The labour officer is expected to act within two weeks after receipt of the report which is made under section 3 of the Act. First of all, it is important to serve the respondent a copy of the report of complaint in a labour dispute made by a party. Thereafter the labour officer may meet the parties and endeavour to conciliate and resolve the dispute or appoint a conciliator to conciliate the parties in dispute and inform the parties inwriting of the appointment or refer the dispute back to the parties with comments and proposals to the parties of the terms upon which settlement the labour dispute may be negotiated; reject the report and inform the parties accordingly give reasons for rejecting it having regard to the matters provided there under. Lastly. The Labour Officer may inform the parties to the dispute that the report comprises matters which cannot be dealt with under the Act.*

Section 4(e) of the LADASA which allows the Labour officer to inform the parties to the dispute that, the report comprises matters which cannot be dealt with, is silent on what steps the labour officer should take, in such circumstances, which may be include situations where questions of law or fact have arisen and the Labour officer cannot handle them.

The holding in **Mugenyi(**supra) is further to the effect that, even if it is mandatory for a labour officer to refer the dispute to the industrial Court at the request of any party to the dispute, as provided under Section 5(1), of the LADASA and given that the Industrial Court has jurisdiction to deal with any reference from the labour officer, where the Labour Officer believes that a question of law or fact arises from the materials before him or her, which form the complaint, he or she is at liberty to refer it to the Industrial Court without following the requirements under section 5(1) of the LADASA(supra).

In the instant application, the Labour officer was notified about the dispute by the Respondent’s chief shop steward, a one Mr. Ondoma by email, he notified the Applicant through Ms. Napeyok it’s Human Resources Officer about it. She acknowledged receipt of the Complaint and Responded to it. She also mentioned that the same had been reported to the Ministry of Gender Labour and Social Development. The Labour officer in his reference to the Industrial Court seemed to intimate that parties participated in a phone conference to resolve the matter but no proceedings of the said conference were adduced as evidence. As counsel for the Applicant submitted it is highly unlikely that the phone conference took place because no evidence was adduced any evidence to that effect. This notwithstanding, the labour office made a reference to the Industrial Court on the basis that the matter was a point of law which court had to resolve.

As already discussed, **Eric Mugyenyi,**(supra) is to the effect that a Labour officer, can on his or her own volution, make a reference to the Industrial Court solely based on the materials upon which the parties expressed themselves in their pleadings, in a complaint before him or her, where a point of law arises therefrom.

The expectation is that each labour officer should at least comply with section 4(a) and (c) to conciliate or cause a conciliation before making a reference to the Industrial Court. However, the Court has taken Judicial notice that most Labour Officers are not lawyers or are not very conversant with the law, therefore they may not be able to handle certain complaints, hence having to refer them without recourse to sections 4(a) (c) and 5(1) of the LADASA. We believe this is the reason why the legislators provided, the labour officer with an option to inform the parties where, the report comprised of matters which could not be handled under the Employment Act.

In the circumstances, having made the reference based on the fact that a point of law which he could not resolve had arisen from the claim, and the Industrial Court being dressed with Jurisdiction to handle references from the labour officer and given the holding in **Eric Mugenyi**(supra), the Claim is competent before the Industrial Court.

We shall not address our minds on the contention that the Respondent was forum shopping, simply because the reference in contention arose from the Kasese Labour office.

This application therefore fails. It is dismissed with no order as to costs.

 Delivered and signed by:

**1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE …………….**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA …………….**

**PANELISTS**

**1. MR. RWOMUSHANA JACK …………….**

**2.MS. HARRIET MUGAMBWA NGANZI ..…………..**

**3.MS. ROSE GIDONGO …………….**

**DATE: 17/12/2020**