

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

REVISION NO. 96 OF 2019

(c/f Original CMA/ARS/ARB/484/2019)

BETWEEN

STANSLAUS M.N. MINJA.....APPLICANT

VERSUS

HIGHLAND VETERINARY COMPANY LTD.....1ST RESPONDENT

ISAACK WILLIAM MPEMBENE.....2ND RESPONDENT

JUDGMENT

30/03/2020 & 04/05/2020

GWAE, J

Before me is an application for revision preferred by the applicant one Mr. Stanslaus M. N. Minja brought under section 91 (1) (b) and 91 (2) (b) & (c), 94 (1) (b) (i) of the employment and Labour Relation Act No. 6/2004 and rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN 106 of 2007. The applicant's prayers are to the effect that;

1. That, this Honourable Court may be pleased to call for the record of the proceedings in the Commission for Mediation and Arbitration (CMA) for Arusha in dispute number CMA/ARS/ARB/484/2019 so as to examine the record, proceedings, decisions, and the award of the said

Commission so that this court can and satisfy itself on the correctness, legality and propriety of the said decision and award delivered on 11/10/2019 by Honourable Lomayan Stepheno, the Mediator.

2. That, this Honourable court be pleased to reverse and quash the award of the Commission for Mediation and Arbitration (CMA) in dispute number CMA/ARS/ARB/484/2019 delivered on 11/10/2019 by Honourable Lomayan Stepheno, the Mediator.
3. That, this Honourable court be pleased to find out that the award is unlawful, illogical and irrational.
4. Any other relief (s) this honourable court shall deem fit and just to grant.

A brief background of this case may be given as follows; the applicant in the first place referred his dispute against the second respondent before the Commission on 12/06/2019 through CMA/ARS/ARB/304/2019. On 08/07/2019 when the matter was fixed for hearing of the sought condonation, the applicant prayed to withdraw his case with leave to re-file so as to be able to join a necessary party. Leave was granted and the applicant was given 14 days to re file his case. The applicant for the second time filed his case through CMA/ARS/ARB/484/2019 and this time the first respondent was joined to the case. The matter was heard by way of written submission and both parties presented their written submissions. On the date fixed for mention with a view of fixing a date for ruling the applicant again came up with the prayer that he be permitted by the Commission to withdraw the case with leave to re-file as he has discovered that the first respondent is not a legal entity. The applicant further stated that he has

been facing difficulties in identifying the respondent as he was not given the employment contract by the respondent.

Following the applicant's repetition of the same error (Mis-joinder of parties) the Commission rejected the applicant's prayer for the reason that this was not the first time for the applicant to make such a prayer with the same reason of "identifying the respondent". The Commission further stated that, litigation should come to an end and allowing this kind of prayers would entertain endless litigation in support of his holding, the Hon. Mediator cited the case of **Stephen Masato Wasira vs. Joseph Sindi Warioba & the Attorney General** [1999] TLR 332 at pg 342.

The Commission further stated that the applicant and his advocate's failure to identify the real respondent between the Highland Veterinary Company Ltd and Highland Veterinary Services amounts to negligence and cannot use it as an excuse. Given the above circumstances the Commission went on dismissing the entire suit for the reason that the applicant has failed to identify the respondent therefore even if the application for condonation was granted the applicant would nevertheless withdraw his case.

On hearing of this matter the applicant was represented by the learned counsel **Mr. Thadei Minja** whereas the respondent stood represented by the learned counsel **Ms. Upendo Nelson Merinyo**.

Submission of the case was done orally by the parties and it was the submission of the applicant that he had sufficient cause for the delay as

he was sick for a long period of time and he tendered the necessary medical chits.

The respondent on the other hand submitted that the applicant's application for condonation was not heard on merit except that the same was dismissed on the ground that the applicant lacked due diligence. The act of the applicant who was represented by an advocate to repeat the same mistake twice amounts to negligence. The counsel cited the case of **DP Valambhia v. Equipment** [1992] TLR 246 where negligent position was stressed.

In his rejoinder the applicant stated that it is true that the matter was not decided on merit but on technicalities which is contrary to the principle of overriding objective. The counsel cited the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 where the Court of Appeal held that courts should dispense justice without being tied with technicalities.

Having gone through the entire records of both the Commission and those brought up in this court, the issue for determination is whether the Mediator decision was correct to dismiss the entire dispute.

The main reason for the Mediator's decision to dismiss the entire case is as a result of the applicant's failure to identify his employer (respondent). Indeed It appears that the applicant so far did not know the exactly person to sue and that is why he has been withdrawing his case on two occasions. In the CMA Form No. 1, the applicant indicated that he has been working with his employer since 01/05/2005 up to

30/09/2018 when he was terminated. Roughly the applicant has worked for his employer for more than ten years and it goes without saying that for all this time the applicant never knew his employer. The applicant further claims that he has never been given his employment contract therefore making things even more difficult on his part to identify his real employer. According to the records of the Commission the applicant stated that and I wish to quote;

"Mwajiri anafanya biashara kwa kutumia Business Name na Company Name, kwenye duka ameandika Highland Veterinary Services na baadhi ya documents na voucher na katika nyaraka zingine anatumia Highland Veterinary Co. Ltd.....hivyo nimekuja kubaini kuwa Highland Veterinary Co. Ltd haina legal capacity (not a legal entity) hivyo tunaomba kuondoa kesi hii kwa ruhusa ya kuwasilisha upya kwa kurekebisha parties na kumueka asome kama Isaack William Mpembene trading as Highland veterinary services."

Following the above quotation and taking into consideration that the applicant does not have the employment contract indeed it may be true that it was difficult for the applicant to identify his employer. I am aware of the fact that the applicant ought to have brought his concern at an earlier stage before the matter was set for fixing a date for ruling and I am also aware of the fact that litigations must come to an end as stated in the case of **Stephen Masato wasira vs. Joseph Sindi warioba & The attorney general** [1999] TLR 332. However I am of the view that each case must be decided according to its own set of facts **See: Charles Chama & others v. the Regional Manager TRA & others**, Civil appeal No.224 of 2018 CAT at Bukoba (unreported).

In the case at hand denying the applicant an opportunity to withdraw his case so that he may file a new application with proper parties will be going against the principal of ***"justitia nemine negand"*** (justice should be denied to no one) together with his constitutional right to be heard as per Article 13 (6) of the Constitution.

I am further of the view that the Hon. Mediator misdirected himself in dismissing the entire case since the matter was not determined to its finality and from the outset the application was improperly filed (wrong parties) The Mediator in his ruling stated that and I quote;

" pamoja na kwamba maombi haya yameletwa wakati wa kusubiri uamuzi wa maombi ya muda wa ziada, hata kama maombi hayo yangekubalika, mleta maombi bado angeomba kuondoa tu maombi hayo kwa kile anachodai anahitaji kufungua shauri dhidi ya mlalamikiwa sahihi hivyo suala hili litakuwa linakwenda mbele na kurudi nyuma kutokana na maombi mbali mbali ambayo hayapati muafaka. Kwa ufafanuzi niliutoa hapo juu ninalazimika kutupilia mbali (dismiss) shauri hili."

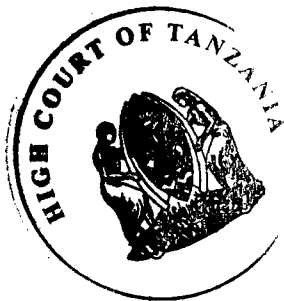
It is well settled as to when the court should make a decision as to whether to dismiss or struck out the matter before it, **See: Mabibo Beer Wines & Spirits Ltd. vs. Fair Competition Commission & 3 Others Civil Appl. No. 132 of 2015** CAT at DSM (unreported). More so in the old case of **Ngoni Matengo Cooperative Marketing Union Ltd vs Alimahomed Osman [1959]** EA 577 the defunct Court of Appeal for Eastern Africa stated that:


"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

With the above principle, the proper approach to have been taken by the Mediator was for him to strike out the application and allows the applicant to file a fresh application with proper parties instead of dismissing it or alternatively making an order as to an amendment of the parties.

In the event this application is granted, the CMA order is hereby revised and set aside, the CMA's Mediator is directed to make an order inserting proper parties to the application and then proceed determining the application for condonation on merit

It so ordered.




M.R.GWAE
JUDGE
04/05/2020