

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
LABOUR REVISION NO.37 OF 2020**

(Arising from a Decision of the Commission for mediation and Arbitration in
CMA/MZ/NYAM/APP/11/2019)

NYANZA ROAD WORK APPLICANT

VERSUS

JULIUS MABUSI RESPONDENT

JUDGMENT

Last order: 21.07.2020

Judgment Date: 24.07.2020

A.Z.MGEYEKWA, J

This is an application which was brought under Section 91(1),(a)and (b), Section 91 (2),(a),(b) and (c), Section 91 (4) (a) and (b) and Section 94 (1),(b),(i) of the Employment and Labour Relations Act No.6/2004 Rule

24(1), 24(2),(a),(b),(c),(d),(e) and (f) and 24(3),(a),(b)(c),and (d) and Rule 28 (1),(c),(d) and (e) of the Labour Court Rules GN.No.106/2007.

The applicant filed a Notice of Application, Notice of Representation, Chamber summons accompanied by an affidavit deposed by Milembe Faith Lameck.

The respondents challenged the application by filing a Notice of Opposition and a Counter-Affidavit deposed by Rose Edward Ndege, learned counsel.

The applicant in his chamber summons prayed for the following orders:-

- 1. That this Honourable Court be pleased to call for records and revise and set aside the whole award of the Commission for Mediation and*
- 2. Any other relief the court may deem fit and just to grant.*

The hearing was done via audio teleconference whereas the applicant enjoyed the service of Mr. Ringia, learned counsel, and the respondent enjoyed the service of Ms. Rose Ndege, learned counsel.

Supporting the application, Mr. Ringia argued that the typed proceedings are contrary to the original proceedings. He referred this court to the last

page of typed proceedings and argued that at the time when they filed their application the CMA original record proceedings dated 15th February, 2019 was recorded to the extent that it ended in rejoinder and there was no any CMA record as what the CMA stated thereafter. He added that they have noted that the typed proceedings contain additional words; CMA has informed the respondent's representative concerning the date of the ruling.

Mr. Ringia lamented that those words were missing and it was one of their ground that the applicant was not notified on the date of pronouncement of the ruling. He added that the law requires the CMA to inform the parties when the ruling will be delivered to allow the parties the step to be taken thereafter. To support his submission he referred this court to the case of **Serengeti Breweries v Joseph Boniface**, Civil Appeal No. 150 of 2015 (unreported).

The learned counsel for the applicant continued to submit that the CMA proceedings are tainted with irregularities. He argued that Regulation 32 of GN. 64 of 2007 directs how to write a proceeding failure to that the proceedings are a nullity. Mr. Ringia fortified his submission by referring this

court to the case of **Tanzania Leaf Tobacco Company Ltd v Said Mgemwa** (unreported) High Court at Tabora.

It was Mr. Ringia further disputed the mode of summons used to summon the applicant to appear before the CMA. He argued that the CMA claimed that the applicant was served to appear before the CMA through EMS while the records are silent, there is no any receipt which indicates that the applicant received the summons and signed it.

He continued to argue that the Arbitrator faulted himself to determine a new issue on time limit which was not raised by parties. He argued that the Arbitrator *suo mottu* decided that the matter was time-barred. He referred this court to the case of **David Nzaligo v N. Microfinance Bank PLC**, Civil Appeal No. 61 of 2012, and the case of **Pauline Minza v Junior Construction Company Ltd**, Labour Revision No. 94 of 2019. HE argued that parties were required to be informed, failure to that the award is a nullity. He went on to fault the Arbitrator for citing a wrong section regarding time limitation. He added that the Arbitrator cited section 90 of the Employment Labour Relation Act instead of citing section 87 (5) of the Act.

He went on to argue that the CMA decision concerning the matter of time-barred was contrary to the law.

In conclusion, Mr. Ringia urged this court to allow the applicants to be heard on merit, set aside the *ex parte* award and the matter to be determined inter parties before another Arbitrator.

Responding, Ms. Ndege prays this court to adopt the respondent's counter-affidavit and form part of her submission. She submitted that the issue of proceedings is not a new issue because is not stated in the applicants' affidavit otherwise she left the matter in the hands of the court to direct itself on the CMA proceedings. Ms. Ndege admitted that the CMA misdirected himself for deciding that the matter before the CMA was time-barred by citing section 90 of the Employment Labour Relations Act instead of citing a proper section 87 (5) of the Act.

Ms. Ndege argued that both parties were summoned to appear at the CMA and the respondent was summoned through EMS and the EMS was received by one Ismail with reference No. ee20/627872512. She added that the receipt was filed at the CMA. She went on to argue that the respondent

appeared at the CMA but the first file which contained those records was nowhere to be found. Ms. Ndege argued that when the matter was called for hearing on 5th February, 2019 the respondent was present at the CMA and the hearing date, and the ruling date was set thus he was aware of the pronouncement date of the exparte ruling.

Regarding the matter of extension of time, Ms. Ndege submitted that this court will determine if the applicant was required to apply for extension of time before filing his application to set aside the exparte award. To support her submission she cited the case of **Tanzania Isack M v Railway Cooperation** Civil Case No. 3 of 2014 (unreported) and argued that the issue of jurisdiction is fundamental and it can be raised at any stage even suo mottu. Regarding the issue of irregularities, he argued that the Court of Appeal of Tanzania in some cases does not order retrial unless the irregularities prejudiced the parties. Thus she urged this court not to order retrial because the same will affect the respondent.

In conclusion, Ms. Ndege urged this court to dismiss the application.

In a brief rejoinder, Mr. Ringia reiterated his submission in chief and disputed that the first file was lost. He argued that they have not raised any

new issue since the applicant's affidavit shows that the applicant has raised an issue of irregularity. He urged this court to allow their application.

After a careful perusal of the submissions made for and against the application by both the learned advocates and after having gone through the court records, I have come to the following firm conclusions.

In determining the application, I find it convenient to start with the grounds of review raised by the applicant counsel because in my opinion, if any of three grounds will be upheld it will have the effect to bring to an end the entire application. In that regard, I start with the first ground of review that the Commission for Mediation and Arbitration award and proceedings are tainted with irregularities.

The learned counsel for the applicant has lamented that there is a variance between the typed CMA and the original proceedings for the reason that the original proceedings were recorded in a way that the CMA ended in recording rejoinder but the typed proceedings show that the applicant was informed about the date of delivering *ex parte* judgment. I have perused the court records and found that in the original proceedings the CMA's records included the notification to the applicant that the decision will be pronounced

on 28th February, 2019. However, examining closer I have noted that the handwriting are not the same it is doubtful if the last part on notifying the applicant was written. The doubt is resolved in favour of the applicant.

Additionally, the Arbitrator on 14th day of January, 2019 recorded that the applicant was absent without informing the CMA even when he was duly been served through EMS. I have perused the CMA records but I could not find any proof of service. The CMA records show that on 14th day of November, 2018 both parties were present, Mr. Bernard Bnyikila appeared for the defendant. The parties framed issues and both parties were ordered to bring exhibits on 27th day of November, 2018 and hearing was scheduled on 13th day of January, 2019 and 14th day of January, 2019 that means, the presence of the suit was brought to the attention of the applicant as he showed appearance and then he disappeared. Although the EMS receipt was not filed in the CMA records but the records reveal that the applicant was aware and appeared before the CMA.

Additionally, the applicant lamented that the Arbitrator *suo mottu* raised his own issue that the application was time-barred. This ground made me

peruse the proceedings to grasp the issues framed by parties, the issues which were framed by both parties are produced hereunder:-

1. *Whether there were sufficient reasons for the Commission to set aside the ex parte award;*
2. *What relief sought.*

The Arbitrator determined the first issue and before embarking to the second issue on page 7 of the CMA award, the Arbitrator *suo mottu* determined an issue on time-barred, I produce the Arbitrator findings for ease of reference:

" This application is out of time and the applicant did not bother to file first an application for extension of time for him to be allowed to file an application to set aside an ex parte award.

From the above excerpt of the proceedings in the CMA, it is clear that the issue of time-barred was not raised by either party. The CMA records show that the issue of time-barred was considered at length when the CMA was deliberating the second issue and he reached a conclusion that the CMA had no jurisdiction to determine the matter at hand. In the case of **David Nzaligo** (supra), the Court of Appeal of Tanzania observed that the High

Court Judge determined the issue of the status of probation suo mottu without according the parties the right to submit thus, the appellant was not accorded an opportunity to be heard.

Similarly, in the case of **Amos Elias v Grace Mwijage** Civil Application No. 432/08 of 2018, which was delivered on 19th June, 2020 the Court of Appeal cited with authority the case of **Abbas Sherally v Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (unreported) it was held that:-

" That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of the principle of natural justice."

Base on the above authorities and findings, I find that the Arbitrator did not direct himself to the issue framed by the parties; instead, he directed himself to determine issues which were not raised by the parties. I am saying this because the Arbitrator diverged from the framed issues and discussed the issue of time-barred. The analysis of the Arbitrator was thorough to the extent that his analysis rendered the determination of the second issue demerit and as a result, he dismissed the application.

It has to be noted that the CMA is legally bound to adhere to the issues framed by the parties when analysing and stating reasons to reach a fair decision. In case the Arbitrator thought that there is a new issue before composing his judgment or ruling he was in a position to call upon both parties to address him and afford them the right to submit instead of raising his own issues *suo mottu*.

The above mentioned irregularities raised by the applicant's learned counsel and the circumstance of the error that the respondent was not notified about the date of the *exparte* Judgment. I find that the shortfalls call for intervention of this Court loudly notwithstanding the merits of the appeal.

In the end result, I find that failure by the Arbitrator to observe the fundamental procedure in the arbitration process as demonstrated above amounted to material irregularity leading to injustice to the parties. From the above findings and analysis, it is hereby ordered that:-

1. The proceedings in Labour Dispute No. CMA/MZ/NYAM/APP/11/2019 is hereby quashed and set aside;

2. The CMA record is remitted back to the CMA for the same to be arbitrated inter-parties afresh before another Arbitrator.

Order accordingly.

Dated at Mwanza this date 24th day of July, 2020.




A.Z.MGEYEKWA

JUDGE

24.07.2020

Ruling delivered in the chamber this 24th day of July, 2020 via audio tele conference, and both learned counsels were remotely present.


A.Z.MGEYEKWA

JUDGE

24.07.2020