

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LABOUR REVISION NO. 112 OF 2018**

**(C/F misc. application. no. 7 of 2018, original CMA/ARS/MED/411/2016)**

**TRUCKLINE LIMITED.....APPLICANT**

**VERSUS**

**NASIBU JUMA.....RESPONDENT**

**JUDGMENT OF THE COURT**

**4/05/2020 & 24/08/2020**

**GWAE, J**

The applicant above is dissatisfied with the decision of the Commission for Mediation and Arbitration (Hon. Lomayani Stephano) in Misc. Appl. No. 7/2018 where his application for setting aside an ex-parte award of the case No. CMA/ARS/MED/411/2017 was dismissed for lack of good cause. Eventually, he has brought this application under Section 91(1) (a) and (b), (2) (a), (b) and (c) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 24 (1), (2) (a), (b), (c), (d), (e), (f) and 24 (3) (a), (b), (c), and (d) and 28 (1) (a), (c), (d), and (e) of the Labour Court Rules, GN No. 106 of 2007.

The applicant is seeking orders of this court in the following terms;

1. That this Honourable Court be pleased to call for and examine the records of CMA Ruling made on the 24 November, 2018 in Misc. Appl. No. 7/2018, by Honourable Arbitrator, Lomayani Stephano for purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made there in and revise and set aside the same.
2. That, any other relief this Honourable Court deems just and fair be granted.

This application is supported by the affidavit of Mr. Qamara Aloyce Peter the advocate for the respondent whose affidavit is to the effect that he is aggrieved by the decision of the Hon. Arbitrator in the following grounds;

- i. That, the mediator's ruling was improper for failure to consider that besides availability of receipts of the service by way of postal service there was no proof of reception by the applicant.
- ii. That the mediator's ruling was improper for failure to consider that the postal service is not a conclusive proof that, the other party received summons without signature of the recipient.
- iii. The mediator's ruling was improper for failure to consider that the initial summons issued to the respondent was for the matter which was assigned for mediation before another mediator and the changes of mediator was done without notifying the respondent at CMA.
- iv. That the mediator's ruling was improper for failure on the part of the mediator to consider the testimony of the applicant without making of fact findings.

The applicant's affidavit was opposed by the counter affidavit of the respondent's Personal Representative one **Herode Bilyamtwe** who maintained that there are no irregularities and that the mediator's ruling was proper.

Hearing of this matter proceeded by way of written submissions and the parties were represented by **Mr. Qamara Aloyce Peter** (advocate) and **Mr. Herode Bilyamtwe** (Personal Representative) respectively.

In submitting his grounds for revision the learned counsel for the applicant argued that, the availability of the postal receipts without proof that the documents were received by the other side is not in itself a proof that the documents were served to the other party. The counsel went on submitting that even the law that govern proof of service indicate that the service under Rule 7 (1) (a) (b) (c) (i) (ii) of the Labour Institutions (Mediation and Arbitration) GN 64 of 2007 (to be referred as the Rules henceforth) is only a presumption unless the contrary is proved otherwise.

The counsel further cited Rule 9 of the Rules, which provides for a presumption that where a document is sent by registered post it is presumed that within seven days from when it was posted to have been received by the person to whom it was sent. The counsel was of the view that the respondent violated the requirement of this Rule specifically on the second summons which was posted two days before the date of the hearing. The counsel also added that they had never refused acceptance of the summons from the court and even when the first summons which was

done by physical means the applicant appeared before the Commission for Mediation and Arbitration (CMA) even though the mediator was absent.

The learned counsel also submitted on the issue of change of the mediator without notifying the respondent. He stated that the first summons which he was served with, indicated that the parties were to appear before Hon. Keffa. The applicant's counsel appeared on the mention date apparently the mediator was absent and as usual he was told that a summons with another date will be issued.

On the other hand the respondent through his personal representative strongly opposed the applicant's submission by stating that the mediator was proper to decide the matter ex parte after the applicant had not appeared for mediation for 30 days. The respondent further introduced a new issue that the applicant is challenging the wrong party. According to him the name of the respondent in the CMA ex parte award was NASIBU AYUBU JUMA while the name of the respondent challenged in the application to set aside the ex parte award by the applicant appears to be NASIBU JUMA. Thus according to the respondent the ex parte award is still not challenged as the names of the respondent appear to be different.

In his short rejoinder the applicant counsel consented on the omission of the respondent's middle name AYUBU as it was a typographical error, and is of the view that the omission does go to the root of the matter which can cause injustice to any party. The counsel also stated that cases are identified by names of the parties together with the case

number. In this matter even though the respondent's middle name was omitted but the case number of the matter challenged was correct.

I have diligently considered the rival submissions of both parties in this revision together with the record of the CMA. As stated above this revision arises from an application to set aside an ex-parte award thus the main issues for determination are; **One**, whether the applicant was not properly served with summons and for that reason he was not aware that the matter was fixed for hearing. **Two**, whether the applicant was prevented by any sufficient cause from appearing when the matter was called on for hearing.

It is settled that, in applications for setting aside, the applicant has to establish that he was prevented by sufficient cause from appearing on the material day. In the case of **Abdallah Zarafi V. Mohamed Omari** (1969) HCD the Court anchored this position and it was held that:

"There are occasions when a court is empowered by law to set aside its own orders. A trial court is empowered to set aside an ex-parte decree or an order dismissing a suit passed as a consequence of non appearance so long as the person against whom the decree or order for dismissal of the suit is able to establish that he was prevented by sufficient cause from appearing in court on the material day."

From the records, it appears that the applicant strongly refuted to have received any summons for the scheduled hearing and added that availability of the postal receipts without proof that the documents were



received by the other side is not sufficient to prove that the documents were served to that party. On the other hand the respondent seriously maintains that, he had properly served the applicant through the postal services in which receipts from postal office attached in the complaint (referral).

From the wording of Rule 7 (1) (a), (b) (c), (i) and (ii) and Rule 7(2) of the Rules, I partly agree with the applicant's counsel submission that it might be correct that mere presence of postal receipt does not in itself suffice to prove that the documents have been received by the other party as there is nothing to indicate that the documents have been well received by the receiver. The receipts issued by the postal office only indicate that the documents had been successfully sent to the other party however there is nowhere in the receipts that point out that the documents have been received.

The postal rule has also a challenge as stipulated in rule 9 of the Rules that it is presumed that within seven days from when the document was posted to have been received by the person to whom it was sent. It is therefore a mere presumption as anything may happen as opposed to service through EMS which guarantee assurance of service. A good example is on the second summons which was posted two days before the hearing date, thus in contravention of Rule 9 of the Rules, it therefore is doubtful as to whether the applicant was in a better position to have received the summons in two days before hearing. I am of the view that, the postal service is the weakest mode of service to be encouraged and I would suggest this mode of service to be used only where other modes of


services are inapplicable or have proved failure as the same does not guarantee proof of service.

The respondent has also raised an issue concerning the names of the respondent appearing in the applicant's application, according to him the names referred by the applicant are not the names of the respondent. I have gone through the documents and I shall not dwell much on this as I right away agree with the applicant's counsel that, the omission of the middle name "AYUBU" was a typographical error and does not occasion any injustice to the respondent, further to that, the respondent has not rejected the other names of NASIBU JUMA. I think with the advent of the principle of overriding objective disputants should not be tied with legal mere legal technicalities but rather should aim at achieving substantive justice.

That being told, and for the reason that, there is no tangible proof as to whether the applicant received the summons, I think refusing to grant this application is tantamount to the infringement of the right to be heard on the party of the applicant. Consequently this application is granted, the ex-parte award procured by the Commission is hereby revised and set aside. The dispute between the parties shall be heard inter-parties. No order as to cost is made.

It so ordered.



  
**M.R.GWAE**  
**JUDGE**  
**24/08/2020**