

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

REVISION No. 23 OF 2019

MKURUGENZI TARIME GOODWILL FOUNDATION..... APPLICANT

VERSUS

EDITHA SALONGO TIBAMANYA..... RESPONDENT

(Arising from dispute No. CMA/MUS/233 OF 2017)

RULING

17th & 24 March 2020

Kahyoza, J.

It is in the interest of State that litigation should come to an end. Parties cannot litigate endlessly. They need time out of litigations to undertake economic activities. I resolve to preface this rulling with those words for what I will attempt to explain herein under. **Mkurugenzi Tarime Goodwill Foundation** employed **Editha Salongo Tibamanya**. Mkurugenzi terminated the employment contract of Editha. Editha instituted a labour dispute before the Commission for Mediation and Arbitration (the CMA). It was **labour dispute No. CMA/TRM/39/2016**. The labour dispute was determined infavour of Editha on the **31/8/2017**. The determination was made *ex-parte*.

The CMA awarded Editha **Tshs. 13,016, 266/=**. On one hand, Editha applied to execute the award to the High Court by instituting Execution **No. 24/2017**. The Court allowed the execution

to proceed on the 15th November 2019. On the other hand, Mkurugenzi applied to the CMA seeking to set aside an *ex-parte* award. It was application number **CMA/MUS/233/2017**. The CMA dismissed the application to set aside the *ex-parte* award on the 18th December 2017.

In 2018, Mkurugenzi instituted two applications before the High Court. She instituted Misc. Application No. 1/2018 on the 28/11/2018, seeking for an order to stay execution of the *ex-parte* award. The application was filed almost one year from the date Mkurugenzi's application to set aside an *ex-parte* award was dismissed.

This Court on the 17/7/2019 struck out **Misc. Application No. 01/2018** as prayed by Mkurugenzi's advocate, Alhaji Majogoro. Later, on the 17/8/2019 Mkurugenzi instituted another application Misc. Application No. 13/2019 seeking for extension of time within which to apply for stay of execution which is still pending to date.

While the struggle to stay, execution was proceeding, the said Mkurugenzi was endeavouring to set aside the *ex-parte* award. Following the dismissal of his application to set aside the *ex-parte* award by the CMA, Mkurugenzi instituted Revision proceedings on the 31/1/2018. Mkurugenzi sought this Court to revise the award of the CMA refusing to set aside its award in CMA/TRM/233/2017 by instituting Revision No. 1/2018. Later, the Court struck out that application (i.e. Rev. No. 1/2018) at the instance of Mkurugenzi's advocate Alhaji Majogoro.

After **Rev. No. 1/2018** was struck out, Mkurugenzi through his advocate, Alhaji Majogoro instituted another **Misc Application No. 11/2019**. This application was seeking for extension of time within which to file an application for revision to challenge the award of the CMA refusing to set aside its *ex-parte* award. The Court on the 8/ 11/2019 granted the application. Subsequently, Mkurugenzi instituted the current application.

Editha enforced the *ex-parte* award through execution and the Mkurugenzi paid her the amount decreed by the CMA.

I have given an account of events which entangled the parties' dispute to indicate that this matter has a fetched history. It may amount to an abuse of the due process of the Court. There is no doubt that the award which Mkurugenzi seeks to set aside has been executed.

Back, to the instant application, Mkurugenzi seeks to revise the award of the CMA refusing to set aside its *ex-parte* award. The issue for determination in such an application, is therefore, whether the CMA unreasonably failed to set aside its *ex-parte* award.

The instant application proceeded *ex-parte* as Editha did not file a notice of opposition and a counter affidavit as required by Rule 24 of the Labour Court Rules, G.N No. 42/2007. The applicant, Mkurugenzi, submitted through his advocate that there were three issue to be determined by this Court as follows:-

- 1) Whether the applicant adduced sufficient reasons to set aside *ex-parte* award.
- 2) Whether it was proper for the arbitrator to award more than what was claimed in form No. 1.
- 3) Whether it was proper for the arbitrator to hear and determined claims which were time barred without condonation.

Alhaji Majogoro learned advocate, submitted in support of the first issue that the applicant's advocate was before the CMA when the matter was ordered to proceed *ex-parte*. The applicant's advocate had no witnesses on that day he prayed for adjournment. The CMA refused and ordered to proceed *ex-parte*. He contended that the records of the CMA showed that the applicants advocate never failed to enter appearance. He contended that those were sufficient reason for setting aside an *ex-parte* award.

As to the second issue, **Alhaji Majogoro** Advocate, submitted vehemently that Editha claimed 12 months' compensation for unfair termination but the CMA awarded her 40 months. He contended that the CMA was not justified to award more than what was claimed for. In support his contention, he cited the cases of **Security Group Ltd V. Ayoub Mbwana Labour Rev No. 63/2009** (HC Unreported) **International Medical & Technological University V. Eliwangu Ngowi Rev. No. 54/2008** (HC unreported) and **Power Roads (T)**

Ltd V. Haji Omary Ngomero Revision No. 36 of 2007 (HC unreported).

On the third issue the Applicant's advocate contended that the CMA awarded claim for unpaid annual leave which were time barred without an application for condonation. He submitted that the law provides that any dispute other than a dispute for unfair termination must be instituted within 60 days. Editha claimed for unpaid leave from 2010 – 2015, which the CMA allowed without an application for condonation.

As stated above, this is an application for setting aside an *ex-parte* award. The grounds for setting aside an *ex-parte* award or any *ex-parte* order or decree are mainly **two: one**, that applicant was not served and for that reason he was not away that the matter was fixed for hearing or some other step. **Two** that the applicant was prevented by any sufficient cause from appearing when the matter was called for hearing. Errors in the decision sought to be set aside are not good grounds for setting aside an *ex-parte* judgment. Thus, I will not discuss the second and third issues raised by the applicant's advocate. They are irrelevant at this stage.

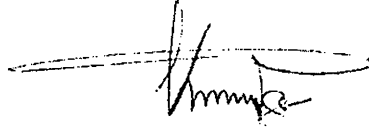
In the case **Abdallah Zarafi V. Mohamed Omari** (1969) HCD the Court anchored the position that in an application for setting aside, the applicant has to establish that he was prevented by sufficient cause from appearing in Court on the material day. It held -

"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".

The applicant's advocate contended that the on the date the CMA ordered the dispute to proceed *ex-parte* the applicant's advocate was present. It is my considered view that the presence of an advocate without a witness, thus, unable to proceed with the hearing, was as good as not being present. There were no ground, let alone sufficient ground advanced why the witnesses were not before the CMA on the date the dispute was fixed for hearing. The applicant had a notice of the hearing date through her advocate. That is why the advocate was present. I therefore, find that the applicant failed to proceed with the hearing without just cause. The CMA was entitled to order the matter to proceed *ex-parte*. Consequently, I am unable to fault the decision of the CMA denying to set aside its *ex-parte* award.

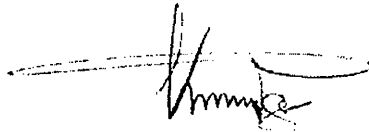
In the upshot, I am not convinced that the applicant was prevented by sufficient reasons to parade witness(es) before the CMA when the matter was set for hearing. Hence, the CMA had ground not to set aside its *ex-parte* award. The application is dismissed for want of merit.

It is ordered accordingly.



J. R. Kahyoza
JUDGE
24/3/2020

Court: Ruling delivered in the presence of Mr. Mhagama Advocate for applicant and Mr. Sanya for the Respondent. Mr. Mofuga J/A Present



J. R. Kahyoza
JUDGE
24/3/2020