

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(LABOUR DIVISION)**

AT SHINYANGA

APPLICATION FOR REVISION No. 12 OF 2019

*(Arising from the Award of the Commission for Mediation and Arbitration
Shinyanga in Labour dispute Decision No. CMA/SHY/132/2018)*

MGANGA MKUU-KOLANDO CDHAPPLICANT

VERSUS

SAMWEL MWALA & WENZAKE.....RESPONDENT

JUDGMENT

Date of Last Order: 28th April, 2020

Date of Judgment: 29th May 2020

MKWIZU, J:

MGANGA MKUU- KOLANDOTO CDH brought this application under the provisions of sections 94 (1), (b) of the Employment and Labour Relations Act, Cap 366 of 2004, Rule 24 (1), (2) (a), (c), (d), (e) and (f), and (3) (a),(b),(c) and (d) and Rule 28 (1) (a),(c),(d) and (e) of the Labour Court Rules, 2007 G.N No. 106 of 2007

The application is for the following orders;

- 1. That, this honourable court to be pleased to call and revise the decision and orders made by Commission for mediation and*

Arbitration in the dispute No. CMA/SHY/132/2018 which was delivered on the 29th day of march,2019.

2. That, this honourable court be please to set aside the award in reference No. CMA/SHY/132/2018.

At the CMA the respondents lodged their complaint against the Kolandoto Hospital claiming for unpaid salaries. They were late, so they filed an application for condonation vide CMA Form No 1 and 2. After the Commission has heard the parties submission on the application for condonation, it advised the parties to settle their differences out of the Commission and the matter was adjourned for ruling. Fortunately, parties reached settlement at TUGHE and settlement deed was drafted on 16 /7/2018.

The CMA issued a certificate of settlement. Defendant failed to honour the agreement thus on 29th March, 2019 CMA issued an award based on that agreement and ordered the Applicant to implement and execute the agreed terms within 14 days from the date of Award. However in that award, respondent changed from Kolandoto Hospital to Mganga Mkuu, Kolandoto CDH.

It is from the above order, the Applicant are dissatisfied and therefore on the 10th day of May, 2019 filed chamber summons taken out at the instance of Gunda & Malimi Advocate and supported by the ground as set out in the affidavit of DR. MAGANGA DOHOI.

When the matter was called on for hearing, the Applicant had service of Mr. Silas John learned advocate while the Respondents were represented by Mr. Salehe Hassan also learned advocate.

Submitting in support of the application, Mr. Silas contended that the Arbitrator was in error by issuing an award against the Doctor in charge of Kolandoto CDH that is Mganga Mkuu Kolandoto CDH who is an employee and not the owner of the said hospital capable of suing or being sued. He said, Mganga Mkuu Kolandoto CDH is a designation of an employee and not a name of the respondent's employer as the law requires. He clarified further that the Kolandoto Hospital belongs to the African Inland Church Tanzania (AICT) a Registered Trustee. He suggested that it was fatal for the Arbitrator to issue an award against a person who lacks capacity to be sued. He cited the case the **National**

Social Security Fund (Nssf) V. Rashid Mrisho Kakozi 2002 [2013]

the Labour Court Digest 1 at page 371 to support his position.

Another irregularity pointed out by Mr. Silas was that the award is ambiguous. He said, the award contains computations which were unknown to the applicant. The agreement reached at TUGHE contained no proper computation and therefore the award is incapable of being executed. He cited the case of **S & G Ginning Co. Ltd V. Simon Mboje Banya Revision No 145 [LCCD] 249**. He challenged the certified settlement by the Arbitrator for being vague and not in conformity with the CMA Form No. 7 provided for under Rule 34 of the ELRA (General Regulations), 2017.

On the issue whether the Arbitrator exercised jurisdiction vested on him, he said, the dispute was filed vide form No. 1 & 2 meaning that the dispute was out of time and it had to be condoned by the CMA first before any further step is taken, but to the contrary before making the order for condonation as the law required, the CMA issued the certificate that parties had settled their dispute, that is illegal insisted Mr. Silas adding that the arbitrator acted without jurisdiction. The case **Telecommunication Co.**

Ltd V. Bwire Nyamen Revision No. 3 [2013] LCCD 1, 346. Was cited for reference.

On his last complaint, Mr. Silas submitted that, arbitrator committed an error to include applicants who were not parties to the dispute. The initial complaint at the CMA was preferred by 37 individuals and only 18 of them signed a document appointing Samwel Mwala to represent them. The award included even the ones who did not take part in the case. He mentioned them as DEBORA ZAKARIA, DEVINA VITUS and ANTHON IGOHE and called upon this Court to revise the all orders made by the CMA in dispute No. CMA/SHY/132/2018 dated on 29th March, 2019.

In rebuttal, Mr. Salehe for the Respondents submitted on the issue of jurisdiction first, he said, it was true that the Arbitrator award was given without condonation because parties had decided to settle their matter before TUGHE and entered into the agreement in which applicant had agreed to pay the Respondent their salary claims on a monthly installment effective from 30th July 2018. Mr. Salehe contended that, by agreeing to settle out of the Commission, parties had agreed to the condonation and if

the applicant had any query, he could have not signed the certificate of settlement.

It was the respondent's counsel submission that, all parties in the award were parties to the labour dispute to the CMA/SHY/132/2018. He conceded that DEVINA VITUS signed the document while the two others that is DEBORA ZAKARIA, and ANTHON IGOHE, were not in the list. He however of the view that it was correct to have them included in the CMA award

Mr. Salehe invited this court not to consider the issue raise on the improprieties of the award by the CMA. He said, it is a new issue not raised at the CMA. He cited the case of **Tanzania Cotton Marketing Board V. Coge Cot Cotton Co. Sa. (2004) TLR 132** and Hotel **Travertine Ltd V. NBC LTD (2006) TLR 133** the court discussed the same above case.

Having gone through the records of this application and evaluated the submissions of both counsels, it is upon this court to decide whether the revision is merited or not. I will first see whether the applicant is a proper part under the circumstances of this case.

It is evident from the records that the Labour Dispute No CMA/SHY/132/2018 filed at the CMA was against Kolandoto Hospital. The award issued bears the name of Mganga Mkuu Kolandoto CDH. Mr. Silas's contention is that, Mganga Mkuu kolandoto CDH is a resignation of an employee of the African Inland Church Tanzania (AICT) who is not the respondent's employer and therefore incapable of being sued or sue. The Kolandoto Hospital belongs to the African Inland Church Tanzania (AICT) Registered Trustees who employs the Mganga Mkuu. Thus the award is not maintainable in law for being brought against a wrong party.

It is not in dispute that respondents who were the applicants at the commission were the employees at the Kolandoto hospital. As stated above their labour complaint was directed to the Kolandoto Hospital and therefore is goes without saying that the Mganga Mkuu is not their targeted employer capable to execute the CMAs' award. In the case **Afisa Tawala Mkuu Hospital Ya Ndala Vs. Eunice Meshak Shimba, REVISION No. 17/2015 High Court (Labour Division) Tabora** (Unreported) the court faced with a similar issue said

"it was improper for the respondent to institute a dispute against Afisa Tawala Mkuu of Ndala Hospital who cannot be sued. The Registered Trustees have a separate legal power distinct from Afisa Tawala"

It was held further that,

"...the Respondent sued a wrong party thus the CMA award is not executable in the eyes of the law."

Mr. Silas informed this court that Kolandoto Hospital is owned by The African Inland Church Tanzania (AICT) as a Registered Trustees which should be the legal name of the respondent's employer who has a legal capacity to sue or be sued. Unfortunately, this was just a statement from the bar as it does not feature in the affidavit in support of the application and nothing was brought to clear this out. That notwithstanding, the award is against Mganga Mkuu Kolandoto CDH who was not a party to the proceedings. The respondent's employer as pleaded in the application before the CMA was Kolandoto Hospital, not the applicant.

In the case of **The Registered Trustees of Umoja wa Wazazi Vs. Uswenge Msika and 2 Others**, Misc. Application No 19 of 2017, HCLD at Mbeya[unreported] the Court held that

"it is the responsibility of the one who prosecutes his case to ensure he prosecutes the proper party and not otherwise. Due to this omission, now the 1st respondent is left with an unexecuted award in possession".

Again, in the case of **National Social Security Fund (Nssf) V. Rashid Mrisho Kakozi** (supra), cited by the counsel for the applicant, the court faced with a similar situation had this to say:

"It follows therefore that the learned Arbitrator, was wrong to give the respondent an award as against an institution which cannot sue or be sued and therefore the award was preferred against a wrong party in which case the arbitration award was wrongly procured and therefore subject of being revised by this court"

Like in the above decisions, there is no doubt that the award is against a wrong person. It was improper for the CMA to issue an award in the name

of the applicant who was neither a party to the proceedings nor a person with legal personality capable of being sued and therefore the respondents are left with an executable award. This being the case therefore I find merit on this point. I allow the revision, quash the CMAs award and the respondents are advised to file their dispute against the proper party if they so wish of course, subject to the law of limitations. This being a point of law, I see no need to discuss the remaining grounds. No order as to costs.


Order accordingly.




E.Y. Mkwizu
Judge
29/5/2020

Court: Right of appeal explained.




E.Y. Mkwizu
Judge
29/5/2020