IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO. 28 OF 2020

CHAMA CHA WALIMU TANZANIA (CWT) ..... APPLICANT

VERSUS

BARAKA AGALLA OWAWA ..... RESPONDENT

(Application from the decision of the Commission for Mediation and Arbitration for Mara at Musoma in CMA/MUS/47/2020)

JUDGMENT

22nd April and 24th May, 2021

KISANYA, J.:

On 26th May, 2020, the Commission for Mediation and Arbitration for Mara at Musoma (the CMA) delivered an *ex-parte* award in favour of the respondent, Baraka Agalla Owawa. In terms of the said award, the applicant, Chama cha Walimu Tanzania was ordered to reinstate and pay him salary arrears at the rate of TZS 3,034, 089.02 per month from the date of termination (February, 2020) to the date of reinstatement.

Dissatisfied, Chama cha Walimu Tanzania lodged an application seeking an order to set aside the *ex-parte* award. The said application was vigorously contested by Baraka Agalla Owawa. Upon hearing both parties, the application was dismissed for want of merit.

Desired to challenge the said decision, Chama cha Walimu Tanzania filed the present application in which the Court is moved to revise the CMA's order refusing to set aside the *ex-parte* award.

Briefly, Baraka Agalla Owawa lodged Labour Dispute No. CMA/MUS/47/2020 before the CMA-Musoma for unlawful termination from employment and prayed for reinstatement. When the said labour dispute was called on for hearing on 19th May, 2020, the applicant's counsel failed to appear. Her regional secretary one, Lucy Masengenya appeared instead. She tendered the letter from the respondent's counsel praying for adjournment to 1st, 2nd or 3rd June, 2020 on the ground that, he was under self-quarantine for 14 days from 15th March, 2020. The arbitrator did not consider the request by the respondent's counsel. He adjourned the hearing to 22nd May, 2020.

As the respondent failed to appear on 22nd May, 2020, the matter was heard *ex-parte* leading to the *ex-parte* award and hence, the application to set aside the *ex-parte* award which was dismissed for want of merit. It is that decision which gave rise to the instant application for revision.

Before me, Mr. Erick Kahangwa learned advocate appeared to argue the application on behalf of the applicant while, the respondent, Mr. Baraka Agalla Owawa appeared in person, unrepresented. I will consider both parties' submissions in the course of addressing issues pertaining to this application.

The application before the CMA was predicated under rule 30(1) of **the Labour Institutions [Mediation and Arbitration] Rules**, GN. No. 64 of 2007. This provision requires that an application to set aside the *ex-parte* award be filed within 14 days from the date on which the party becomes aware of the said award. However, the Rules or labour laws do not specify the factors to be considered by the CMA in determining the application for setting aside the *ex-parte* award. Deriving a text from Order XIX, Rule 9 of the **Civil Procedure Code**, Cap. 33, R.E. 2019 on the same matter, I am of the view that the applicant is required to satisfy the CMA that he was prevented by any sufficient cause from appearing when the labour matter was called on for hearing.

The law is settled that what amounts to "sufficient cause" is determined basing on the circumstances of each case. See for instance, the **Mwanza Director M/S New Refrigeration Co. Ltd vs Mwanza Regional Manager of TANESCO and Another** [2006] TLR 329. However, the applicant must be able to prove that he failed to appear to reasons beyond his control.

In the case at hand, what prevented the applicant from appearing before the CMA on 22nd May, 2020 is reflected in paragraphs 5, 6, and 7 of the affidavit in support of the application. The then counsel for applicant had on 19th May, 2020 asked the arbitrator to adjourn the case to 1st, 2nd or 3rd June, 2020 on the ground that he was self-quarantined in fear of having contracted COVID-19. His

prayer was rejected and the matter was fixed for hearing 22nd May, 2020. Therefore, the said counsel deposed before the CMA that, he failed to appear on 22nd May, 2020 because he was still under self-quarantine and that he had no prior notice as to the *ex-parte* order. These grounds were contested by the respondent on the reasons that "there was no proof of quarantine."

As stated earlier, the arbitrator dismissed the said application for want of merit. Now, the issue that I am called upon to determine is whether the arbitrator erred in refusing to set aside the *ex-parte* award.

Mr. Erick Kahangwa advanced two grounds to support the application. First, he faulted the CMA for hearing the labour dispute in the absence of the applicant while her counsel had submitted a letter of leave of absence on the reasons stated therein. He was of the view that the CMA ought to have given the benefit of doubt to the said counsel and adjourn the matter.

The learned counsel argued further that, the applicant was required to be given time before hearing the matter *ex-parte.* He contended the CMA's reasons for refusing to set aside the *ex-parte* award are not reflected in the proceedings. This included the reason that, the applicant had been given time to send his representative or prove that her counsel was under quarantine.

Another ground advanced by Mr. Kahangwa was existence of triable issue in the labour dispute lodged by the respondent. The learned counsel argued that

existence of triable issue is a sufficient cause for setting aside the *ex-parte* award. He bolstered his argument by citing the case of **T.M Sanga vs Sadrudin G. Alibhai and Two Others** (1977) LRT No. 51 and **Freco Equipment vs Sino Logistics Co. Ltd**, Commercial Application No. 121 of 2021 (unreported).

Replying, the respondent argued the applicant failed to prove that her counsel was under quarantine after travelling to Dar es Salaam. He cited the case of **Christina Alphonse Tomas (As Administrator of the late Didass Kasele vs Saamoja Masingija**, Civil Application No. 1 of 2014, where the Court of Appeal held that an adjournment of a case on the ground of sickness should be supported by medical evidence. Also, the respondent was of the view that the applicant ought to have engaged another advocate.

I will commence with the second ground on triable issue in the labour dispute filed by the respondent. I am alive to the authorities cited by the applicant's counsel on the principle that existence of triable issues in the matter heard *ex-parte* is a sufficient cause for setting aside the *ex-parte* order. However, in the case at hand, the ground pertaining to triable issues was not advanced before the CMA. In that regard, I am of the view that, the ruling of the CMA cannot be revised basing on the ground that was not advanced before it. I will therefore not consider this ground.

Reverting to the first ground, it is common ground that the applicant's counsel wrote a letter for adjournment of the case on the ground that he was under self-quarantine. That was the sole ground advanced in the application to set aside the *ex-parte* award. Reading from the ruling/award of the CMA, I find that the said ground was not considered. Matters considered by the CMA in declining to set aside the *ex-parte* were as follows:

First, the CMA considered that the applicant had been ordered to submit evidence to prove that her counsel was under self-quarantine and failed to do so. This is reflected at page 4 and 5 of the CMA's ruling/award where the arbitrator stated:

> "*Cha kushangaza ni kwamba, baada ya Tume kuahirisha shauri tarehe 19/05/2020 ilipanga kusikiliza shauri tarehe 22/05/2020 na kuelekeza kuwa mleta maombi atume afisa na alete ushahidi kuhusiana na sababu alizotoa kwamba wakili wa mleta maombi ni mgonjwa wa Corona na athibitishe kwamba aliwekwa katika karantini lakini tarehe 22/05/2020 mlalamikiwa hakuweza kutuma afisa yoyote wala kutoa udhuru wowote kuthibitisha hoja zake.*"

I went through the proceedings of the CMA to see what transpired on 19th May, 2020 when the respondent's representative presented the advocate's letter for leave of absence. The CMA's order is reproduced hereunder:

"Tume-Amri

Tume inaona kwamba sababu za malamikaji kuahirisha shauri siyo za msingi, na kwa hiyo, shauri linaahirishwa hadi tarehe 22/05/2020 kwa ushahidi wa pande zote kwa kuwa shauri lipo chini ya dharura.

KEFA, P.E
Saini
MUAMUZI
19/05/2020"

In view of the above order, it is clear that the ground that applicant's counsel was under self- quarantine was not considered to be meritless. Contrary to what was held by the CMA in the ruling/award subject to this application, the applicant was not given time to submit proof that her counsel was under self-quarantine. Therefore, the Hon. Arbitrator considered extraneous matters in determining the application to set aside the *ex-parte* award.

Further to that, the said order infers that the arbitrator had arrived at a decision that the applicant had not advanced a sufficient cause. In other words, the CMA had already decided that, self-quarantine was not a sufficient cause for adjournment. In such case, the arbitrator could not have changed his decision even after receiving the required proof because he was *fanctus officio* on that matter.

Second, the arbitrator considered that the applicant had not appeared before the CMA several times without assigning any reason. He held as follows:

"...mlalamikiwa alikuwa akipewa fursa ya mara kwa mara kujihudhurisha mbele ya Tume ili kujibu madai yaliyowasilishwa na mlalamikaji dhidi yake (mleta maombi) mlalamikiwa hakuona umuhimu wa kufika mbele ya Tume na kutumia kichaka cha ugonjwa wa Corona."

I have also gone through the record. It displays that the labour dispute filed by the respondent came for hearing for the first time on 19th May, 2020. Also, that was the first time the respondent's counsel requested for adjournment. In that regard, the CMA's consideration that the applicant had failed to appear several times for no apparent reason is not supported by its own record.

Lastly, the CMA considered that the applicant had failed to prove the ground of Covid-19 sickness when it held:

Tume inambua ugonjwa wa Corona na athari zake kwa jamii na ulimwengu Lakini pasipo kuongozwa ipasavyo wadaawa watatumia kisingizio cha ugonjwa ili kukwepa wajibu wao kwa Tume na Mahakama...mjibu maombi (sic) alipaswa kuzingatia hilo katika kufanya tathmini yake kabla ya kufanya uamuzi wa kutohudhuria katika shauri. Sababu ya ugonjwa bila kutoa ushahidi ni sababu ya kipuuzi."

I am at one with the respondent that adjournment due to sickness is required to be proved by medical evidence. See also the case of **Christina Alphonse Tomas (As Administrator of the late Didass Kasele vs Saamoja Masingija** (supra) where the Court of Appeal held:

"The Court has always discouraged adjournment on grounds of sickness not supported by medical proof. The learned advocate is aware or ought to be aware that the Court has to have evidence to support grounds for an adjournment."

However, in the instant case, the applicant's did not raise the ground of sickness. He deposed to have been under self-quarantine in fear that he had contracted COVID-19. In that regard, the arbitrator misdirected himself in holding that the applicant's counsel had not proved COVID-19 sickness.

Now, was self-quarantine in fear of COVID-19 a sufficient ground? In the case of **Chama Cha Waalimu Tanzania (Cwt) Vs Baraka Agalla Owawa,** Labour Revision No. 27, HCT at Musoma (unreported) this Court (Hon. Kahyoza, J.) had a time to consider this ground in another matter involving the parties at hand. The Court held that:

"It was a common knowledge that there was COVID-19 outbreak in this country for the first time in March, 2020. It was also a common medical advice that once a person has been exposed to areas hit by the virus had a duty to his neighbours to quarantine himself for 14 days before he could intermingle with them. I have said above that the CMA ought have examined the record to establish the applicant's advocate's conduct before deciding on the matter."

I fully associate myself with the above position. It tells it all and I need not say more. It may be useful to add that that much as the applicant's counsel was

in fear of having contracted COVID-19, he was duty bound to avoid interacting with other people. Requiring the said counsel who was in Dodoma to appear before the CMA - Musoma was a risk to the other passengers and the CMA's officials. If there was urgency of determining the matter, the CMA ought to have used the modern technology and hear the application online.

For the reasons I have endeavored to discuss, I find that there was sufficient cause for the arbitrator to set aside the *ex-parte* award. Consequently, I hereby allow the application and order as follows:

1. The CMA's ruling/award dated 21st September, 2020 that the applicant had not advanced sufficient reason to set aside the *ex-parte* ward is quashed and set aside.
2. The CMA's *ex-parte* award dated 26th May, 2020 is set aside.
3. The CMA is ordered to hear the Labour Dispute No. CMA/MUS/47/2020 *inter-parties.* It is in the interest of justice, the said labour dispute be heard by another arbitrator.
4. Each party to bear its own costs.

Order accordingly.

DATED at MUSOMA this 24th day of May, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered this 24th day of May, 2021 in the absence of the presence of the respondent in person and in the absence of the applicant. B/C Simon present.

E. S. Kisanya
JUDGE
24/05/2021