IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

IN THE LABOUR COURT ZONE CENTER

AT MOSHI

LABOUR REVISION NO. 37 OF 2020

(Originating from Labour Dispute No MOS/CMA/M/129/2016 before H. T. Lukeha, Mediator delivered on 16th May 2016 in the Commission for Mediation and Arbitration at Moshi)

1. EVANS .G. MINJA
2. BARIKI .R. MINJA
3. MELKIZEDECK .B. MOSHA
4. CHARLES .K. SHIO ..... **APPLICANTS**
5. ROBATH .H. LYIMO
6. GODBLESS .Y. NGOWI
7. EDWARD .T. MTUI

VERSUS

BODI YA WADHAMINI SHIRIKA LA HIFADHI YA TAIFA (TANAPA) ---------- RESPONDENT

JUDGMENT

MUTUNGI .J.

The applicants herein filed an application for Revision to challenge the decision of the Commission for Mediation and Arbitration of Moshi by H. T. Lukeha. The Application is

made by Chamber Summons under section 91(1)(a),91(2)(c) and section 94(1)(b)(i) of the Employment and Labour Relations Act [CAP 366 R.E 2019; and Rule 24(1) and 2(a),(b),(c),(d),(e) and (f), and section 24(3)(a),(b),(c)and(d), Rule 24(11) and Rule 28(1),(c),(d) and (e)of the Labour Court Rules 2007 GN No.106 of 2007).

The Application is supported by the applicants' joint affidavit. The material recollected from the affidavits are that, the applicants were the employees of the Respondent with different contracts, duties and salaries. In 2016 they were terminated from their employment. They instituted the claim in the Commission for Mediation and Arbitration of Moshi.

On 16/05/2016 the dispute was mediated successful and the settlement agreement signed by their representative one Allan Mbwambo and advocate Sandi. The applicants are now claiming the respondent colluded with Allan Mbwambo and Advocate Sandi together with the Mediator by excluding them and drafted a Settlement Agreement which they signed without involving the applicants nor where they called upon to sign.

With this reason the applicants have knocked the doors of this court and applied to have the settlement agreement

set aside. During the hearing the applicants were represented by Mr. Benedict Bagiliye while the respondent was represented by Mr. George Dakili, learned advocates.

In challenging the settlement agreement issued on 16/05/2020, Mr. Bagiliye's submission is that, it was improperly procured as the applicants were not involved nor did they sign the said agreement. The signatures appearing in the settlement agreement are those of Allan Mbwambo who was representing 1st to 6th applicants and the signature of advocate Sandi whom they have no knowledge of. The learned advocate stated that even if Allan Mbwambo conceded, but still the 7th applicant was never involved nor consulted as he was unrepresented.

The learned advocate further contended that, the reason for mediation is to settle the dispute amicably by involving the parties and the advocates are there to assist the parties. He avers that **rule 8(1) of the Labour Institutions (Mediation and Arbitration) Guidelines** provides for the meaning of mediation whereas **section 88(7)b of Cap 366 RE 2019** provides for how the settlement agreement should be drawn in which the parties must sign. If not signed, the learned advocate argued, it doesn't qualify to be a decree of the court. He cited Rule **13(2) and (3) of Labour**

Institution Guidelines and argued that it advocates for settlement agreements to be reached by parties' concessors.

The learned advocate concluded by stating, the agreement settlement is void and should be set aside and order for mediation de-novo.

In reply the Respondent's learned advocate adopted the counter affidavit and continued to argue that, the stand that the settlement agreement was signed without the parties is misplaced because the records reveal, the applicants were present and also represented by a member from the trade union namely Allan Mbwambo who had all powers including powers to sign the settlement agreement. **Section 86(6) of Cap 366 RE 2019** provides for the mediation and representation. In the dispute at hand Mr. Mbwambo was representing the applicants. The learned advocate was surprised as to why the applicants are now disputing such representation something which they did not raise or object to during the mediation session. Submitting on the cited provision cited by Mr. Bagiliye, it doesn't put any limitation for representatives to sign the settlement agreement.

It was his further submission that this is an afterthought and cannot be a ground for revision because, at first the Applicants through Misc. Labour Application No. 37 of 2016 filed an application for executing the settlement but later they prayed to withdraw the same. The application was withdrawn on 28.11.2018. The learned advocate questioned as to why they did that, if at all they were aggrieved. He commented, this shows they acknowledged its existence, participated and embraced it. For some unknown reasons they later on changed their minds, stating they were not part of the mediation process.

The learned advocate lamented, it is trite procedure that litigation must come to an end, so by allowing this application will be setting a bad precedent to those who wasted time, energy and resources in mediation and later on changed by the afterthought of other parties. In conclusion he prayed for the court to dismiss this application with costs and the settlement between the parties be declared valid.

In rejoinder the Applicants' advocate argued in mediation sessions there is no record kept since the process is confidential and if such record exists then it is an illegality.

As to **section 86(6) of Cap 366 RE 2019** he stated it is not mandatory as it states **maybe** so the inclusion of advocate or member of trade union doesn't exclude the parties to the dispute. Mr. Mbwambo who represented 1st to 6th applicants was a proper representative but he was just facilitating or assisting the mediation and this doesn't suggest the applicants or the parties thereto be excluded in the signing process. The learned advocate argued that they were not told as to why the 7th applicant was not involved and who instructed advocate Sandi. The applicants were not aware of his competency to appear on their behalf. He further claimed the illegal decree cannot be executed by the parties, since it was not reached through consultations. This is why the applicants opted to abandon the execution application.

The learned advocate concluded, the settlement agreement dated 06.05.2016 was improperly procured and he reiterated his prayer for the settlement to be set aside and order the mediation process to start de novo.

After going through the affidavits and submissions made, I find the only issue which need to be answered is ***whether the settlement agreement was properly procured.***

The applicants are complaining about two things, ***first*** they were never involved in the negotiations leading to the settlement agreement nor did they sign the same. It was only signed by their representative and one advocate whom they don't recognize. ***Secondly***, they complain the 7th applicant was not involved in the settlement yet he was representing himself and nor did he sign the settlement agreement. First and foremost it is legally settled in terms of **Section 88(7) of Employment and Labour Relations Act (supra)**;

> "' *A mediator may, by an agreement between the parties or on application by the parties, draw a settlement agreement in respect of any dispute pending before him,* ***which shall be signed by the parties and the mediator****, and such agreement shall be deemed to be a decree of the Court.*

Under Rule 13 (3)(f) of Labour Institution (Mediation and Arbitration Guidelines) Rules provides;

"The settlement agreement shall ensure that it;

a. Is clearly understood by all parties

b. Does not create further dispute

c. *Is clear and concise*

d. .....

e. .....

f. ***Is signed by all parties to the dispute***

The above provisions does not limit the representative to sign the settlement agreement. The law makes it very clear the settlement agreement is to ensure all parties to the dispute sign. **Section 86(6) of the Employment and Labour Relations Act Cap 366 R.E. 2019** provides: -

"In any mediation, a party to a dispute may be represented by

(a) A member or an official of that party's trade union or employer's association.

(b) An advocate, or

(c) A personal representative of the party's own choice

As per the case at hand, it is true that the settlement agreement was signed by the representative of the **1st to 6th applicants (one Allan Mbwambo) and advocate Sandi whom the records and several corams indicate was representing the 7th applicant.** Specifically on 29/4/2016 and 9th/5/2016 the 1st – 6th applicants had demonstrated that Mr. Allan Mbwambo was their personal representative

of their choice. As to the corams on 29/4/2016 before the Mediator Advocate Sandi appeared for Edward Mtui (7th Applicant) and dully stated as hereunder: -

> **"I am representing Mr. Edward Mtui, while others are represented by Mr. Allan Mbwambo who is in safari in D'SM.**

In the end on 16/8/2016 before Mr. H. I. Lukeba (Mediator) all complainants were present and as usual Mr. Allan Mbwambo and Advocate Sandi were present. This was the day the parties came to a final settlement agreement.

With such glaring evidence it is far from suggesting that the 7th applicant had no knowledge of the presence of advocate Sandi neither were the others without the knowledge of the presence of their representative. The presented settlement agreement (CMA F 21), is clear evidence that the CMA had created a format so as to include a part to indicate agreed matters and to have signatures appended not only of the Mediator but also to include those of the parties and their representatives. In my settled view this would be evidence of parties agreement with whatever is stated on the signed form. There was thus an avenue that permitted the representative who were appearing to safe guard the interest of the parties to sign

the settlement agreement on the employees' behalf and this is exactly what transpired. In terms of **Rule 13(3) (f) supra** this was not fatal to the mediation process.

Coming to the word shall as provided for under 88(7), the word does not exclude the representative to sign in the circumstances of this matter. In the case of **Victor Bushiri &133 Others vs AMI (T) LTD Civil Application No. 64/2000 (unreported)** it was held;

> *"This Court has said in a number of occasion that the use of the word shall in a provision does not always make the provision mandatory. Whether the use of that word has such effect will depend on the circumstance of each case"*

In view thereof, I find no reason to revise or fault the settlement agreement. The representative signed the agreement after the applicants (1st – 6th) had permitted him to take part in the mediation. Likewise advocate Sandi who all along had dully been introduced and acknowledged as the 7th applicant's advocate participated fully in the process. If at all the applicants had complaint they ought to have raised the same during the mediation process. Their presence presupposes they understood what was being discussed subject of the

Settlement Agreement. I support the submission by the Respondent's advocate that raising this objection at this stage is an afterthought.

From the reasons advanced I find no ground to revise the settlement agreement instead I hereby dismiss this application with no order to costs, this being a labour dispute.

B. R. MUTUNGI
JUDGE
28/5/2021

Judgment read this day of 28/5/2021 in presence of 1st, 2nd, 4th, 5th and 7th Applicants and in absence of the Respondent dully notified.

B. R. MUTUNGI
JUDGE
28/5/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
28/5/2021