IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 60 OF 2020

(Original CMA/MZ/NYAM/APP/15/2019)

ELIZABETH PAUL----------1ST APPLICANT

THERESIA SULUSI ---------- 2ND APPLICANT

VERSUS

BRAC TANZANIA FINANCE LIMITED ----------RESPONDENT

JUDGMENT

21st June, & 28th July, 2021

TIGANGA, J

In this matter the court has been moved under sections 91(1)(a),(b),(2),(c) and 94(1)(b),(i) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24(1),(2)(a),(b),(c),(d),(e),(f), and (3)(a),(b),(c) and (d), and Rule 28 (1),(c),(d) of the Labour Court Rules, 2007 GN No.106 of 2007. The application has been preferred by a notice of application, notice of representation and chamber summons which was supported by the affidavit sworn by Mr. Erick Martin Mutta, Advocate dully instructed to represent the applicant in this application.

The orders sought in the chamber summons which was taken at the instance of the applicants Elizabeth Paul and Theresia Sulusi are:

1. For this court to be pleased to exercise its revisional jurisdiction and call for and examine, the records of the proceedings before the Commissioner for Mediation and Arbitration of Mwanza for purpose of satisfying itself on the correctness, legality or propriety of the decision made by the Arbitrator Hon. Mswakollo. S dated 26/06/2020.
2. That, having so called the record, it be pleased to revise and set aside the award made by the said Arbitrator due to material irregularity and unlawful findings.
3. Any other relief that this court may deem fit and just to grant.

The affidavit filed in support of the application pointed out the historical background of the dispute as follows; that the applicants who were employees of the respondent, in the capacity of loan officers were terminated by the respondent from their employment. Being aggrieved by the termination on 06th day of May 2019; the applicants filed Labour Dispute No. CMA/MZ/NYAM/171/2019 before the CMA. Mediation of the matter failed, the matter went for arbitration which was to be preceded by the filing opening which the applicant complied and framing of issues on which date the counsel for the applicant attended but the respondent did

not, therefore the matter was adjourned on account of the absence of the respondent and his counsel where the matter was scheduled on 13/09/2019.

On that date the counsel for the applicant was appearing before the High Court Criminal Session which was going on before Hon. Mgeyekwa, J which he proved by attaching the cause list as Annexture "A" to the affidavit.

Following that absence of the counsel for the applicant, the arbitrator scheduled the matter on 23/09/2019 on the date when criminal session was still on progress and the advocate had to attend the same as proved by annexure "B". On that date the respondent addressed the CMA and asked it to dismiss the complaint on the ground that, on that date it was a third time the matter was being called without the attendance of the applicant and his counsel. After recording the submission by the respondent, the CMA reserved the matter for ruling on 01/11/2019 when the application was dismissed.

Being aggrieved by the dismissal order, on 06/11/2019 the counsel filed the application for restoration, yet still the same was dismissed making the base of this application for revision.

The counsel for the applicant has raised one legal issue for determination as follows;

"Whether for an advocate attending Criminal Session at the High Court is not sufficient cause to set aside dismissal order?"

He prayed the application to be granted as prayed.

The application was opposed by the respondent by filing the Notice of opposition, Notice of representation and the counter affidavit, sworn and filed by Amedius Michael Mushi, who introduced himself as a principal officer of the respondent conversant with the facts of the case. It was averred that the absence of the respondent before CMA was supported by the prior notification to the CMA before the said date. Regarding the fact that, the Advocate was appearing in High Court Criminal Session, he said the advocate was duty bound to inform the CMA of the same. According to the deponent, the counsel for the applicant and the applicant himself was duty bound to make follow up to know what transpired on 13/09/2020 and 23/09/2019 and 10 & 11/10/2019. He deposed that as there was no information of the High Court Criminal Session, then the dismissal of the application was proper and in accordance with the law.

With leave of the court, the application was argued by way of written submissions, where the applicant was represented by Mr. Erick Mutta, learned counsel, while the respondent was represented by Mr. Venance Kibulika, also learned counsel. In the submission in chief, Mr. Mutta adopted the content of the affidavit filed in support of the application, he submitted that Labour Dispute No. CMA/MZ/NYAM/171-102/2019 was dismissed for non appearance and the applicants waged unsuccessfully effort to restore the same vide Labour Application No. CMA/MZ/NYAM/15/2019 hence calling for this application before this court

According to him, appearance under Order IX Rule 1 of the CPC Cap 33 R.E 2019, which is either by attendance in person or by Advocate in court on the date stated in summons or adjourned thereto on the notice of both parties for the hearing of the suit when the suit is called up for hearing on the contrary, it amounts to non appearance thus the suit may be dismissed for such non-appearance. Wherefore, under section 87(5)(a) and (b) of the Employment and Labour Relations Act Cap 366 R.E 2019] inter alia provides for the applicants to show a good cause for failing to attend the hearing and that CMA may reverse its decision.

He insisted that his failure to appear when the matter was called for hearing was caused by his appearance in the High Court Criminial Session at the High Court, Mgeyekwa, J which had been taking place from 13 to 27/09/2019 as supported by the attached cause list. He prayed the application to be dismissed for want of merits.

In reply submission, Mr. Venance Kibulika, for the respondent submitted by first adopting the counter affidavit filed in opposition of the application, he insisted that it was the duty of the counsel to inform the CMA through his clients or fellow Advocate that he was appearing in the High court session. He submitted that failure of the advocate to communicate and notify the CMA on his absence amounted to sheer negligence on the part of the applicants and is a clear sign that applicants have no interest with the matter at hand. He referred at page 9 of the ruling that one cannot claim to be favoured out of his negligence. He invited the court to be pursuaded by the decision of this court at Arusha, in the case of **Corridor Springs Hotel vs Ally Yusuph Martin, Lab Rev. No. 54 of 2016** where the court held inter alia that;

> *"As an Officer of the Court he knows the procedure he ought to have written the letter to CMA and attached the cause list showing the date he was attending the special sessions..., this*

lack of seriousness when an advocate failed to appear in court for the reasons best known to himself cannot be entertained by this court. in the absence of the relevant documents to support his absence of relevant documents to support his absence this court is of the view that it amounts to a sheer negligence."

Further to that he submitted that, the advocate in the affidavit did not mention where the applicants were on the date when their application was dismissed by the CMA. In other way he is asking where was the applicant on that particular day, their absence was a puzzle as there is no affidavit sworn by the applicants themselves in respect of their absence. He pointed out that on the date when the matter was dismissed the matter was for arbitration hearing. Therefore the precence of the applicant was of paramount importance to ensure the hearing takes place in that aspect even if the advocate would have attended at the CMA on the material date still hearing of the arbitration could never proceed for the applicant's absence and no reasons were communicated to the CMA on their absence.

He reminded the court of the provision of Rule 28(i)(a) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, 2007 GN No. 67 of 2007 state; which requires the arbitrator to dismiss the application on account of non appearance of the applicant or may adjourn it. He submitted that in the present case the applicants failed to appear and there

was no information for their non appearance, he asked the court to dismiss the application at hand for want of merits.

In this case the court is called upon to call for and examine the records of the proceedings before the CMA for purpose of satisfying itself on the correctness, legality or propriety of the decision made by the Arbitrator. If it will find that there is any incorrectness, illegality or impropriety then revise the said decision and set aside the award.

The decision complained of is the ruling which dismissed the labour complaint filed by the applicant, against the respondent, the reasons for dismissal is non appearance of the applicant/complainants on the date when the matter was called for hearing. The issue is whether the CMA was mandated to do so?

The answer to this question is as correctly submitted by the counsel for the respondent in the provision of Rule 28(i)(a) of the **Labour Institutions (Mediation and Arbitration Guideline) Rules, 2007 GN No. 67 of 2007** which provides as follows;

> *"Rule 28(i) when a party fails to attend an arbitration hearing an arbitrator may do the followings;*
>
> *(a) where a party who referred the dispute to the commission fails to attend the hearing, the Arbitrator may*

dismiss the matter *or* ***postpone the hearing.***"[Emphasis added]

Also the provision of rule 28(2) of the **Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007** provides that;

"(2) An Arbitrator is entitled to ***dismiss a complaint*** *if the referring party fails to attend an arbitration hearing.*"[Emphasis added]

This means under these provisions provided by two different laws, failure by a party who referred the matter to the Commission, to attend on the date when the matter was scheduled for hearing, entitles the Arbitrator to dismiss the matter for want of appearance and prosecution, or postpone the hearing.

In this case it has been established by the affidavit filed by the applicant and the counter affidavit by the respondent as well as the arguments by the counsel for the parties that, on 13/09/2019 the matter was scheduled for hearing but the applicant who referred the matter to the Commission and their counsel did not attend. Apparently there was no reason and notice for the non attendance from the applicants and their counsel. Following that non appearance, the Arbitrator undoubtedly applying the provision of rule 28(1)(a) of GN. No. 64 of 2007 the adjourned the matter on 23/09/2019 for hearing.

It is also evident that on 23/09/2019 the applicants and their Advocate once again did not appear and there was no notice and reason given, the matter was scheduled on 10/10/2019 also the respondent appeared but the applicants and their Advocate did not appear without notice and reason. On that date the respondent addressed the court and asked for the application to be dismissed with costs. Following that request, the Arbitrator reserved the matter for the ruling which he delivered on 01/11/2019 in which the matter was dismissed under rule 28(2) of the **Labour Institutions (Mediation and Arbitration Guideline) Rules, 2007 GN No. 67 of 2007** of for non appearance of the respondent at the hearing stage without notice and assigning reasons.

From the above exposition, it goes without saying that, given the state of affairs, the Arbitrator was justified to dismiss the matter as the law allowed him to do so in the circumstance.

After the matter had been dismissed, on 06/11/2019 the applicant filed an application for restoration of the dismissed application. In which application he alleged that, he failed to appear on the respective dates because he was appearing to the High Court Criminal Session which was going on before Hon. Mgeyekwa, J commencing from 16th August to 30th

September, 2019 which fact he proved by attaching a copy of cause list to the affidavit filed in support of the application.

However, the Commission dismissed the application for lack of merit on the ground that the applicant and his counsel did not diligently act by their failure to inform the Commission that the counsel was appearing before the High Court in a special session. He therefore failed to persuade the Commission to enable it to restore the dismissed labour dispute.

In this application the applicant has proposed one main issue namely; "Whether for an advocate attending Criminal Session at the High Court is not sufficient cause to set aside dismissal order?"

In resolving this issue, I first and foremost start with the well settled practice, that an advocate is expected to manage his diary by making sure that he does not schedule two cases before two different courts on the same date and at the same time. If need be, and where the said courts are of different level the higher court in rank takes precedence. However, the lower court in rank must as a matter of practice be informed of the Advocates appearance before the Higher Court, the information which will necessitate the lower court to adjourn the case or reschedule the same to the time or date convenient to the court, parties and justice.

That procedure should also be equally adopted in cases which are in special sessions, either before the High Court or Court of Appeal, where Advocates are customarily assigned to represent the parties to the case in that particular sessions. The respective Advocates are still duty bound to communicate the information to the other lower court and prove the same by attaching the cause lists or summons (which summons them the higher court,) to the lower court to justify their absence. Failure to so communicate entitles the lower court before which he fails to appear, to dismiss the case or make any adverse order against the absent party or Advocate.

From what I have just said herein before, it is evident that although the Advocate's appearance before the higher court is a good and valid ground not only for adjournment but also for setting aside the dismissal order and restoration of the dismissed case, that is only when the party against whom the dismissal order was made acted diligently to inform the court that he was appearing in the higher court before the case is dismissed.

On this I am highly persuaded by the decision of the High Court as relied on by the arbitrator and recited by the counsel for the respondent in

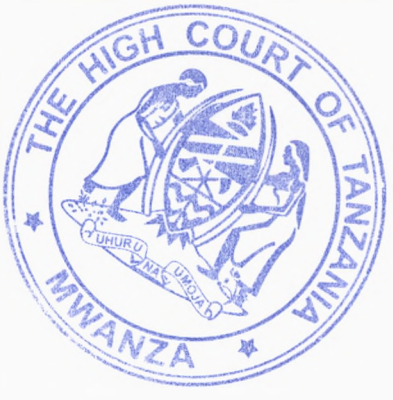
his submission in the case of **Corridor Springs Hotel vs Ally Yusuph Martin, Lab Rev. No. 54 of 2016**.

From the principle developed in the above cited case; where failure to appear in court on the account of having and attending other cases in the higher court involves an Advocate, he is expected as an officer of the Court, to knows the procedure that he ought to have asked a fellow Advocate including the Advocate of the adverse party, to hold brief for him, thereby informing the court that he was assigned or summoned to appear before the Higher Court. Alternatively, to write a letter to lower Court or Tribunal, and attached the cause list or summons showing the date he was summoned to attend the special sessions, or to send his clients to come to court and ask for adjournment on that ground. Failure to employ any of these methods, put the said advocate at risk of being labeled in that particular matter to have acted negligently by lacking the sense of seriousness which state should be discouraged. Even if at later stage the said Advocate comes with the proof that he was actually appearing before the higher Court, the proof which had it been presented before, the matter could not have been dismissed, the Advocate cannot be heard and cannot be exonerated from the blame.

In this case, as correctly held, by the Arbitrator, the matter was dismissed on the date when the matter was scheduled for hearing, where the personal attendance of the Applicants and their witnesses was in dispensable for them to testify and prove the case. It was on the date when the presence of an advocate was also of paramount to lead his client to prove their claim; any non attendance should be for the proved reasons which should be communicated on the spot. Failure to do so entitles the court or the tribunal, like the arbitrator did before the CMA, that the party has lost interest in the matter. The advocate has not stated in the affidavit, or argument what prevented him from writing to the CMA, or sending the fellow Advocate to hold his brief or send his clients, who on that stage of the case their attendance was necessary and in dispensable. Failure to so state entitles this court to find that the Advocate has not shown good cause for revision, the Application is therefore dismissed for want of merits.

It is accordingly ordered.

DATED at **MWANZA** this 28th day of July, 2021



J.C. TIGANGA

JUDGE

28/07/2021