IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

(SONGEA DISTRICT REGISTRY)

AT SONGEA

APPLICATION FOR REVISION NO. 04 OF 2021

(Originating from Labour Application No. CMA/RUV/SON/29/2020/ARB/APP/MSC. ARB/04/2021)

E. A. ELECT POWER SOLUTIONS LTD ..... APPLICANT

VERSUS

ALLY OMARY SWAI AND 14 OTHERS ..... RESPONDENTS

RULING

Date of Last Order: 9/9/2021

Date of Ruling: 23/09/2021

BEFORE: S.C. MOSHI, J.

E.A Elect Power Solutions Ltd, the applicant herein, filed the present application for revision against the award of the commission for Mediation and Arbitration (herein referred to as CMA) in Labour Dispute No.CMA/RUV/SON/29/2020/ARB/APP/MSC.ARB/04/2021. The application was made under section 91(1)(a), (91(2) and 94(1) of the Employment and Labour Relations Act, No. 6 of 2004, Rule 24(1), (2), (3) and Rule 28(1) (a) or (b) or (c) or (d) or (e) of the Labour Court Rules, G.N No. 106 of 2007. The applicant is praying for the court to revise a ruling

issued by Hon. P.M. Chuwa in the respective application. The application is supported by an affidavit of Werema Msongo who is applicant's Principal Officer. The affidavit contains five legal issues that arises from material facts in paragraph ten (10). The respective legal issues are as follows: -

1. *Whether it was correct for the Commission for Mediation and Arbitration to deny the applicant's application on the ground that service of summons to the applicant was proper after it was received by Mr. Edmund Mnyawami, Advocate.*
2. *Whether, the Commission for Mediation and Arbitration was correct when it denied the applicant's application while there was a proof that, Mr. Edmund Mnyawami, Advocate was only instructed to represent the applicant herein during the Mediation stage and had no instructions about the arbitration.*
3. *Whether the commission for Mediation and Arbitration was correct when it denied the applicant's applicant while there was a proof that, the applicant being the principal officer was sick for a number of months.*
4. *Whether, it was correct for the Commission to ignore the illegality on the issue of time limitation to the respondent's complaint in that, their complaint was time barred.*
5. *Whether it was not correct for the commission for mediation and arbitration to set aside its ex parte award for the interest of justice in order to give the appellant a right of being heard especially when it is clear from the records that some of the respondents' claims were not proved.*

The historical background of the dispute is that, the applicant on 10/6/2020 terminated the employment of his employees (respondents) namely Ally Omary Swai, Farid Awadhi, Hamza Awadhi, Mukeshi Ally, Thomas Bernard, Matei John, Njaidi Ally, Toddy Peter, Juma Mikole, Juma Luambano, Lucas Nyaukair, Selemani Makoye, Abdallah Shafii, Dickson Philimini and Said Selemani. The respondents referred the dispute to the commission, the dispute was heard ex- parte and the commission delivered an exparte arbitral award in favour of the respondent's on 23/11/2021. The applicant was not satisfied with the commission's exparte award. He filed an application to set aside the exparte award before the Commission on 11th March 2021, however the application was not granted. Dissatisfied by the Commission's Ruling, the applicant filed the present revision application.

When the matter came for hearing, both parties were represented. The applicant was represented by Mr. Jamhuri Johson, Advocate whereas the respondents were represented by Mr. Aloyce Nditi, Zonal Secretary of TADWU (TANZANIA Drivers Workers Union).

Mr. Jamhuri prayed the court to adopt the applicant's affidavit and submitted among other things that, the applicant was not notified of the arbitration date, therefore was unable to attend since his advocate Mr. Edmund Mnyawami was instructed to appear during mediation and not at arbitration stage. He argued that the applicant was not given a right to be heard. He said that page 12, the arbitrator cited the case of **Simba steel Ltd V. Fikiri Seleman and 3 others,** High Court Labour Division, Misc. Lab Appl. No. 204 of 2013, 12/12/13 where the court dismissed a Revision on the ground that advocate's negligence can't be a good ground to warrant revision. He argued that in this case, the advocate who represented the applicant at the commission was not negligent, he was hired to appear during mediation only and not arbitration. He said that the proper way to go was to serve the applicant in person so that he can appear during arbitration. He said further that even if he assumed that the applicant's advocate was negligent, the applicant couldn't be condemned by advocate's actions. In this respect he cited the case of **Afriq Engineering and Construction Co. Ltd V. The Registered Trustees of Central Tanganyika**, Misc. Commercial Cause No. 4/2020 at page 25 and the case of **Bahati Musa Hamis Mtopa V. Salum Rashid**, Civil Application No. 112/2018 (unreported). He contended that a right to be heard is constitutional under Art.13 (6)

exparte Award is set aside if the court or commission is satisfied that the party was prevented from appearing by sufficient cause. This court in the case in the case of **M/S Jaffer Academy vs. Hhawu Migire**, Revision No. 71 of 2010, High Court Divisio, at Arusha (Unreported), held that:-

> *"When a party aggrieved by an exparte award on ground that the order to proceed ex parte was wrongly made, the proper procedure open to the aggrieved party is to apply to the CMA, explaining reasons for the failure to appear before it, and seeking its order to set aside the ex parte award. If the commission is satisfied that such a party had a good ground for failing to attend hearing, it will reverse the ex parte order so made and allow the matter to proceed interparty."*

I have gone through the entire application, submission in support of the application, the major cause for non appearance on the date set for arbitration as advanced by the applicant is that the advocate who received summons for arbitration was not instructed to represent it during Arbitration but during mediation only. That even if the advocate was instructed, then the negligence was on the party of the advocate Edmund Myawami who received the summons and he failed to inform

the applicant the date set for arbitration; hence the applicant was denied his right to be heard while the applicant was not negligent.

Generally, an error made by an advocate through negligence or lack of diligence is not a sufficient cause. There are however, exceptional circumstances surrounding the case where such an error can amount to sufficient cause. See the case of **Bahati Musa Hamisi Mtopa vs. Salum Rashid** (supra).

On the part of applicant, there is apparent evidence of negligence, engaging an advocate doesn't mean that he should not follow up his case or matter. The case of **Bahati Musa Hamis Mtoa vs Salum Rashid** (supra) is distinguishable, in that case the applicant acting on information given to her by her advocate who was granted to her on legal aid, travelled to Mtwara to attend the hearing of the application for reference on the scheduled date only to find that court had no sessions thereat rather in Dar es salaam. She informed her advocate so but it was already late, the latter could not enter appearance in Dar es salaam Registry where the application was set for hearing. The Court of Appeal held that it is unjust to impute the advocate's mistake into the applicant. On the part of her advocate the court stated that she was not negligent too, since the application used to be heard at Mtwara and when she read the notice of hearing served to her, she firmly believed that the

application was to be heard at Mtwara and she duly informed her client, the applicant and proceeded to male arrangement to travel to Mtwara. The court held that given the circumstances and the efforts made by her she committed a human error in reading the notice of hearing.

The situation in the application at hand is different, the applicant never made effort to communicate with his advocate likewise his advocate after receiving the summons did not attend the arbitration session, and he didn't inform the applicant. Again, there is nowhere in the CMA record showing that he was not engaged to represent the applicant during arbitration session, if it was so, he would have notified the Commission so that the applicant could be notified in person. I find that stating it after the execution process of the ex parte award has started, the argument is just an afterthought.

On the issue that the applicant was not given a right to be heard; I also find to have no merit as he didn't enter appearance although notice was issued, he can not blame the Commission for his and his advocate's negligence.

In respect of the issue of costs as prayed by the respondent, Rules 51(1) of the Labour Court Rules G.N.No. 106/2007 do categorically provide that no costs, fees or interests whether commercial or court fees or interests whatsoever shall be payable before the court in respect of

any proceedings under the provisions of the Acts. However, sub rule 2 of rule 51 allows the court in its discretion to order costs for frivolous and vexatious proceedings. Therefore, the respondent was duty bound to prove that the proceedings were frivolous and vexatious but there is no such proof.

That said, I find the revision application to have no merits and I hereby dismiss it accordingly.

No orders as to costs.

Right of appeal is explained.

S.C. MOSHI

JUDGE

23/9/2021

(a) of the Constitution of the United Republic of Tanzania. In this respect he cited the case of **Kanjibah Patel V. Dahya bai F. Minstriy** (2003) TLR 437 at page 439.

He said that by failing to restore the case, the Arbitrator denied the applicant a right to be heard.

In reply the respondent opposed the application, and he prayed the court to adopt the counter affidavit and stated that, there is no scintilla of evidence indicating that Edmund Mnyawami withdrew his services before the CMA at Mediation stage, and he didn't inform the CMA that he is not involved in arbitration. The CMA record shows that Edmund Mnyawami in his affidavit supporting an application to set aside the decision admitted that, he received the summons, he tried to contact his client, the applicant herein but he was not successful. He said that, since the applicant's advocate was appointed by applicant to represent it on behalf of the company and admitted to receive the summons for arbitration, it is obvious that he acted on behalf of the company, he was aware of Arbitration but he denied his company a right to be heard during the arbitration. He added that If it is true that he was not instructed, how could he receive the summons that did not concern him? He said that, therefore, this ground has no merit as there is no evidence that he had withdrawn his instructions/services.

On the issue that there was no proper service of summons, he argued that, a company is an institution which has an administrative system. The company must have at least two directors. Therefore, it was not necessary to serve Werema only, it could have been served to other directors, body members or employee who could have attended the arbitration. He cited section 88(7) of the Employment and Labour Relation Act Cap. 366 R.E 2019 which lists persons who can represent a party to a dispute during arbitration namely a member or official of the party's trade union, or employers' association, an advocate and a party's representative of the party's own choice.

It was his submission that, the cases cited by the applicant's advocate are distinguishable since in this case, the advocate was given a right to be heard, he neglected it, first by having no good communication within his client and by not informing the commission that he failed to contact his client. He added that a right to be heard is not for only one party. Both parties have a right to be heard. He said that, the respondents were the ones who were affected by the termination. CMA considered section 88 (4) (a) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019; to determine the case fairly and quickly. The arbitrator refused to set aside the award so he could do justice to employee timely.

On the issue of negligence, he said that Mnyawami's advocate affidavit shows that he tried to contact the applicant but he didn't succeed and he didn't inform the CMA. He said that the applicant was negligent and not his advocate as he wasn't communicating with his advocate to know the whereabouts of the case. Even the affidavit of Werema Msongo's affidavit and Edmund's affidavit before the CMA were inconsistent. Mr. Nditi prayed for the dismissal of the application with cost since the applicant neglected the case and now is disturbing the court.

In rejoinder Mr. Jamhuri reiterated his submission in chief emphasizing that the advocate was negligent and not the applicant. Concerning the costs, he said that the respondent didn't explain why he requested costs.

From the submission of the parties, the issue for determination is whether this application has merits. It is a principle of law that an application to set aside an exparte award is granted where the applicant establishes sufficient ground for the Commission or the court to set aside the ex parte decision. In the case of **Mbeki Teachers Saccos vs. Zahra Justas Mango,** Revision No. 164 of 2010, High Court Labour, Division at Mbeya (Unreported), this court held that sufficient reason is pre condition for court to set aside ex parte order. The commission's