IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT BUKOBA CENTRE

REVISION APPLICATION NO. 05 OF 2021

BETWEEN

MAVUNO PROJECT.....APPLICANT

AND

ALBINUS VEDASTO LYAGALA..... RESPONDENT

RULING

Date of the last order 13/10/2021

Date of the ruling 13/10/2021

A.E. Mwipopo, J.

The Applicant herein namely Mavuna Project has filed the present application against the decision Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/BUK/92/2018 delivered by Mwabeza N.L., Arbitrator on 28th June, 2019. The CMA delivered an ex-parte decision in favour of Respondent namely Albinus Vedasto Lyagala. The dispute was referred to the Commission by the Respondent following the act of the Applicant to terminate the employment of the Respondent on 21st May, 2018. The dispute was heard in *Exparte* following the failure of the Applicant to appear before the Commission.

Dissatisfied by the Commission Ex-oarte decison the Applicant filed the present revision application.

The Applicant is praying for the Court to revise and set aside the award of the Commission for Mediation and Arbitration at Bukoba dated 28th June, 2019 in Complaint No. CMA/BUK/92/2018. The application is accompanied by Chamber Summons and affidavit sworn by the Applicant's Advocate namely Joseph Bitakwate. The affidavit contains 5 grounds of revision in paragraph 13 of the affidavit. The grounds are as follows:-

1. *The Commission for Mediation and Arbitration at Bukoba erred in law in entering an exparte award without summoning the Applicant to attend the hearing in contravention of the principles of natural justice.*
2. *That the Arbitrator erred in law and fact in holding that there was no contract for employment between the Applicant and the Respondent on one hand while on the other hand holding that there was unfair termination of the Respondent's employment by the Applicant.*
3. *The Commission erred in law when on 18th March, 2019 refused to dismiss the complaint filed by the Respondent after the Respondent had failed to appear on hearing without reasonable ground contrary to the law.*

4. *The Arbitrator erred in law and facts in delivering an award for the Respondent without evidence to support the said award and on biased grounds.*
5. *The Arbitrator erred in fact in relying on the oral statement made by the Respondent that he was employed by the Applicant on 19th July, 2017 without proof of the said fact, while a copy of the terms of service between the Applicant and the Respondent indicated the agreement between the two for the duration of 6 months from 1st July, 2017 to the 3`st December, 2017.*

The Applicant in this application was represented by Mr. Joseph Mutakwate, Advocate, whereas the Respondent was represented by Mr. Sicarius Bukangale, Advocate.

Mr. Joseph Bitakwate submitted in support of the application that when the dispute was coming for hearing on 07.02.2019 the Respondent was absent and the information was provided that he was not able to attend on that hearing date. The hearing was adjourned to 18/03/2019 where the Respondent also failed to appear. The matter was adjourned once again. The Applicant was informed by the Commission that after the Respondent has appeared the Applicant will be notified. The Applicant was never informed on the hearing date but it appears that the Respondent appeared at the CMA on 14.04.2019, on 30.04.2019 and on

17.05.2019 where the commissioned made an order for the hearing to proceed in exparte.

He stated that the hearing proceeded in *exparte* on 21.05.2019 while there is nothing to prove that the Applicant was informed of the date of hearing. The typed proceeding in page 11 shows that the Respondent informed the CMA that he was serving the Applicant with summons through EMS.

The Counsel argued that the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 provides in rule 6 and 7 for the procedure of serving the other party that there has to be proof that the other party was served before the court. In absence of the proof of service it means that the other party was not served with summons. The CMA proceeded to make an order to proceed in *exparte* without proof of service of summons to the Respondent. This has caused injustice to the Applicant. The important of serving summons to the other party was discussed in the case of **NBC Ltd and Another v. Balut Construction Company Ltd**, Civil Appeal No. 72 of 2017, CAT at Tanga where it was held that in absence of proof of service it cannot be proved that the other party was served.

He went on to state that the effects on serving summons to the other party was stated in **Yazidi Kassim Mbakilaki V. CRDB [1996] Ltd**, Civil Reference No. 14/04 of 2018, Court of Appeal of Tanzania, at Bukoba, (Unreported), at page 11 the court cited several authorities where it emphasized that the effects in such

decision is that it has to be set aside. The Court has duty to provide opportunity for the party to be heard as it was provided in the case **Mbeya Rukwa Autoparts & Transport Ltd V. Jestina Mwakyoma [2003] TLR 251** which held that the effects of the defect in the decision is to make the proceeding to be invalid. Since the CMA heard the Dispute without satisfying itself that the Applicant was served with summons, the Counsel prayed for the court set aside the CMA judgment. He was of the view that this ground alone is sufficient to dispose of the Revision and prayed for the revision to be allowed.

In response, Mr. Sicarius Bukagile Advocate commenced by distinguishing cases cited by the Applicant. He argued that the cited case of **Yazid Kassim Mbakuleki V. CRDB [1996] Ltd** (supra) by stating that the person given opportunity to be heard my decide not to exercise his right. That the Applicant herein decided not to exercise his right to be heard. On the case of **NBC Ltd V. Ballest Construction Ltd** (supra) he said that it is not applicable in this case for the reason that the case is dealing with the service of summons before the Court of Appeal while the present case is on the labour matters where there are Rules which provides for the procedures of service of summons in the Labour Matters. Thus, the cited case is not Applicable.

Thereafter, he proceeded to submit that the Applicant was properly served several times through Registered mail and EMS and the same was proved before

the Commission. Those summons were received on the dates indicated in the receipt attached. In such circumstances there is proof that the summons was set and received by the Applicant. He said that the Applicant has attached some summons to show that he received it on 31.05.2019 after the hearing of the case. But, there is no explanation in the Affidavit from the Applicant as how the summons was received. Thus, the claims that they were not served with summons has no merits.

In his rejoinder, Advocate Joseph Bitakwate argued that the Record proceedings of the CMA dated 17.05.2019 does not show if the Respondent proved that the Applicant was served with summons hence it was wrong for the Arbitration to proceed to order hearing to proceed in exparte and the Respondent has not explained as to how the documents tittle annexture "A" has been attached to the present application while it was not part of the record of the CMA. This means that the service was not effected to the Applicant by the Respondent.

After the parties' submission, where it was clear that the main Applicant's ground of the present revision application is the Commission order of exparte that it was made without proof that the Applicant was served with summons, the Court observed that the Applicant has never applied to the CMA to set aside the exparte order of the CMA. Instead, he filed the present revision application before the court

to set aside the Exparte decision f the CMA. Following that omission, I asked the counsels for the Applicant and the Respondent to address the court on the issue.

The Counsel for the Applicant stated that section 91 (1) of the Employment and Labour Relations Act gives chances to any person who is a party to the Arbitration Award, who find there is defects in the CMA Award, to apply for revision in the High Court Labour Division against that Award. The party is not obliged to set aside the exparte award first before applying for Revision as it is provided by rule 30 (1) of G.N. No. 64 of 2007. The application under rule 30 (1) are made where the party find that there are clerical errors or mistakes in the CMA award. If it is the CMA decision in exparte award, then the party under Section 91 (1) (a) and (b) of the Act has a right to apply for the revision without setting aside the exparte order. For that reason, he was of the view that the application for revision was properly brought before the court. He prayed for the court to proceed with determination of the revision accordingly.

The Counsel for the Respondent submitted that the concept is clear that a party cannot appeal or apply for revision before he made application to set aside exparte order or judgment. The party aggrieved was supposed to apply to set aside the exparte order first before he proceed to file Revision against the same award. For that reason, he is of the opinion that the Applicant was supposed to

make application to set aside the exparte decision and the matter be heard inter parties before he proceed with the Revision.

From the submissions, I find it relevant to determine first if the application for revision was properly brought in this Court before I determine the matter on merits.

It is a trite law that a party aggrieved by an ex parte award of the Commission for Mediation and Arbitration have to make application to set aside the exparte award at the Commission before filing revision application to the Labour Court. See the case of **M/S Nufaika Distributors V. Tumaini Lunguru and Others**, Revision No. 24 of 2009, (Unreported); **Brooke Side Dairy Tanzania Ltd V. Valentina Lucas Kinawiro**, Revision No. 90 of 2010, High Court Labour Division at Mwanza, (Unreported); and **Alizon Lodge V. Maria P. Mwami and another**, Revision No. 11 of 2014, High Court Labour Division, at Shinyanga, (Unreported).

This Court in the case **M/S Jaffer Academy V. Hhawu Migire**, Revision No. 71 of 2010, High Court Labour Division, at Arusha, (Unreported), held that:

> *"When a party aggrieved by an ex parte 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".

In the present application, applicant was aggrieved by the ex parte award of the Commission for Mediation and Arbitration at Bukoba in labour dispute no. CMA/BUK/92/2018 which was delivered on 30th June, 2019 and filled the present application for revision before making an application to the Commission to set aside the ex parte award. The Applicant in his address to the Court is of the opinion that he was not supposed to make application to set aside the ex parte award which was improperly procured and since the law is silent then the application for the revision is properly before the Court. The Respondent addressing the Court was of the opinion that the Applicant was supposed to apply to set aside the exparte decision of the Commission before he file application for revision.

As submitted by both parties, there is a lacuna in labour law in respect of the procedure of setting aside ex parte award. In such a vacuum the available remedy is to look for the general law providing for the civil litigation which is the Civil Procedure Code Act, Cap. 33 R.E. 2019 and the case laws. The Civil Procedure Code Act, provides in Order IX Rule 9 that the remedy available to a person whose rights have been determined in his/her absence is to apply before the same Court

by which the decree was passed for an order to set it aside if it is satisfied that the party was prevented from appearing by sufficient cause. The said application to set aside the Commission ex parte award can be made under rule 29 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. Thus, the Applicant submission that section 91(1) (a) and (b) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 allows aggrieved party to file revision application in the High Court Labour Division against the exparte decision of the Commission for Mediation and Arbitration has no merits.

Therefore, I find that the matter was lodged in this Court prematurely. The applicant was supposed to make application before the same Commission which made an *exparte* order after it was satisfied that the applicant failed to appear before it without good reason. If the Commission will be satisfied by the reason for non-appearance, then it will set aside ex parte award and order for the hearing to proceed interparties. But, if the application fails then he may proceed to file revision application in this Court to set aside and revise the ex parte award. In the circumstances, the only remedy available to the applicant was to apply to the CMA to set aside the ex parte award and hear the matter inter parties.

Consequently, this revision application is dismissed. No order as to the costs.

A.E. Mwipopo

Judge

13/10/202.

Court: The ruling was delivery today this 13.10.2021 in chamber under the seal of this court in the presence of the Mr. Joseph Bitakwate, Advocate for the Applicant and Mr. Sicarius Bukagile, Advocate of the Respondent. Right of appeal explained.

A. E. Mwipopo

Judge

13/10/2021