IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 15 OF 2021

KIGEMU SECURITY GROUP ..... APPLICANT

VERSUS

NGOSHA BULABO MIHEMU ..... RESPONDENT

JUDGMENT

14th September, & 22nd November, 2021

ISMAIL, J.

The respondent was employed by the applicant on 10th July, 2018. He had a two-year stint as a security guard, until 18th November, 2019, when the employment relationship was severed. On 25th August, 2020, the respondent commenced arbitral proceedings in the Commission for Mediation and Arbitration (CMA), claiming a sum of TZS. 3,108,000/-, being an aggregate of unpaid claims of overtime, leave allowances and extra duty allowances.

After the failure by the parties to mediate, the matter proceeded to an arbitration. These arbitral proceedings were a one-sided affair, following the applicant's non-appearance despite issuance of several notices of hearing all of which were allegedly delivered to the applicant but to no avail. There was

also an attempt to invite the applicant to the CMA through a telephone call. After the conclusion of the proceedings, the arbitrator took the view that the respondent's claims were meritorious. She went ahead and awarded a revised aggregate sum of TZS. 2,288,000/-, covering assorted claims presented by the respondent.

The *ex-parte* award did not amuse the applicant. She chose to challenge it through an application for setting it aside. The applicant's contention in the said application was that she was not served with any notice of hearing allegedly issued on 2nd September, 2020, or at all. She held the view that, in view of the absence of the evidence that such notice was served on the applicant, hearing of the arbitral proceedings was done in violation of the applicant's right to be heard. By a ruling dated 26th February, 2021, the applicant's efforts hit a rock. The arbitrator held that the application was devoid of merit as there was evidence that service was effected on the applicant. The arbitrator went further and demonstrated her own initiative to let the applicant's principal officer attend to the matter through a phone call.

This decision did not go well with the applicant, hence her decision to institute the instant application. The application calls for revision of the proceedings and the award in Labour Dispute No.

CMA/MZ/ILEM/APPL/08/2020, for failure by CMA to exercise its jurisdiction when it rejected to set aside the *ex-parte* award. There is also an allegation of denial of the right to a fair hearing. The application is supported by an affidavit of Mr. Dennis Kahangwa, the applicant's counsel and it sets out grounds on which the application is based.

The respondent has opposed the application through a counter-affidavit sworn by Mr. Robert Kimatare, his representative. He averred that he served the respondent right when she lost the matter on account of her failure to appear and defend the arbitral proceedings, despite service of several notices of hearing. The contention by counsel is that the applicant slept on her own rights by refusing to heed to the notices of appearance.

Hearing of the application was done by way of written submissions, filed consistent with the schedule for filing of the submissions was drawn.

Mr. Dennis Kahangwa, learned counsel for the applicant, began his onslaught by submitting that, when the matter came up for orders, the respondent's representative indicated that he wished not to file any counter-affidavit, signaling his intention not to contest the application. Believing that the application is uncontested, and that he has not been served with any affidavit in opposition, Mr. Kahangwa prayed that the application be granted. Reverting to the substance of the matter, Mr. Kahangwa submitted that the

decision that seeks to condemn a party unheard is a nullity. He argued that this contention derives its legitimacy from the case of ***Petrobert D. Ishengoma v. Kahama Mining Corporation Ltd & 2 Others***, CAT-Civil Application No. 172 of 2016 (unreported).

Mr. Kahangwa further contended that the arbitrator's decision to resort to a phone call to a Mr. Emmanuel, the applicant's principal officer, was seemingly an exercise of a discretion accorded by law. However, this meant that all previous efforts to serve the applicant were vacated, and the arbitrator believed that the latest attempt was proper and effective. This meant that such attempts could not be used as the basis for proceeding *ex-parte* against the applicant. Casting aspersion on the use of a telephone call as a means of conveying a notice of hearing, counsel argued that such decision was an abuse of the discretion and unreasonable, as it ignored the fact that discretion should be exercised fairly, equitably and according to the rules of reasoning. It was Mr. Kahangwa's contention that it was unfair and unreasonable for a corporate entity such as the applicant to be notified of the hearing through a phone call on a day set for the hearing. He added that there is no proof that the person called on the day was a manager of the company. He argued that, under rule 6 (3) of GN. No. 64 of 2007, if a corporate entity is not willing to be served then the option is to have the

notice of hearing affixed on the main door of the premises. In this case, no order of affixation was requested and issued, notwithstanding the fact that the respondent and the local leaders knew the applicant's business premises. Such failure, in Mr. Kahangwa's view, constituted a non-adherence to rule 6 (4) of GN. No. 64 of 2007, and it resulted in a denial of a fundamental right of a fair hearing. He buttressed his contention by citing the decision of the Court in ***The Registered Trustees of the Lutheran Church in Tanzania v. Elirehema Malaki Nnko***, HC-Labour Revision No. 194 of 2017 which quoted with approval the case of ***T.M. Sanga v. Sadrudin G. Alibhai & 2 Others*** [1977] LRT n. 51, in which it was held:

> *"... uncertainty of service of summons is sufficient reason foal lowing an application to set an ex-parte judgment and decree thereof ...."*

Mr. Kahangwa prayed that the CMA award be set aside and the applicant be heard on merit.

In her brief address, Ms. Angela Kindimba, learned counsel for the respondent, refuted that there was a denial of the right to be heard. She argued that the decision to proceed *ex-parte* came as a result of the CMA's persistent absences, despite proof that she was served with summonses that required her to appear before the CMA. Counsel contended that summonses

issued were for appearances on 20th June, 2020; 10th July, 2020, 7th September, 2020; and 16th December, 2020. Ms. Kindimba contended further that there were subsequent services done through a postal office. She argued that there are EMS Delivery Notices for 17th April, 2021 and 24th April, 2021, and they indicate that both of the summonses were received by a certain Mr. Desdery Petro, the applicant's employee who chose not to act on them.

Recalling the events during the arbitral proceedings, Ms. Kindimbe argued that at one point, a Mr. Julius Said appeared for the applicant when the matter came up for orders and the respondent recognized him as an officer of the applicant. This implied that the applicant was aware of the proceedings but chose to spurn subsequent proceedings. Counsel concluded that no sufficient evidence had been adduced to allow for restoration of the matter.

Two issues arise out of the submissions by counsel. One is whether the applicant was denied of her right to be heard; and, if not, whether sufficient reason for restoration of the matter.

With respect to the right to be heard, it is common knowledge that a party's right to a fair hearing is so unalienable that is it not only a principle of natural justice, but also a right that is guaranteed by the Constitution of

the United Republic of Tanzania, through the enactment of Article 13 (6) (a). The need for courts and tribunals to adhere to this right has been restated in a multitude of decisions of this Court and the Court of Appeal, and I feel indebted to borrow a leaf from. In ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (ARS-unreported), the upper Bench held:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice,* ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party****."*[Emphasis added].

Accentuating the importance of this right and the need for conformity with it, the Court of Appeal of Tanzania gave the following guidance in the case of ***Director of Public Prosecutions v. Shabani Donasian & 10 Others,*** CAT-Criminal Appeal No. 196 of 2017 (unreported):

> *"We should hasten to add that affording a party the opportunity of being heard before a prejudicial order is*

made is not merely a judicial practice: It is, so to speak, a fundamental constitutional right...."

See also: ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

Significantly, the cited decisions picked from where the upper Bench left, when it laid a scintillating principle in ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,*** CAT-Civil Application No. 33 of 2002, wherein it was held as follows:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.****"*[Emphasis supplied]

Having laid the foundation through the cited decisions, the pertinent question is whether the applicant was denied of this right. As stated earlier on, the basis for the applicant's complaint is what Mr. Kahangwa calls an uncertainty in the service of notices of hearing on the applicant. In fact, his contention is that the applicant was never served at all. But as he pitches a tent on this contention, evidence is clear that summonses were served on

the applicant on numerous occasions as Ms. Kindimba has enumerated them, including twice when the same were sent by expedited mail services offered by the Tanzania Posts Corporation. The delivery notes show that Mr. Desdery Petro received them on the applicant's behalf. This means that information on the existence of the case was conveyed and an invitation to attend to it was extended. As if this is not enough, the applicant featured in the proceedings that came before the *ex-parte* hearing, and was represented by Mr. Julius Said. This implies that she was aware that the case had been adjourned and would come for orders on a date that was set in his presence. Throughout Mr. Kahangwa's affidavit and submission, there has been no denial of Mr. Said's representation in the proceedings. There is no denying that said officer represented the applicant, either.

The applicant's counsel has argued that the subsequent telephonic invitation to the proceedings wiped out all subsequent attempts to serve the applicant, wondering if such invitation is a known procedure in law. With great respect, I hold a different view. I do not think that the telephone call was intended to overwrite anything that was done before, including delivery of summonses to attend, or the applicant's previous appearance. It was merely a generous emphasis which was intended to remind the applicant of the existence of the case and the need to have her day in the CMA. In my

considered view, this was a rare gesture of generosity that should be emulated, instead of ridiculing or taking advantage and find a refuge, as the applicant is attempting to do. In sum, I am hardly persuaded that this was a case of uncertainty of service of summons which would require an application of the principle enunciated in ***T.M. Sanga v. Sadrudin G. Alibhai*** (supra); and ***Registered Trustees of the Lutheran Church in Tanzania v. Elirehema Malaki Nnko*** (supra), cited by Mr. Kahangwa. None of the cited anomalies are prevalent in the instant case.

It is my view that the right to be heard was accorded to the applicant but the latter simply chose to spurn it, and the CMA cannot be held responsible for applicant's refusal to grab the right to protest her innocence.

Moving on to the next issue, the question is whether sufficient cause was adduced by the applicant to warrant a prayer for setting aside the *ex-parte* order.

The generally acknowledged position is that the law accords a party the right to apply for setting aside an *ex-parte* decision, and have the matter heard on merit and *inter-partes*. However, this would require the party against whom such decision was passed to satisfy the court or tribunal, in this case, the CMA, that the non-appearance leading to such decision was for a good or sufficient cause (See: ***Nzibikire Robert Isack v. Access***

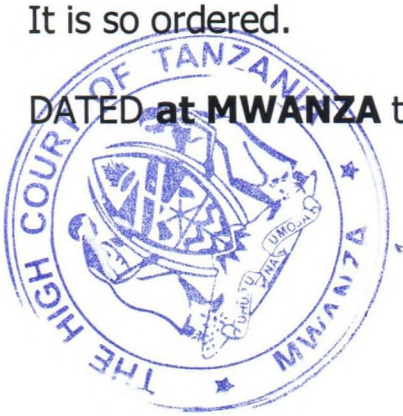
Bank Tanzania (T) Ltd, HC- Misc. Land Application No. 82 of 2020 (unreported)).

From the evidence adduced by the respondent and, as held by the arbitrator, the non-appearance that precipitated the decision to proceed with the *ex-parte* hearing was of the applicant's own creation and liking. This is in view of the fact that, whereas she was aware of the existence of the proceedings and even fielded a representation at some point, she chose to abandon the said proceedings, midway, and taking no heed to the notices that invited her to the hearing. In my considered view, these self-inflicted actions cannot be considered to have any semblance of what one would consider as sufficient cause, requisite for setting aside the *ex-parte* decision.

In the upshot, I take the view that the application is devoid of merit that would move the Court to find fault in the decision which refused to set aside the *ex-parte* decision. Accordingly, I uphold the Arbitrator's decision and dismiss the application. No order as to costs.

It is so ordered.

DATED **at MWANZA** this 22nd day of November, 2021.



M.K. ISMAIL

JUDGE

Date: 22/11/2021

Coram: Hon. C. M. Tengwa, Dr

Applicant: Mr. Denis Kahangwa, Advocate

Respondent: Absent

B/C: P. Alphonce

Court:

Judgment delivered today.

C. M. Tengwa

DR

At Mwanza

22nd November, 2021