IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 124 OF 2018

(Original CMA/ARS/MED/388/2014)

TANALEC LIMITED ..... APPLICANT

VERSUS

JACKSON BASU ..... RESPONDENT

RULING

Date of last order 26-10-2021

Date ruling 16-11-2021

B. K. PHILLIP, J.

This application made under the provisions of Section 91(1) (a), (2) (b) and (c) 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), Rule 28 (1) (b) (d) and (e) of the Labour Courts Rules, G.N. No. 106 of 2007. The applicant prays the following orders:

i) That the Labour Court be pleased to call and examine the records of the Labour dispute No. CMA/ARS/MED/388/2014, thereafter be pleased to revise and quash the Ruling on application to set aside the ex-parte Award dated 4th day of June 2015 by Hon Maurice

Egbert Sekabila, thereafter the matter be remitted to be tried *de novo*.

ii) Any other orders / reliefs that this Honourable court may deem fit to grant.

The application is supported by an affidavit sworn by the learned Advocate Aggrey Cosmas Kamazima, whereas the learned Advocate Sheck Mfinanga filed a Counter Affidavit in opposition to the application. Mr. Kamazima and Mr. Mfinanga appeared for the applicant and the respondent respectively.

I ordered the application to be disposed of by way of written submission. Both advocates filed their written submissions as ordered. Before embarking on the analysis of the submissions made by the learned Advocates appearing herein, let me state albeit briefly, the background to this application.

The respondent herein was employed by the Applicant as an Internal Auditor. His employment was terminated on 17/10/2014 on the ground of incompetency. Being aggrieved by the termination of his employment he lodged his complaint at the Commissioner for Mediation and Arbitration for

Arusha ("CMA") vide Labour dispute No. CMA/ARS/MED/388/2014. The matter at CMA was heard ex-parte, following the Applicant's non appearance before the CMA. On 14/01/2015 the CMA delivered its Judgment in which it ruled out that the Respondent's termination was substantively and procedurally unfair. It ordered the applicant to pay the Respondent a sum of Tshs. 48,700,000/= being 12 months' salary in lieu of notice, severance pay, leave pay and repatriation costs from Arusha to Dar es Salaam, and issuance of a certificate of service to the respondent. On 12/02/2015 the applicant lodged an application at the CMA, seeking for an order for setting aside the ex-parte Judgment on the following grounds; That the applicant's representative one Bernard Hezron, when he appeared before the CMA he mistakenly noted that the matter was adjourned to 15/12/2014 instead of 12/12/2014. Consequently, the applicant failed to attend at the CMA on the hearing date .That he became aware of the ex-parte award on 15/01/2015.The applicant's application aforementioned was heard inter-parties and on 04/06/2015 the CMA dismissed it on the ground that the applicant failed to adduce sufficient reasons for setting aside the ex-parte award. The applicant did not give up, he filed an application for Revision vide Application No. 140

of 2015, which was struck out with leave to refile within seven days on 12/05/2017 for being defective .On 19/05/2017, the applicant refiled his application for Revision vide application No. 62 of 2017, but the same was found to be incompetent. On 29/11/2018 the aforementioned application was marked withdrawn with leave to refile following the applicant's prayer to withdraw it. On 14/12/2018 the application at hand was filed by the Applicant with the same aim of setting aside the ex-parte award made by the CMA on 14/01/2015.

Back to the application at hand, in his submission Mr. Kamazima adopted the contents of his affidavit in support of this application and raised the following grounds: That on 26/11/2014, the Applicant's Human Resource Officer, Mr. Bernard Hezron who appeared before the CMA, he mistakenly noted that the matter was adjourned to 12/12/2014 instead of 15/12/2014, as a result he went to the CMA on 15th December 2014, only to be told by the clerk that his case was not scheduled on that day. That, being a layman, he decided to assign his case to a Law firm namely Law Bridge. Unfortunately that Law firm had closed for the end of the year vacation from 14th December, 2014 to 15th January, 2015. The applicant became

aware of the ex-parte award on 15th January, 2015 when he was served with the same.

Mr. Kamazima faulted the Mediator's order for ex-parte hearing on a single non-appearance of the applicant. He maintained that the applicant had no any previous records of non-appearance. That it was wrong for the Mediator during mediation stage to move to such an extreme step of ordering an ex-parte hearing for only single non-appearance of the applicant, without warning himself of the importance of the fundamental right to be heard

Citing the Provisions of Rule 14 (2) of the Labour Institution (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2004, Mr. Kamazima contended that the Mediator had discretion to postpone the mediation and issue summons or to continue with the determination of the dispute. He maintained that the Mediator erred for not taking the 1st option in the discretion bestowed upon him by the law, that is, postpone the mediation and issue summons for mediation on another date as the applicant had a good record of attending at the CMA. In short Mr. Kamazima was of the view that the mediator failed to exercise his discretion judiciously.

It was Mr. Kamazima's contention that the Labour Court is a Court of equity thus, the mediator erred in law for failure to issue summon to the applicant who had a good record of appearing before CMA. To cement his argument he cited the case of **Felician Rutwaza Vs. World Vision Tanzania, Civil Appeal No. 213 of 2019** (unreported) in which the Court of Appeal said the following;

> *".. the Labour Division of the High Court was right in exercising its discretion granting leave to refile a proper application. In our view that Court acted consistent with Rule 3(1) and 55 (1) of the Labour Court Rules, 2007 GN. No.106 made under section 55 (1) of the Labour Institution Act, (CAP 300 R.E. 2019), the former rule provides the Labour Court be a Court of equity..."*

Mr. Kamazima submitted further that the ex-parte award is tainted with illegality and was improperly procured because the respondent had worked with the applicant for less than 12 months. Thus, he was not entitled to the payment of severance pay and leave allowance. To cement his arguments he cited the Provisions of Section 42 (2) (a) and 30 (b) (i) of the Employment and Labour Relations Act, (henceforth the "ELRA")

Relying on the provisions of section 88 (4) (b) of the ELRA, and Rule 3 (i) of the Labour Court Rules 2007, Mr. Kamazima insisted that the Mediator

was required to avoid technicalities and deal with the matter on its merits. He faulted the mediator's findings that the applicant was supposed to attach a copy of his diary so as to prove that he wrongly recorded the next date for the case as 15/12/2014 instead of 12/12/2014.

Also, he cited the case of **M/S Metro Plastic Industry Limited Vs. Abuu Mkulwa and Richard Mwaifunga T/A Yona Auction Mart Labour Revision No. 62 of 2009** (unreported) in which this court set aside an ex-parte award for lack of proof of service of summons among others. Mr. Kamazima implored this Court to set aside the ex-parte award, quash the proceedings of the CMA and order hearing of the matter inter-parties.

In rebuttal, Mr. Mfinanga came up with the following arguments; That the application for setting aside the ex-parte award was hopelessly filed out of time in contravention of Rule 30 (1) of the Labour Institution (Mediation and Arbitration Guidelines) G.N. No. 64 of 2007 which provides that, an application for setting aside an award has to be made within 14 days from the date a party became aware of the award sought to be set aside. Referring to paragraphs 8 and 11 of the affidavit in support of this

application, Mr. Mfinanga contended that, the applicant became aware of the ex-parte award on 15/01/2015 and filed his application for setting aside the ex-parte award on 12/02/2015, that is, 29 days from the date he became aware about the existence of the ex-parte award. He cited the case of **Swila Secondary School Vs. Japhet Petro** (unreported) in which the Court of Appeal said the following:

> *"Since, in the present case, the second application for setting aside the ex-parte award was time barred, the CMA lacked jurisdiction to entertain it. The proceedings before it and the order setting aside the ex-parte award were therefore a nullity. The ex-parte award therefore remained unchallenged, hence intact as the learned judge rightly and firmly held."*

The learned Advocate went on submitting that, the legal consequences for filing an application out of time is dismissal of the same. He cited the case of **Steven Massatu Wasira Vs. Joseph Sinde Warioba & the AG, (1999) TLR 334, Mama Seleman Chileu & 19 Others Vs. Halmashauri ya Manispaa yaTemeke, Revision No. 821 of 2018** (unreported) and **Swila Secondary School** (supra) to buttress his arguments. He pointed out that though the issue concerning the time limit for filling an application for setting aside an ex-parte award was not

raised at the CMA, the same can be raised at this stage as it involves the question of Jurisdiction. He strongly argued that the CMA was supposed to dismiss that application outright for being time barred.

With regard to the arguments raised by Mr. Kamazima, Mr. Mfinanga's response was to the effect that, the applicant failed to adduce sufficient explanations and /or reasons to move the CMA to grant his application. Relying on the case of **Abdallah Zaraf Vs. Mohamed Amari(1969) HCD 191,** Mr Kamazima argued that the applicant was duly bound to establish that he was prevented by sufficient cause from appearing before the CMA on the material day.

It was Mr. Mfinanga's contention that the applicant was duly served with summons for the application, that is why he appeared before the CMA on 26/11/2014 and prayed for adjournment of the application so as to get a time to liaise with the Company's management for settlement of the dispute. The matter was adjourned to 12/12/2014. Moreover, Mr. Mfinanga argued that, the applicant's contention that he recorded the next date for the case wrongly depicts lack of diligence on part of the

applicant and cannot be a sufficient reason for setting aside the ex-parte award.

In addition, Mr. Mfinanga argued that the applicant's inability or failure to appear before the CMA on the date the matter was scheduled and/or subsequent failure to apply for extension of time to lodge the application for setting aside the ex-parte award is fatal. It is not a mere inadvertence. The applicant decided to sleep on his rights. The CMA cannot be faulted in any way as it effectively served the applicant with the summons.

With regard to the award of severance allowance and money for leave, Mr. Mfinanga implored this Court to ignore Mr. Kamazima's argument in respect of those two grounds because the same have been raised as an aforethought. They are not reflected in the affidavit in supporting this application and consequently the respondent had no opportunity to respond to the same in his counter affidavit as he has been taken by surprise. He insisted that submission is not evidence and it is supposed to be predicated on what is deponed in the affidavit in support of the application and not otherwise. He cited the case of **Tanzania Union of**

Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Limited Vs. Mbeya Cement Company Limited and another (2005) TLR 41. To bolster his arguments.

Furthermore, the allegations raised by Mr. Kamazima on the payment of severance allowances and leave pay needs evidence to be proved so as to determine whether or not the respondent worked with the applicant for less than 12 months, contended Mr. Mfinanga. He was of the view that entertaining the aforesaid grounds would led this Court to determine issues which are not within its jurisdiction as the ex-parte award is not yet set aside. To cement his arguments he cited the case of **The registered Trustees of Pentecostal Church in Tanzania Vs. Margreth Mukama,Civil Appeal No. 45 of 2015** (unreported).

With regard to the applicant's contention that the Human Resources Manager Mr. Gerard Hezron mistakenly recorded the next date for the case wrongly, Mr. Mfinanga argued that the affidavit in support of the application that was filed at the CMA did not disclose the date which was recorded by the applicant's Human Resources Manager. Disclosing that date at this stage is a new fact, which should not be entertained by this

court since it is a pure afterthought aimed at circumventing the proper legal procedure and abuse of the court's process, contended Mr. Mfinanga. He implored this Court not to take into consideration the applicant's assertion that he wrongly recorded the hearing date. To cement his argument, he cited the case of **Registered Trustees of Social Action and another Vs. Happy Sausages Ltd and 10 others (2002) TLR 285.** And **Farida and 2 others Vs. Domina Kagaruki, Civil Appeal No. 136 of 2006** (unreported) which was cited with approval in the case **Yazidi Rajabu Aka Byamungu and 2 others Vs. Nakuroi Investment Co. Ltd Land Case No. 118 of 2016 ,** (unreported) in which the court said the following.

> *"It is the general principle that the appellate court cannot consider or deal with issues that have not canvassed, pleaded and or raised at the lower court"*

Relying on the case of **Ngao Godwin Losero Vs. Julius Mwarabu, Civil Application No. 10 of 2015**, (unreported) Mr. Mfinanga submitted that Mr. Kamazima's contention that the applicant is a layman, thus was not conversant with the legal procedures cannot be a shield for his negligence. He contended that ignorance of the law is not a defence. If the applicant

was a diligent and prudent party he would have asked to be apprised of the proper legal procedures and the law in general. He insisted that ignorance of the law is not an excuse. To cement his argument he cited the case of **Salum Ahmade Kuangaika Vs. Mohamed Mussa Salum, Civil Reference No. 4 of 2011** (unreported).

Furthermore, Mr. Mfinanga submitted that since the applicant did not file any reply to the counter affidavit filed by the respondent to contradict what has been alleged therein, then, implied he admitted that he was negligent. To cement his arguments he cited the case of **Tanzania Parts Authority Vs. Ms. Pembe Flour Mills Ltd., Civil Application No.49 of 2009** (unreported).

Moreover, Mr. Mfinanga argued that, the applicant's assertion that he appeared in court on 15/12/2014 and was informed by a Clerk that the application was not scheduled on that date does not hold water, since he failed to file an affidavit sworn by the CMA Clerk to substantiate the aforesaid assertion. The same remains to be a hearsay. To bolster his arguments he cited the case of **Said Salim Bakhresa Vs. Ally A. Ngume(1997) TLR 312** and **M/s Tanzania Coffee Board Vs. M/S**

Rombo Millers Limited Civil Application No. 25 of 2015 (unreported).

With regard to the applicant's contention that the Law firm he intended to engage was on the end of the year vacation, Mr. Mfinanga's response was to the effect that, that argument has no merits as the CMA records reveals that on 26/12/2014 the applicant's officer (Mr. Bernard Hezron) prayed for an adjournment of the application to 12/12/2014 so as get time to liaise with the applicant's Management team for proposing a settlement of the matter. The story on engaging a law firm is a new one. The applicant's hand are not clean as he is creating new stories now and then. Mr. Mfinanga contended that whoever seeks equity from this court must came with clean hands.

Mr. Mfinanga distinguished the case of **Felician Rutwaza** (supra) from this case on the ground that the same is not concern with an application for setting aside the ex-parte award, but it is concern with the discretional powers of the High Court to grant leave to refile a proper application for Revision after the first one was struck out. The case of **M/S Metro Plastic Industries Limited** (supra) was also distinguished from the

matter in hand on the ground it is concern with a situation where there was no proof of service of summons to the applicant who had not appeared in court , whereas in the matter at hand there was proof of service of summons to the applicant and the applicant had appeared before the CMA.

In his rejoinder Mr.Kamazima reiterated his submission in chief. He contended that the applicant was denied his right to be heard which is a fundamental principle of natural justice enshrined in our Constitution. Our Courts have insisted several times that parties have to be accorded their right to be heard. To fortify his argument he cited the case of **Transport Equipment Vs. Deoram Valamblis (1998) TLR 89** and **Mbeya Rukwa Autoparts and Transport Limited Vs. Jestina Mwakyoma (2003) TLR 253.**

Furthermore, Mr. Kamazima, submitted that the issue concerning the payments of severance pay and leave pay has been properly raised at this stage because it involves Jurisdiction issues, thus , it can be raised at any stage. He invited this court to set aside the ex-parte award.

Having dispassionately analyzed the submissions made by the learned Advocates appearing herein. Now, let me embark on the determination of the merits of this application. As it can be deciphered from the prayers made by the applicant in this application as well as the submissions made by the learned Advocates, the task of this Court is to determine whether or not the applicant adduced sufficient reasons for failure to appear before the CMA on the date when the application was heard ex-parte. In his affidavit in support of this application filed at the CMA, the applicant adduced two major reasons for his non appearance before the CMA, to wit; That the applicant's Human Resources Manager, Mr. Bernard Hezron mistakenly recorded the date for the case wrongly and that he was not served with summons to appear on the date when the matter proceeded ex-parte. The same reasons have been adduced before this Court together with additional reasons which were not raised at the CMA. However, upon going through the Ruling of the CMA ,I noted that the Mediator dealt with the reason concerning the wrong recording of the date of hearing only. He did not say anything concerning the applicant's concern that that he was not served with the summons for the ex-parte hearing. The reason behind this is not disclosed in the Ruling.

The learned Advocate Kamazima have submitted extensively on the issue of service of summons and cited case laws to support his stance. Suffice it to say that it is a common ground that service of summons is crucial on the procedure of hearing of cases as it informs a party his right to be heard and accords him the opportunity to be heard. It is not in dispute that right to be heard is a basic principle of natural justice.

In his submission, Mr. Mfinanga argued strongly that the applicant was served with the summons for the application, that is why he appeared in Court. Therefore, he was aware of the hearing date. His sloppiness in noting the next date for the application is his fault and cannot amount to a good reason for failure to appear before the CMA when the matter was heard ex-parte. With due respect to Mr. Mfinanga, I think he has missed the point on the applicant's complaint concern on the service of summons.The CMA records shows that on 26/11/2014 the matter was called for mediation. Both the applicant and respondent were present. The matter was adjourned to 12/12/2014 and that is when problems cropped up. The applicant claims that he mistakenly recorded the next date for the application as 15/12/2014 instead 12/12/2014. Consequently, when the case called for mediation on 12/12/2014 the applicant did not enter

appearance. Furthermore, the CMA records show that on 12/12/2014 the respondent prayed for ex-parte hearing because the applicant did not enter appearance. The Mediator granted the prayer and fixed the matter for ex-parte hearing on 18/12/2014. Let me interpose here one important aspect of this matter, that is, the status of the application changed, from mediation to ex-parte hearing. The ex-parte hearing was scheduled to be conducted on another date which the applicant was not aware of. Under normal circumstances the applicant was entitled to be notified of the date for ex-parte hearing by being served with a summons which would have indicated that the status the case had changed from mediation to ex-parte hearing.

I am inclined to agree with Mr. Kamazima that it was imperative for the Mediator to issue an order for service of summons to the applicant. If the Mediator would have decided the matter on 12/12/2014 pursuant to Section 87 (3) (b) of ELRA, the applicant's complaint that he was not served with summons would not hold water. So long as the Mediator decided to fix the ex-parte hearing on another date, he was duty bound to notify the applicant. In the same line of argument, I decline to agree with Mr. Kamazima's contention that the Mediator was bound to postpone

the mediation session because the applicant had defaulted to appear before the CMA only once. It has to be noted that the law does not provide that there should be numerous defaults in appearance for the CMA to exercise its discretion to determine the matter under Section 87 (3) (b) of the ELRA. The fact that the labour Court is a Court of equity does not mean that it condones laxity of the parties.

Since I have already made a finding that the applicant was not served with summons upon adjourning the matter for ex-parte hearing, which I hold it to be a good reason for his failure to appear in court on 18/12/2014 when the matter was heard ex-parte, I do not see any plausible reasons to deal with the remaining arguments raised by the learned counsel in this matter.

~~In the upshot this application is granted. The ex-parte award issued by the~~ CMA is hereby set aside. This matter should be heard *de novo* before another Mediator.

Dated this 16th day of November 2021

B.K.PHILLIP

JUDGE