

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA**

REVISION APPLICATION NO. 06 OF 2020

(Arising from the original Award Decree of Decision No. CMA/BUK/109 of 2009)

MUTAGAHYWA KAGISA APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF ELCT NORTH

WESTERN DIOCESE RESPONDENT

RULING

05/10/2021 & 24/12/2021
NGIGWANA, J.

This is an application for revision against the orders of the Commission for Mediation and Arbitration (CMA) which has its peculiar history. It seeks from this court to nullify the proceedings held on 23/02/2016 through MGOGORO WA KIKAZI NA MISC. APPLICATION 02 OF 2015 before D. Mayale (Mediator) which had set aside the terms stipulated in the mediator's certificate of settlement arrived at by the agreement of both parties before Mediator E.F. Urassa on 05/02/2010 through Labour Dispute No. CMA BUK/109/2009.

The peculiarity of this matter resonates on zig-zag movement meaning that at different times, the matter was severally going forward and backward to the extent of causing this matter to remain in court corridors for almost 11 years. Conversely, this application for revision therefore touches on the issue of how settlement agreements terms on the certificate of settlement

should be drafted and the legal implication of failure by the mediator to properly draft executable settlement deed, it also touches on the legality of the same commission whether it has such power of setting aside its earlier decision on parties' agreements pegged in the settlement certificate. Moreover, the application also hinges on the legality of the commission by failure to comply with the inherent power of the High Court of giving orders and directives to the lower courts/tribunals particularly in this matter to rectify the settlement deed by ironing executable terms.

To appreciate the context upon this application was brought and as well its peculiarity which has made this matter to remain courts corridors for a long time without an end, it is imperative to recapitulate the brief historical background of it. The Applicant herein Mutagahywa Kagisa was in contract of employment with ELCT North Western Diocese 2009. Their relationship eventually turned into antagonistic situation as the applicant filed labour dispute as an Application No. CMA/BUK/109/2009 of 2009 which ended into mediation settlement on 5th February, 2010 and signed the Mediator's certificate of settlement (Form No. 5) made under Section 98 (2) (r) of the employment and Labour Relations Act [Cap 366 R: E 2019].

The same deed of settlement as drafted by the CMA, stipulated the following agreed terms: -

1. *Mlalamikaji anakubali kurudisha Shs. 444,000/= ambazo ni thamani ya mbao 111 za fiti 13.*
2. *Akishalipa mlalamikaji mwajiri atampa ruhusa ya kwenda kusoma.*

3. *Mlalamikaji amekubali kuingia mkataba na mwajiri wake wa kwenda masomoni ili akimaliza masomo arudi kufanya kazi kwa mwajiri wake.*
4. *Mwajiri amekubali akishaingia mkataba atamlipa mshahara wake kwa kipindi chote atakachokuwa masomoni.*
5. *Kila upande utabeba gharama zake.*

Those were agreed terms by both parties in the settlement deed. What is viewed apparently from the agreed terms by parties and most probably which appears to be the acceleration of dispute, it is that the terms and conditions in the certificate embodies no time frame which describes the starting and ending dates of each activity.

After seeing that the respondent has remained silent on the agreed terms, the applicant filed, Application for Execution case No. 1 of 2010 before the Deputy Registrar, High Court Labour Division to enforce his rights.

The matter being before the Deputy Registrar as the executing officer, the terms and conditions to be executed were different from those found in the settlement certificate and unfortunately the Deputy Registrar did not detect the contrast, instead ordered execution as prayed by the applicant contrary to the agreed terms in settlement certificate. The act which prompted the respondent to prefer Application for Review No. 01 of 2010 in this court praying for stay of execution and review of execution order issued by the Deputy Registrar.

It is worth to reproduce the orders which were issued in the Ruling delivered by the Registrar for easy reference viz:

- (a) *12 months salary compensation.*

- (b) 12 months salary arrears from June, 2009 to date.*
- (c) One month salary in lieu of notice.*
- (d) One month salary in lieu of leave.*
- (e) Severance pay for 10 years.*

This court before Lymo, J. faulted the execution order of the Deputy Registrar as it had treated the whole complaint as one of the termination of employment and hence gross alteration of the deed of settlement.

This court finally quashed and set aside the orders of the Deputy Registrar in the execution case No. 01 of 2010 and as well quashed the attachment order for attachment of the respondent bank account. It finally ordered that the record to be remitted to CMA for the person concerned to iron out the terms of the agreement along the lines hinted therein. However, this court did not set the time limit required for any party to return to the CMA. The applicant again returned to the CMA for the time he preferred as guided and directed by this court. When the hearing of the application at the CMA in Misc. Labour Application Number CMA/BUK/02/2015 kicked off, the new issue of time limitation to enforce the mediation settlement of 5th February, 2010 emerged.

The commission (CMA) before Dickson Mayala on 23/02/2016 after hearing parties, dismissed the dispute in entirety on the reasoning that the applicant came to CMA after 4 years from the order of the High Court that he was supposed to come within 60 days after the order of the High Court though the CMA conceded that the High Court order did not stipulate the time which any party would have gone back to the CMA. It therefore ordered that the agreement in CMA F5 had been overtaken by event.

The decision of the CMA was not welcomed by the applicant as he made necessary efforts to impugn it through Application for Labour Revision No. 4 of 2016 before this court but in vain as it encountered a stumbling block after being struck out for incompetency. Still the applicant did not give up as he successfully applied for extension of time to institute Revision against the decision and award of the said Commission for Mediation and Arbitration through Misc. Labour Application No. 4 of 2017 before Mtulya, J.

The sufficient cause among others which this court hinged in granting extension of time was on the illegalities as to whether the same institution with same powers can alter its previous decision, or else it was barred from the principles of *functus officio*. This court went on putting it clearer whether an award of mediation which has no ending date emanating in Dispute No. CMA/BUK/109/2009 can be dismissed in Labour Dispute Misc. Application No. 02 of 2015). This is a main question which is also the ground pegged in the chamber summons by the applicant's counsel including as to whether the CMA had acted out of the High court order which directed it to set time for the terms in the settlement deed agreed by parties?

When the matter came for hearing, advocate James Kabakama who represented the applicant was brief that the decision of the CMA dated 23/02/2016 should be quashed as it had no jurisdiction to reverse its own decision which according to him the CMA went *ultravires* and without jurisdiction. Along with, the applicant's learned counsel, submitted that

there was disobedience of the High court order dated 11/02/2011 which Lymo, J. gave specific directions to CMA and instead of complying to it, the CMA overruled the mediation order thus there was gross irregularity. He therefore finally prayed for the order of the High Court to be complied with and the decision of the CMA to be quashed and set aside and finally prayed costs for this application.

In reply, Advocate Erasto for the respondent submitted that the applicant was not terminated from his employment but he went for studies without being permitted. He referred this court to form No. 5 **"the settlement terms"** entered on 5/02/2010 that the nature of the dispute was titled **"KUJIONDOA KAZINI"** that after mediation is when the applicant departed for studies without permission but he had a debt of 444,000/=. That permission for studies was subject to payment of the debt that the applicant paid the debt but did not come back to the respondent to allow performance of the other terms instead, the applicant filed the execution No. 1 of 2010 claiming money for unfair termination contrary to this settlement order which resulted to multiplicity of proceedings.

That the CMA which dismissed the matter was right and performed its role as the terms in the settlement deed were no longer capable of being executed as the applicant had already attained the retirement age and that had already gone to Uganda for studies and returned back to Tanzania. The respondent's counsel added that when the High Court ordered the matter to be reverted to the CMA, the applicant remained silent for 4 years and there after emerged and approached the CMA.

The learned counsel for respondent finally submitted that the CMA did not go astray and hence the application lacks merit and there is no irregularity as the delay was inordinate and the chronological sequence of events which occurred made the terms to be overtaken by event and hence not executable.

In rejoinder, the applicant's counsel replied that the issue of inordinate delay or time limit cannot arise as execution expires after 12 years. He further added that the applicant did not sleep on his right as he made necessary follow ups as he averred in his Affidavit. He reiterated that the High Court order was never complied with and that and that the CMA had no jurisdiction as the mediator cannot revoke the settlement agreement of the other mediator.

Having dully considered the competing discourse of both parties, I am now in a position to determine whether this application is meritorious or otherwise. I will confine myself in the following sub -issues:

1. Whether the High court order was complied with?
2. Whether the decision of the CMA before Dickson Mayale to alter the terms of settlement of its previous decision was legally justified?

I need not be detained in the above two sub-issues. Stating, with the first one. After this court before Lymo, J. had discovered that the terms which were agreed by parties in the settlement deed were ironed without setting time limit basing on the reason that the activities by one part depended the fulfillment by the other party, this court therefore inherently ordered the record to be remitted to CMA for the person concerned to iron out the

terms of the agreement along the lines hinted therein. This court, what it meant was in other way directing parties that if the agreements were framed in a such a way of giving each party obligation to perform his part of bargain, there was supposed to be a prescribed time limit required to perform those activities. By so doing, parties would have contemplated the issue of termination of employment for the party who would have failed to fulfill his part of bargain.

The CMA therefore was duty bound to put the said agreement as directed by the High Court and not otherwise as it did. The High court has inherent powers including directing or guiding the lower courts to the particular matter for the interest of justice. Failure by the CMA to abide to the High court order and going beyond to alter the terms of parties to the extent of dismissing the mediation settlement was not only *functus officio* but also was going *ultra vires* and also a nullity and hence with no legal effect in law. The only duty by CMA was to fix time in the parties' agreement to pave way the fulfillment of parties' duties, should any party fail his party of bargain or finds impossibilities that would be another cause of action independent to the CMA.

This court finds the CMA orders in its decision as a nullity for want of complying to this court's order.

Coming to the last issue, the same is answered to its affirmative and already discussed above. It was an error as the CMA was **functus officio** to its earlier decision. The Dispute between parties had already been

determined to its finality which ended in settlement deed upon which mediator's hands were tied save in the manner directed by the High Court. In the event, I have found sentiment of merit in this application for revision.

I consequently nullify the proceedings of the CMA before Dickson Mayale Mediator in Labour Dispute No. CMA/BUK/109/2009 from where he started and ended save that the case file remains the same. I order that the record be remitted to the CMA so that the order of this court of Lyimo J through application for Review No. 01 of 2010 be complied with by the CMA as directed.

Order accordingly



E.L. NGIGWANA

JUDGE

24/12/2021

Ruling delivered this 24th day of December, 2021.



E.L. NGIGWANA

JUDGE

24/12/2021