

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO.62 OF 2019

*(C/f Labour Dispute No. CMA/ARS/ARS/ MISC APP/19/2017 at the Commission for
Mediation and Arbitration at Arusha)*

BANANA INVESTMENT LIMITED.....APPLICANT

Vs

JOFREY MKAMA.....1ST RESPONDENT

SIMON RAPHAEL.....2ND RESPONDENT

RICHARD MARTIN.....3RD RESPONDENT

DEOGRATIUS FESTO.....4TH RESPONDENT

AMOS BONIFACE.....5TH RESPONDENT

CHARLES ZAKARIA.....6TH RESPONDENT

RULING

Date of last order: 14-12-2021

Date of Ruling: 8-2-2021

B.K. PHILLIP, J

The applicant herein being aggrieved by the dismissal order made by the Commission for Mediation and Arbitration of Arusha (Hon. Anitha Kazimoto), in Labour Dispute No. CMA/ ARS/MISC APP/19/2017, has lodged this application seeking for the following orders;

- i) That this Honorable Court be pleased to revise and set aside the dismissal order dated 1st August, 2019.
- ii) That this Honorable Court be pleased to determine the dismissal order in the manner that it considers appropriate and give any relief it considers just to grant.

The application is made under the provisions of Section 94 (1) (b) and (d) of the Employment and Labour Relations Act, Rule 24(1) (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (b) (c) (d) and (e) of the Labour Court Rules, 2007, GN. No. 106 of 2007, supported by an affidavit sworn by the applicant's advocate, the learned Advocate Emmanuel Sood.

The respondents filed a notice of opposition which is supported by a Counter affidavit sworn by their Advocate, the learned Advocate Frida Magesa.

A brief background to this matter is as follows; In the year 2016, the respondents herein lodged complaints for unfair termination at the Commission for Mediation and Arbitration of Arusha ("CMA"). The same was determined ex-parte. An ex-parte award in favour of the respondent was granted on 23rd June 2017. Following the aforesaid ex-parte Award, the applicant herein filed an application for setting aside

the ex-parte Award vide Labour Dispute No. CMA/ARS/MISC.APP/19/2017, which was dismissed on 6th May 2019 on the reason that the applicant herein had abandoned it. Consequently, the applicant lodged this application.

I ordered this application to be disposed of by way of written submission. Mr. Sood, raised two major points. First, that the CMA ruling is not valid before the eyes of the law, hence null and void. Secondly, it was unreasonable, illogical and not practical for the Honourable Arbitrator to hold that the applicant had abandoned the case.

With regard to the first point Mr. Sood submitted that the dismissal order made by the Hon. Arbitrator is not backed up with any proceedings. He wondered where did Hon. Anitha record what transpired before the CMA if at all the matter was called before her and same seemed to be abandoned. Relying on the case of **Stanles Murithi Mwaura Vs Republic, Criminal Appeal No. 344 of 2019**, (unreported). Mr Sood contended that there is always presumption that a court record accurately represents what happened.

Furthermore, Mr Sood submitted that the Honourable Arbitrator raised the issue of "abandoning the application" *suo motu* and never afforded the parties the right to be heard in contravention of the laws of the land. He

cited the case of **Pili Ernest Vs Musani, Civil Appeal No.39 of 2019** and the **Director of Public Prosecution Vs Shabani Donasian and others, Criminal Appeal No. 196 of 2017** (both unreported) in which his Lordship, Mussa, JA as he then was he quoted the case of **Mbeya – Rukwa Autoparts and Transport Ltd Vs Jeshina George Mwakyoma (2003) TLR 251**, which the Court held that;

" a decision reached without regard to the principles of natural justice and /or in contravention of the constitution is void and of no effect"

In response, Ms Magesa, started her submission with an argument in form of point of preliminary objection that this application is not proper before this Court. The applicant has not exhausted the remedy available under the provisions of section 87 (5) (a) and (b) of the Employment and Labour Relations Act, Cap.366 R.E 2019 ("ELRA") which provides that the Commission may reverse a decision if an application is made under the prescribe manner and the Commission is satisfied that there are good grounds for failing to attend the hearing. She insisted that the applicant filed the said CMA/ARS/MISC. APP/19/2017 on 24th July 2017 and abandoned it. Consequently, on 6th May 2019 the Commission dismissed it for being abandoned. She was of a strong view that this application has been filed in this court prematurely. She contended that

under the circumstances the applicant was supposed to file an application before the CMA for setting aside the dismissal order and give sufficient reasons for abandoning the application.

Ms. Magesa, went on submitting that it is not true that the ruling the subject of this application is not backed up with court proceedings. The matter was abandoned by the applicant. The applicant never showed up before the CMA. Which proceedings does the applicant need for backing up the ruling? , questioned, Ms. Magesa. She referred this Court to section 87(3) (a) of ELRA which provides that

“ in respect of a complaint referred under this Act, the mediator may dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing”.

Furthermore, Ms Magesa submitted that the case of **Stanles Urith Mwaura** (supra) cited by Mr Sood is irrelevant in this matter.

With the regard to Mr. Sood’s concern that the applicant was not afforded the right to be heard, Ms. Magesa submitted that the applicant sat on his right to be heard for failure to appear before the CMA to pursue his application.

I have dispassionately analyzed the arguments raised by both advocates in respect of the first point of complaint raised by Mr. Sood as well as perused the Court’s records. I wish to point out the following; I agree with Ms. Magesa that the CMA can reverse its decision made under

section 87 of the ELRA pursuant to the provisions section 87 (5) (a) and (b) of ELRA provided that the applicant gives good ground for failing to attend the hearing. The above cited provision of the law relied upon by Ms Magesa, defeats the argument she raised in her response that is, since the application was abandoned then, there cannot be any proceedings. I am saying this because, the provision of section 87 (5) (b) presupposes that there are proceedings for the hearing of the matter in question which shows that the applicant failed to attend at the hearing. That is why the laws provides that the applicant has to give good grounds for failure to attend at the hearing. In short, whenever a matter is dismissed for non-appearance of a party, or for being abandoned by the applicant as is argued in this matter by Ms. Magesa, proceedings should reflect that and summons for appearance before the Court/ CMA should also be in the Court's/CMA's record to prove that parties were notified of the date for hearing but failed to attend at the hearing of the matter.

This case is among the peculiar cases I have come across. As correctly submitted by Mr. Sood, the CMA file does not have any proceedings. The impugned ruling of the CMA is not back up with any proceedings. Brief as it is, it just states that the matter had been abandoned. There is nothing

showing that the matter was ever called before the Arbitrator. The scenario in this matter brings a message that the applicant was not accorded the right to be heard. In the absence of proceedings it is illogical to argue that the applicant abandoned the application in question. Under the circumstances, I decline to agree with Ms. Magesa that the applicant was supposed to make an application before the CMA under the provisions of section 87 (5) (a) and (b) of the ELRA. It is my settled opinion that this matter cannot be treated like the ones where there are proceedings showing that the matter was dismissed upon the parties being summoned to appear before the CMA and the same was called as scheduled, but parties failed to enter appearance. In this matter, there is nothing through which the applicant could have relied upon to make an application at the CMA as suggested by Ms. Magesa. In my considered opinion this application is proper before this Court, since this Court has powers to revise the orders of the CMA under any circumstances, including ones like the matter in hand where there are no proceedings at all, but only a bare typed copy of a Ruling.

Having said the above, I do not see any plausible reasons to continue with the analysis of the arguments made in respect of the second point of complaint as doing so will not alter the findings I have made herein above

which have the effect of disposing of this matter. In the upshot, this application is granted. The ruling of the CMA in respect of application No. CMA/ARS/MISC. APP/19/2017 is hereby set aside. Further order, application No. CMA/ARS/MISC. APP/19/2017 should be heard *de novo* before another Arbitrator.

Dated this 8th day of February 2022




B. K. PHILLIP

JUDGE.