

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**LABOUR DIVISION AT ARUSHA**  
**LABOUR REVISION NO.83 OF 2021**

*( Arising from Labour Dispute No. CMA/ARS/ARS/527/20 at the Commission for  
Mediation and Arbitration at Arusha )*

**NOSACCU JCE LTD.....APPLICANT**

**Vs**

**JOYCE PAUL LORRY.....RESPONDENT.**

**RULING**

*Date of last Order: 10-5-2022*

*Date of judgment: 21-6-2022*

**B.K.PHILLIP,J**

This application is made under the provisions of sections 91 (1) (a), (b), (2) (a) and (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 28 (1) (a) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007 . The applicant prays for the following orders;

- i) That this Honourable Court be pleased to call and examine the records in Labour Dispute No. CMA/ARS/ARS/527/20 at the Commission for Mediation and Arbitration at Arusha.
- ii) That this Honourable Court may be pleased to quash and set aside an ex-parte award in the Labour Dispute No. CMA/ARS/ARS/527/20 and declare that the proceeding and the award were null and void.

- iii) That this Honourable Court be pleased to grant any other relief(s) that shall deem fit and just to grant.

The application is supported by an affidavit affirmed by Mr. Amani Rashid Mallya, the applicant's managing Director. The respondent filed a notice of opposition and a Counter affidavit sworn by the learned Advocate Richard Patrice Mosha together with a point of preliminary objection couched as follows;

*" That this application is incompetent and improper before this Honourable Court ;Thus this Honourable Court has not been properly moved."*

The learned Advocate Emmanuel Anthony appeared for the applicant whereas the learned advocate Richard Patrice Mosha appeared for the respondent. I ordered the point of preliminary objection to be disposed of by way of written submission.

Submitting in support of the point of preliminary objection, Mr. Mosha submitted as follows; That the award, the subject of this application is an ex-parte award. The applicant and his advocates defaulted to enter appearance on the hearing date. Consequently , hearing proceeded ex-parte against the applicant pursuant to the provisions of section 87 (3) (b) of the Employment and Labour Relations Act ( "ELRA"). The applicant was supposed to make an application to set aside the ex-parte award before the Commission for Mediation and Arbitration ( 'CMA") before lodging this application in this Court. He contended that this application has been filed in this Court prematurely. He cited the case of **Nufaika Distributors Vs Tumaini Kunguru and others , Misc Application**

**No. 24 of 2009 ( and Tanzania Gaming Industry Vs Specioza Elikana, Revision No. 137/2013 ( Both unreported),** to cement his arguments. He insisted that this Court has no jurisdiction to entertain this application since it has been filed prematurely. It is the Commission for Mediation and Arbitration that has powers to set aside the ex-parte award upon the applicant showing good cause for failure to enter appearance on the hearing date.

Furthermore, Mr. Mosha argued that jurisdiction is a creature of statute. He maintained that if anyone is intending to set aside an ex-parte judgment / award on the ground that he had sufficient cause for his failure to enter appearance on the hearing date, the appropriate remedy is to file an application for setting aside the ex-parte judgment/award at the trial Court . He referred this Court to the case of **Pangea Minerals Vs Petrofuel (T) Limited and two others , Civil Appeal No. 96 of 2015, Jaffari Sanya & Another Vs Salehe Sadiq Osman , Civil Appeal No.54/1997** and **Dangote Industries Ltd Tanzania Vs Warnercom (T) Limited , Commercial Appeal No. 1 of 2020** ( all unreported) , and Order IX Rule 13 (1) of the Civil Procedure Code ( “ CPC”) .Mr. Mosha implored this Court to dismiss this application with costs.

In rebuttal, Mr. Emmanuel Anthony submitted as follows; That on the date when the matter was scheduled for mediation he did not enter appearance before the Commission for Mediation and Arbitration. The Mediator ordered the matter to be heard ex-parte on 30<sup>th</sup> day of June 2021. On 30<sup>th</sup> day of June 2021 he appeared before the Commission for Mediation and Arbitration together with his colleague the learned

Advocate Leonard Satu Mashabara, Advocate. They made an oral application to set aside the order for ex-parte hearing. The Mediator refused to set aside the ex-parte order. He proceeded to hear the matter ex-parte without according them the right to defend the respondent contrary to the principle laid down in the case of **Mbeya Rukwa Autoparts & Transport Ltd Vs Jestina Mwakyoma, ( 2003) TLR 251**, in which the Court of Appeal held that Courts have a duty to provide opportunity for parties to be heard. Mr. Anthony, argued that the order for ex-parte hearing that was made under section 87 (3) (b) of the ELRA was reversible , pursuant to the provisions of section 87(5) of the ELRA which provides as follows;

*"The Commission may reverse a decision made under this section*

- (a) Application is made in the prescribed manner and*
- (b) The Commission is satisfied that there are good grounds for failing to attend the hearing."*

He contended that so long as the Mediator refused to set aside his order for ex-parte hearing, there was no point for the applicant to make an application before the same Mediator for setting aside the ex-parte award as argued by Advocate Mosha in his submission.

Furthermore, Mr. Anthony argued that , there is no hard and fast rule which requires the applicant to set aside the ex-parte award before going to the appellate Court. It all depends on the circumstances of the case. Relying on the case of **Dangote Industries Ltd Tanzania Vs Wanercom (T) Limited, Civil Appeal No.13 of 2021 ( CA)** and

**Jaffari Sanya Jussa & another Vs Saleh Sadiq Osman Civil Appeal No 54 of 1997 ( CA) –Zanzibar** ( Both unreported), he contended that when a party intends to challenge the merit of an ex-parte award/judgment , he is not duty bound to make an application at the lower Court for setting aside the ex-parte judgment.

Mr. Anthony maintained that the case of **Jaffari Sanya** ( supra) does not support the arguments made by Mr. Mosha and the rest of the cases cited by Mr. Mosha were decided per in curium since they did not follow the principles established by the Court of Appeal in the case of **Dangote Industries Ltd Tanzania** ( supra).Mr. Anthony implored this Court to dismiss the point of preliminary objection.

In rejoinder, Mr. Mosha submitted that in this application the applicant is challenging both the Mediator's order for ex-parte hearing and the merit of the award. Therefore, going by the holding of the Court of Appeal in the case **Dangote** ( supra) this application is incompetent because the Court of Appeal held that when a party wants to challenge both the order for ex-parte hearing and the merit of the award he has to first apply to set aside the ex-parte award before the trial Court/ tribunal before going to an appellate Court. He contended that the contents of the applicant's notice of application shows that the applicant intends to challenge both the order for ex-parte hearing and the merit of the ex-parte award.

From the submissions made by the learned advocates, it is a common ground that the position of the law is that if a party intends to challenge the merit of an ex-parte judgment/award is not obliged to first make an

application at the trial Court to set it aside the ex-parte judgment/award. He can lodge his appeal straight to the appellate Court. But if he wants to challenge both the order for ex-parte hearing and the merit of the award/judgment then, he has to first apply to set aside the order for ex-parte hearing before the trial Court /tribunal/Commission. This is in line with the holding of the Court of Appeal in the case of Dangote ( supra) in which it held as follow;

*".. Thus the requirement that an aggrieved party should not appeal before before attempting first to set aside an ex-parte judgment , does not apply where the appellant is not interested to challenge the order to proceed ex parte or ...."*

It is noteworthy that the case of **Dangote (Supra), Commercial Appeal No.1 of 2020** that was cited by Mr. Masha in his submission is no longer a good law since it was overturned by the Court of Appeal in **Civil Appeal No.13 of 2021** between **Dangote Industries Ltd Tanzania and Wanercom (T) Limited,** ( supra)

Therefore ,the determinant factor on whether or not the point of preliminary objection in hand has merit is the intention of the applicant, that is, as between challenging the merit of the award and challenging the order for ex-parte hearing. Mr . Masha's submission is to the effect that this application intends to challenge both the order for ex-parte hearing and the merit of the award whereas Mr. Anthony's submissions is to the effect that this application intends to challenge the merit of the ex-parte award. In addition, he pointed out that the attempt to set aside the order for ex-parte hearing was done and the same was not successfully.

Upon reading the pleadings between the lines, I am of the settled opinion that this application intends to challenge the merit of the award only. This can be deduced from the legal issues and relief sought as stated by the applicant in his affidavit pursuant to the provisions of Rule 24 (3) ( c ) and (d) of Labour Court Rules, 2007. The legal issues which this court is called upon to determine as stated in the applicant's affidavit are as follows;

- i) Whether the Honourable Arbitrator had determined Labour dispute No. CMA/ARS/ARS/ARB 527/20.*
- ii) Whether the determination of the dispute in the Commission for Mediation and Arbitration at Arusha had adhered to the provision of the law.*
- iii) Whether a fixed term Contract remedies are similar to unspecified term contract.*

The applicant prays for the nullification of the proceedings and setting aside the ex-parte award, and an order for trial *de novo* of the dispute.

I have perused the notice of application too and I do not agree with Mr. Mosha's contention that the contents of the notice of application show that the applicant intends to challenge both the order for ex-parte hearing and the merit of the application. In fact, the intention of the applicant is determined by the issues/matters that are supposed to be stated in the affidavit in support of the application which the appellate Court is called upon to determine.

From the foregoing and on the strength of the decision of the Court of Appeal in the case of **Dangote** ( supra), I hereby hold that the point of preliminary objection has no merit and the same is hereby struck out.

Dated this 21<sup>st</sup> day of June 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", is written over a horizontal line.

**B.K. PHILLIP**

**JUDGE**

ORIGINAL