

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE ARUSHA DISTRICT REGISTRY

AT ARUSHA

LABOUR REVISION NUMBER 111 OF 2020

(Originating from Employment Dispute No. CMA/ARS/ARS/MISC. APPL/30/2020)

SUNDA (T) INVESTMENT LIMITED.....APPLICANT

VERSUS

SUNDAY MAYOBA..... RESPONDENT

JUDGMENT

17th June & 28th July, 2022

TIGANGA, J.

This application emanates from labour dispute in the Commission for Mediation and Arbitration of Arusha herein to be referred by the acronyms "CMA" throughout the judgment. In the above said original dispute in the title, the applicant herein was the respondent whereas the respondent in this application was the applicant. However, for cogent reasons and appreciation of the matter, the historical background albeit, briefly need be recorded which goes as follows:

The respondent was employed by the applicant on a one-year fixed term contract which was subject to renewal. The same was subject to renewal from 2nd July, 2018 up to 30th June, 2019. Before termination

of the said contract the respondent was served with a notice of nonrenewal of the contract from 29th May, 2019 before termination period agreed as per by parties' employment contract. The reason necessitating such service was due to the allegation of misconduct purported to have been done by the respondent. Such alleged misconduct was of theft. The respondent was accused of stealing roofing materials, the properties of the applicant. In due course, criminal case against the respondent was filed. He was charged for theft before the Resident Magistrates Court of Arusha in Criminal Case No. 332 of 2018.

Therefore, with the circumstances above, the respondent took a step forward towards filing his complaints of unfair termination before the CMA. The complaints were that, the employment between him and the applicant was to end up on 30th June, 2019 but at his dismay, upon being served with the certificate of service it was indicated that, the employment was terminated on 25th March, 2019 before the agreed time of expiration of the contract.

As a matter of procedure, the applicant was served with the complaint. The dispute went to arbitration stage after mediation process had failed. After some adjournments which were done on account of

non appearance of the applicant, the Arbitrator, entered the order of exparte hearing of the matter and it was heard on merit in favour of the respondent.

Noticing the game, the applicant applied to the same CMA seeking for it to set aside its previous orders and award and make the matter be heard inter-parties. The prayer for setting aside exparte award was heard and finally, the learned arbitrator who preside over the matter satisfied that, the reasons brought forward by the applicant to convince CMA to set aside the exparte award were non meritorious. He proceeded to dismiss the application. The applicant was aggrieved by such dismissal, she therefore, preferred this revision.

The application was brought under Section 94(1)(b)(i) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] and Rules 24(1), (2)(a)(b)(c)(d)(e) and (f), (3)(a)(b)(c)(d) and (f) and 28(1)(c)(d) and (e) of the Labour Court Rules, 2007.

The reasons for the application were set forth in the affidavit sworn by the learned counsel one Rogers Godfrey Mlacha who also represented the applicant in this matter, both at the CMA and this Court. As a result, the respondent was also afforded an opportunity of swearing in to the opposition of the raised grounds or otherwise via

counter affidavit. In fact, the learned counsel, Ms. Rehema Arnold Kitany who also represented the respondent in both, this application and at CMA disputed all grounds likely to turndown the matter decided in the favour of her client and put the applicant under strict proof thereof.

The issues which were raised by the applicant and agreed by the respondent are whether the Arbitrator was right in dismissing the appellant's application and what reliefs are the parties entitled.

In his submission Mr. Mlacha contended that, the impugned ruling is tainted with illegalities and irregularities. He said so standing on the argument that the ruling was constructed without considering evidence adduced before CMA during hearing. He further argued that, the said ruling is not compatible with the exparte award, the subject of this tag of war. Mr. Mlacha added that, the learned arbitrator in his ruling did not address all grounds of the application for setting aside exparte award craved by the applicant during hearing. Therefore, to him, the ruling does not reflect submissions made by parties.

Owing to that, Mr. Mlacha considered the application meritorious and that the exparte award was improperly procured. To substantiate his position, he cited plenty of authorities to wit; **Asanterabi Mkonyi vs TANESCO**, Civil Appeal No. 53 of 2019 (Unreported), **Tanzania**

Union of Industries and Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs Mbeya Cement Company Limited and National Insurance Corporation (T) Ltd (2005) TLR 41, **Attu J. Myna vs CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021(unreported), **Tanzania Breweries Limited vs Antony Nyingi** [2016] TLS LR 99, **The Manager NBC, Tarime vs Enoch M. Chacha (1993) TLR 228, Juma s/o Hussein vs The Republic**, Misc. Criminal Application No. 18 of 2020 (Unreported) and **East African cables (T) Limited vs Spencon Services Limited**, Misc. Application No. 42 of 2016 (Unreported).

Ms. Rehema distinguished all of the above cases by contending that they do not apply in the circumstances of this matter as it is different from theirs and therefore, they were cited out of context. she urged this Court to uphold the decision of the impugned ruling as it was justly procured. To buttles her position she cited Sections 110 and 111 both of the Law of Evidence Act, [Cap. 6 R.E 2019] and 87(5)(b) of the Employment and and Labour Relations Act, [Cap. 366 R.E 2019]. Furthermore, Rule 28(1)(b), (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 and Section 88(8)(b) of the Employment and Labour Relations Act (supra). Also, the

cases of **Mbezi Fresh Market Limited vs Shabani J. Rajabu**, HC at Dar, Revision No. 690 of 2019 (Unreported), **Amina Rashid vs Mohinder Sigh and Another**, (1986 TLR 196, **Maro Machege Maro vs Augustino Katikiro and Kondoa Auction Mart & Court Brokers**, HC (DC) Civil Appeal No. 18 of 2019 (Unreported). In the upshot, Ms. Rehema fortified that, Mr. Mlacha did not prove his allegations and justify revision in the standard required.

In rejoinder Mr. Mlacha reiterated his position in submission in chief.

In deciding this application, I will directly tackle the issue raised which is whether, the CMA was right in dismissing the applicant's application. I have taken into consideration submissions of both parties together with the record of CMA. In the pathway, as said by the Arbitrator in the impugned ruling that he did not find good reasons advanced by the applicant to warrant setting aside exparte award remains to be the back borne of contention of the matter. I say so because, the ground raised by the applicant in CMA when seeking the order of setting aside exparte award as it is revealed from the affidavit sworn by Mr. Mlacha at paragraph 8 and paragraph 7 of the affidavit of

Mr. Samwel Guard Madulanga are the demise of Mr. Mlacha's Aunt and the illness which was facing him.

These grounds are also reflected in the exparte award (Labour Dispute No. CMA/ARS/ARS/218/19/195/19) (Annexure "SM-2") delivered by the learned Arbitrator, Mataris, R. The Arbitrator accepts that the matter was rescheduled on 20/06/2020 on the ground that the learned counsel (Mr. Mlacha) lost his beloved aunt. This acceptance was in line with Annexure-S1 which is the letter written by Dexter Attorneys with reference number DA/SI/SM/2020/01 which was received on 19th June 2020 by the CMA. In this letter, CMA was informed of the indisposition of Mr. Mlacha and death of his aunt.

In my view, there is no contradictory as to whether there was no ground already known in the mind of CMA on the incumbrances making Mr. Mlacha fail to inter appearance for continuing hearing of the matter. I say so because, even the trial Arbitrator in second paragraph at page 2 of the award, the CMA noticed the said grounds. In the case of **Sadru Mangau vs Abdul Aziz Lalami and Two Others**, Misc. Commercial Application Cause No. 3 of 2015 (Unreported) the Court of Appeal of Tanzania held:

"It is evident from the affidavit supporting this application that counsel for the applicant's failure to appear when the matter was called on for hearing was a result of his being sick; that he had a running stomach so 3 time when the case was called, he was in the toilet...I think the applicant's counsel has sufficiently explained away why he did not appear in court when his case was dismissed for want of prosecution".

The Court of Appeal of Tanzania in **Aristides Pius Ishebabi vs Hassan Issa Ikwendebe and Three Others**, Civil Appeal No. 5 of 2019 (Unreported) observed that:

"Indeed, it is a settled principle that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient reasons for his absence..."

This principle of the case law, is in conformity with Section 87(5)(b) of the Employment and Labour Relations Act (supra) which reads that;

"The Commission may reverse a decision made under this section; the Commission is satisfied that there are good grounds for failing to attend the hearing".

Indeed, as said above, the ground of sickness and bereave are reasonable, sufficient and good grounds to make a person not to enter appearance in court/ Commission once justified. It is unbecoming for the

person to attend court sessions while sick or bereaved. The good end of justice does not demand so. The no doubt illness and bereaved of Mr. Mlacha sufficiently justifies the setting aside of exparte award.

There was another ground raised by the applicant that, this court should find the award procured illegally and with irregularities. In my view, this should not detain me much. I say so because, irregularities and illegalities are grounds to be raised during hearing of the complaint after the decision of the impugned ruling has been quashed and set aside. In fact, this court at this juncture cannot entertain issues pertaining to fairness or otherwise of the termination. What it does, is to answer the raised issue on the sufficiency of grounds to set aside the exparte award.

Meanwhile, entertaining this ground at this time is as equal as doing it prematurely. I therefore, choose to distance from deciding otherwise.


In the event, the remedy available is to quash and set aside the decision which refused to set aside the exparte award passed by the CMA and other orders emanated from the impugned ruling. I also quash and set aside the proceedings and award given exparte in Employment Dispute No. CMA/ARS/ARS/218/19/195/9. The file be remitted back to

CMA for hearing the dispute Inter-parties by another arbitrator competent to try it. This being a labour matter, I order no costs.

It is accordingly ordered.

DATED at **ARUSHA** on this 28th day of July 2022.




J.C. TIGANGA
JUDGE.