THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION NO. 02 OF 2022

(Originating from Labour Dispute No. CMA/NJ/AUG/25/2017, in the Commission for Mediation and Arbitration of Njombe, at Njombe.)

BETWEEN

MASU INTERTRADE LIMITED.......................................APPELLANT

VERSUS

ABAS NUHU...RESPONDENT

RULING

21st April & 13th June, 2022.

UTAMWA, J

The applicant, MASU INTERTRADE LIMITED preferred this application by way of chamber summons under Sections 91(1) (a) and 91(2) (c) of the Employment and Labour Relations Act, No. 6 of 2004 (henceforth the

ELRA), Rules 24(1), (2)(a), (b), (c), (d), (e), (f) and 24(3)(a), (b), (c), (d) and 28(1)(c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 (the LCR). The application is supported by an affidavit sworn by the applicant's counsel.

On the other hand, the respondent resisted the application by filing his counter affidavit sworn by himself. He also lodged a notice of preliminary objection (the PO) with the following four limbs:

a) That, this application is incompetent and bad in law for being preferred and filed in a court which lacks jurisdiction to entertain the same and offends Rule 29(1)(a) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, G.N No. 64 of 2007 (the Labour Institutions Rules) and Section 51 of the Labour Institutions Act, Cap. 300 R.E 2019 (the Labour Institutions Act).

b) That, this application is incompetent before this honourable court for being time barred and offends Section 91(1) of the ELRA.

c) That, this application is vitiated for want of a valid application in that, the name of the respondent in this application is not that of the party who featured in the award of the Commission for Mediation and Arbitration for Njombe, at Njombe (the CMA); the application is therefore incompetent.

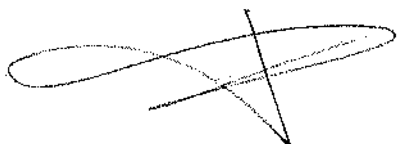
d) That, this application is bad in law and incurably defective for containing wrong citation of the enabling law.

The respondent thus, urged this court to strike out the application in its entirety with costs for being frivolous and vexatious. The applicant did not concede the PO, hence this ruling.

In this squabble, the applicant was represented by Mr. Moses Ambindwile, learned counsel whereas the respondent enjoyed the services of Mr. Leonard Sweke, learned advocate. The PO was argued by way of written submissions.

Due to the nature of the present application, it is incumbent that I narrate the contents of the affidavit and counter affidavit before I consider the arguments by the parties.

The affidavit basically states that, in 2017 the respondent lodged a complaint before the CMA against the applicant (his former employer) for what he had considered to be an unfair termination. The dispute was determined *exparte* in favour of the respondent since the applicant was not aware of the same. The CMA thus, awarded the respondent the sum of Tanzanian shillings (Tshs.) **15, 685, 769/=.** In turn, the applicant filed an application for execution of the award before this court at the tune of Tshs. **71, 665, 769/=** which was beyond the sum awarded by the CMA. This court (apparently its taxing officer) ordered for the execution of the sum that had been awarded by the CMA only, and not more. The respondent was aggrieved by that order, he consequently filed a Reference No. 19 of 2020 to a Judge of this court. In turn, the Judge (Matogolo, J.) made an



order (dated 1st October, 2020) directing that, the record be remitted to the CMA for the arbitrator to rectify some contradictions in the award which had been detected by him (the Judge).

The affidavit further states that, in complying with the order of the Judge, the arbitrator rectified the award which was dated 18th November, 2021. However, the rectified award had material irregularities which are the subject matter of the application at hand. The irregularities included the following: that, the parties were not heard before the award was rectified, a large amount of subsistence allowance of Tshs. 45, 000/= per day was awarded to the respondent without the arbitrator giving reasons for it and in making the order dated 1st October, 20 mentioned above, the Judge wrongly exercised his jurisdiction. The order of the Judge and the rectified award of the CMA thus, caused injustice to the parties.

It was also deponed in the affidavit that, the respondent did not serve the applicant with the rectified award until on the 25th January, 2022 when she was also served with the summons to appear before this court for the Labour Execution No. 1 of 2022 (intending to execute the rectified award with the sum of Tshs. **79, 495, 769/=**). The application at hand is therefor, timely instituted, states the affidavit.

The legal issues that arise from the above narrated facts, according to the affidavit are as follows:

i. Whether the order made by the High Court Judge (mentioned above) was with material irregularity and with errors material to the merits of the dispute.

ii. Whether the arbitrator was justified to amend the arbitral award without affording the parties the right to be heard.

iii. Whether the arbitrator was justified in awarding to the respondent the huge amount of Tshs. 45, 000/= per day as substance allowance without giving reasons.

iv. Whether there are errors pertaining to the merits of the said ruling of this court and the arbitral award involving injustice to the parties.

The reliefs sought by the applicant according to the affidavit was, for this court to revise and set aside the rectified arbitral award of the CMA dated 18th November, 2021.

In his counter affidavit, the respondent essentially maintained that, the applicant was aware of the rectified arbitral award as soon as it was made. The rectified award was justified and was made following the order of the Judge of this court in the reference matter. He also disputed the legal issues listed in the applicant's affidavit and the relief sought by her.

In his submissions supporting the first limb of the PO, the respondent's counsel argued that, the application is incompetent and bad in law for being preferred and filed in the court which lacks jurisdiction to entertain it. The same offended Rule 29(1) (a) of the Labour Institution Rules and Section 51 of the Labour Institutions Act. The application is based on the complaint that the CMA rectified the impugned award without affording the parties the right to be heard. That being the case, the

applicant was supposed to go back to the CMA and lodge an application for setting aside the rectified award. It is thus, doubtful if the rectified award is worth of being revised because the court had ordered the parties to go back to the CMA so that the arbitrator could clear the contradictions in the original award. This court therefore, lacks the jurisdiction to hear the impugned matter.

On the second limb of the PO, the respondent's counsel contended that, the application is incompetent before this court for being time barred. It offended Section 91(1) of the ELRA. The record shows that the applicant was served with summons to appear before the CMA on 10th November, 2021. On 16th November, 2021 both parties entered appearance before the CMA where they were informed to collect the rectified award on 18th November, 2021. The law provides that, revisional matters like the one under discussion should be filed within six weeks from the date of service. However, the applicant filed her application on the 15th February 2022 that being a period of twelve weeks and five days. The remedy for a time barred application is dismissal in the light of the case of **Tanesco Ltd v. Bakari Mayongo [2015] LCCD 14** read together with sections 3 and 46 of the Law of Limitation Act, Cap. 89 R.E 2019.

Regarding the third limb, it was submitted by the respondent's counsel that, the name of the respondent in this application is not the one for the party who featured in the award of the CMA. The award shows that, the respondent's name is **Abas Nuhu Mbosa** and not **Abas Nuhu** as shown in the application at hand. These are two different persons. In

his view, the application is instituted against a wrong party, hence incompetent and deserves to be dismissed in its entirety with costs. He supported this contention by the case of **Wilson Chacha v. Dar es Salaam Water and Sewage Authority as Successor of Meneja Mkuu Dawasco, Revision No. 482 of 2019, High Court of Tanzania Labour Division at Dar es Salaam** (unreported).

On the last limb, the respondent's counsel submitted that, the applicant cited Sections 91 (1) (a) and 91(2) (c) of the ELRA read together with Rules 24 (1), 24(2) (a), (b), (c), (d), (e) and (f), 24(3), (a), (b), (c) and (d) and Rule 28(1) (c), (d) and (e) of the LCR (as Act No. 6 of 2004) supporting the Notice of Application. She also cited Sections (91) (1) (a) and 91(2) (c) of the ELRA (as Act No. 6 of 2004) read together with Rules 24(1), 24(2) (a), (b), (c), (d), (e) and (f) Rule 24(3) (a), (b), (c) and (d) and Rule 28(1), (c), (d) and (e) of the LCR as enabling laws in the Chamber Summons. However, we currently do not have the ELRA, Act No. 6 of 2004, instead we have the ELRA, Cap. 366 R.E 2019. The applicant's citation of the enabling provisions of the law is thus, wrong. The application is therefore, incompetent as it was decided by this court in the case of **Security Group (T) Ltd v Simon Mathew Peter & 8 others [2015] LCCD 21.**

The respondent's counsel therefore, urged this court to strike out the application with costs as per Rule 51(2) of the LCR.

In his replying submissions, the applicant's counsel argued, in relation to the first limb of the PO, that, the only court with jurisdiction to

set aside the award is the High Court Labour division and not the CMA. This is in accordance with Section 91 of the ELRA. He added that, when the order of the Judge remitted the matter to the CMA for rectification of specific errors, the arbitrator imported new issues in the said award instead of doing what he was directed to rectify. The new issues included the computation of repatriation costs by basing on contradicting numbers and changing the names of the respondent.

In relation to the second limb, the applicant's counsel submitted that, the application is well within time since the said copy of the award was served to her on the 25thJanuary 2022. It is the duty of the CMA to serve an award to the parties according to Section 91(1)(a) of the ELRA. The application is therefore not time barred. The **Tanesco case** (supra) is therefore, irrelevant.

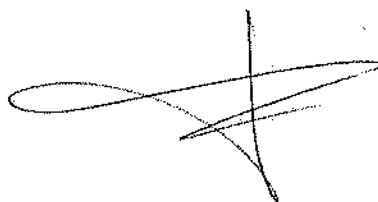
On the third point of the PO, the applicant's counsel submitted that, the original CMA records contained the names of Nuhu Abas (applicant). Furthermore, the Judge's ruling directed the arbitrator to rectify the award for Nuhu Abas and not for Nuhu Abas Mbosa. The applicant was thus, right in naming the respondent the way he appeared in the original records of the CMA and in the order of the Judge. In the event the court finds that the respondent was wrongly named in this application, the remedy available is to rectify the name by adding the missing one. The omission in the name of the respondent can be cured by the principle of overriding objective in the light of Sections 3A (1) (2) and 3B (1), (a), (b), (c) and 3B (2) of the Civil Procedure Code, Cap. 33 R.E 2019. He thus, prayed to

rectify the name of the respondent in the event the court finds that the omission is fatal. He supported the prayer by a decision in the case of **New Forest Company Limited v. Tinashe Bhunu, Revision No. 04 of 2019, High Court of Tanzania at Iringa** (unreported).

Concerning the last limb of the PO, the applicant's counsel submitted that, there is no omission at all in citing the enabling laws in the chamber summons. Both styles of citation refer to the same legislation and the provisions are valid. He further argued that, it is well settled in our jurisdiction that, wrong citation of the law is no longer fatal. He cemented the contention by the holding in the case of **Alliance Tobacco Tanzania Limited v. Mwajuma Hamis (as the administratix of estate of Philemon R. Kinyenyi), Misc. Civil Application No. 803 of 2018, High Court of Tanzania – Dar es Salaam** (unreported) and **The Director General LAPF Pension Fund v. Pascal Ngalo, Civil Application No. 76 /08 of 2018, Court of Appeal of Tanzania (the CAT), at Mtwara** (unreported).

The applicant's counsel thus, urged this court to dismiss the PO and afford the parties the right of hearing the application for the interest of justice.

By way of rejoinder, the respondent's counsel reiterated his submissions in chief. He however, added that, the applicant ought to have gone back to CMA to set aside the rectified award as per the law cited above. Where the provision of a statute is plain and unambiguous, there is no need to resort to rules of construction of the law. He cited the case of **The Board of**



Trustees of National Social Security Funds v The New Kilimanjaro Bazaar Limited, Civil Appeal No. 16 of 2004 (unreported) to support the argument. The Judge of this court directed the arbitrator to clear the contradictions that included repatriation costs, the date of issuance of the award, the names of the respondent and payment of Tshs. 15,685,769/= plus Tshs. 45,000/= per day up to the date the employee is to be repatriated to Iringa.

The respondent's counsel further argued that, the correct name of the respondent is Abas Nuhu Mbosa, the name which has been used from the date of his employed to the date of his termination. The same name has been used in instituting the complaint in the CMA. Nevertheless, due to typing errors, the name was typed as Abas Nuhu which is not correct. The counsel referred the court to Labour Revision No. 3 of 2018 where the name of the respondent is shown as Abas Nuhu Mbosa. He differentiated the cases cited by the applicant's counsel with the present application.

The learned counsel for the respondent also contended that, the applicant cannot bring an application for revision over an application for revision. This is because, the matter in question was heard by the CMA in 2017 and the applicant filed an application for revision in 2018 which was dismissed by this court for being time barred. The rectified award is not a fresh award which can be revised.

The respondent's counsel also insisted that, the application is time barred, the applicant was duty bound to collect the award. It was not the

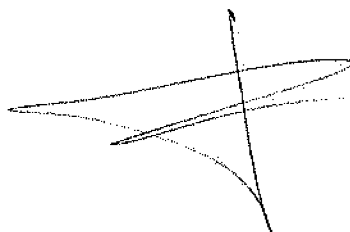
duty of the CMA to serve her with the same since Section 89(2) of the ELRA is not couched in mandatory terms.

On the issue of wrong citation of the enabling law, the respondent's counsel rejoined that, in labour law the court cannot proceed on hearing the application where the documents have errors. He cited Rule 7(5) of the LCR which provide that, the Deputy Registrar may request a party to correct errors in any document filed in court. Where a party refuses, the same is forwarded to the Judge in charge for directions under Rule 7(6) of the same rules.

The respondent's counsel thus, reiterated his prayer in his submission in chief that, this court should dismiss the application with costs in its entirety.

I have considered the rival submissions by both parties, the record and the law. In determining the PO, I will firstly test the first limb of the PO. If need will arise, I will also test the rest. This adjudication plan is based on the fact that, the first issue touches the jurisdiction of this court. The law guides that, an issue on jurisdiction is fundamental and must be tested by a court of law before it tests any other issue before it; see a decision by the the CAT in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and another, CAT Civil Application No. 3 of 2004, at Mwanza** (unreported).

The major issue regarding the first limb of the PO is therefore, *whether this court has the requisite jurisdiction to entertain the present application.* In fact, the circumstances of the case attracts this court to



answer this issue negatively though on different reasons from those adduced by the respondent's counsel in his submissions.

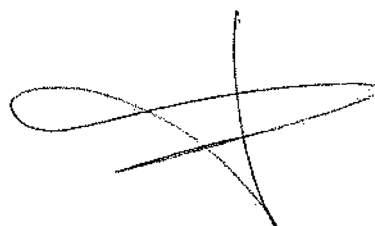
The argument by the respondent's counsel that this court lacks jurisdiction to entertain the present matter because the applicant ought to have gone back to the CMA for setting aside the arbitral award is, in fact, not tenable. This is because, according to the affidavit, in the application at hand, the applicant is not trying to challenge the original arbitral award which was made *exparte* in favour of the respondent. His concern is only against the rectified award which followed the order of the Judge of this court (Matogolo, J.). The reasons for challenging the rectified award are shown in the applicant's affidavit as narrated earlier. The contention by the respondent's counsel would therefore, be forceful had it been that the applicant is trying to challenge the original/*exparte* arbitral award through the application at hand, but this is not the case. These particular views are fortified by the fact that, the provisions of Rule 29(1) (a) of the Labour Institution Rules on which the respondent's counsel pegged his contention, guide on the procedure for *inter alia*, an application for setting aside an *exparte* award before a CMA subject to rule 10 of the same law. The said rule 10 sets time limitation for filing matters before the CMA.

Indeed, in the present matter, there is a clear distinction between the original *exparte* award made by the arbitrator of the CMA in the absence of the applicant (who was respondent before the CMA) to which Rules 10 and 29(1)(a) cited above by the respondent's counsle would apply (on one hand), and the rectified award following the order of the Judge of this

court (on the other). Rules 10 and 29(1)(a) do not apply to the rectified award since in rectifying it (the award), the arbitrator was not trying the dispute between the parties for the first time. He was only rectifying the contradictions in the already made *exparte* award following the order of the Judge of this court.

Furthermore, Section 51 of the Labour Institutions Act which was also cited by the respondent's counsel in supporting his contention does not advance the respondent's case for an inch. This is so because, these provisions essentially vests in this court exclusive civil jurisdiction over any matter reserved for its decision by the labour laws. Now, since I have held above that rules 10 and 29(1)(a) of the Labour Institution Rules do not apply in the matter at hand, and since the applicant in the present application is seeking to revise the rectified arbitral award of the CMA, and since this court is vested with the requisite revisional jurisdiction over arbitral awards and proceedings of the CMA under section 91 of the ELRA, it cannot not be argued that this court lacks jurisdiction to entertain the present application only for the reasons adduced by the respondent's counsel. Nevertheless, this court lacks jurisdiction for other reasons which I am going to adduce soon.

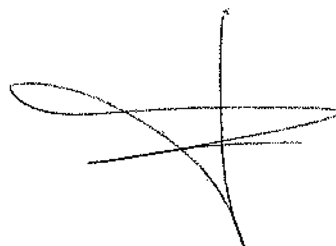
In my firm opinion, and according to the contents of the affidavit supporting the application as narrated above, it is clear that, the applicant wants this court to consider and resolve the legal issues related to the irregularities in both the order of the Judge of this court dated (dated 1st October, 2020) and the rectified arbitral award which followed the order of



the Judge. In other words, she is trying to challenge both orders in this same forum. She thus, wants this court to make a finding on the legal issues in her favour to the effect that, both orders were improper before it (this court) reverses the rectified award. The clear understanding of the applicant's affidavit is therefore that, she wants this court to reverse the rectified arbitral award by the CMA because both the order of the Judge and the rectified arbitral award were improper for irregularities and demerits.

Now, as I observed previously, this court is legally vested with the revisional jurisdiction over arbitral awards and proceedings of the CMA under section 91 of the ELRA. It does not however, have jurisdiction to make consider and make any finding on the propriety or otherwise of an order of a Judge of this same court as the respondent tries to suggest in the legal issues she raised in the affidavit. This is because, as a Judge of this court I enjoy concurrent jurisdiction with the learned brother Judge of this court who made the order being challenged by the applicant. This is by virtue of the doctrine of *stare decisis* (precedents). In my firm view therefore, the proper forum for challenging the order made by the Judge of this court is before the CAT. It can entertain such grievances in exercising its appellate or revisional jurisdiction as per the powers vested in it by section 4(1)-(3) of the Appellate Jurisdiction Act, Cap. 141 RE. 2019 (the AJA).

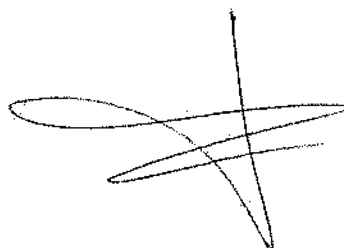
It follows thus, that, the applicant has erroneously combined two different causes in the present application, the legal forums of which are



available before two distinct courts and under two distinct pieces of legislation as highlighted above. Furthermore, this court lacks the requisite jurisdiction to entertain one of the two combined causes, to wit; the applicant's grievance against the order of the Judge of this court (Matogolo, J.). And it is more so since that order of the Judge is still in force because, the record does not show anywhere that the applicant had challenged it before the CAT so that it can exercise its powers under the provisions of the AJA mentioned above. The effect of this odd cocktail style adopted by the applicant is that, it erodes the jurisdiction of this court.

It follows thus, that this court lacks jurisdiction to try the entire application at hand. It is more so since it is difficult to separate the legal issues raised by the applicant in recording this ruling. This is because, the applicant's grievances and belief according to the affidavit, is that, the alleged inappropriateness in both the order of the Judge and the rectified arbitral award are the legal reasons for the application at hand. Indeed, it would have been a different case had the applicant challenged in this application only the impropriety of the rectified arbitral.

Due to the above reasons, I hold the issue posed above negatively that, this court lacks the requisite jurisdiction to entertain the present application. I consequently partly uphold the first limb of the PO and partly overrule it. This is so because, I have agreed with the counsel for the respondent that this court lacks jurisdiction though on different reasons from those adduced by him.



The effect of filing a matter in a court without jurisdiction is that, the same becomes incompetent. The only legal remedy for it is therefore, to strike it out.

The findings I have made above in relation to the first limb of the PO are capable enough to dispose of the entire matter. I will not thus, consider the rest of the limbs of the PO and the other arguments by the parties. Otherwise I will be performing an academic or superfluous exercise of kicking a dead horse, which is not the primary objection of the adjudication process. I consequently strike out the application at hand for incompetence due to the reasons adduced above. Each party shall bear its own costs since this is labour matter in which costs are usually not awarded unless a matter is frivolous and vexatious, which is not the case in the matter at hand under the circumstances narrated above. The applicant is advised to firstly separate the above discussed causes of her grievances if she intends to pursue her rights (if any) in accordance with the law. It is so ordered.

JHK UTAMWA

JUDGE

10/06/2022

Delivered in the presence of Ms. Theresia Charles, learned Advocate for the applicant and Mr. Sweke, learned Advocate for the respondent. Respondent also present in person.

Ms. Glory Kisima (Clerk): present.

M. A. MALEWO

DEPUTY REGISTRAR

13/06/2022

Right of appeal explained.

M. A. MALEWO

DEPUTY REGISTRAR

13/06/2022