IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 06 OF 2021

(Originating from CMA/MZ/ILEM/331/2020)

HARRIETH CHARLES MUGUMIRA..... APPLICANT

VERSUS

NMB BANK PLC ..... RESPONDENT

RULING

30/11/2021 & 17/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection raised by the Respondent to the hearing of the application. The notice of preliminary objection filed on 18/02/2021 contains two points of law namely: -

i. *The court has been wrongly moved to entertain the present application; and*

ii. *That this Court lacks jurisdiction to entertain the present application because the application is seeking for orders of revisiting a CMA award while on the face of record there is no award.*

Prior, the Applicant had applied via CMA/MZA/ILEM/331/2020 for condonation in the Commission for Mediation and Arbitration (CMA) in which to file a labour dispute which was dismissed for want of merit on 10/12/2020 by Hon. Msuwakollo. The Applicant became aggrieved, hence, the instant matter.

At the oral hearing of the objection, the Applicant was represented by Mr. Mushongi, learned Advocate and the Respondent enjoyed the services of Mr. Paschal Kamara, learned Advocate.

Submitting in support of the objection, Mr. Kamara argued the two points of law of the preliminary objection seriatim.

In respect of the first point, he argued that the application is bad for want of a notice of under CMA Form 10 as required by Rule 34(1) of the GN No. 47 of 2015.

In regard to the second point, Mr. Kamara argued that this Court lacks jurisdiction to entertain this application because the applicant seeks revision of an award but there is no award. The decision dated 10/12/2020 is a ruling which dismissed an application for condonation, it is not an award. The Counsel argued further that a revision is made under section 91(1) of the Employment and Labour Relations Act, (ELRA), [Cap. 366 R. E. 2019] which deals with awards. He concluded

that since there is no award to revise, then the Court has no jurisdiction to revise a ruling under that provision of the law. He prayed the objection to be sustained and the application be dismissed.

The Counsel for the Applicant, Mr. Mushongi, submitting in opposition to the preliminary objection stated, in respect of the first point, conceded that it is true that there is no notice was filed, but he quickly pointed out that under Rule 34(1) of the GN No. 47 of 2015 that does not render an application incompetent but rather is intended to enable the CMA prepare the file for revision by the High Court. He added that the Respondent has not shown how the anomaly prejudiced them. The Counsel for the Respondent has argued that the wording of Rule 34(1) of the GN No. 47 of 2015 is couched in mandatory wording because of the use of the word "shall". Judicial interpretation of the word "shall" have not been taken always to mean mandatory, but depends on the circumstances of each case. Where miscarriage of justice is occasioned, such word is taken to mean mandatory not where no prejudice is occasioned. In this matter this Court has already said that, in the circumstances of this case, there was no miscarriage of justice.

In respect of the second point, Mr. Mushongi conceded that it is true the CMA gave a ruling. Not an award but maintained that the same is

revisable. He relied on the authority in the case of **Omary Shaban S, Nyambu (As administrator of the estate of Late Idddi Moha vs. CDA and 2 Others,** Civil Appeal No. 256 of 2017 (unreported) which was not a labour case but Mr. Mushongi elaborated that in that case a decree was titled as drawn order, the court regarded the irregularity as minor and held the same curable. He prayed the objection to be overruled.

In rejoinder, Mr. Kamara reiterated his submissions in chief and added that in respect of the first point of objection, Rule 34(1) of GN No. 47 of 2015 uses the word "shall" which means mandatory, therefore, the defect goes to the root of the matter. In respect of the second point of objection, he distinguished the **Omary Shaban S. Nyambu's case (supra)** in that the issue in that case was mistitling of a decree which was wrongly written as a drawn order while in the current case it is the decision itself which is a ruling not award.

Those were the submissions by the counsel for both sides. I am thankful to the Bar. Both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

I will start with the first point of law in the preliminary objection that the court has been wrongly moved to entertain the present application.

The Counsel for the Respondent supported his objection that the application is bad for want of a notice under CMA Form 10 as required by Rule 34(1) of the GN No. 47 of 2015. The Counsel for the Applicant concedes to this defect but argues that it is minor and curable. Although he did not say how it is curable, I think he meant under the overriding objectives principle.

I have taken the pain to go through the said provision of the law and I am in agreement with the Counsel for the Applicant that it provides for preparation of the file to be transmitted to the High Court. In my firm views such procedure has nothing to do in the situation where the file is already with this Court. The absence of the notice did not prejudice the Respondent. With the spirit of the overriding objectives where Courts are required to dispense substantive justice, I find the defect curable. This objection in the first limb lacks merit.

The second limb of the objection is that this Court lacks jurisdiction to entertain the application because it is about application for revision of a ruling which is not provided for under Section 91(1) of the ELRA. The Counsel for the Respondent argued that the provision provides for

revision of awards not drawn orders. This position of the law is conceded to by the Counsel for the Applicant; however, it is argued by the Counsel for the Applicant that this Court has jurisdiction to revise any decision of the CMA. Therefore, according to the Counsel for the Applicant, ruling which created the drawn order is revisable. The Counsel for the Respondent argument is that the ruling is not revisable under section 91(1) of the ELRA which the Applicant admits. This court finds that the controversy basically is not on the powers of this Court to revise a ruling of the CMA but rather it is about whether the powers of revising a ruling are provided under the provisions of section 91(1) of the ELRA.

In my understanding, the Counsels are at par that this Court can revise any decision of the CMA including the impugned ruling but they lock horns as to which provision of the law that empowers this Court to do so. Both Counsel agrees that section 91(1) of the ELRA which was cited by the Counsel for the Applicant is inapplicable. In the circumstances this Court finds that the issue is more about citing of a wrong provision of enabling law than jurisdiction of this Court to revise decisions of the CMA.

A question is what does the law say in a situation where a party has cited a wrong provision of the law but the court has power to grant the order requested? The answer is the case of **Alliance One Tobacco and Another vs. Mwajuma Hamisi and Another (supra)**. In that case my brother Hon. Mlyambina stated as follows: -

> *"Though dismissal of objection is likely to encourage laziness to lawyers in doing their homework prior to filing applications and so hamper the development of jurisprudence, I find the call made by the applicant adds more value in the administration of substantive justice. Upholding the raised preliminary objection is a punishment to the client for mistakes done by its counsel. Indeed, upholding of the preliminary objection will cause more wastage of time and resources to both litigants and to the court, multiplication of unnecessary cases, and over burdening litigants with unnecessary costs. Upholding the same objection will not solve the dispute of the parties. Indeed, the Court will be used as a vehicle of miscarriage of justice at the expenses of legal technicalities. It must be noted, however, that the imported wisdom of Rule 48 [of the Court of Appeal Rules 2009] into this Court is limited to circumstances where an application has omitted to cite any specific provision of the law or has cited a wrong provision, but the jurisdiction to grant the order sought exists."*

In another case of **Dangote Cement Limited Vs Nsk Oil and Gas Limited,** Misc. Commercial Application No. 08 of 2020, this Court (Hon. Magoiga, J.) said at page 14 to 17 as follows: -

The question I have to ask myself is whether failure to cite the relevant provisions of the law has the effect of striking out this application? I agree with the learned counsel for respondent that in the past this was fatal and incurable in all respects, even without citing any case law. However, with the introduction of overriding objective this is not the case both civil and criminal laws as amended requiring basically courts to focus on substantive justice."

The court went on stating further that: -

Whereas I entirely agree with the reasoning with my learned brother Hon. Mlyambina Judge, in the above case, nevertheless, I wish to add that, one, in my opinion, the jurisdiction to grant orders in any application is not conferred by the chambers summons but by the law, and this being a court of law, in my opinion, is presumed to know the law, hence, I am enjoined to overrule the objection irrespective of the failure to cite the specific provision of the law in the chamber summons so long as the jurisdiction to grant the orders exist under section 283 of the Companies Act. Two, the argument that the court is not properly moved, in my opinion, is a technicality that we have engaged for years and yet in most cases we have failed to reach the yolk of the dispute between parties and miserably failed to determine the real controversy in issue at the expense of that technicality. Courts needs to be jealous of their jurisdiction granted by the Acts of Parliament or any law

for that matter and deny any suggestion of undermining that jurisdiction."

I am in total agreement with my bother judges that this court should not be tied with legal technicalities when determining disputes. This is the invent of the Constitution of the United Republic of Tanzania, 1977 under article 107A(2)(e) that when deciding cases both civil and criminal courts should observe among others to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice.

It on these reasons that I do hereby find that the second point in the preliminary objection as having no merit.

To this end I also find the second point in the preliminary objection as none meritorious. Consequently. I do hereby overrule the preliminary objection. The matter to proceed to hearing on merits. It is so ordered.

THE HIGH COURT OF TANZANIA

F. K. MANYANDA

JUDGE

17/03/2022