

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DISTRICT REGISTRY**

**AT TABORA**

**LABOUR APPLICATION NO. 1 OF 2021**

*(Arising from Labour Application No. 10/2019 originating from Labour Application Dispute No. 31/2015 and Misc. Application No. 3/2016 of the Commission for Mediation and Arbitration for Tabora)*

**WETCU LTD.....APPLICANT**

**VERSUS**

**KASSIM OMARY KIBWANA .....RESPONDENT**

**JUDGMENT**

Date: 12/7/2022 & 26/8/2022

**BAHATI SALEMA, J.:**

The applicant herein named **WETCU** has filed the present application seeking revision of the award of the Tabora Commission for Mediation and Arbitration (herein CMA) which was delivered on 22/01/2016.

The application was made under Rule 28(1)(c)(d)(e), Rule 24(1)(2)(a)(b)(c)(d)(e)( f), 3(a)(b)(c)(d) of the Labour Court Rules GN 106 of 2007 and is supported by the affidavit of Mr. Revocatus Mugaya Kaitila Mtaki, learned counsel.

The respondent **Kassim Omary Kibwana** challenged the application through the counter-affidavit of his counsel, Mr. Hassan Kilingo.

The brief background of this dispute is as follows; the dispute started on 27<sup>th</sup> July, 2015 and both parties were present. It was agreed by both parties that the applicant, Khasim Omary Kibwana should provide his claims analysis, and the matter was set to be heard for mediation. On the agreed date the respondent did not appear and the Commission adjourned the matter. The records show that the respondent was serviced with the summons and received but he did not appear before the Commission. Hence the Commission proceeded *ex parte* and awarded the applicant according to the law.

Being aggrieved by the CMA award, the applicant has approached this court armed with this application seeking to set aside the said award on the following grounds that;

- i. Since the applicant is a registered institution with a legal personality capable to sue or to be sued in its name, was it proper for the CMA to proceed with and issue an award against MENEJA MKUU an unknown legal entity.*
- ii. Whether the award by the CMA at Tabora is capable of being enforced by way of execution against MENEJA MKUU WETCU.*

- iii. *Whether it was proper for the CMA at Tabora to pronounce an award against the applicant without notice.*
- iv. *Whether it was proper in law for the CMA at Tabora to decline to allow the applicant's application to set aside the ex parte award.*

At the hearing of the application, both parties were represented by counsels. Mr. Revocatus Mtaki for the applicant whereas Mr. Hassan Kilingo for the respondent. By consent of both parties, the application was argued by way of written submission which I commend for the good research.

In his submission, the counsel for the applicant submitted that in paragraph 2 (i) of the affidavit, the applicant is a cooperative union registered under the laws of the United Republic of Tanzania dealing with Tobacco Crops in Western Tanzania. He further stated that it was wrong for the respondent to file the complaint in the Commission for Mediation and Arbitration at Tabora against **Meneja Mkuu** because he has no legal status to be sued, instead, the respondent ought to have sued **Western Zone Tobacco Growers Cooperative Union (WETCU LIMITED)** which is a registered cooperative union capable of being sued. In this regard, he cited section 35 (1) of the Cooperative Societies Act, No. 06 of 2013. The respondent ought to have instituted his claim

against the said Western Zone Tobacco Growers Cooperative Union (WETCU LIMITED) who was his employer. To support his position in a similar case of **Afisa Tawala Mkuu Hospital ya Ndala Vs Eunice Meshaki Shimba**, Tabora High Court, Revision No. 17 of 2015. (Unreported) the court held that it was improper for the respondent to institute a dispute against Afisa Tawala Mkuu Ndala Hospital who could not be sued as such.

Based on that decision of the High Court, he stated that it was improper for the respondent to institute a labour dispute against MENEJA MKUU WETCU Ltd who has no legal personality capable of being sued.

As to the second ground he also submitted that the award by CMA Tabora cannot be executed against Meneja Mkuu as was rightly observed in **Afisa Tawala Mkuu Hospitali ya Ndala Vs Eunice Meshaki Shimba** (supra) where it was held thus;

*"In the circumstances as discussed hereinabove that the respondent sues a wrong party thus the CMA award is not executable in the eyes of law. For it is not the intention of the parliament for a party to remain with executable judgment or award."*

Therefore in this matter, the award cannot be executed or enforced against the applicant.

As to the third ground, he contended that it was not proper in law for the CMA to pronounce an award against the applicant in his absence and without notice; one of such procedure is provided under Order XX Rule 1 of the Civil Procedure Code, Cap.33. Buttressing his stance, the requirement of the presence of parties during the delivery of decision in respect of disputes was emphasized by the Court of Appeal of Tanzania in the case of **Cosmas Construction Co. Ltd vs Arrow Garments LTD** [1992]TLR 127.

He stated that the Commission for Mediation and Arbitration at Tabora acted illegally resulting in serious material irregularities as pointed above and as envisaged by Rule 28 (1) (c) and (d) of the Labour Courts Rules GN. No 106 of 2007.

He prayed in terms of section 91 (4) (a) (b) of the Employment and Labour Relations Act, No. 06 of 2004 and Rule 28 (1) (e) of the said Labour Court Rules GN No. 106 of 2007 to quash all the proceedings of the Tabora Commission for Arbitration (CMA) in dispute No. 31 of 2015 and set aside the award.

Retorting, the counsel for the respondent, Mr. Kilingo submitted the first and second limbs of the applicant's revision that after the lapse of the first contract the respondent wrote a letter to the Meneja Mkuu (General Manager) WETCU to request the extension of the contract of

employment and Meneja Mkuu (General Manager) WETCU granted approval for the respondent to proceed with the employment.

In that connection, he submitted that the respondent was right to sue Meneja Mkuu (General Manager) WETCU because he was the one who allowed for the extension of employment. In addition, some employees are employed by WETCU, and others are employed by the Meneja Mkuu (General Manager) WETCU.

Coming to the third limb of the applicant's revision according to Rule 6 (2) (a) and 7 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN No.64 of 2007 explained how the second party can be served a notice to appear before CMA.

He submitted that the applicant has cited the above case that striking the applicant himself. The applicant was gross negligent causing himself absent in the proceedings in Labour Dispute No 31/2015 at the Commission for Mediation and Arbitration for Tabora which led *ex parte* award without justified reason to that effect. As expressed on page 1 and 2 in case No. 31/2015;

*"Kimsingi mgogoro huu ulianza kusuluhishwa Julai 2015 na pande zote za mgogoro huu zilikuwepo na kusikilizwa, lakini kwa makubaliano husika, ilipendekezwa mlalamikaji afanye mchanganuo wa madai yake mwajiri aone kama*

*yanatekelezeka au la, na Julai 29/2015 ilipangwa kama siku ya kuendelea na usuluhishi. Katika tarehe hiyo mlalamikaji hakufika hivyo kuilazimu Tume kuahirisha hadi Julai 31/2015, kwa kuwa mlalamikiwa alikuwa na shauri lingine mbele ya Tume kwa siku hiyo. Kumbukumbu zinaonesha kuwa wito ulitumwa na kupokelewa vema na mlalamikiwa, lakini bado hakufika. Tume haikuwa na namna nyingine zaidi ya kutekeleza mamlaka iliyopewa.”*

It was further stated that the above-cited law and reference to the CMA award show that the applicant was negligent to appear before the CMA. They served the summons to attend the dispute before the tribunal which lead to the matter heard *ex- parte*. However, the applicant tried many times to set aside the CMA's award but he failed and again he filed application No. 03/2016 and the mediators had to say this on the applicant's negligence in attending the labour dispute No. 31/2015.

Coming to the last limb of the applicant's revision. The grounds for setting aside an *ex-parte* award or any order or decree is mainly that applicant was not served and for that reason, he was not aware that the matter was fixed for hearing or some other step and that the applicant was prevented by any sufficient cause from appearing where

the matter was called for hearing. As supported in the case **Abdallah Zarafi Vs. Mohamed Omari** (1969) HCD the court anchored the position

As expressed on page 6 in case No. 31/2015 that;

*"Lakini tafauti na matarajio ya Tume mjibu mombi (applicant) hakufika kuchukua mchanganuo huo, wala kufika kwa ajili ya usuluhishi kwa tarehe iliyokuwa imepangwa, hali iliyoilazimu Tume, ili kuhakikisha haki inatendeka na kuonekana kutendeka kuahirisha mgogoro huo hadi tarehe 31/07/2015, jambo ambalo halikuzaa matunda kwani pamoja na kwamba wito unaonyesha shauri kuendelea tarehe hiyo iliyopokelewa na mleta maombi (Respondent) kupitia kwa Meneja Msaidizi wa Mjibu Maombi (applicant) bado hakuweza kuhudhuria katika shauri hili..."*

This is also supported under Rule 6 (2) (a) (b) and 7 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 together with the case of **Mkurugenzi Tarime Goodwill Foundation versus Editha Salongo Tibamanya**, Revision No. 23 of 2019 (Unreported) that the CMA was entitled to order the matter to proceed *ex- parte*.

To the end, the respondent prayed this court to dismiss the entire application.



In his rejoinder, Mr. Mtaki for the applicant reiterated his submission in chief. He explained the applicant's efforts to set aside an *ex- parte* award which facts are not in dispute in the case at hand. The applicant's contention is whether it was proper for the CMA to pronounce an award in absence of the applicant as she was entitled to know the final outcome.

Submitting on what he termed as the last limb of the applicant's revision, the respondent focused on explaining the factors and grounds to be taken into consideration by the court or tribunal before granting or refusing an application for setting aside an *ex- parte* award. He submitted that these grounds are irrelevant to the matter at hand. The grounds for setting aside an award are quite different from the grounds for the revision of an award. In that, the cases cited by the respondent on that aspect are distinguishable on the grounds

Therefore in addition to whatever grounds ought to have been taken by the CMA before granting or refusing an application for setting aside its award, the CMA ought to have set it aside since the applicant had pointed out points of illegalities/irregularities on the said award. Failure to do so by CMA, call this court to intervene, revise and quash the said award and the proceedings thereof.

Having gone through the parties' submissions, labour laws, CMA and Court records, the issues for determination are first *whether it was proper for the CMA to proceed with and issue an award against MENEJA MKUU an unknown legal entity*, secondly, *whether the award by the CMA at Tabora is capable of being enforced by way of execution against MENEJA MKUU WETCU*, thirdly, whether it was proper for the CMA at Tabora to pronounce an award against the applicant without notice and *whether it was proper in law for the CMA at Tabora to decline to allow the applicant's application to set aside the exparte award*.

To start with the first issue as to whether it was proper for the CMA to proceed with and issue an award against MENEJA MKUU an unknown legal entity.

Section 35 (1) of the Cooperative Societies Act, No.06 of 2013 provides that;

*"The registration of the society shall render it a body corporate by the name under which it registered, with perpetual succession and a common seal, and with power to own property, to enter into contracts, to institute and defend suits and other legal proceedings, to do all things necessary for the purposes laid down in its by laws."*

In that regard as rightly submitted by the counsel for the applicant that unlike a natural, the legal person cannot decide on her behalf. The law is clear on the Meneja Mkuu has no legal status to be sued, instead, the respondent ought to have sued **Western Zone Tobacco Growers Cooperative Union (WETCU LIMITED)** which is a registered cooperative union capable of being sued in its name. WETCU limited as a registered cooperative union under the Cooperative Societies Act, No. 6 of 2013, WETCU LTD has its board of Directors which by Section 35 of the Cooperative Societies Act No. 6 of 2 2013 can be sued. Likewise in the case of **Ndala Hospital Vs Bruno Charles Matalu and Mary Juma Masumbuko High Court (Tabora Registry)** Labour Revision No. 1 of 2014 where Mallaba, J held that:-

*"As such, the position of the law is that only a legally recognized person can sue and be sued. In the view of this court, this position would not be affected by the fact that the application had earlier on entered into the contract in a name other than of the registered trustees of Ndala Hospital. This is because two wrongs do not make a right. Where suing in the name of registered trustees is mandatory, it does not matter that there was a contract in the name of a wrong party."*

This was also enunciated in **Afisa Tawala Mkuu Hospital ya Ndala Vs Eunice Meshaki Shimba, High Court Revision No. 17 of 2015.** (Tabora Registry unreported) Mashaka, J (as she then was), held that it was improper for the Respondent to institute a dispute against Afisa Tawala Mkuu Ndala Hospital who could not be sued as such.

In my scrutiny of records, I share the views with Mr.Mtaki, for the applicant that the respondent ought to have instituted his claim against the said Western Zone Tobacco Growers Cooperative Union (WETCU LIMITED) who was his employer instead of embarking to MENEJA MKUU. I have also considered the holding in the case of **Afisa Tawala Mkuu Hospital Ya Ndala Vs Eunice Meshaki Shimba, High Court Revision No. 17 of 2015.** (unreported). Therefore I differ with the respondent's counsel that he was extended his contract by Meneja Mkuu. In my considered view, it was not proper for the CMA to proceed with the matter since the award by the CMA at Tabora is incapable of being enforced by way of execution against MENEJA MKUU WETCU. I find merit in this.

As to the second ground that whether it was proper in law for the CMA to pronounce an award against the applicant in his absence and without notice.

As properly submitted by the applicant counsel according to the Labour Court Rules, the Commission for Mediation and Arbitration is guided by basic rules of procedure in the adjudication of labour disputes; one such procedure is provided under Order XX Rule 1 of the Civil Procedure Code, Cap. 33 provides thus;

*"The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates."*

The requirement for the presence of parties during the delivery of decisions in respect of disputes was emphasized by the Court of Appeal of Tanzania in the case of **Cosmas Construction Co. Ltd vs Arrow Garments LTD** [1992] TLR 127. As correctly submitted by the applicant the party is entitled to know the final outcome of the matter. Opposing to what the respondent has referred in the case **Abdallah Zarafi Vs. Mohamed Omari** (1969) HCD and **Mkurugenzi Tarime Goodwill Foundation versus Editha Salongo Tibamanya**, Revision No. 23 of 2019 (Unreported) which are distinguishable to the matter at hand.

On that basis, I am in accord with the applicant's submission since it was not proper for the CMA to pronounce an award against the

applicant in his absence and without notice because in so doing the arbitrator violated the basic right of being heard.

Last, whether it was proper in law for the CMA at Tabora to decline to allow the applicant's application to set aside the *ex parte* award.

Before addressing this pertinent issue, it may be valuable to make a brief explanation of the law relating to *ex-parte* determination of a suit. It is a clear position of law, under Order 9 of the Civil Procedure Code, Cap.33 that, where the defendant does not appear on the date of hearing, the trial Court may allow the plaintiff to proceed *ex-parte* and upon *ex- parte* hearing, it may pronounce an *ex parte* judgment.

According to Order 9 Rule 13 (1) of the Civil Procedure Code, Cap.33 an *ex parte* judgment may be set aside if the judgment debtor assigns good cause that prevented him to appear on the date when the Court allowed the decree holder to proceed *ex-parte*. It has to be noted that the remedy for setting aside an *ex-parte* judgment is only available if the judgment debtor has good cause to justify his non-appearance.

From the record, there is nowhere the applicant was notified of the delivery of the judgment. As stated in the decision in the **Cosmas Construction** (*supra*) it was not proper for the Arbitrator to decline to set aside the *ex parte* award. In my findings, I share the views with Mr.

Mtaki, learned counsel for the applicant that the Commission acted illegally resulting in serious material irregularities. I have also considered the holding in the case of **Mkurugenzi Tarime Goodwill Foundation versus Editha Salongo Tibamanya**, Revision No. 23 of 2019 (Unreported) Kahyoza, J. which in my view is distinguishable from the matter at hand.

Guided by the authorities above, I am of the view that the award procured thereto was improper.

As the result, the award is revised, set aside and proceedings quashed. The matter is ordered to be remitted back to the CMA.

Order accordingly.



**A. BAHATI SALEMA**

**JUDGE**

**26/08/2022**



Date: 26/08/2022

Coram: Hon. G.P. Ngaeje, Ag DR

Appellant: Present by advocate Joyce Nkwabi.

Respondent: Advocate Joyce Nkwabi holds brief for Advocate Hassan Kilingo.

B/C Omari Mkongo, RMA

**Advocate Joyce Nkwabi:** The matter comes for judgement. We are ready.

**Court:** Judgment delivered in presence of advocate Joyce Nkwabi for the applicant who also hold brief for advocate Hasaan Kilingo for the respondent in the open court.

  
G.P. NGAEJE

Ag. DEPUTY REGISTRAR

26/8/2022

**Court:** Right of appeal explained.



  
G.P. NGAEJE

Ag. DEPUTY REGISTRAR

26/8/2022