IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

IN THE LABOUR COURT

AT ARUSHA

REVISION APPLICATION NO. 44 OF 2021

(Originating from Labour Dispute No. CMA/MISC.APP/49/20)

AFRICA SAFARI GLAMPING..... APPLICANT

AND

YOHANA ATHUMAN SAID AND 4 OTHERS.....RESPONDENTS

RULING

27.04.2022 & 18.05.2022

N.R. MWASEBA, J.

The applicant, **Africa Safari Glamping**, is seeking for revision of an award of the Commission for Mediation and Arbitration (CMA), Arusha in Labour Dispute No. CMA/ MISC. APPL/49/2016. The application is supported by an affidavit sworn by Mr. Patrick Salum, Legal representative of the applicant.

The facts leading to this application are as follows: the respondents were employees of the applicant company working in different position and

department. It was alleged that all of them were unlawfully terminated from job on 18th March 2020.

All respondents decided to file a complaint against the applicant at the CMA for unfair termination. The matter proceeded exparte on allegation that the applicant herein was dully served but did not enter appearance. After full determination of the complaint, the CMA decided that the respondents' termination was procedurally unfair for employer's failure of giving them a right to be heard before retrenchment. It was further ordered that the applicant should pay twelve-month salary compensation as per **Section 40 (1) (c) of the Employment and Labour Relations Act,** No.6 of 2004. In addition, they were entitled to leaves and notice of termination. For Yohana Athuman Said and Mohamed Ally is 300,000x 14x2/= 8,400,000/= whereas for Daniel Lenga Meta, Silvano Anthony and Silas Peter is 192,000 x14x3/= 8,064,000/=.

The said dispute was heard and determined ex-parte on 11.12.2020 where the arbitral award declared that the termination was unfair. Later, the applicant filed another application No. CMA/MISC. APP/49/20 in order to set aside ex-parte order for being devoid of merit as they were neither served nor called at the CMA. They argued further that since the respondent are not strangers to the applicant there was no need for them

to serve them via postal addresses instead of serving them physically as they did when serving them an ex-parte award. Having heard both parties on 14th day of April 2021, the mediator delivered a ruling and proceeded to dismiss the application for being devoid of merit.

Aggrieved, the applicant filed this application seeking for revision of the the said ruling on the following issues:

1. Whether it was proper for the Honourable mediator of the Commission for Mediation and Arbitration to entertain a dispute Ex-parte and grant Ex-parte Award.
2. Whether the Commission for mediation and Arbitration was proper to grant Ex-parte hearing while respondents never compromised with Rule 6 of the G.N 64 regulating services of summons.
3. The trial Honourable Mediator failed observe and violated basic rules of natural justice of the right to be heard on a due process of the law.
4. The trial Honourable Mediator failed to scrutinized evidences adduced during the Ex-parte hearing of the matter.

When this application came up for hearing the applicant was represented by Mr. Kessy Ngao, learned advocate whereas the respondent enjoyed

the services of Mr. Laurence M. Mollel, Personal Representative (PR) from CHODAWU. Hearing proceeded orally and both parties were present.

Arguing in support of the application Mr. Ngao Learned Counsel for the applicant submitted that in the respondent's counter affidavit some of the matters were disputed and some of them were not disputed. One of the issues which were disputed was the issuance of summons, whereby they argued that the summons was dully served via post office and attached a summons of CMA that they refused service. However, Mr. Ngao argued that they were not served with the summons.

It was his further submission that the respondents were employed as casual labourers (Gardeners) who reported to work daily. However, during the Corona Pandemic they stopped their business and asked the workers to stop working and that they will call them again when they will resume their business. Some of the workers did understand the situation and some of them disagree and decided to refer the matter to CMA. The matter proceeded ex-parte and they were not served until the day they received arbitral award to pay the respondents Tshs. 16,464,000/=. They filed an application at CMA to set aside ex-parte order but their application was dismissed. Thereafter the respondents filed an execution case and

they applied for stay of execution pending determination of this application for revision.

He submitted further that, they brought this application to inform the court that they were never served with the summons to appear at CMA and there was no proof of service. They informed the Mediator at CMA that the respondents knew their physical address and decided to serve them via postal address but he failed to grasp their point. Moreover, there was some legal issues which were not adhered to by the mediator during the time of hearing the dispute ex-parte and that the mediator was compromised with Rule 6 of GN No. 64 of 2007 which regulate service of summons. In the end they prayed for the court to set aside ex-parte award and order the matter to be heard inter-partes.

Responding to the submission made by the applicant, Mr. Mollel told the court that they adopt their counter affidavit and its annexures to be part of their submission. He added that as per **Section 14 (1) (a), (b), (c) and (2) of the Employment and Labour relation Act** No. 6 of 2004, there is no such thing as casual labourers. They prayed for the court to reconsider **Section 37 (1), (2) (a), (b) and (1), (2) (c) of Act no. 6** of 2004 which deals with termination of the employees from their jobs.

In brief rejoinder, Mr. Kessy insisted that the respondents were never terminated from their jobs but they just stopped them from working for some time due to Corona pandemic. After the issue of pandemic was over, they were called back to work and the respondents denied.

Having gone through the records and the submissions by both parties, this court is now in the position to determine the merit of this application. The main claim by the applicant's counsel which led to this application is the act of the Mediator to dismiss their application of setting aside the ex-parte award delivered on 11/12/2020 against them while they were not dully served with the summons to appear at the Commission. Thus, the main issue for determination is whether the applicant was dully served to appear at the Commission in Dispute No CMA/ARS/MDL/190/20.

It is a trite law that an ex parte award can be set aside if the applicant provides sufficient reason. The same is provided under **Section 87 (5) (a) and (b) of the ELRA**. It reads:

> "(5) *The Commission may reverse a decision made under this section if –*
>
> *(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."

In Dispute No. CMA/MISC.APP/49/2 the applicant prayed for the Commission to set aside the ex parte Award dated 11.12.2020 and proceed to entertain the matter inter parties. The sole reasons advanced by the applicant is that they were neither served with the summons to appear nor given an opportunity to defend the complains alleged against them. And that if the application will be granted no injustice will be caused to the respondents as far as the Principles of Natural Justice is Maintainable.

On their side, the respondents' representative submitted that the applicant was served through postal address and they were given a registered slip from the post office. Further to that the applicant was served with summons three times via Village Executive Officer and they rejected to receive the said summons. No body is sure that the applicant received the said summons.

In the case of **T.M Sanga Vs Sadrudin G. Albhai & 2 Others** (1977) LRT No. 51 it was held that:

"Uncertainty of service of summons is sufficient reason for allowing an application to set aside an ex parte judgment and decree thereof."

However, this court having revisited the proceedings of the trial Commission (Dispute No. CMA/MISC.APP/49/2020) noted that the applicant was served CMA F1 via their postal address as required by **Rule 6 of Labour Institutions (Mediation and Arbitration)** GN No. 64 of 2007.

Further to that the respondents made an effort to serve the applicant physically via Nkungani B Village Executive Officer one John Ndosa and it is alleged that they denied to receive service so the Village Executive Officer wrote a letter to the commission to that effect.

In the case of **Abdallah Zarafi Vs Mohamed Omari** (1969) HCD the Court anchored the position that in an application for setting aside an exparte order, the applicant has to establish that he was prevented by sufficient cause from appearing in Court on the material day. It was held that:

"There are occasions when a court is empowered by law to set aside its own orders. A trial court is empowered to set aside an ex-parte decree or an order dismissing a suit passed as a consequence of

non - appearance so long as the person against whom the decree or order for dismissal of the suit is able to establish that he was prevented by sufficient cause from appearing in court on the material day"

Based on the cited authority, I am of the considered view that the applicant has established good cause to warrant the grant of the application to set aside exparte award since the respondent herein knew the address of the applicant but they did not serve him physically. At the same time the VEO whom it is alleged that he served them wrote a letter to the commission to reported that he dully served the applicants. However, that is not a practice. In practice the proof of service is effected by issuance of an affidavit of the process server.

On the basis of the foregoing reasons, this application has merit. I therefore proceed to quash and set aside the exparte award of the CMA in labour dispute No CMA/ MISC.APP/49/20. The matter be remitted to the CMA for trial inter parties before another mediator. This being a labour dispute, each party should bear its own costs.

Ordered accordingly.

DATED at **ARUSHA** this 18th day of May 2022.

N.R. MWASEBA

JUDGE

18.05.2022