IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 58 OF 2020

(C/F Original CMA/ARS/ARB/140/20/85/20)

GENUINE COMPANY LIMITED.....APPLICANT

VERSUS

JULIAN ELEREHEMA MABINGA.....RESPONDENT

JUDGMENT

29/08/2022 & 31/10/2022

GWAE, J

This is an application for revision brought by the applicant, Genuine Company against her former employee, **Julian Elerehema Mabinga.** The applicant is seeking revision of the award of the Commission for Mediation and Arbitration (CMA) delivered on 23rdJuly 2020 in favour of the respondent.

Principally, the parties' employment relationship was on specific task contract. After hearing of the parties, the CMA finding was that the respondent had proved his claims against the applicant on the projects he was undertaking. The applicant was consequently ordered to pay the respondent Tshs. 20,000,000/= being payment of the projects he alleged to have done. The applicant was therefore held responsible to keep and

maintain the records including employments contracts that he had entered with the respondent in Mandela, Mbigiri and Kilombero areas as required by the law under section 15 (1) of the Employment and Labour Relations Act, Cap 336 R. E, 2019.

Dissatisfied with the award procured by the CMA, the applicant has filed this application supported with an affidavit of one Loserian Sokonoi Mollel, the applicant's managing director alleging that, the respondent herein has never been an employee of the applicant or engaged in any projects worth Tshs. 20,000,000/=. According to him, the respondent was paid his dues and left the site since November 2019. Therefore; the applicant faulted the CMA award on the following grounds;

1. That, the applicant failed to prove that, the respondent took Tshs. 600,000/= as a loan from the applicant.
2. That, the respondent be paid Tshs. 20,000,000/= without proving the same as per the evidence on records.

The respondent opposed the application through his sworn counter affidavit where he strongly supported the CMA findings and stated that he was engaged by the applicant sometimes on May 2019 to undertake supervision of three water projects at Madela, Mbigiri and Kilombero villages. He was also required to conduct plumbing and installation of

pipes in those three projects at the consideration of Tshs. 20,000,000/=. Above all the respondent claimed that, he signed a formal contract for execution of the said duties, however upon his completion of the projects he was not paid as agreed.

Briefly, the respondent filed a complaint to the CMA claiming for his payment of the agreed consideration to the tune of Tshs. 20,000,000/= being payment for his contract with the applicant in three projects which were to be conducted at Madela, Mbigiri and Kilombero villages. According to the respondent, after he had finished the said projects, the applicant did not pay him as per their agreement. That, he subsequently filed his dispute before the CMA.

On the other hand, the applicant's version is that, she is not indebted to the respondent and that neither there was any agreement that he entered with the respondent relating to the consideration of Tshs. 20, 000,000/=. Admittedly, the applicant asserted that, the contract entered by the parties for specific task and that there were two contracts that were entered and each contract was for the consideration of Tshs. 3,000,000/= and that, once the former was concluded or completed, the following contract used to be entered in writing.

At the hearing of this application, t Mr. Issa Mavura and Ms. Jenifer Kibiki, both the learned counsel represented the applicant and respondent respectively. This application was argued orally.

Supporting the application, Mr. Mavura vigorously argued that, the arbitration award Tshs. 20,000,000/=was improper since the arbitrator ignored the contract that was entered by the parties where payment agreed was Tshs. 3,000,000/=. The work was to be completed within a period of four months and if the same was concluded before the agreed time the applicant was contractually duty bound to pay the respondent Tshs. 1,000,000/= in addition thereto. The counsel went further to submit that exhibit RE3 proves that the respondent was paid all his rights and he signed acknowledging the receipt of the said amount.

The applicant's counsel went on submitting that, the complaint was instituted on 19/03/2020 and therefore it is time barred since the same was filed beyond the required time of sixty (60) days as the respondent was paid his last installment on 6/12/2019. The counsel, also added that the respondent was supposed to give strictly proof of his claims but he failed to do so.

The respondent through his counsel submitted that, the parties herein had entered into the contract on 15/06/2019 on three projects but

the respondent was not supplied with the said written contract. According to the counsel exhibits RE2 is a minute sheet, RE1 is construction works which were executed by the respondent, RE3 and RE4 were not signed by the respondent. The respondent also argued that, the applicant was duty bound to provide him with the written contract which demonstrated the rate for remuneration, she was therefore of the opinion that, the applicant violated sections 14,15 and 27 of the Employment and Labour Relations Act Cap 366 R.E 2019.

In the rejoinder, Mr. Mavura submitted that there is no dispute that the respondent entered into an employment agreement with the applicant as per exhibit DE2, indicative of three projects. He went on to state that exhibit DE2 set out remuneration and nature of the work. He further distinguished exhibit DE1 (agreement entered 2018) and DE2 stating that exhibit DE1 is irrelevant to the dispute in question. He maintained that, there was no agreement for 20,000,000/=

Having considered the application, parties' submissions together with the court's records, this court is of the view that the main issue to be determined by this court is whether the CMA was justified to grant the respondent's claim of Tshs. 20,000,000/=.

However, before determining this application on the impugned award, I wish to briefly respond to the issue of limitation raised Mr. Mavula that, the respondent's complaints were referred to the Commission out of the prescribed period. I am not made to believe that, the respondent's dispute was time barred. I am holding so simply because, DE2 dated 15th June 2019, the parties' contract of services does not indicate as when the work would be concluded and even if it were so, yet the work would not necessarily to have been concluded on the date fixed in the parties' agreement. It follows that the period would start running against the respondent after his completion of work and failure to honour the demand of such payment.

Now, coming to the issue whether the CMA improperly procured the award. From the parties' pleadings, it is undisputed fact that, the parties herein have been in employment relationships on specific tasks contract for quite a long period. The last contract appears to be the one entered in the year 2019 however the main controverse between the parties is, on the agreed amount payable in favour of the respondent with regard to the projects.

The CMA's record and submission by the parties before this court reveal that, the parties are serious in dispute as to the existence of the

contract for the consideration of Tshs. 20,000,000/= as earlier explained. It is an elementary principle that he who alleges is the one responsible to prove his allegation.) See the case of **Abdul-Karim Haji vs. Raymond Nchimbi Alois** and **Joseph Sita Joseph** (2006), T.L.R. 420

This court has gone through the proceedings of the CMA when the respondent was testifying, he did not give any evidence to support his allegation nor did he provide the written contract which provided for the terms of the contract including the said consideration. What he alleges is that, the said contract was not provided to him by his employer, and therefore he tendered exhibit "P1" which is an agreement entered in the year 2018.

The applicant on the other hand has provided evidence as to the agreement of the two projects namely; Mandela and Mbigiri area. The R E2 is indicative that it was entered on 15/06/2019 as opposed to what the respondent asserted to have engaged in three projects mentioned herein with the respondent. RE2 indicates that, the consideration of the said two projects was to the tune of Tshs. 3,000,000/= and according to exhibits D3 and D5 collectively show how the consideration was paid to the respondent.

I have noted also the allegation by the respondent that, there was forgery of the respondent's signatures, however this is a mere allegation with no proof at the required standard. Nonetheless, this court has also noted that, while giving his testimony at page 27 of the typed proceedings the respondent when asked the amount he claims from the applicant he replied to be Tshs. 10,000,000/= as payment for all the three projects. Moreover, even when he was asked as to whether he had any contract showing that he claims from the applicant Tshs. 20,000,000/= in all the three projects he responded negatively (see page 30 of the typed proceedings). In the case of **Bakari Athuman Mtandika vs. Superdoll Trailer Ltd,** Labour Revision No. 171 of 2013 when faced with similar situation had the following to say;

> *"It is a trite principle of law that he who alleges must prove. In this case, the employer alleged that from that amount due to the employee, they had set off a loan he owed; but the employee denied existence of the loan. Under those circumstances, it was the employer who had the burden to prove that the loan indeed existed, not for the employee to prove the negative, i.e. that 'he was not given a loan', as submitted by the employer. In absence of proof of the loan by the employer, I see no basis for faulting the Arbitrator's decision on the issue."*

While I am in agreement with the findings of the learned arbitrator that, employers are duty bound to provide and keep particulars of employees (maintain records) as per provisions of section 14 and 15 of ELRA. However, in the circumstances of this case, I am of the firm view, that, the respondent's assertion that, he did not sign exhibits tendered by the applicant during arbitration (DE1-DE6) especially RE2 to have not been proved to the required standard to justify this court to hold that, his signature appearing in the said exhibits to have been forged. It is established principle that, the allegation on fraud or forgery allegation must always be strictly proved (Seen the decision of the Court of Appeal in **City Coffee Ltd vs. Registered Trustees of Ilolo Coffee Group**, Civil Appeal No. 94 of 2018 (Unreported).

More so, it is the court view that, the contract between the parties appearing in DE2 though not in standard form yet according to the type or extent of the work to be executed by the respondent, it was a sufficient contract. I hold so, merely as it contained necessary terms such as the nature of the work, period within which it was to be concluded and a bonus that was to be offered in favour of the respondent if he completed it earlier than the period specified therein. Therefore, the issue of keeping

and maintaining records by the employer, in the circumstances of this case does not arise

That, being the court's observation, the respondent was duty bound to give sufficient proof of his claim of Tshs. 20,000,000/= being payment for the work done in the three project was not well proved and therefore the CMA award was unjustifiable.

In the event, I grant this application and proceed quashing the impugned award of the CMA and set it aside. Given the fact that, this is a labour matter, each party shall bear its costs. It is so ordered.

DATED at **ARUSHA** this 31st day of October 2022

M. R. GWAE
JUDGE
31/10/2022