

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 68 OF 2021

*(Originated from the ruling of the Commission of Mediation and Arbitration at Arusha
dispute No. CMA/ARS/ MISC. APPL/03/21)*

SIMON CHARLES MBISE APPLICANT

VERSUS

SUNNY SAFARIS LIMITED RESPONDENT

JUDGMENT

03/03/2022 & 28/04/2022

KAMUZORA, J.

This application was brought under the provision of section 91(l)(a) (b) and (2)(a)(b)(c), 94(l)(b)(i) of the Employment and Labour Relations Cap 366 R.E 2019 and Rule 24(l)(2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 28(l)(a)(b)(c)(d)(e) of the Labour Court Rules, 2007, GN No. 106 of 2007. The Applicant in this application is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/MISC.APPL/03/21 and ruling thereto dated 02/07/2021.

The brief background of the matter as may be depicted from CMA record is such that, the Applicant lodged a complaint for unfair

termination at the CMA against the Respondent and the matter was heard ex-parte against the Respondent and the award was delivered on 08/05/2020 in favour of the Applicant. In an attempt for the Respondent to challenge the said award it found itself time barred hence preferred an application for extension of time before the CMA so as to lodge an application to set aside the ex-parte award.

The main ground adduced by the Respondent at the CMA was that she was not aware of the case and it was the reason as to why the matter proceeded ex-parte against her. The CMA after hearing both parties issued a ruling granting the Respondent a condonation order which is now the subject of this application.

Hearing of the revision application was by way of oral submission, and as a matter of legal representation the Applicant was represented by Mr. Shedrack Mofulu, learned advocate while the Respondent enjoyed the service of Mr. Ibrahim Mwamasangula, personal representative.

Arguing in support of the application, Mr Mofulu adopted the affidavit filed in support of the application and submitted that, the application before the CMA is CMA/ARS/MISC.APPL/45/20 filed on 09/03/2021 but a similar application was filed before the CMA bearing

the same number that is CMA/ARS/MISC.APPL/45/20 and was struck out per the ruling dated 08/03/2021. That, the impugned ruling issued by the CMA came up with new dispute number not prior communicated to the parties.

Mr. Mofulu went on and submitted that, the notice of application filed by the Respondent at the CMA prayed for extension of time to file an application to set aside an ex-parte award. That, the CMA Ruling at page 1 referred the application as an application for condonation to set aside ex-parte award and the conclusion was to award the application for setting aside the ex-parte award which was not the prayer made before it. That, despite the CMA granting the prayer which was yet to be lodged before it still it did not adduce sufficient reasons as stated under the Applicant's affidavit. To cement his submission, he cited the Rule under the Labour Institution Mediation and Arbitration) GN N. 62 of 2007 which requires any application to set aside an ex-parte award to be made within 14 days from the date the Applicant became aware. He also submitted that, as per his affidavit, the Respondent became aware of the award on 13/05/2020 when the award was attached to the email communication sent to the Respondent who is a managing director and on 18/05/2020 the same acknowledged to receive the Applicants email.

For this he argued that, the Respondent filed an application for extension of time on 09/03/2021 while 10 months had already lapsed. The Applicant prays for this court to revise the CMA proceedings and set aside the CMA decision.

Responding to the submission by the Applicant Mr. Mwamasangula submitted that, this application is based on dispute No. CMA/ARS/MISC.APPL/03/2021 whose decision was issued on 02/07/2021. He pointed out that there is a pending case at the CMA and it was the reason that the Arbitrator issued a date for parties to appear before the CMA for hearing of the matter inter parte. That, what is brought by the Applicant before this court is premature as section 74(2) of the CPC 2019 requires that revision application be preferred after the dispute is determined on merit. Regarding the communication with the managing director, he replied that, this is a matter of facts and the emails are electronic proof printed from computer and its authenticity is questionable.

He submitted further that the application before the CMA is to set aside the ex parte award issued to the Applicant and not an application for condonation. He also submitted that there was an application for extension of time which was finalised and allowed them to file an

application to set aside the ex-parte award. The Respondent thus prays for this court to regard the revision application as premature as there is a pending matter before the CMA.

In a rejoinder submission Mr. Mofulu referred this court to the first paragraph of the dispute in CMA/ARS/ARS. MISC APPL/45/2020 which is referring application for extension of time to file application to set aside the ex-parte award to which its ruling was delivered on 08/03/2021 striking out the application. That, on 09/03/2021 the Respondent filed another application for extension of time which is now the subject of this revision application. He stated that, the said ruling refers the contents of the affidavits and counter affidavits which were based on the application for extension of time to file an application to set aside the ex-parte award and not an application to set aside the ex-parte award. He thus insisted that the current application is not premature.

Re-joining on the issue of email he stated that the same is electronic evidence and the fact was raised at the CMA in their counter affidavit and the Respondent did not reply the same. He stated that there is no any application filed by the Respondent to set aside the ex-parte award but rather what was filed was an application for extension of time to file an application to set aside ex-parte award.

Mr. Mofulu finalised by stating that it is not true that the decision had not affected the other party. That, the decision apart from being misconceived it denied the Applicant the right to enjoy the award issued in his favour as there is a pending execution for many years now. He thus prayed that this application be granted and the ruling be set aside.

Before I deliberate on the merit of the application, I would like to address the issues of errors in the dispute number in this application. It was contended by the Applicant that the impugned ruling issued by the CMA came up with new dispute number not prior communicated to the parties. That, CMA/ARS/MISC.APPL/45/20 and was struck out per the ruling dated 08/03/2021 but on 09/03/2021 a similar application was filed before the CMA bearing the same number that is CMA/ARS/MISC.APPL/45/20. Upon perusing the file, I discovered that the application filed on 09/03/2021 was bearing the same number that was struck out that is CMA/ARS/MISC.APPL/45/20. However, it was registered by CMA as application No. CMA/ARS/MISC.APPL/03/21. Thus, the pleadings by containing a different number to me is not fatal rather a typo error as the same could not have obtained number before it was registered. The original file indicates the correct number to which the application was registered which is also referred to in this revision

application as No. CMA/ARS/MISC.APPL/03/21. Thus the documents filed by the Applicant containing the number before it was registered cannot be regarded as error affecting rights of the parties. If there was error affecting the parties' interest, the same could have been raised before the CMA. To me I see no injury suffered by either of the party because the pleadings referred a different application number.

Turning to the merit of this application, I have considered the arguments made by the counsel for the Applicant and Respondent's representative for and against the application. I have careful gone through the CMA records in CMA/ARS/MISC.APPL/03/21. The records are clear that in that application, the Applicant (now Respondent) raised three prayers which I quote for easy of reference: -

- 1) That this honorable commission be pleased to grant an order for extension of time within which the Applicant can file an application to set aside an ex-parte award in connection to the AN EXPARTE AWARD made by the Arbitrator in Employment dispute CMA/ARS/ARD/531/19.*
- 2) That, this honorable commission to set aside the ex-parte award in the Employment dispute CMA/ARS/ARB/531/19.*
- 3) That, any other orders that this honorable commission deem fit and just to grant under this circumstance.*

The CMA in its ruling dated 02/07/2021, it determined the prayer for condonation and allowed the extension of time. It further ordered the parties to appear before it on the date scheduled. It is the said ruling of the CMA which is subject of this revision. With such records, it becomes obvious that the prayer to set aside an ex-parte award was not determined by the CMA and that is why the CMA called for the parties to appear before it after granting the prayer for condonation.

Rule 50 of the Labour Court Rules, GN No. 106 of 2007 requires only decisions or orders with effect of determining the dispute to be subject to revision. The said provision reads: -

*"No appeal, review or revision shall lie on interlocutory or incidental decisions or orders, unless such decision has the effect of **finally determining the dispute**"*

The above provision has similar effect with the provision of section 74(2) of the CPC 2019 cited by the Respondent's representative. The main dispute in this matter is the fairness in termination of the Applicant employment. The same was determined ex-parte and the Respondent preferred an application for extension of time that was granted to pave way for determination of application to set aside ex-parte award. As the application for extension of time was granted it presupposes that the

dispute is still open for determination of the application subject to the grant of application to set aside an ex-parte award. Thus, the ruling to that effect cannot be termed as finally determining the dispute. The same could have been considered otherwise if the application was not granted meaning that the Applicant had no other chance to pursue his right. In **Consolidated Revision No. 787 & 852 of 2019, China Commercial Bank Ltd Vs Anganile Mwankuga**, the CMA decision ordered the matter to be heard inter-parties. This court, Hon. Abood J held that the ruling in question did not bring the matter to its finality.

In another High court case, **Labour Revision No.62 Of 2019, Equity Bank (T) Ltd Vs Abuhussein J. Mvungi**, Tiganga J was faced with similar situation where the Applicant was challenging the decision in an application for condonation. The objection was raised that such decision is not from the interlocutory proceedings thus a suit in itself. This court subscribed to the decision of the Court of Appeal in the case of **MIC Tanzania Ltd and 3 Others vs Golden Globe International Service Ltd Civil Application No. 1/16 of 2017 CAT - DSM (unreported)** which held that: -

"...the proper test for determining whether or not an impugned order is preliminary or interlocutory is patently discernible from the

language of the provision, itself. That is to say the test is whether or not the order desired to be revised had the effect of finally determining the suit."

In **Equity Bank (T) Ltd** this court concluded that the proceedings and the order in which the Applicant seeks revision of the CMA decision was in respect of an application for condonation thus falls in the category of interlocutory decision not subject to revision before this court.

I have similar stance to the above decision. The decision of the CMA which is the subject of this revision application falls under the category of an interlocutory decision because the impugned decision did not finalize the dispute between the parties, as there is still a dispute pending before the CMA. As the dispute before the CMA is still pending it means that, the decision subject to this application did not finally and conclusively determine the dispute, thus not subject to revision by this court.

In that regard therefore I agree with the Respondent's representative that this revision application was prematurely brought before this court. The application is hereby dismissed with no order as to costs.

DATED at **ARUSHA** this 28th day of April 2022.



[Handwritten Signature]
D.C. KAMUZORA

JUDGE

