

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 11 OF 2021

SERO LEASE FINANCE (SELFINA)..... APPLICANT

VERSUS

FATUMA TERRY & 4 OTHERS RESPONDENT

JUDGMENT

Date of last order: 08/04/2022

Date of judgment: 16/05/2022

NGUNYALE, J.

The records as gathered from the original file before the Commission for Mediation and Arbitration (CMA) tells that the applicant SERO LEASE FINANCE and the respondents namely FATUMA TERRY, JULIANA MWATOMOKA, AHOBWIKE MWAKAGALI, AMANI MWAKABAGA and ABDUL NGWALE were under employer and employee relationship. The respondents were employees of the applicant serving under different position employed in different dates based at Mbeya. According to the respective CMA form No. 1 each of the respondents had a claim of salary arrears. They filed a Labour Dispute No. **CMA/MBY/92/2018/AR.37**

seeking an order of the Commission for Mediation and Arbitration to compel the applicant to pay salary arrears. In an **ex parte** award the Arbitrator was satisfied that the respondents were employees of the applicant and that they had genuine claim of salary arrears, hence the award was pronounced in their favour on 10th December, 2019.

The applicant was aggrieved with the decision of the Commission, she filed this application under Rule 24 (1), 24 (2), (a), (b), (c), (d), (e), (f), and 24 (3) (a), (b), (c) & (d) of the Labour Court Rules, GN No. 106 of 2007 and 28 (1), (a), (b), (c), (d), (e) of the Labour Court Rules, GN No. 106 of 2007 and section 91 (I), (a), (b), 91 (2), (a), (b), (c) of the Employment and Labour Relations Act No. of 2004 R. E 2019 praying for the following orders; -

- (i) *That the honorable be pleased to call and examine the record of the proceedings of the Commission for Mediation and Arbitration of Mbeya in Labour Dispute No. CMA/MBY/92/2018/A.R, revise and set aside the award of the Commission for Mediation and Arbitration dated 10th December 2019 delivered by Hon. Naomi Kimambo Arbitrator.*
- (ii) *That the honourable Court be pleased to make such any other orders as it may deem fit.*

The application was supported by an affidavit sworn by Victoria Kisyombe in favour of the applicant. In her affidavit she deponed that the respondents were the employees of the applicant and the applicant had paid timely their salary as per employment contract. In her affidavit she

deponed further that the CMA award of the tune of Tshs 76,095,600/= was issued without proper evidence on proper calculation of the amount which the respondents deserve and the applicant was not served with the due notice upon which the said *ex parte* award was to be delivered.

In paragraph 12 of the affidavit, she deponed that there is a legal issue which warrant determination by this court that whether the applicant has demonstrated a sound and sufficient cause and reason for this Court to exercise its revision power. The application was opposed by the counter affidavit sworn by one William Mambo the personal representative of the respondents.

The application was heard by written submissions, the applicant under the service of James Mwenda learned Counsel from BM Attorney submitted in support of the application. It was the submission of the applicants' Counsel that the decision of the CMA was not properly procured on ground that the trial Arbitrator issued award to the tune of Tshs 79,095,600/= without proper evidence on record, it is undisputed that the copies of the contract of employment between the applicant and the respondent was tendered and admitted as exhibit on record, and it is further undisputed that the respondent tendered copies of the bank statement to prove the allegation sought and the same was admitted as exhibit on record. It was the view of the applicant's counsel that the copy of the contract of

employment was properly admitted because it was tendered without having stamp duty which is the mandatory requirement of the law as it was provided for under section 47 (1) of the Stamp Duty Act Cap 189 R: E 2019. To support the above argument he relied to the case of **Zakaria Barie Bura vs. Theresia Maria John Mubiru** (1995) TLR 211 that sale documents did not bear any stamp duty and were thus inadmissible in evidence.

The applicants Counsel submitted further that the Arbitrator did not consider whether the said contract was still valid or not and when it was signed and when it will come to an end. Those issues were relevant in order to establish the claims on salary arrears against the applicant. The bank statements which were admitted as exhibits were also improperly admitted. There was no proof that they were issued by the bank contrary to section 78 (1) and (2) of the Evidence Act Cap 6 R. E 2019.

In the last part of his submission the Counsel for the applicant submitted that the applicant was not served with the due notice upon which the said *ex parte* award was to be delivered; this is the position of the Court of Appeal of Tanzania in the Case of **Cosmas Construction Co Ltd vs. Arrow Garments Ltd** (1992) TLR 127. In this case the Court of Appeal faced with the similar situation and was of the view that;

"A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex parte but has to be told when the judgment is delivered so that he may, if he wishes, to attend to take it as certain consequences may follow"

The above position was well reiterated by this Court in the case of **Chausiku Athuman vs. Atuganile Mwaitege**, Civil Appeal No. 122 of 2007(unreported) where it was held; -

"In ex parte proceedings failure to notify the defendant when the ex parte judgment will be delivered, renders such proceedings null because it denies the defendant the right to take necessary the right to take the necessary steps to protect her/his rights where the judgment is prejudicial to her/his interests ... the main suit in civil case no 241/2002 in the District Court of Ilala at Samora Avenue be remitted to the trial Court to be tried de novo inter parties before another Magistrate of competent jurisdiction."

On the foregoing submission the applicant prayed the Court to revise and set aside the award of the Commission for Mediation and Arbitration.

The respondents under the service of their personal representative one William Mambo strongly contested the above position as submitted by the applicant. They adopted their respective counter affidavit and submitted that the applicant challenges the *ex parte* Award that the tune of Tshs 79,095,600 was improperly granted on ground that there was no evidence. This applicants' argument is baseless because the Arbitrator have awarded that amount basing on the evidence tendered by the respondents. what has been submitted by the applicant of this ground is

just a mere dying kicks of the horse. The applicant had a chance of attaching any document in the list of documents to be relied in the affidavit basing on rule 17 (1) (b) of GN 106. Failure to do so connotes that the respondents' claims are legal and genuine.

On the submission of the applicant relying on section 47 (1) of Stamp Duty Act and the case of **Zakaria Barie Bura** (supra) the respondents argued that those authorities are irrelevant, illogical and immaterial because they are relevant in sales documents only as stated by the applicant himself. The Court should disregard them. Section 78 (1) and (2) of Evidence Act cited by the applicant do not put it obligatory for affidavit to support the bank statement. The cited provisions use the word 'may' which connotes discretion. The affidavit requirement was not necessary before CMA because the respondents themselves who were issued with the bank statement were present.

The argument that they were not served with due notice of date of judgment of *ex parte* award is now immaterial. The point was necessary when seeking to set aside *ex parte* award. Since the application to file application to set aside *ex parte* award out of time was granted by the CMA, this case now is irrelevant. On the Chausikus' case supra that the case should be tried de novo for failure to give notice on date of *ex parte* judgment the Court should adopt the outmost overriding objective

principle of our land enshrined in the number of cases. This principle entails that the Court have to regard to substantive justice of the statute or provision against the procedural provisions or technicalities so as to administer justice. on this point of substantive justice, the respondent relied to the case of **YAKOBO MAGOIGA GICHERE VS PENINAH YUSUPH**, CIVIL APPEAL NO. 55 OF 2017, COURT OF APPEAL OF TANZANIA, at Mwanza (unreported).

The respondent's representative submitted further that what the applicant is seeking is only to delay justice. he referred the case of **HUMPHREY NGALAWA VS COCA COLA KWANZA LIMITED** LABOUR REVISION NO. 18 OF 2017, HIGH COURT MBEYA (Unreported) where it was stated;

"to my view labour disputes are of their own nature, they affect the parties to dispute as well as those depended on the employment as a means of their livelihood. to my view the spirit of extending jurisdiction to all judges is that labour disputes be disposed expediently and timely... to my view does not prejudice justice to the other parties rather it serves time to both parties and ensures speed determination of the dispute ..."

Having in mind the affidavits of both parties and their respective rival submission the Court is to rule out as to whether there is sufficient cause to revise the award or not.

The applicant's application is based on two points calling for revision **one**, there was no evidence warranting award of 76,095,600/= Tshs as salary

arrers, **two**, the applicant was not served with the due notice about the date when *ex parte* award was pronounced.

On the point of evidence, the applicant complain that the employment contracts were tendered before the Commission for Mediation and Arbitration and admitted without abiding to section 47 (1) of the Stamp Duty Act. The respondent was of the view that section 47 (1) of Stamp Duty Act was irrelevant in dealing with employment contract. That provision was relevant for sales contract. The applicant has misconceived the same. I agree with the respondent that section 47 (1) (a), (b), (c), (d) and (e) analyse instruments relevant with lien or sales which require stamp duty. The contract of employment does not fall in that respect as rightly submitted by the respondent. After all, the applicant is disputing admission of the employment contract. Those contracts aimed to prove existence of employment relationship between the applicant and the respondent. The affidavit filed in support of the application, the applicant admit that the respondents were her employees, therefore the complaint of the applicant has no merit at all. He disputes about calculation of the salary arrears without any other evidence to contradict the position testified by the respondents before CMA. Under the labour laws the applicant would have invoked Rule 17 (1) (b) of GN No. 106 of 2007 of the Labour Court Rules to contradict the alleged calculations however he

avoided. His avoidance means the calculations are correct as extracted from the bank statement and evidence of the respondents.

The applicant again complains that the banks statements which were admitted by the Arbitrator before CMA were admitted without affidavit or proof that they were issued by the bank. The respondent strongly challenged the position of the applicant about admission of bank statements in view of section 78 (1) and (2) of the Evidence Act. He was of the view that the Commission had discretion to admit the bank statement which were dully signed by the relevant banks. Section 78 (1) and (2) of the Evidence Act Provides: -

(1) A print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection

(2) of section 78 that it was made in the usual and ordinary course of business, and that the book is in the custody of the bank, it shall be received in evidence under this Act. (2) Any entry in any banker's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document" for the purpose of subsection (1) of section 64.

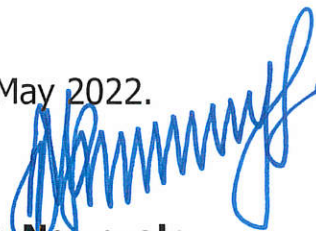
The above provision does not require affidavit as submitted by the applicant but a bank statement which is a product form banker's book is normal primary evidence once dully issued by the bank as it happened to this case. Therefore, the Arbitrator was right to rely on those bank

statements during evaluation of evidence. The bank statements were very clear on dates where the salary was deposited for each month which they received salary and those months in which they were not paid.

The last part of the complain of the applicant is that he was not served with due notice of the date of pronouncement of the award. From the outset, I am of the settled view that this point was very relevant for seeking to set aside the *ex parte* award at this stage it was legally relevant to focus on the substantive part of challenging the *ex parte* award. The applicant is complaining about due notice to fault the arbitral award of CMA issue in her absence. I think these allegations ought to have been made in the application for setting aside the *ex parte* award as rightly submitted by the respondent. The application for setting aside *ex parte* award was refused. That refusal is not the subject of this revision. At this stage he should aim to fault the arbitral award.

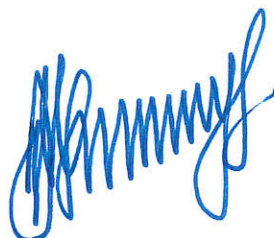
In the end result, and for what had been endeavoured, it is well settled that the applicant has not demonstrated sufficient cause warranting revising the arbitral award. The application is found to be without merit, it is hereby dismissed.

Dated at Mbeya this 16th day of May 2022.



D. P. Ngunyale
Judge
16/05/2022

Judgment delivered this 16th day of May 2022 in presence of Mr. Stanslaus Michael learned Counsel for the applicant and the 3rd and 5th respondents in person.



D. P. Ngunyale
Judge
16/05/2022