IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

LABOUR REVISION APPLICATION NO. 44 OF 2022

(Originating from CMA/ARS/ARS//Misc. App/07/2022)

ROBERT KIROKA ..... 1ST APPLICANT

EMMANUEL MBISE ..... 2ND APPLICANT

DANIEL NYANTORY ..... 3RD APPLICANT

GADIEL PALLANGYO ..... 4TH APPLICANT

GODFREY LAIZER ..... 5TH APPLICANT

JOSEPH S. SAMBWATI ..... 6TH APPLICANT

REGINA ASENGA ..... 7TH APPLICANT

SAMSON MASASI ..... 8TH APPLICANT

DANIEL WANKA ..... 9TH APPLICANT

HASSAN MOLLEL ..... 10TH APPLICANT

STEPHANO LOGIRU ..... 11TH APPLICANT

BOAZ S. BANDA ..... 12TH APPLICANT

ALLY J. FUDUA ..... 13TH APPLICANT

EPAFRA NANYARO ..... 14TH APPLICANT

MATHAYO ALLY ..... 15TH APPLICANT

SHEDRACK JUMA ..... 16TH APPLICANT

OBEDY LORUKU ..... 17TH APPLICANT

MAULID A. LESSO ..... 18TH APPLICANT

HASSAN MSWAK ..... 19TH APPLICANT

RISHAEL M. AKYOO ..... 20TH APPLICANT

DAUDI MOLLEL ..... 21ST APPLICANT

ABUNA ATHUMANI ..... 22ND APPLICANT

JOHN AKYO ..... 23RD APPLICANT

MOHAMED MANDA ..... 24TH APPLICANT

INNOCENT D. MDEE ..... 25TH APPLICANT

REGINA LUKUMAY ..... 26TH APPLICANT

JOSHUA MOLLEL ..... 27TH APPLICANT

JOSPHINE NANGAY ..... 28TH APPLICANT

NIVOKAVIT S. MUNGURE ..... 29TH APPLICANT

LEGINA LUKUMAY ..... 30TH APPLICANT

INNOCENT MODEST MSOFE ..... 31ST APPLICANT

VERSUS

KNIGHT SUPPORT LTD ..... RESPONDENT

RULING

03/11/2022 & 23/02/2023

KAMUZORA, J.

The Applicants herein preferred this application under section 91(1)(a)(b) and 2(a)(b)(c) and section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004 (ELRA) and Rules 24(1)(2)(a-f) and (3)(a-d) and 28(1)(c)(d)and (e) of the Labour Court Rules, G.N No. 106 of 2007,

moving the Court to call and examine the record in respect of Labour Dispute No. CMA/ARS/MISC.APP/07/2022 dated 15/05/2022 for the purposes of satisfying itself as to the correctness, legality and or propriety of the proceedings and orders made therein and reverse and set the same aside. The application is supported by affidavit deponed by Mr. John Kivuyo Lairumbe, learned advocate for the Applicants and the same is opposed by a counter affidavit deponed by Fikiri Mzeru, the Respondent's Principal Officer.

Brief facts of the dispute resulting to this application can be discerned from the affidavits and the record in general as follows: The Applicants were working as security guards in the Respondent's security company. They were constructively terminated by the Respondent following the Respondent's failure to pay their renumerations. They complained to the Labour Officer but in vain. Eventually, they referred the dispute in the Commission for Mediation and Arbitration (CMA) vide Consolidated Dispute No. CMA/ARS/ARS/428/2020, ARS/420/2020 and ARS/422/2020. The Respondent defaulted appearance in the CMA resulting to ex-parte award that was issued by the CMA on 20/01/2021 against the Respondent at the mediation stage. In the ex-parte award, the Respondent was ordered to pay the Applicants the sum of TZS 175,843,289/= as terminal benefits and certificate of service. That

decision aggrieved the Respondent, who intended to file an application to have the ex-parte award set aside, but unfortunately, she found herself out of the statutory time.

On 25/03/2022, the Respondent filed Application No. ARS/Misc. App./07/2022 seeking extension of time to set aside the ex-parte award above referred. After hearing the parties, the CMA Arbitrator made a finding that the ex-parte award was in contravention of the law, as the CMA had no jurisdiction to enter ex-parte award at the mediation stage. In his ruling delivered on 15/05/2022, the arbitrator allowed the application by *suo motu* setting aside the ex-parte award and ordered the parties to appear before the CMA so that the case could proceed inter parties. That decision aggrieved the Applicants, leading to this application.

On 29/09/2022, when the Respondent filed her counter affidavit, it was coupled with a preliminary objection couched in the following terms:

> *"That the application is incompetent for being preferred against an interlocutory order"*

At the hearing of the preliminary objection, the Applicants were represented by Mr. John Kivuyo Lairumbe, learned advocate while the Respondent had the services of Mr. Raymond William, learned advocate. The preliminary objection was heard *viva voce*.

Submitting in support of the preliminary objection, Mr. William contended that the application for revision aimed at challenging the decision of the CMA dated 19/05/2022 which set aside the ex-parte award dated 20/01/2021 and ordered the parties to be heard inter-parties. He made reference to section 50 of the Labour Court Rules G.N No. 106 of 2007, insisting that such decision is interlocutory which is not appealable or revisable. He added that the decision did not determine the dispute to its finality rather it directed the parties to be heard inter-parties thus fall under the category of interlocutory decisions, which are neither appealable nor revisable. He made reference in the case of **Equity Bank Tanzania Limited Vs. Abuhussein J. Mvungi**, Labour Revision No. 62 of 2019, which had similar facts and was held to be interlocutory. Mr. William also relied on the Court of Appeal decision in **Celestine Samora Manase & 12 others Vs. Tanzania Social Action Fund and AG,** Civil Appeal No. 318 of 2019 (unreported) which underscored that decision to set aside ex-parte judgement is not appealable. He therefore prayed for dismissal of the application and order of this court directing the parties to be heard inter-parties before the CMA.

In addition, Mr. William informed the Court that in the course of his submission, he discovered that the application was wrongly filed. He insisted that it was filed under section 91 (1) (a)(b) and section 91(2)

(a)(b)(c) of the ELRA while such provisions are applicable in filing revision against the CMA award but not against other orders of the CMA. According to the Respondent's counsel, the impugned decision is not an award, therefore the above provisions are inapplicable rendering the application incompetent for being preferred under wrong provision of the law.

On his part, Mr. Lairumbe strenuously submitted that Labour Dispute No. CMA/ARS/Misc. App/07/2022 was basically on extension of time to set aside the ex-parte award in Consolidated Labour Disputes No. ARS/428/2020, ARS/420/2020 and ARS/422/2020. However, the arbitrator in the said ruling departed from determining the application for extension of time and on the contrary, he ended up setting aside the ex-parte award and ordered the parties to be heard inter-parties. He also blamed counsel for the Respondent stating that he did not cite the provision of law breached by the Applicant. To reinforce his argument that a preliminary objection must state the provision of the law contravened, Mr. Lairumbe referred the Court to the following decisions **Mathias Ndayuki & 15 others Vs. AG**, Civil Application No. 144 of 2015, (unreported) and **Mukisa Biscuits Manufacuring Ltd. Vs. West & Distributors Limited**, 1969, EA 696. According to Mr. Lairumbe, the raised preliminary objection requires the Court to ascertain the proceedings before CMA therefore it cannot qualify as preliminary

objection on point of law. Mr. Lairumbe maintained that the case at hand is distinguishable to the cases cited by the Respondent's counsel because in the application at hand rights of the parties were determined to finality. It was his further view that the decision of the CMA does not qualify to be interpreted under Rule 50 of the Labour Court Rules GN No. 106 of 2007.

On the point raised during hearing of the PO, he desisted from arguing the same insisting that he was taken by surprise. That, there was no proper notice availed to him so as to fully prepare himself arguing the raised preliminary objection.

In his rejoinder submission, Mr. William insisted that the reliefs sought in the CMA included extension of time and any other reliefs. It was his further contention that being officers of the Court they are duty bound to assist the Court in reaching a fair and just decision. He therefore raised the second objection in order for the Court to rule out whether the application is properly before it or not. He reiterated prayers made in the submission in chief.

I have considered the affidavits of the parties, CMA record, the raised preliminary objection and submissions for and against the same. The main issue for determination is whether the preliminary objection raised has merit.

According to Mr. William, the decision of the CMA in respect of Labour dispute No. CMA/ARS/Misc. App/07/2022 was interlocutory because it did not determine the rights of the parties to finality. He was of the view that since that decision ordered the parties to go back to the CMA so as to be heard inter-parties, their rights were not determined to finality. He insisted that such decision is neither appealable nor revisable in the web of Rule 50 of G.N No. 106 of 2007. The Applicants' counsel insisted that the decision was not interlocutory as the rights of the parties were conclusively determined in consolidated Labour Disputes No. No. ARS/428/2020, ARS/420/2020 and ARS/422/2020.

In order to appreciate the issue of contention, it is resourceful to begin the determination of the application by understanding what amounts to interlocutory decision. An interlocutory decision has been defined in numerous decisions of the Court of Appeal including: **Tanzania Motor Services Ltd & Another Vs. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2006; **Murtazar Ally Mangungu Vs. The Returning Officer for Kilwa North Constituency & 2 Others**, Civil Application No. 80 of 2016, **JUNACO (T) Ltd & Another Vs. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 and **Vodacom Tanzania Public Limited Company Vs. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (all unreported).

For example, in **JUNACO (T) Ltd & Another Vs. Harel Mallac Tanzania Limited** (supra), the Court had this to say:

> *"In view of above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the nature of the order-test". That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

Applying the principle above in the application at hand, it is apt to note that the decision of the CMA that set aside the ex-parte award in respect of Consolidated Labour Disputes No. ARS/428/2020, ARS/420 and ARS/422/2020 and ordered the parties to go to the CMA and be heard inter-parties, was interlocutory as it did not finally and conclusively determine the rights of the parties. Rights of the parties would be determined in the inter-party hearing of the dispute. Simply put, an order setting aside ex-parte decision, is nothing, but interlocutory order. This settled legal position was ascertained in the authoritative decision of the Court of Appeal relied on by the Respondent's counsel, in the case of **Celestine Samora Manase & 12 others Vs. Tanzania Social Action Fund and AG** (supra) wherein at page 8, the Court underscored:

*"As a matter of fact, we are not treading on an uncharted terrain. In **Paul A. Kweka** (supra), we held that an order granting an application pursuant to Order IX, rule 13 of the Civil Procedure Code, Cap. 33 R.E 2002 (now Cap. 2019) **to set aside an ex parte judgment is not appealable.** That holding, would equally apply to the impugned order, which, as indicated earlier, was made under rule 38(2) of the Labour Court Rules, 2007."*
(Emphasis added)

Fortified by the above decision, and basing on the elaboration I have endeavoured to discuss above, I am inclined to hold that the decision sought to be challenged is interlocutory order which is neither appealable nor revisable.

The Respondent's counsel also challenged the application stating that it is incompetent for being preferred under wrong provision of the law. Surprisingly, the learned counsel has not stated the proper provision under which the application ought to have been preferred. As an officer of the Court, the learned counsel has abdicated his duty as he ought to have disclosed the proper provision rather than leaving it for the Court to decide. That said, the second preliminary objection raised in the submission is hereby overruled.

Ordinarily, I would have ended here and dismiss the application by sustaining the preliminary objection. However, this being the Court of

record, is endowed with legal duty to exercise its powers to ensure that court records are confined to the law. In other words, revisional powers of the Court can be invoked even in the circumstances where the same are restricted by law in order as to correct anomalies in the courts and tribunals below so as to avoid perpetuating illegalities. Inspiration in this aspect is manifested in **Commissioner General Tanzania Revenue Authority Vs. JSC Atomredtzoloto (ARMZ),** Consolidated Civil Appeals No. 78 and 79 of 2018 (unreported) where the Court of Appeal had the following to say when faced with a similar scenario:

> *"On account of the said infractions, normally having ruled that the appeal is incompetent we would have proceeded to strike it out. However, in view of what will be unveiled in due course we shall refrain from following that path for a purpose and in order to remain seized with the record of the Board and the Tribunal* ***so as to intervene by way of revision and rectify the revise illegalities prevalent in the proceedings of both the Tribunal and the Board otherwise the decisions of the Board and the Tribunal will remain intact perpetuating the illegalities.*** *This approach was followed by the Court in* ***Tanzania Heart Institute vs The Board of Trustees of NSSF****, Civil Application No. 109 of 2008,* ***Chama Cha Walimu Tanzania vs The Attorney General,*** *Civil Application No. 151 of 2008 and* ***The Director of Public Prosecutions vs***

Elizabeth Michael Kimemeta @Lulu, *Criminal Application No. 6 of 2012 (all unreported)"* (Emphasis added).

In that case the Court proceeded:

"In the light of the settled position of the law as propounded in case law, ***the Court has jurisdiction to raise the matter suo motu and where possible invoke revisional jurisdiction to correct anomalies in decisions of the courts below or tribunals in order to avert perpetuating illegalities."*** (Emphasis added)

Having due regard to the above position of the law, the decision of the CMA in respect of Labour Dispute No. CMA/ARS/Misc. App./07/2022 cannot be left to stand because the arbitrator did not determine the issue before him. In that application, the Respondent was seeking application for extension of time to set aside ex-parte award, but in his deliberations, the arbitrator blatantly engaged in assessing whether the said ex-parte award was in conformity with the law. In other words, what the arbitrator did was revising the decision of his colleague arbitrator, contrary to the law and entirely beyond his powers.

What the arbitrator ought to have done, was to confine himself in determining whether there were sufficient reasons placed before him to warrant extension of time sought and not determining the merits of the intended application to set aside the ex-parte award. That recourse was

uncalled for. It must be noted that once the court is moved to grant extension of time, it cannot abdicate that duty and engage in determining merits of the intended application or appeal in case the extension of time is granted. This position was cemented in the case of **Marry Rwabizi t/a Amuga Enterprises Vs. National Microfinance PLC,** Civil Application No. 378/1 of 2019 (unreported), where it was held in extenso that:

> *"Thus, since the intention of the Applicant is to place before the Court on review the argument that the error apparent on the face of the record has made the decision of the Court to be illegal, there is, in my view, no need of going further at this stage of the application to demand the Applicant to divulge further and better particulars of alleged illegality. Certainly, if given opportunity, the Applicant will expound further the allegation contained in the above reproduced paragraphs of the affidavit in support of the application. It is noteworthy that in the said paragraphs the thrust of the Applicant's claim on the illegality of the judgment of the Court is that the same is based on incorrect facts of the case. Therefore, to demand further explanation at this stage, will in my view, be prejudicial to what the Court will have to deal with if an application for extension of time is granted. It is equally inappropriate at this stage, I think, for me to go further and determine the substance of the claim of illegality."*

Discerning from the above, the decision of the CMA cannot be left to stand despite the fact that the impugned decision is found interlocutory. By so doing would be perpetuating illegality which would not be in the interest of justice.

Since in their submissions both counsel for the parties have submitted material relevant on both the main application and the preliminary objections, I find no compelling reasons to order hearing of the main application, whose substance has been made apparent while arguing the Preliminary Objection. That said and done, by invoking revisional powers conferred to me under section 91(2)(c) of the ELRA, I hereby nullify the decision of the CMA in respect of Dispute No. CMA/ARS/Misc. App/07/2022 for being anchored contrary to the tenets of the law. I order that the file be remitted back in the CMA so that the application for extension of time be heard on merits before another arbitrator. In considering that this is a labour dispute, I direct that each party bears their own costs.

Order accordingly,

DATED at **ARUSHA** this 23rd February, 2023

D. C. KAMUZORA

JUDGE