

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MUSOMA

LABOUR REVISION NO. 9 OF 2023

PATRICK SAHANI OJWAN'G APPLICANT

VERSUS

NORTH MARA GOLD MINE LIMITED RESPONDENT

JUDGMENT

07 & 13 June, 2023.

M. L. KOMBA, J.:

The applicant herein is seeking for the following orders;

1. **THAT**, the Hon. Court be pleased to call for the proceedings, record and the decision of CMA/MAR/MUS/111/2022 dated 21st day of April, 2023.
2. **THAT**, this Hon. Court be pleased to find that there were errors material to the merits of subject matter before the Commission for Mediation and Arbitration involving gross injustice to the applicant.
3. **THAT**, this Hon. Court be pleased to find that the Commission had failed to properly assess the potential case and evaluate evidence adduced before it, specifically on the substantive aspect of it, leading

to wrong conclusions and adverse ruling that victimized the Applicant.

4. **THAT**, this Court be pleased to revise the proceedings and set aside the Commission decision and make such any other order (s) as it deems fit.

The application is preferred by way of chamber summons made under section 91 (1) (a), (b); (2) (a), (b) (c); and section 94 (1) (b), (1) of the Employment and Labour Relations Act No. 06 of 2004, as amended by Written Laws (Miscellaneous Amendments) Acts No. 03 of 2010; Rule 24 (1), (2), (a), (b), (c), (d), (e), (f); 3 (a), (b), (c), (d) and Rule 28 (1) (a), (b), (c), (d), (e) Labour Court Rules G.N No. 106 of 2007 read together with Rule 34 (1) of the Employment and Labour Relations (General) Regulation G.N 47 of 2017 and any other enabling provision of the law. The chamber summons supported by an affidavit sworn by the applicant.

In his affidavit specifically at paragraph 6,7 and 9 applicant deposed as follows;

6. That, the said halting order is founded on wrong premise that the Respondent had already on 10/11/2022 lodged Notice of Appeal with which she intended to appeal to Court of Appeal, but in vain,

*wherefrom the Mediator/ Arbitrator had sought ground to halt the present matter sine-dire before the Commission. **A copy thereof is appended herein marked annexure 'BB' to form part of the affidavit.***

***7. That,** upon careful scrutiny of the reasons behind the decision, it is apparently obvious that the Mediator/ Arbitrator was conflicted to deploy technical bias to halt the main case **sine-dire**, in pretext for the final determination of the intended appeal which has never been preferred.*

***9. That,** the trial decision was improperly reached, for the trial mediator failed to take cognizance that Labour Dispute No. CMA/MAR/MUS/111/2022 is/was a new matter before the Commission, and whether there was a tenable appeal to Court of Appeal is/was subject to Labour Dispute No. CMA/MUS/114/2021 from which Revision No. 05/2022 was founded.*

On the other side the human resource officer of the respondent deponed that on the basis of the fact that there is a notice of intention to appeal lodged in the Court of Appeal by the respondent against Revision no. 5 of 2022 in which the applicant was given leave to file a dispute at CMA and the applicant filed the said CMA/MAR/MUS/111/2022, the arbitrator was justified to rule that the main dispute shall wait for the final determination

of the intended appeal or its withdrawal or struck out by the court of appeal.

The factual brief of the matter is that the applicant was the employee of the respondent whose employment was terminated on 10/06/2020 but he challenges the same on account that when he was given notice of intension to terminate his employment he went for medical examination and was found suffering from *lumbar sacral spine* and started treatment and was attending treatment at the costs of employer. He was later on informed that his employment was terminated on 10/06/2020 but according to him, he was not served with termination letter. He finds himself out of time and filed dispute no. CMA/MAR/MUS/114/2021 to Commission for Mediation and Arbitration (CMA) seeking for extension of time so that he can file labour dispute for unfair termination. Illness was the ground for his delay. CMA dismissed the application.

Applicant was dissatisfied and filed an application for Revision No. 5 of 2022 in the High Court (Hon. Mbagwa, J.) to set aside decision of CMA where he succeeded and that he was given 30 days from 17/10/2022 to file labour dispute to CMA. On 15/11/2022 the applicant filed labour dispute No. CMA/MAR/MUS/111/2022 challenging his termination. On the

other side, respondent lodged Notice of Appeal intending to Appeal to the Court of Appeal against decision of the Revision No. 5 of 2022. Confronted with the two issues from two parties CMA via arbitrator invited parties to address him on the way forward and ruled out that the main dispute (CMA/MAR/MUS/111/2022) should wait for the final determination of the intended appeal or until the said notice is withdrawn. Applicant was dissatisfied hence this revision.

When the matter was called for hearing, the applicant had the service of the personal representative Mr. Elly Ogola while Mr. Faustine Malongo learned advocate represented the respondent.

Mr. Ogola representative of the applicant brought to the attention of this court that applicant filed application on time but respondent objected it on the ground that they have appealed to the Court of Appeal. He complained that respondents are dealing with technicality to delay the justice as to date there is no appeal filed. However, he submitted that the appeal which was intended to be filed has nothing to do with a new case filed at CMA. He said the labour Dispute No. CMA/MAR/MUS/111/2022 was a new one and was not decided and therefore it was not subject to appeal. According

to him, respondent and the CMA are disobeying court order and pray this court to use oxygen principle to reverse the said ruling.

Mr. Ogola further submitted that applicant's health condition is not good and it is the employer who is supposed to take care of him but they are hiding in technicalities. He prayed this court to adopt the applicant's affidavit and direct the main suit be entertained and if possible, by this court as they have lost trust to lower tribunals.

Finally, he complained that the order was interlocutory which is unappealable how comes now there is an appeal. He further submitted that, Rule. 33 of court of Appeal Rules will not be applicable and that the respondent is time barred to file an appeal and he prayed this court to note that and revise the CMA decision as respondent is out of time and they are just wasting time as the appeal was supposed to be filed within 60 days.

Resisting the application, Mr. Malongo pray this court to adopt notice of preposition and counter affidavit and pray application be dismissed as the CMA was correct to decide what was decided as there was notice of appeal and therefore, CMA could not entertain anything till the appeal is filed and heard or till when the notice of appeal is withdrawn.

He submitted that the Revision No. 5 of 2022 which was delivered on 17/10/2022 the High Court decided that applicant has to file labour dispute to CMA but on 10/11/2022 respondent filed notice of appeal and the applicant was served. He said, the applicant filed labour dispute to CMA basing on High Court decision and that it was the same High Court decision which the respondent intended to appeal against. He further submitted that because there is intention of appeal, High Court and CMA cannot entertain the matter which respondent intend to appeal against as was decided in **Mark Alexander Gaetje vs. Brigitte Gaetje Defloor**, Civil Appeal No. 15 of 2010 at page 6-7 where the CAT held that once the notice is lodged to them trial Judge should stop the proceedings. He submitted that according to this decision subsequent proceedings must stay and means mean CMA had no power to entertain the labour dispute while the notice of appeal was lodged.

On the issue of interlocutory order counsel said that is not true because the decision finally determine rights of parties as the High Court is concerned, that's is because after the decision there was nothing continued at the high court all files was closed.

It was Malongo's submission that the order of the High court was not interlocutory order as was decided by the CAT in **Commissioner General TRA and AG vs. Milambo Limited**, Civil Appeal No. 62 of 2022 at page 10 the court analysed the nature of order test and directed that it should be looked at whether the order finally determine the right of the parties. He further submitted that, even if the decision was interlocutory this court cannot decide on that as it has to be raised at Court of Appeal and will be determined at that level.

Counsel continued that the issue that the appeal is time barred should not be dealt with this court as it is the mandate of the Court of Appeal and that all what applicant can do is to file an application to CAT and pray the appeal to be struck out. He submitted that respondent will have time to argue over the expiration of time as raised by respondent under rule. 33 of Court of Appeal rules and this is not supposed to be done by this court. He acknowledges that applicant is sick (but subject to verification) but he said that alone cannot allow the CMA or High Court to proceed contrary to the law and entertain the matter which is subject of appeal.

When given time for rejoinder, Mr. Ogola insisted that the high court order was interlocutory and that the CMA has no mandate to defy the decision of

the High Court. He submitted that what is done by counsel for the respondent is technicalities but it is upon this court to decide as the counsel led the court but then it is upon the court to decide.

After careful consideration of the parties' competing submissions, reading CMA decision and Court records as well as relevant law, I find the Court is called upon to determine only one issue; whether the CMA was right to halt the proceedings pending the intended appeal.

In applicant's affidavit at paragraph 3, in support of the application for this revision, the applicant deposed that,

*3. **That** the said decision halted hearing of the labour dispute No. CMA/MAR/MUS/111/2022 and adjoined **sine dire**, pending determination of appeal coming from former Labour Dispute No. CMA/MAR/MUS/114/2021, which was struckout on 17/10/2022 through High Court Revision Application No 05 of 2022.*

Together with other cited paragraphs, the position of the law is that, when a person is aggrieved by decision of the court or tribunal, the right way to challenge that decision is by way of appeal or revision to the higher court/tribunal. Respondent herein was aggrieved by the decision in Revision No. 5 of 2022 by the High Court, decision which granted the applicant leave to file a new labour dispute. Claiming that the appeal has

no connection with the new dispute is not right. The intended appeal originated from dispute no. CMA/MAR/MUS/114/2021 but might affect the new application as submitted by Mr. Ogola, dispute no. CMA/MAR/MUS/111/2022. This court find the relation between the two is contrary to what was submitted by the applicant.

It is undisputed fact that respondent lodged intention to appeal to the court of appeal, rather, parties differ on the way forward after the notice intention to appeal is lodged. Applicant was of the submission that the order of the high court is interlocutory and therefore it is unappealable and even though the intended appeal is out of time and that the high court order should be complied of. It is trite law that when there is a notice of intention to appeal, proceedings at the trial court should stop to allow the appeal process to take place or until when the notice is withdrawn. There is plethora of authorities to that effect, for instant see **Mark Alexander Gaetje vs. Brigitte Gaetje Defloor** (supra), **Tanzania Electric Supply Company Limited vs. Dowans Holdings S. A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No.142 of 2012 and **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No, 1 of 2019 CAT Mwanza (Unreported).

It is apparent therefore that the Notice of Appeal filed by the respondent on 10/11/2022 is still operative as there is no order of withdrawal or otherwise. Position of the applicant in this, if need raise is to apply to the court of appeal to stuck out the notice for reasons which will be forwarded by the applicant and not otherwise. Absence of this application then, neither CMA nor this court can entertain that application.

There was the issue of interlocutory order and the intended appeal to be out of time, just as submitted by the counsel for the respondent, this court finds that it is not among its jurisdiction to entertain both issues. It is for the Court of Appeal.

From the analysis, I find the arbitrator was right to halt the dispute no. CMA/MAR/MUS/111/2022 pending appeal. That is the position of law.

It is so ordered.

Dated at **MUSOMA** this 13 Day of June, 2023.




M. L. KOMBA
Judge