IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB REGISTRY OF SHINYANGA
AT SHINYANGA
LABOUR REVISION NO. 4 OF 2022
[*Originating from CMA/SHY 144/2017*]

BAKARI HAMISI ALLY.....APPLICANT

VERSUS

BULYANHULU GOLDMINE LTD.....RESPONDENT

JUDGMENT

Nov. 8th & 10th, 2023

Morris, J

Mr. Bakari Hamisi Ally, vide the present application, invites this Court to revise the decision of the Commission for Mediation and Arbitration for Shinyanga (herein, *CMA or Commission*) dated October 16th, 2017. In the impugned decision, his application for condonation was dismissed for being accompanied by a defective affidavit.

The application herein is supported by own affidavit. However, the same is contested by the counter affidavit of the respondent's Niwakweli Mushi. When the matter was tabled for hearing, parties were represented by Messrs. Paul Kaunda and Imani Mfuru, learned Advocates respectively. It was the submissions for the application that the applicant unsuccessfully moved the Commission for condonation. That is, the

respondent objected it preliminarily (PO), which PO was sustained by CMA. According to the applicant, instead of striking the application out, the Commission dismissed it in its entirety. He also argued that, the counter affidavit of respondent (especially paragraph 8) also notes that the application was incompetent. Thus, such appreciation, is as good as acknowledging that the applicant never filed any proceedings because no merits were traversed. Mr. Kaunda, thus, prayed for the application.

In reply, it was submitted that the applicant had previously filed two incompetent applications for condonation before CMA. They were thus struck out. The third application, subject of these proceedings, was also incompetent. Hence, the mediator found that filing incompetent applications thrice was negligent on the part of the applicant. Thus, the Commission dismissed the application for condonation due to such displayed negligence. He made reference to the case of ***Elly Matiku and another vs Mediterranean Shipping Co. Ltd.***, Civil Appeal No. 454/2020 (unreported). The counsel argued hereof that repeated filing of incompetent applications manifests gross negligence.

Further, the respondent's counsel argued that the Labour Division of this Court also dismissed similar applications on such basis. He cited

the case of ***New Tabora Textile Ltd v Tanzania Union of Industrial & Commercial Workers (TUICO)***; Revision No 5/2016 (unreported).

In rejoinder, it was submitted that the two cases relied on by the respondent were distinguishable. He argued that, for instance, ***Elly Matiku's case*** (*supra*) was dealing with issue where the application condonation thereof was heard on merit. In this case, no merits were covered. Further, the ***Tabora Textile's case*** (*supra*) is no exception. The matter therein involved a represented litigant who mistook the CMA directives five (5) times. To Mr. Kaunda, the applicant herein had 2 previous applications only. In addition, in such case, the applicant had been given the last chance by CMA, yet he messed things up. Hence, the two cases, according to the applicant herein should not be applied strictly.

I have, with dispassion, considered the submissions of both parties. The Court is invited to determine one question: *whether the CMA was justified to dismiss the application which was incompetent*. To the applicant CMA erred. However, the respondent finds no fault in the CMA award. To him. It was justified to so hold. I will start by addressing the *duo* concepts and effects therefrom. In law, when the matter is struck out, it ceases to exist. Simply put, it is as if no application or proceedings

were ever mounted. I make reference to the case of ***Hashim Madongo and 2 others vs Minister for industry and trade and 2 others***, civil appeal No. 27 of 2003 (unreported) at page 5. Nevertheless, when the matter is dismissed, in law, it is considered that the same was fully determined but it failed on the basis of want of merit. In ***Olam Uganda Limited v Tanzania Harbours Authority***, Civil Appeal No. 57 of 2007 (unreported) the court of appeal held that;

> *"In our considered opinion then,* ***the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable.*** *The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision, by this Court"* (bolding rendered for emphasis).

Also, in the case of ***Ngoni Matengo Cooperative Marketing Union Ltd vs Alima Mohamed Osman*** (1959) EA 577 the erstwhile East African Court held as follows:

> *"What this court ought to have done in each case, was to "strike out" the appeal as being incompetent, rather than to have dismissed it; for the later phrase implies that a competent appeal*

has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of"

Therefore, when the matter is found to be incompetent, it should be struck out as there is nothing worth determination. The similar approach was stated in the case of ***Charles Luhemeja v Republic***, Criminal Appeal No. 10 of 2020; and ***Cyprian Mamboleo Hizza v Eva Kioso and Another***, Civil Appeal No. 3 of 2010 (both unreported).

In the matter at hand, the respondent wishes to justify the dismissal on the basis of his two previously applications which were incompetent. He further found his comfort in the case of ***New Tabora Textile Ltd.*** (*supra*) where this court dismissed an incompetent application for being filed *quintuple* with similar defects. This Court, in the cited case, adopted the procedure under Rule 55 of ***the Labour Court Rules***, GN No. 106 of 2007.

In this matter, I am inclined to differ with the foregoing holding. I have reasons. **One**, the matter which was not heard on merit cannot be dismissed, as there is nothing worth for determination; **two**, negligence of the applicant can be sanctioned by other awards such as costs to the other party; **three**, procedural defects cannot hinder a part to have

access to justice; **four**, since the previous applications by the applicant herein were found to be incompetent and struck out; they are deemed to have never existed. Therefore, the applicant is justified to file another similar application which is taken as fresh.

Five, the CMA dismissed the affidavit for reason that one paragraph out of 9 paragraphs was not verified. To me, the proper approach was to expunge the unverified paragraph and move on appropriately; **six**, in this matter, the applicant only filed two incompetent applications compared to the previous cited case where the respective appellant was negligent over 4 times.

Seven and last, the filing afresh of the struck-out proceedings is not without the safe valves in favour of the other party. In this matter where the applicant was time constrained/barred, for instance, his coming back will involve accounting for more days of delay. Hence, the respondent will have his pack of justice determined when hearing the newly-filed matter on its merit.

In fine, I find this application to have merit. I accordingly allow it. The ruling of CMA in dispute No. CMA/SHY/144/2017 is quashed and set

aside. I make no order as to costs. It is so ordered and right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

November 10th, 2023

Ruling is delivered this 10th day of November 2023 in the presence of Advocates Paul Kaunda and Imani Mfuru (both online) for the applicant and respondent respectively

C.K.K. Morris

Judge

November 10th, 2023