THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

CONSOLIDATED LABOUR REVISION NO. 21 & 23 OF 2022

(From Labour Dispute No. CMA/MBY/Mby/37/2021/ARB.13)

ACCESS MICROFINANCE BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

PATRICK NGWALE .....1ST RESPONDENT

BARAKA MWASOMOLA .....2ND RESPONDENT

And

PATRICK NGWALE .... APPLICANT

VERSUS

ACCESS MICROFINANCE BANK TANZANIA LIMITED ..... RESPONDENT

JUDGMENT

Date of hearing: 6/9/2023

Date of judgment: 5/12/2023

NONGWA, J.

This is a consolidated application. It combines two applications that originate from same proceedings of CMA in Labour Dispute No. CMA/MBY/Mby/37/2021/ARB.13. Whereas, the applicant ACCESS MICROFINANCE BANK TANZANIA LIMITED has lodged the application no. 21/2022 against the two respondents PATRICK NGWALE and BARAKA MWASOMOLA (1st & 2nd respondents) while PATRICK NGWALE also lodged

his application no. 23 of 2022 against ACCESS MICROFINANCE BANK TANZANIA LIMITED, both applications seek to have the CMA award of the Commission for Mediation and Arbitration at Mbeya be revised and set aside and the court make appropriate orders thereafter. The grounds for the orders sought are set out in the affidavits of both sides.

Both applications are made under section 91(1)(a)(b)(2)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relation Act [Cap 366 R.E 2019] "the ELRA", Rule 24(1)(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) and rule 28(1)(c)(d)(e) of the Labour Court Rules G.N. No. 106 of 2007. It is supported by the affidavits dully sworn by Amedius Mallya learned counsel for the and Patrick Ngwale. The applications are resisted by the respondents who filed separate counter affidavits.

Briefly the respondents Patrick Ngwale and Baraka Mwasomola were employed by the applicant as the loan officer of the applicant since 2015 and relation officer in 2016 respectively. In 2021 the respondents were accused for misconduct of receiving money from clients precipitating the matter to be investigated by the employer. The investigation resulted the respondents to be charged before the disciplinary committee which conducted hearing leading the employment of the respondents to be terminated by the applicant.

The respondents referred the labour dispute to the CMA, upon hearing both parties, the arbitrator found that there was no fair reason for termination, the applicant was ordered to pay twelve month's compensation for unfair termination together with other statutory entitlement. The award aggrieved both the applicant and respondents who filed the present revisions on the grounds set forthwith in the parties' affidavits.

When the matter came for hearing the applicant was represented by Evance Rwekaza whereas the respondents by Mr. Baraka Mbwilo, both learned advocates, the matter was heard orally. However, their submission will not be recited here for the reason to be apparent shortly.

In the course of composing judgment, I endeavoured to go through the CMA records, upon perusal, I noticed that testimonies of some witnesses for both parties were received without oath or affirmation contrary to the mandatory requirement of Rules 19 (2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. No. 67 of 2007 (G.N. No. 67 of 2007). As such, I summoned the learned counsels for the parties to address on the issue.

In attendance were Evance Rwekaza and Mr. Isaya Mwanri, both learned advocate for the applicant and respondents respectively.

Mr. Mwanri was the first to take the ball rolling, he submitted that there were witnesses who were sworn and others not, he prayed the court to look on the magnitude of the problem and invoke overriding objective and see whether parties have been prejudiced. He stated that, in **Tanzania Distillers Limited vs Bennetson Mishosho** (Civil Appeal 382 of 2019) [2022] TZCA 838 (TANZLII) in which similar situation happened and the court found the omission curable. He added that parties have been in court since 2021, despite that witness have to be sworn the matter be decided on merits.

On part of Mr. Rwekaza submitted witnesses have to be sworn in the CMA as required by rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. No. 67 of 2007. That if one witness is not sworn, it affects the whole matter and at hand it was more than one witness who had testified without being sworn or affirmed.

He went on to submit that under section 4(a) of the Oath and Statutory Declaration Act all those who testify in court must be under oath. He cited the case of **WEIR Services Tanzania Limited vs Jacques Louis Bruwer**, Civil Appeal No. 247 of 2020 [2023] TZCA 17762 (TANZLII) to bolster the argument that the proceeding has to be quashed in case it is ruled that witnesses did not testify under oath.

He stated that because there are more than one witness overriding objective principles cannot be applied. That although the matter has taken long time, speed is good but justice must prevail.

In rejoinder Mr. Mwanri insisted that there was no proof that unsworn evidence was used in deciding the matter, thus prayed the court to decide the matter on merits.

Having dispassionately considered the submissions made by the learned counsel for the parties and perused the record of revision before me, the main issue for determination is the validity or otherwise of the proceedings before the CMA.

The records of the CMA bear out that the employer called four witnesses Elizabeth Philip (DW1) who was sworn, Juma Amiri Kahomi (DW2) did not affirm, Tungu Charles Daudi (DW3) was sworn, Kinanira Nsoro (DW4) not sworn. On part of the complainants Baraka Mwasomola (PW1) was not sworn and Patrick Ngwale (PW2) was sworn.

The above records clearly show that the evidence two witnesses for employer side and one complainant, were received without oath or affirmation, Rule 19(2)(a) of the G.N. No. 67 of 2007 empowers administrator to administer oath to any person who appears before him to give evidence. For clarity, the said Rule provides that;

'19 (2) The power of the arbitrator includes to-

(a) administer an oath or accept an affirmation from any person called to give evidence.'

Similar requirement is echoed pursuant to Rule 25 (1) of the same G.N. No. 67 of 2007 which provides that;

'The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process-

(a) examination in chief-

(i) the party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;

(ii) parties are predicted to ask leading questions during an examination in chief.

(b) cross-examination: -

(i) the other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute.'

The above cited rules require the parties to a labour dispute, to lead evidence through the witnesses who must testify under oath or affirmation. It follows therefore that, before any witness can give evidence

before the CMA, he or she must take oath or affirmation. The requirement, is strengthened by the provisions of sections 2 and 4(a) of the Oaths and Statutory Declarations Act, [Cap 34 R.E 2019] which also was referred to this court by the counsel for the applicant. Section 4(a) provides that;

> *'Subject to any provision to the contrary contained in any written law, an oath shall be made by any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court.'*

The court of appeal has emphasized the need of every witness who is competent to take oath or affirmation before the reception of his or her evidence in the trial court including the CMA. If such evidence is received without oath or affirmation, it amounts to no evidence in law and thus it becomes invalid and vitiates the proceedings as it prejudices the parties' case. See for instance the cases of **Catholic University of Health and Allied Science (CUHAS) vs Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020, [2020] TZCA 1890 [TANZLII] and **SNV Netherlands Development Organization Tanzania vs Anne Fidelis,** Civil Appeal 198 of 2019 [2022] TZCA 427 (TANZLII) **Catholic University of Health and Allied Science (CUHAS)** the court stated;

'...it is mandatory for a witness to take oath before he or she gives evidence before the CMA... where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case.'

I agree with Mr. Mwanri that in the case of **Tanzania Distillers Limited** (supra), the court declined to nullify the proceeding on the ground of unsworn evidence of only one witness. The court further suspended the operation of rule 25 for six months. The court held that

'Having declined to accept Mr. Mushi's invitation to discount the said irregularly recorded proceedings and unsworn evidence of PW1 and having considered that the position we have just taken is quite new to the cases filed before, and for timely resolution of employment disputes, we hereby suspend the requirement and operation of rule 25 (1) of the guidelines for six months as grace period from the delivery of this judgment That requirement shall apply in cases filed thereafter, for avoidance of doubt.'

From the above it is no true that in **Tanzania Distiller Limited** (supra) the court stated the omission to take evidence under oath of affirmation was curable. Now taking November 2022 when the operation rule 25 of G.N. NO. 67 OF 2007 was suspended for appeal which was already in court with unsworn evidence, when this matter is being decided

the six months has elapsed and is caught in the web of the rule 25 G.N. No. 67 of 2007.

Mr. Mwanri invited the court to invoke overriding objective principle, the argument which was strongly refuted by Mr. Rwekiza. The circumstances of this case do not require invocation of overriding objective principles because unsworn evidence cannot be used to decide rights of parties. At best, evidence of unsworn witnesses will be discarded in record and see if the remaining evidence does not affect the case.

Applying such rule to the case at hand, if evidence of DW4 is discarded it means there will be no evidence to support procedural compliance with the law. At the same time there will be no evidence to support the claim of Baraka Mwasomola. It follows that if evidence of DW2, DW4 and PW1 are discarded, there will be no evidence support or challenge the labour dispute which was before the CMA.

Consequently, I invoke revisional powers bestowed in this Court under section 94 of the ELRA and hereby nullify the entire proceedings of the CMA and quash the resultant award and set aside the subsequent orders thereto as they emanated from nullity proceedings.

In the event, and for the interest of justice, the file is remitted back to the CMA for the parties to be heard afresh before another arbitrator,

with all possible expedition and in accordance with the law. Since, this is a labour related matter, I make no order as to costs.

V.M. NONGWA
JUDGE
5/12/2023

DATED and DELIVERED at MBEYA this 5th day of December 2023 in presence of Mr. Sefu Wembe counsel for the 1st Respondent and Mr. Alex John for the 2nd Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

V.M. NONGWA

JUDGE