IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 42 OF 2022

BETWEEN

MUSABE SCHOOL..**APPLICANT**

VERSUS

EMMALINE EMMANUEL ....**RESPONDENT**

JUDGMENT

Last Order: 16.02.2023
Judgment: 23..02.2023

M.MNYUKWA, J.

The central issue in this Revision Application is the propriety of the Order issued by the Arbitrator in the Labour Dispute No CMA/MZA.NYAM/82/2022 which grants the respondent leave to file the application within fourteen days "according to the law" after the aforesaid Application was struck out for being defective.

Aggrieved by the said Order the applicant, Musabe Schools filed the present Revision Application under section 91(1)(a), 91(2)(c),94(1) (b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein

to be referred as the Act) and Rule 24(1), 24(2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d) and 28(1)(b)(c)(d)(e) 28(2). 55(2) of the Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN No. 106 of 2007). The applicant prayed before this Court for the following Orders:

1. *That this honourable court be pleased to revise, quash and set aside an award of the Commission for Mediation and Arbitration Mwanza in Labour Dispute No. CMA/MZA.NYAM/82/2022 delivered by Hon. Ester Kimaro on 14th June 2022*

During the hearing, the applicant was represented by Julius Mushobozi, learned counsel while the respondent enjoyed the legal services of Sileo Mazula, learned counsel. The Revision Application was argued orally.

The brief facts of the matter goes thus; The respondent in this Revision Application filed the labour dispute before the Commission for Mediation and Arbitration (CMA) through the CMA Form No. 1 which initiate complaints in labour dispute. After being served, the applicant filed the notice of preliminary objections. The preliminary objections filed by the applicant were:-

i. *The dispute is a non starter as the applicant seeks for the two claims at ago.*

ii. *This applicant employment agreement is unenforceable Inoperative and premature.*

After hearing both parties to the case, the CMA sustained the preliminary objections and the matter was struck out. However, after the matter being struck out, the applicant was granted 14 days to file Application according to the law. As I have said earlier on, it is the above Order of filling the Application within 14 days "according to the law" that prompted the applicant to file this Revision.

Thus, the main issue for consideration and determination is whether it was proper for the Arbitrator to grant 14 days to the respondent to bring the Application to the CMA.

Submitting in supporting the Revision Application, Mr. Mushobozi prays to adopt the affidavit sworn in by Justin Kalikawe to form part of his submission. He was of the view that, the decision issued by the Hon. Arbitrator has some illegality and this Court has to intervene. He pointed out the illegality being, it is not clear whether the 14 days' condoned to the respondent was for extension of time or it was for filing the labour dispute.

He remarked that, after the matter has been struck out, the Arbitrator gives the Order which reads as follows: **" Tume inampa ruhusa mjibu pingamizi ndani ya siku 14 awe amewasilisha maombi yake kwa mujibu wa sheria"**

It was the complaint of Mr. Mushobozi that the above statement is vague because it is not clear whether the leave granted to the respondent was for filling condonation or the labour dispute. He remarked that, the vagueness in any decision is a ground for a superior court to intervene.

He went on to submit that, after the matter has been struck out, it appears like there is nothing exist in the Court records. He wonder why the Arbitrator extend time of doing an action while there is nothing before her. He added that, as parties argued the preliminary objection, and since there was no prayer for extension of time from any of the party, it is clear that the CMA did it *suo moto.*

Mr. Mushobozi contended that, judicial body is not mandated to issue any order adverse to the other party without afforded the other party the right to be heard. He was of the opinion that, the arbitrator was required to invite parties and make an address to her on the new issue of

extension of time. He added that, the applicant is the affected party and he is prejudiced by the Order of the Arbitrator.

He further submitted that, the Arbitrator was not vested with jurisdiction to extend time whether for filling the labour dispute within 14 days or condonation within 14 days as she did. He stated that, the law gives the Procedure on the circumstances in which the Arbitrator may be vested with the jurisdiction to extend time. He refers to Rule 11 and 29 of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 which provides that, a party who seeks for extension of time has to file Form No 2 which is the condonation and it is from that is when the arbitrator will have power to extend time if the application for condonation is before her.

He retires by averring that, there was no any application before the court which moves the arbitrator to condone time. Since her powers are limited with the Labour Rules, she was not required to do anything out of the prescribed Rules. He added that, it is the practice of this Court that, the relief that was not prayed for, cannot be granted. He therefore prays the Revision Application be allowed and the decision of the Arbitrator

extending time be quashed so as the party may do what is required to be done after the matter was struck out.

Contesting, Mr. Sileo Mazula challenged the applicant's Notice of Application which seeks to revise the decision of Labour Dispute No. CMA.MZ/320/2020/125/2020 delivered by Hon. Kefa, P.E while the applicant's oral submission challenged the decision delivered on 14/06/2022 by Hon. Ester Kimaro. Mr, Mazula was of the view that, since in the Revision Application the applicant is required to file the Notice of Application, Chamber Summons and Affidavit, and as the Notice of Application filed by the applicant seeks to revise the decision delivered by Hon. Kefa and not Hon. Kimaro, there is no proper application before the court and that this anomaly goes to the root of the matter. He remarked that, as there was no proper Revision Application, the Court has no power to entertain it.

Mr. Mazula also pointed out that, the order which is sought to be challenged is the interlocutory order which is not subject to Revision. He refers to Rule 50 of GN. No. 106 of 2007 and claimed that, as the Order delivered by the CMA do not have the effect to dispose the merit of the case, it is not subject to Revision.

The counsel refers to the case of **Bozson v Alrtrincham Urban District Council,** 1903 1 Kings Bench . 947 at page 948 where it was hed that:-

> " *It seems to me that the real test of determining this question ought to be this; Does the Judgement or Order made finally dispose the rights of the parties. If it does, it ought to be treated as a final Order, if it does not, it is then in my opinion an interlucocutory order."*

Mr. Mazula submitted that, it is his view that as the decision delivered by the Hon. Arbitrator did not decide the dispute on merit, it is the interlucotory Order and as per the provision of Rue 50 of the Labour Court Rules, GN No. 106 of 2017, the Order is not subject to Revision and therefore, it is premature before this Court.

He finally prays the Revision Application to be dismissed and the matter be remitted back to the CMA to continue with the hearing and determination of the labour dispute.

Rejoining, the counsel for applicant reiterates what he had submitted in chief. On the issue of whether the Order delivered by the Hon. Arbitrator which is subject to Revision is an interlocutory order or not, he stated that, the decision delivered is not an interlucotory order and

the case of **Bozson v Alrtrincham Urban District Council,** (supra) is distinguishable since the decision delivered was not an interlocutory order because it dispose the matter. He said that, since Rule 50 of GN No, 106 of 2007 did not define what is interlocutory order, resort has to be made in the Civil Procedure Code, Cap 33 R.E 2019 which defines what is interlocutory order. He end up by stating that, what was filed before the CMA was struck and the Order that followed afterwards was tainted with illegality and confusion, therefore it is subject to Revision.

On the issue of the Notice of Application to be improper, Mr. Mushobozi submitted that, it is true that, the Notice of Application refers to the Arbitrator and the Labour Dispute which is not subject of this Revision Application. However, he quickly pointed out that, the proper labour dispute number was cited in the Notice of Application and Notice of Representation though in the contents the case number referred to was not correct as it refers to the decision of Hon. Kefa. He claimed that, in the Chamber summons, the correct case number was cited and the correct name of the Arbitrator. Likewise in the affidavit, the correct labour dispute number was cited and the correct name of the Arbitrator. He added that, the decision which is subject to this Revision application is properly attached in the Affidavit.

Mr. Mushobozi was of the view that, what transpired is the typographical error which does not go to the root of the matter as the respondent was not prejudiced by that typographical error as he responded by filling a reply to the affidavit. He added that, the notice of application is not mandatory in Revision Application. He supported his argument by referring to the case of **China Henan International Cooperation Group Company Limited v Morning Glory Construction Copany Limited ,** Misc, Civil Application No 2 of 2021, HC at Songea, which held that typographical error in the pleadings, chamber summons and aplications are curable. He finally prays the Court to allow the Revision Application.

To begin with, it is clear from the submission of the parties that the respondent did not respond on the propriety of the Order given by the Arbitrator to grant the respondent 14 days to file Application "in accordance to the law". Instead, he opposed the Revision Application for being defective and that the Order issued was an interlucotory Order. However, in his affidavit, the respondent deponed that, the CMA being a Court of Law and Equity, the Arbitrator was justified to grant 14 days to the respondent to bring the Application.

In determing the issue of the Notice of Application that sought to revise the decision of Hon. Kefa and not of Hon. Kimaro in which the applicant's submission relied on. Mr. Mushobozi conceded on that and he qucikcly stated that, it is a typographical error.

As it was correctly stated by the learned counsel of the applicant, I agree with him that the same is the typographical error, because in the Notice of Application, the applicant referred the labour dispute No CMA/MZA.NYAM/82/2022 which is the dispute that the labour applicant sought this Court to exercise its revisionary power. Again, the Notice of Representation referred to the same dispute which is sought to be revised as well as the Chamber Summons and the Affidavit referred the same dispute and the decision which is subject to Revision has been attached.

As it was correctly stated by the applicant, the typographical error so noted did not prejudice the respondent who was able to file the notice of opposistion and the reply to the affidavit which he prayed to be part of his submission. Therefore, this being a court of law and equity, it is my firm view that the noted typographical error is curable by the oxygen principle as it did not occassion failure of justice to the respondent.

On the issue whether the decision sought to be challenged by way of Revision is interlocutory order or not, I don't think if I should detain myself much on this point, as the decision itself speaks. It is on record that the decision delivered by Hon. Kimaro disposes the matter which is labour dispute No. CMA/MZA.NYAM/82/2022 after sustain the point of objection raised by the applicant on point of jurisdiction. Part of her decision reads as hereunder:-

> "... *Kwa misingi hiyo ni dhahiri kabisa Tume haina mamlaka ya kuendelea kuusikiliza mgogoro huu kwa kuwa fomu hiyo inamapungufu kwa mujibu wa sheria latika ujazwaji wake, mjibu pingamizi amechanganya madai ya kuvunjwa kwa mkataba na madai ya kawaida. Kwa misingi hiyo ili Tume kutenda haki kwa pande zote mbili na kwa Kumbukumbu zilizopo mbele ya Tume. Tume inakubaliana na pingamizi lililowasilishwa na mleta pingamizi (mlalamikiwa) na kupeleka mgogogoro huu kuondolewa (SRICKED OUT) kwa kuwa haujakidhi matakwa kwa mujibu wa sheria (Defective referral form).* ***Tume inampa ruhusa mjibu pingamizi ndani ya siku 14 awe amewasilisha maombi yake kwa mujibu wa sheria."*** (The emphasis is mine in the bolded words)

From the extract of the above part of the Ruling, there is no need to emphasize on what has been stated by the Arbitrator. As the Ruling clearly

shows that, the CMA was not vested with jurisdiction to entertain the matter and proceed to struck out. Thus, the above Order cannot be regarded as interlocutory order since she had no any other application before her to proceed with. Therefore, I agree with the learned counsel of the applicant that the decision of the Arbtrator was not an interlocutory order.

As to the issue of the propriety of the Order given by the Arbitrator after struck out the Application for want of jurisdiction and granting 14 days to the respondent to file a new application according to the law, it is my firm view that the Order issued is vague. As it was correctly stated by the applicant's counsel, it is not clear whether the Order aimed to extend time for the respondent to file application for labour dispute or an application for condonation.

As the records bear testimony, the labour dispute filed was struck out for want of jurisdiction. As the matter was struck out, the Arbitrator was not vested with the power to do anything over a dispute. Therefore, her act of extending time *suo moto* and allow the respondent to bring the application within 14 days while there was no any application before her is inappropriate and cannot be legally justified.

In the case of **EFFCO Solution (T) Ltd v Juma Omari Kitenge**, Revision No 753 of 2019ths Court when faced with the akin situation had this to say:

> " *As a matter of procedure, the CMA was required to determine the application for condonation before going to the merit of the application however that was done in the present application. Under the circumstances, I find such procedural irregularity to be fatal and render the whole proceedings nullity.*"

Thus, it is my firm view that, the Arbitrator was required to leave the respondent to file the application for condonation and let the parties argue on that application and gives its Ruling. He was not allowed to allow the party to bring a new labour dispute after being struck out.

In that regard, I therefore find that the procedural irregularity is fatal and renders the Orders granting the respondent 14 days to file application as nullity.

Consequsently, the order granting the respondent 14 days to file application is hereby quashed and set aside. The respondent is at liberty to pursue his right by following the proper procedure of the law. As the matter originated from the labour dispute, I make no order as to costs.

It is so ordered.

Dated at Mwanza this 23th day of February 2023

M.MNYUKWA

JUDGE

23/02/2023

The right of appeal is explained to the parties.

M.MNYUKWA

JUDGE

23/02/2023

Court: Judgement delivered on 23th February 2023 in the presence of Mr. Mushobozi for applicant and in absence of Respondent.

M.MNYUKWA

JUDGE

23/02/2023