

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 118 OF 2016

BETWEEN

TROPICAL ALLUMINIUM & GLASS INDUSTRIES APPLICANT

VERSUS

AMANI NYAMBULA & 26 OTHERS RESPONDENTS

EX-PARTE JUDGMENT

Date of Last Order 09/07/2018

Date of Judgment 17/08/2018

NYERERE, J.

In this application applicant/ **TROPICAL ALLUMINIUM & GLASS INDUSTRIES** filed the present application seeking revision of the Commission for Mediation and Arbitration (CMA) decision and award issued by Arbitrator Kiwelu, L. in respect of the employment dispute No. CMA/DSM/ILA/R.520/13/631.

The respondents were employed on 1st February, 2012 and on 18th June , 2013 respondents engaged in a unlawful strike demanding salary

increase, following the strike the applicant agreed to resolve the matter by the end of July, 2013. However, four (4) days later respondents strike again, applicant again met with the respondent's representative, TUICO and informed respondents, that there will not be salary increase, respondent's opted to end their employment by executing an agreement signed by both parties, and respondents were paid their terminal dues.

Being aggrieved the respondents referred the matter to the CMA claiming unfair termination. The CMA entertained the matter and found that applicant had not followed proper procedure in terminating the respondents, the CMA awarded respondents, one month salary in lieu of notice and two months salary of the remaining contractual period.

Aggrieved applicant lodged revision application whereby advancing grounds for revision as stipulated under paragraph 9 of the supporting affidavit as follows:

- (a) The Honourable Arbitrator erred in law and in fact by awarding one month salary in lieu of notice and two months salary of the remaining contractual period while the matter concerned with the termination by agreement entered on 19th July 2013
- (b) Whether certificate of service can annul or negate a termination by agreement.

- (c) The respondents have sued the wrong party.
- (d) The award is un-executable as against the applicant (Tropical Aluminum and Glass Industries Limited).

At the hearing of the application applicant was represented by Mr. Alex Balomi Counsel for Applicant, whereas respondents were absent and the matter proceeded by way of oral submission and the same was ex-parte for failure of respondents to file Counter Affidavit despite the court order to substitute services which was published in Mwananchi Newspaper on 9th April, 2018 still respondent defaulted appearance and no Counter Affidavit was filed, hence ex-parte hearing.

Submitting in support of the application, Mr. Alex Mashamba Balomi Counsel for Applicant prayed to adopt the supported Affidavit of Aziza Mhina Advocate, to form part of his submission. He specifically refers this court to paragraph 3-10 of the said affidavit in order for the court to grant this application.

After carefully considered applicant's submission and affidavit in support of this application especially paragraph 3-10, CMA records, labour laws and practice of this court, the issues for determination are whether or not the Arbitrator award is justified in law and whether respondents sued a wrong party.

With respect, to the reasoning of the applicant, based on the argument that respondent sued the wrong party, as this issue is raised at this point, Labour Court, involving the same parties at the CMA. It is in the interests of justice to point out that, the CMA and Labour Court records do not support applicant's contention; as the facts in records and evidence; falls within a radius of conclusions that parties involved are relevant parties.

Further, it is common ground that the strike conducted by the respondents was never guided by law. The employees participated in unlawful strike contrary to Section 80(1) (a) to (e) of the ELRA No. 6/2004.

Addressing this issue, I do subscribe to the arbitrator's decision at page 12 of the CMA award. I quote:

"Ni msingi wa sheria kuwa hakuna anayepaswa kufaidika na makosa yake. Kwa kuwa katika shauri hili pande zote mbili wanamakosa na hivyo kuwapa walalamikaji mishahara yote kwa muda wa mkataba uliobaki ni sawa na Tume kubariki mgomo ambao walalamikaji wenyewe wanakiri waligoma. Tume inaona kuwa nafuu inayofaa kwa walalamikaji ni kulipwa mishahara ya

**miezi miwili kila mmoja kwani walifanya
mgomo usio halali"**

Given the circumstances in this case, the respondents having, contravened Rule 14(1) and (2) of the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007 which prescribes conditions for exercising the right to strike; for ease of reference I quote:

14(1) Disciplinary action shall not be taken against an employee who participated in a strike that complies to the provisions of Part VII of the Act.

(2) Notwithstanding the provisions of sub-rule (1) participating in a strike that does not comply to the provisions under PART VII constitutes misconduct and may justify termination of employment

However, the applicant ought to comply with Rule 13 GN 42/2007 (Code of Good Practice) Rules, which is the fairness of procedure before terminating the respondents.

Rule 13 of the Employment and Labour Relations Code of Good Practice, GN No. 42/2007, entails that employer to comply with fairness of procedure, such as employer shall conduct investigation to ascertain whether there are grounds for a hearing to be held, notify the employer on the allegations, give reasonable time to prepare for the hearing and inform

employee of his right to assistance at the hearing , further to provide evidence in support of the allegation at the hearing in order to allow proper response to allegations, and to communicate the decision and reasons for termination , and the right to appeal the decision of the Disciplinary committee.

With the above observation and comparing it with the facts of this case and evidence adduced at arbitration hearing. The arbitrator observed at page 6 of the CMA Award, that the employer is the one who wrote the employees letter of voluntary resignation and not the respondents themselves. I quote:


“Barua hii kwa uandishi wake inaonyesha kuwa iliandikwa na mkurugenzibarua hii imeeleza masuala ya mgorho nakueieza kuwa mfanyakazi aliyetajwa katika barua hiyo kwamba siku ya tarehe 18/06/2013 aliamua kutorudi kazi na badala yake akataka apatiwe kila kilicho haki yake ili akatafute ajira kwingine yenye maslahi zaidi ”

Further at page 7 of the CMA award, arbitrator observed that the applicants did not voluntarily resign. Therefore the respondents were to prove that applicant's resignation was voluntary, in which he failed.

I may state upfront that the respondent's became witness in their own case, Owing to the fact that respondents had the burden to furnish evidence which raises a credible possibility that applicant forced respondents to write resignation letters, in which respondents successful discharged that burden.

In that, I agree with the arbitrator's decision that applicant did not comply with fairness procedure as per Rule 13 of the Employment and Labour Relations Code of Good Practice, GN No. 42/2007, therefore awarding one month salary in lieu of notice to the respondent's and then two (2) month salary for the remaining contractual period is fair and just. In that I hereby confirm CMA decision. Therefore application is dismissed for lack of merit.

It is so ordered.


A.C. Nyerere
JUDGE
17/08/2018

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Date: 17/08/2018

Coram: Hon. S. Simfukwe, DR.

Applicant:

For Applicant: Mr. Priscus Richard advocate holding brief for Alex Balomi
advocate

Respondents: } Absent
For Respondents: }

C.C. J. Kälolo

Court: Ex parte Judgement delivered in chamber, this 17th day of August, 2018, in the presence of Mr. Priscus Richard advocate who was holding brief for Mr. Alex Balomi learned Counsel for the Applicant.


S. Simfukwe

DEPUTY REGISTRAR

17/08/2018