**IN THE HIGH COURT OF TANZANIA**
**LABOUR DIVISION**
**AT DAR ES SALAAM**

**REVISION NO. 181 OF 2019**

**BETWEEN**

**ISON TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**GODWIN ASSENGA.....1ST RESPONDENT**
**NESTORY MTAKI.....2ND RESPONDENT**

**JUDGMENT**

*Date of Last Order: 09/06/2020*

*Date of Judgment: 29/07/2020*

**Z. G. Muruke, J.**

Aggrieved by the decisions of Commission for Mediation and Arbitration [herein after to be referred to as CMA] to wit the award dated 26th October,2015 and the ruling dated 11th November,2016 in Labour Dispute No. CMA/DSM/ILA/R/257/1236, the applicant **ISON TANZANIA LIMITED** has filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f),24(3)(a)(b)(c)(d) and 28(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007 and 91(1)(a),(b),91(2) )(a),(b), of the Employment and Labour Relations Act, CAP 366 RE 2019 [herein after to be referred to CAP 366] praying for Orders that:-

1. This Honourable Court be pleased to revise and set aside the proceedings, ruling and orders of the Commission for Mediation and Arbitration in Labour Dispute CMA/DSM/ILA/R/257/1236 dated 26th

October,2015 delivered by Hon. Mwakajila,-Arbitrator and the ruling dated 11th November,2016 delivered by Hon. Mbena, arbitrator.

2. That this Honourable court be pleased to determine the dispute in a manner it considers appropriate.
3. Any other reliefs.

The application was supported by an affidavit sworn by the applicant's Principal Officer **EMMANUEL ROBERT NG'WANANGOLLO.** The respondents challenged the application through their joint counter affidavit. By consent, hearing was by way of written submission, I thank both parties for adhering to the schedule and for their submissions. The applicant enjoyed the service of Advocates Mpale Kaba Mpoki and Stoki Hamis Joachim, while the respondent were served by Mr. Dismas Raphael, Advocate from DIRM Attorneys.

The brief facts of the case are that, on 20th March, 2014 the respondents referred the dispute before CMA after the applicant having deducted their salary without consultation. The matter was heard exparte, and the exparte award was issued on 26th October, 2015. The applicant having been dissatisfied with the award, applied for the order to set aside the exparte award. Ruling was issued on 11th November, 2016 and the application was declined. Being resentful, the applicants filed the present application seeking for revision of both the exparte award and the ruling declined the application to set aside the award.

Submitting in support of the application the applicant's counsel submitted that, the CMA award is full of illegalities as it was based on the

issue of unfair termination while it was not in dispute between the parties. On 9th October,2014 when framing issues the respondent's counsel abandoned the claim for unfair termination as the respondents were still employees of the applicant, and remained with the claims of breach of terms and conditions of employment contract particulary the alleged deduction of salaries. The arbitrator wrongly envoked Rule 7(1) of the Employment and Labour relations (Code of Good Practice) Rules, GN.42/2007 which applies when there is complaint for unfair termination or constructive termination.

It was further submitted that the arbitrator failed to evaluate the evidence adduced and the framed issues. The arbitrator wrongly awarded the respondents 48 months' salary as compensation as per Section 40(c) of Cap 366, while the respondents were still the applicant's employees. That provision is applicable when there is proof of unfair termination as provided under Section 37(2) (a) and (b) of Cap 366.It is a cardinal principle that failure of the arbitrator to keep records of the key issues relating to the dispute, amounts to violation of Rule 32(3) of the Labour institution (Mediation and Arbitration ) Rules , GN 64/2007(GN 64) and Rule 10 (2) of Labour Institution (Ethics and Code of Conduct for mediators and Arbitrators) GN 66/2007,(GN 66).That the award is improperly procured citing the case of **Mateseko Gwabukoba & 5 others v Nyanza Road Works Ltd**. Rev. No.45/2011 in Mwanza (unreported)

It was further contended that another illegality in the award is the application of Section 40(1) (d) of Cap 366 which does not even exist in

law. And it was illegal or the arbitrator to issue a certificate of service while the respondents were still employees. He cited the case of **Tanzania Heart Institute Vs. Board of Trustees of NSSF** [ 2010] 1 EA 378 CAT, **Director of Public Prosections Vs. Peter kalifumu and Bunga Kalifumu**(2003) TLR and the case of **Principal Secretary, Ministry of Defence, National Service Vs. Devram Valambhia** 1992(TLR) 185

The applicant counsel further submitted that the applicant was not served with a notice of hearing. The matter having been adjourned to 16th March 2015 after the arbitrator went on leave, the next date was not scheduled though he made several follow ups. The applicant was represented with a law firm with a physical address known to CMA but surprisingly the matter was entertained exparte without satisfying itself that the applicant's counsel was dully served with a notice as required by Rule 6(2) of GN 64/2007,citing the case of **Muzito Vs. Njuki** (2005)EA 232 (CAU).

It was further submitted that the respondent's alleged that on 10th April,2015 he served the applicant with a summons dated 23rd April,2015. The applicant have not received any summons and it was wrong for the arbitrator to issue summons to the applicant personally instead of his representative. The said summons is contrary to Rule 7 (1), a, b, and c (i) and (ii) of GN 64/2007. The summons had no name and title of the receiver no statement of the person who delivered those summons. Referring the case of Knight **Support (T) Ltd v Marries John Bekker** Rev. No. 299/2013, **Sadiki Athuman v R** (1986) TLR 235 and **Highland**

**Estate Vs. Kampuni ya Uchukuzi Dodoma Ltd & another**, Civil Application No. 183/2004.

In response to the applicant's averment the respondent's counsel averred that the application is omnibus as the applicant is seeking revision of both the exparte award and the ruling. The applicant ought to have applied for revision of the ruling which denied to set aside the exparte award before Hon. Mbena on 11th November, 2016. That there is no any fatal illegalities on the CMA award. The award was lawful under Section 88(8) of Cap 366. It is true that the essence of the dispute is the applicant's decision to deduct the respondents' salary and it went further to a threat that they should consider themselves terminated if they do not sign new agreement, which amounts to constructive termination. Therefore the arbitrator was right to decide on unfair termination.

It was further submitted that the applicant was aware of the matter but decided not to enter appearance. That CMA issued summons to the applicant as evidenced by Exhibit GOM-1, they were served as per Rule 7(1) (c) (i) through the address obtained from CMA F1 and the same were duly received by the applicant's stamp as in previous summons. It should be noted that the service of summons has no limit that it should be served to the applicant's counsel office as adduced by the applicant, citing the case of **Tito Shumo and 49 others Vs. Kiteto District Council**, Civil Application No.140 of 2012

The applicant's counsel further argued that, the rules are hand maids of justice and through the set rules, our courts reach justice. The

fact that the applicant decided to abandon the matter before CMA, she deprived herself with a right to be heard. The courts cannot be stopped from doing justice only because there are parties who are not willing to prosecute and defend their case. That it is for the interest of justice that all matters have to come to an end, referring the case of **Eritrea Coffee Blenders 1963 EA v Cosmas Swai and another**, Rev No. 16/2014, **A.H Muhimbira and 2 others v John K. Mwanguku,** Civil Application 13/2015 and the case of **Sadiki Athuman v R** (1986) TLR 235. He thus prayed for dismissal of the application.

In rejoinder the applicant's counsel reiterated what he stated in his submission in chief. He further submitted that respondent abandoned the issue of time limitation of time contained in the notice of application on 7th November, 2019. Otherwise the matter was timely filed before this court. That the application is not omnibus in nature. What the applicant is seeking is revision of the CMA's proceedings which involved all the orders and ruling in respect of Labour dispute CMA/DSM/ILA/R/257/1236. He prayed for the application be granted.

After careful consideration of the submissions of both parties, I find the following issues for determination;

i. Whether the application has been brought properly?

ii. Whether the applicant has sufficient cause to set aside exparte award.

In regard to the 1st issue, the applicant in his notice of application and the Chamber summons have prayed for revision of both exparte award and the ruling which rejected to set aside the exparte award.

It is apparent that there are no laws which restricts the combination of prayers into one in an application. Once there is combination of prayers the court has a duty and obligation to satisfy itself if the combination or joining of the applications into one is proper.

These two distinct decision to wit exparte award and ruling, emanates from one labour dispute CMA/DSM/ILA/R/257/1236. They are made under different provisions of the law and are not similar nature hence each has to be determined basing on its own facts.

In application for revision of the two prayers, the court is moved with distinct provisions. The applicant moved the court by relying on the provisions which are applicable in revision of the award and not a ruling. Therefore combining them in one application renders the application bad in law.

In the case of **Rutagatina C.L v The Advocate Committee and Another**, Civil Appeal No. 98 of 2010 CAT - DSM (unreported) held that;

> "When two different prayers with different provisions of the law are sought in one application, then the said application becomes omnibus and cannot stand in the eyes of the law."

With the above cited case it is obvious that this application is omnibus and therefore incompetent before this court. The applicant ought to have filed an application for revision of the ruling which rejected to set aside the exparte award, by demonstrating the sufficient cause which were disregarded by CMA, This was also the position in the case of

**China Construction Company Limited Vs. Simon Manfred,** Rev.8/2014,LCCD 2014 PART II.

If the application would have been granted on that aspect, then the remedy was to set aside the exparte award and the matter be heard interparty. Consequently, for being incompetent this application deserved to be struck out. This position was also held in the case of as it was **Mohamed Salimin Vs. Jumanne Omary Mapesa,** Civil Application No. 103 of 2014 CAT (unreported) that;

> "...as this court has held for time (s) without a number, an omnibus application renders the application incompetent and is liable to be struck out"

In view of the above, I find no reason to labour on determining the remaining issue, I hereby struck out the application for containing omnibus prayers thus incompetent.

Z. G. Muruke
**JUDGE**
29/07/2020

Judgment delivered in the presence of Dismas Raphael for the respondent also holding brief of Joackim Stoki for applicant.

Z.G.Muruke
**JUDGE**
29/07/2020