

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

REVISION NO. 339 OF 2018

BETWEEN

TANZANIA CIGARETTE COMPANY.....APPLICANT

VERSUS

MAGRETH NJAU RESPONDENT

JUDGMENT

Date of Last Order: 08/06/2020

Date of Judgment: 29/07/2020

Z. G. Muruke, J

The applicant **TANZANIA CIGARETTE COMPANY**, filed this application, seeking for revision of the decision issued by Commission for Mediation and Arbitration, (CMA) on 30th May, 2018, in Labour dispute no. CMA/DSM/TEM/271/2014/178/2017 by Hon. Batenga, M- Arbitrator which was in their favour. Despite being in their favour, the applicant filed this application seeking for revision on the following ground;

"That ,when the matter is time barred, the law requires the same to be dismissed ad not to be struck out as ordered by the presiding Arbitrator and that makes the finding by the Arbitrator erroneous in law"

The application was supported by the affidavit of Goodluck Kazaura the applicant's Principal Officer. In challenging the application the respondent filed a counter affidavit sworn by Amin M.Mshana, her advocate.

With leave of the court hearing was by way of written submissions, the applicant was served with Advocate Jacob Arnold Luoga, while the respondent enjoyed the service of Advocate Amin Mohamed Mshana. Gratefully all the parties complied with the schedule.

It is from record that on 9th September, 2014 the respondent filed a dispute before CMA for unfair termination. After failure of mediation neither of the party referred the matter in arbitration stage, hence the CMA suomoto dismissed the application. The respondent filed an application for revision in Revision No. 115/2016 before Hon. Nyerere (as she then was) that order was quashed and set aside and the parties were restored to the position they were after failure of mediation. The respondent referred a matter for arbitration as required by the law. The applicant raised a preliminary objection that the matter was time barred. CMA sustained the objection and the application was stuck out. Dissatisfied with the ruling, the applicant filed the present application.

Submitting on the ground of revision, the applicant's counsel insisted that the arbitrator erred in law by ordering struck out instead of dismissing the matter for being time barred. When the matter is considered to be time barred the same ought to be dismissed and not struck out referring Section 3 (1) of the Law of Limitation Act, Cap 89. It was further submitted that the term "shall" as used in that provision of the law, signifies that the dismissal is a mandatory requirement for all matters falling under that provision. He thus prayed for revision of the CMA's ruling.

In reply to the applicant's submission, the respondent's counsel contended that, the arbitrator was correct in striking out the matter. That

the issue of whether the time barred matter is dismissed or struck out, has been decided in the case of **Wolfram B. Haule v Friginia Ole Mashale**, Land appeal No. 81 of 2011 when cited the cases of **Ngoni Matengo Cooperative Marketing Union Ltd v Alima Mohamed Osman**, (1959) EA, **Abdallah Hassan Vs. Vodacom (T)**, Civil Appeal No.18/2008, and **Thomas Kirumbuyo Vs. Tanzania Telecommunications Co. Ltd**, Civil Application No.1/2005. Where it was held that a dismissal presupposes that a matter has been heard on merit. When a matter is time barred it is incompetent before the court, hence the court lacks jurisdiction to entertain it. He cited the case of **Abdallah Hassan v Vodacom (T)**, Civil Appeal No.18/2008. He thus prayed for dismissal of the application. Having carefully considered the rival submissions of the parties and records, this court is called upon to determine the following issue;

"Whether it was proper for the arbitrator to struck out the matter?"

It is from records that upon determination of the preliminary objection raised by the applicant, that the matter was time barred, the arbitrator sustained the same and stuck out the application. The applicant argued that all time barred matters have to be dismissed, referring Section 3(1) of the Law of Limitation Act, Cap 89 Re 2002, that provides:

"Subject to the provisions of this Act every proceeding described in the first column of the Schedule to this act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defense."

It is apparent that the applicant craved for the dismissal of the matter, though he has failed to state under which category of the said 1st column of the schedule this matter falls. Taking note that from mediation to arbitration you make a reference and not an application.

It is worth determining first, whether the matter was timely referred to arbitration stage. It is from records that on 23rd June, 2017, through revision No.115/2016 the parties were restored to the position they were after mediation, had failed-the time when the certificate of Non-settlement was issued. The order is hereby reproduced for easy reference;

"The CMA proceedings leading to this revision is hereby quashed and set aside, I further order and restore the parties to the position they were after mediation had failed – the time the certificate of non-settlement was issued. Parties are at liberty to refer the dispute to arbitration, if they still wish to pursue their dispute and should do so in a manner provided by the law."

From that order it is apparent that the parties were restored to the position they were after failure of mediation and the issuance of the Certificate of non-settlement. This does not mean that the time frame for referring the matter to arbitration shall be counted from the day the certificate of non-settlement was issued.

It is a settled rule that the duration for referring the matter from mediation to arbitration is 30 days as it has been established in the case of **Dr. Noordin Jella Vs. Mzumbe University**, Complaint No.47 of 2008. It is from records that the arbitrator joined hands with applicants counsel on counting the duration from the date of Non- Settlement to the date of reference 14th August, 2017. That is not right.

This court is of the view that the arbitrator misdirected himself on interpreting the order for restoration. The counting was supposed to be from 3rd August, 2017 the date the respondent received the copy of judgment to the date of reference of the matter to arbitration on 14th August, 2017 which is 11 days. In that aspect the reference was timely filed. By striking out the application, the arbitrator denied the parties of their right to be heard on the dispute on merit. That was against the rule of natural justice as it was held in the case of **Deo Shirimja v Two Others**, Civil Application No. 34 of 2008, Court of Appeal where it was held that;

"....It is established law that any judicial order made in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is made in good faith"

Also in the case of **Samson Ngwalida v The Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 Court of Appeal ;

"It was equitable for both parties to be given an a opportunity to be heard as the principle of natural justice require."

Basing on the above finding that the reference was timely filed, the arbitrator wrongly struck out the matter. Therefore I hereby quash the CMA's ruling and remit the records to the CMA for arbitration to be conducted by another arbitrator. The application for revision is dismissed.

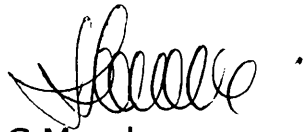


Z. G. Muruke

JUDGE

29/07/2020

Judgment delivered in the presence of Jacob Anord Luoga, Advocate for applicant and in the absence of the respondent.

A handwritten signature in black ink, appearing to read 'Z.G. Muruke', with a small dot to the right.

Z.G.Muruke

JUDGE

29/07/2020