

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

REVISION NO. 182 OF 2019

BETWEEN

COLOSSEUM HOTEL SPA APPLICANT

VERSUS

ISSA BAKARI RESPONDENT

JUDGEMENT

Date: 17/02/2020 & 02/03/2020

MWIPOPO, J.

The Applicant **COLOSSEUM HOTEL SPA** have filed this application against the Respondent one **ISSA BAKARI** requesting for orders that this Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration (CMA) at Dar es Salaam in Labour Dispute Number CMA/DSM/KIN/R.1033/17, revise and setting it aside. The application is made under Section 9(1)(a), (2)(a)(b)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA) together with Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), Rule 28(1)(c)(d) (e) and Rule 55(1) of the Labour Court Rules, 2007, GN. No. 106 of 2007 and any other enabling provision of the Law. The application is by

way of Chamber summons supported by Affidavit of one Raymond B. Balemwa a Principal Officer of the Applicant. The application came for hearing on 17/02/2020 where the Applicant who was absent was represented by Advocate William Mwaikusya and the Respondent who was present was represented by Mr. Hemedi Omari Personal Representative.

The facts of the case in brief is as follows: the Respondent in this case Issa Bakari instituted a Labour dispute No. CMA/DSM/KIN/R.1033/17 at the Commission for Mediation and Arbitration (CMA) on the 08/09/2017 protesting his termination of employment by the Applicant. The case was heard by CMA in exparte after the applicant failure to appear in Court on the date of hearing. The respondent was heard and the Commission delivered its award on the 23/01/2018. The CMA award find the termination of Respondent employment by the Applicant to be unfair and ordered the Applicant to pay the Respondent one month salary which is shillings 570,000/= in lieu of Notice, shillings 570,000/= as an annual leave, shillings 328,846/= being a payment for days the Respondent worked without being paid and 12 months salaries being terminal benefits for unfair termination making the total amount for an award to be shillings 8,306,846. The Applicant was also ordered to give the Respondent Certificate of employment.

Aggrieved by the Exparte Award of the CMA the Applicant filed an application with No. CMA/DSM/KIN/R.1033/17 before the Commission praying it to grant an order to set aside an ex-parte Award which was delivered on 23/01/2018 by Hon. Fungo E.J. and order that hearing to be conducted inter parties. The Commission heard the application to set a side exparte award and decided to dismiss the application for want of merits. The ruling of the Commission in application to set aside an ex-parte Award was delivered on 31/05/2018. Being dissatisfied by the decision of the CMA, the Applicant instituted Revision Application No. 315 of 2018 in this Court which was struck out by Hon. S.A.N. Wambura, J on 05/03/2019 with the leave to re-file within seven days from the date of the decision. Thereafter the Applicant instituted the present Application for Revision on 08/03/2019.

The Counsel for Applicant in his submission adopted the content of Affidavit of Raymond B. Balemwa a Principal Officer of the application to form part of this submission. The Learned Counsel for Applicant submitted that the Applicant was condemned to pay total of shilling 8,308,846/= to the Respondent without being heard. He stated that non-appearance of the applicant at the CMA was not caused by lack of interest or negligence by the Applicant rather it was caused by Advocate Abrogast Sibonike who was trusted by the Applicant to represent his interest at the CMA. The learned

Counsel for Applicant cited Indian Case of Prectan Karor and others V. Nagar Palika Pithaura, M.A. No. 1002 of 2006, High Court of Chhahisgarh Bilaspors.

The learned Counsel is of the view that the Applicant should not pay for lack in action by his advocate while he has done everything in his power to engage an advocate to make sure his interest in the CMA are protected. The learned Counsel also cited the case of DPP V. Amina Tesha and others (1992) T.L.R. No. 237 where it was held that the denial of right to be heard in any proceeding would definitely vitiate the proceedings. The Counsel is of the view that the CMA did not adhere to the principle of fair hearing which is part to our constitution. The learned Counsel prayed that for interest of justice this Court to afford him the right to be heard so that he can protect his interest considering that the respondent does not appear to suffer any prejudice if this application will be heard.

Replying to submission by the Applicant, Mr. Hemed Omari the personal representative of the Respondent submitted that the Constitution of the United Republic of Tanzania of 1977 in Article 107 A(2) provides for principles which the Judiciary have to adhere to in dispensing Justice. Among the principles are the principles of impartiality to all without due regard to ones social or economic status and the second Principle is that not to delay dispensing of Justice without reasonable ground. He states that the Advocate for the Applicant in his submission did not tell the Court the reasons for

Advocate Arbogast failure to appear before the CMA. According to summons issued by the CMA on 7/11/2017, the summons was served to the Applicant (Respondent in CMA dispute) and the Applicant received it and put his stamp. This means that there was a proof of service according to Rule 7(1) of GN No. 64 of 2007. As there was a proof of service, the Arbitrator legally proceeded with the hearing of the dispute under Rule 28(1)(b) of GN. No. 67 of 2007. He is of the view that the Arbitrator legally proceeded to hear the dispute exparte and the Award which was provided by the Commission is in accordance with the Law. The Applicant waived his right to be heard by deciding not to appear on the hearing date.

He submitted further that the Applicant in his submission failed to show which decision of the CMA the applicant is praying for its revision, is it the CMA decision dated 23/01/2018 or that of 31/05/2018. The Affidavit which was adopted by the learned Counsel for Applicant shows that the decision which the application for revision is seeking to revise is in respect of CMA Labour Dispute No. CMA/DSM/KIN/R.1033/2012. But, there are two decisions in respect of the CMA Labour dispute. Therefore, their prayer for revision is not clear as to the decision which the application is requesting this Court to revise. He was of the view that the CMA Ruling dated 31/05/2018 was on the Preliminary Objection and that the issue of appearance of the

Applicant (The respondent in original dispute before CMA) was never determined by the CMA.

The Personal Representative for the Respondent submitted that the Advocate Representing the Applicant in this case have no locus to appear for failure to file Notice of Representation as it is provided for by Rule 43(1)(a) and (b) of GN. No. 106 of 2007. The Rule provides that the party which requires any person to represent him in Court to file a Notice of Representation. The Applicant did not do that, no Notice was filed.

In rejoinder, the learned Counsel for Applicant submitted that the reasons for Advocate Arbogast failure to appear in the CMA is known to Advocate Arbogast himself. He insisted that the negligence by Advocate Arbogast should not deny the Applicant right to be heard. Concerning the issue raised by the Personal Representative for the Respondent that it is not clear as to which decision this application is all about, the learned Counsel submit that the Chamber Summons and the Affidavit in support shows that the decision which this application is seeking for relief of the Court is the decision of the CMA dated 23/05/2018 which was attached in the application. On the issue of Notice of Representation, the learned Counsel for Applicant submitted that the Notice of Representation which was filed by the Applicant shows that the Applicant appointed The Stallion Attorneys to represent him in this case the said Stallion Attorneys have several Attorneys who are

partners including himself. Therefore, whoever among the Attorney from the chamber have right to represent the Applicant. He proceeded to pray for the application to be allowed.

I have gone through parties submissions, Applicant's Affidavit Respondents Counter Affidavit, CMA Award and the CMA record. For the reasons that will be provided later herein, I am going to determine first the issue of appearance of the learned Counsel for Applicant Advocate William Mwaikusya in absence of the Notice of Representation which name him as the appointed advocate to representing the Applicant. The issue was raised by the Personal Representative for the Respondent who submitted that Rule 43(1) (a) and (b) of the Labour Court Rules, GN. No. 106 of 2007 provides for the party which requires any person to represent him in Court to file Notice of Representation. He submitted further that the Notice of Representation which was part of Notice of Application for Revision shows that the Applicant have appointed stallion Attorneys as Applicant's Attorneys in this matter and then the address of the Stallion Attorneys was provided bellow that Notice of Application. He was of the opinion that the Notice was supposed to provide the name of the person who represent the Applicant and not the name of Chamber. On reply, the learned Counsel for the Applicant submitted that in the last paragraph of the Notice of Application there is the Notice of Representation which shows that the Applicant have

appointed Stallion Attorney to Represent him in this case. He states that as the Chamber have Attorneys who work for it then these Attorneys have mandate to represent the Applicant, including himself.

I have read the Applicants Notice of Application for Revision. The Notice which is contained in the last paragraph of the Notice of Application provides that the Applicant appoints Stallion Attorneys as Applicant's Attorneys in this matter and the Applicant will accept service of all the proceedings in the address of Stallion Attorneys. This means that it is in record that the applicant appointed the Stallion Attorneys as the Applicant's Attorney.

The Labour Institutions Act, Act No. 11 of 2004 provides in Section 56 for persons who may appear in any proceedings before this Court. The Section reads as follows:-

"56. In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented by -

- (a) An official of a registered trade union or employer organization; or**
- (b) A personal representative of the party's own choice; or**
- (c) An advocate".**

From the provision, an advocate may appear to represent a party to the proceedings before this Court. However, the Labour Court Rules, 2007

(GN No. 166 of 2007) in rule 43(1) provides for the procedure to be followed by a representative who acts on behalf of any party in any proceeding. The Rule reads as follows:-

"43(1) a representative who acts on behalf of any party in any proceedings shall, by a written notice, advice the Registrar and all other parties of the following particulars -


- (a) The name of the representative;**
- (b) The postal address and place of employment or business; and any available fax number, e-mail and telephone number."**

The above cited rule show that it is mandatory for the person representing a party to any proceedings before this Court to advice the Registrar and all other parties by a written notice the name of the representative and the postal address and place of employment or business. Other particulars to addressed in the written notice are fax number, e-mail and telephone number if available. In this case, the Applicant's Notice that appoint Stallion Attorneys to represent him does not provide for the name of the representative or an advocate who will represent the Applicant. The Notice as it is contained in the Notice of Application also provided for the place of business and address of Stallion Attorneys but there is no name of advocate appointed to represent the Applicant.

I have also read Court record which shows that Advocate Safari Kimboka from Stallion Attorney appeared in this case several times before the learned Counsel Advocate Mwaikusya appeared today. Further, the Notice of Application Chamber summons and Affidavit of the Applicant filed in this case were drawn and file by Advocate Safari Sabas Kimboka. Surprisingly today without any Notice as it is required by the Labour Court Rules Advocate Mwaikusya appears in Court to represent the Applicant. It is my opinion that the purpose of the rule is to ensure the person representing the party in this Court have been appointed by the respective party. Thus the appearance by learned Counsel William Mwaikusya before this Court is contrary to the mandatory provision of Rule 43(1)(a). Therefore it is my finding that he is not supposed to appear before this Court without filing a Notice that contain his name, address and place of business.

The Personal representative for the respondent prayed for the Application to be dismissed. Despite my findings that the representation of Advocate William Mwaikusya was contrary to the Law thus the applicant was not present in Court today, I am of the opinion that the Applicant shall not be punished for the error that was committed by his advocates. Therefore, I hereby strike out this Application with leave to re-file a fresh application within 15 days from today. Following the determination of the case on issue of Representation, I am not going to determine other legal issues raised.

It is so ordered.



A.E. Mwipopo
JUDGE
02/03/2020

Date: 02/03/2020

Coram: Hon. A.E. Mwipopo, J.

Applicant:

Absent

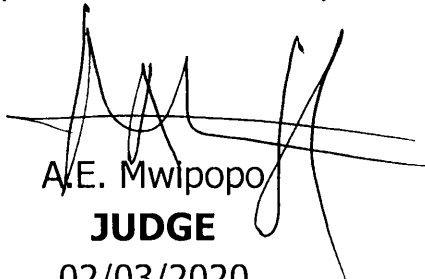
For Applicant:

Respondent: Present in person

For Respondent: Mr. Hemed Omary Personal Representative

C.C. Neema

Court: Judgement read over in absence of the Applicant and in the presence of the Respondent and his Representative.



A.E. Mwipopo
JUDGE
02/03/2020