

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

REVISION NO. 495 OF 2019

BETWEEN

POLYCEM TANZANIA LIMITED..... APPLICANT

VERSUS

JUMANNE SAMNACHILINDI & 5 OTHERS.....RESPONDENTS

JUDGEMENT

Date of Last Order: 22/07/2020

Date of Judgment: 30/09/2020

Aboud, J.

The applicant filed the present application seeking for an order of the Court to revise and set aside the Commission for Mediation and Arbitration (herein referred as CMA in this judgement) ruling on refusal to set aside ex-parte award which was delivered on 22/12/2017 by Hon. Fungo, E. J. in favour of the respondents. The applicant filed the present application on the following legal issues:-

- i. Whether there is good cause to set aside and quash the decision declining to set aside the ex-parte award.

- ii. Whether the Hon. Mediator misconducted himself and acted with material irregularities in declining to set aside the ex-parte award.
- iii. Whether it was proper for the Hon. Mediator to decline a consented application to set aside the ex-parte award.
- iv. Whether the CMA has jurisdiction to decline parties resort to mediation.
- v. Whether the award subject of this application was illegally procured.

The matter proceeded by way of written submission. The applicant was represented by Mr. Dickson Venance Mtogesewa, Learned Counsel while the respondents were represented by Mr. Pascal Teemba, Personal Representative.

Arguing in support of the 1st and 2nd issues Mr. Dickson Venance Mtogesewa submitted that there was no any proof of service to the applicant as provided under Rule 7 (1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. 64 of 2007 (herein referred as GN. 64 of 2007). To strengthen his argument he cited the case of **Zuberi M. Selemani Vs. Makanda Company Ltd.**, Lab.

Rev. No. 469 of 2017. He stated that the Mediator misconducted himself and acted with material irregularities in declining to set aside the ex-parte award.

Regarding the 3rd and 4th issues he submitted that, at the CMA the respondents consented to the applicant's application to set aside ex-parte award, therefore they cannot object the present application. He therefore urged the Court to allow the application.

Responding to the application Mr. Pascal Teemba strongly submitted that the applicant was dully served with summons. He stated that the CMA's records shows that the first summons was issued on 20/10/2017 and received by the applicant on 21/10/2017. He added that the second summon was issued on 17/11/2017 and served to the applicant.

As to the second issue he stated that the court records show that the applicant was properly served therefore it follows logically that non appearance amounted to waiver of his right to be heard.

Regarding the third issue Mr. Pascal Teemba submitted that, the Mediator's decision cannot be faulted in either law or fact because as the Mediator pointed out mediation is not vitiated by having a

decision in place. He added that the parties are free to pursue mediation at any stage of the case without disturbing a lawful court order.

On the last issue Mr. Teemba submitted that, there was no concealment of any material facts to this case. He stated that the mentioned respondents by the applicant were not involved in any other case or instructed any person to conduct a case on their behalf and that they did not sign any pleadings in that case. He therefore urged the court to dismiss the application.

Having gone through Court's records as well as submissions by both parties, it is my considered view that the issue for determination before the Court is whether the applicant was duly served at the CMA.

In the application at hand the applicant contends that he was not served with any summons to attend at the CMA. The Mediator in his decision was of the view that the applicant was dully served. He stated that as per CMA records the applicant was served twice and stamped the relevant summons with his official stamp which signifies his receipt of the relevant documents.

At the CMA service of summons is governed by Rule 7 (1) of GN. 64 of 2007 which is to the effect that:-

“Rule 7 (1)-A party shall prove that a document was served in terms of these rules by providing the following:-

(a) proof of mailing the document by registered post to the other party;

(b) the telefax transmission report indicating the successful transmission to the other party to the whole document;

or

(c) if the document was served by hand:-

(i) with a copy of receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or

(ii) With a statement confirming service signed by the person who

delivered a copy of the document
to the other party or left it at any
premises”.

In this application the summons were served by hand. I have gone through the summons in question and the only proof that the applicant received such summons was his official stamp. In the relevant documents there is no signature, place, time, date, name and designation of the receiving officer save for the summon issued on 17/11/2016 which only had official stamp and date of receiving. Under such circumstances it is my view that in the absence of those vital information as required under Rule 7 (1) of GN. 64 of 2007, in the summons in question raises doubt of their validity, the fact which ought to have been considered by the Mediator. It is my view that the Mediator should have examined the summons in question before reaching to the decision that the applicant was dully served.

The relevance of that vital information is to asses if the summons were dully served to an authorized person. However, in the application at hand it is uncertain of who received the relevant summons. Thus it cannot be presumed that the relevant summons

were received by the applicant. Therefore on the basis of the foregoing discussion it is my view that the applicant was not properly served with the summons in question, on the other hand it suffice to say that he had no knowledge of the matter which proceeded ex-parte at the CMA. Therefore, the Mediator misdirected himself on refusing to set aside the ex parte award.

I have also noted other issues raised by the applicant. However they are of no relevance at this juncture as the matter wrongly proceeded ex-parte at the CMA without sufficient proof if the applicant was dully served.

In the result I find the present application has merit. The ex-parte award issued on 22/07/2017 by Hon. Mahindi. P. P, Mediator is hereby quashed and set aside. The matter is remitted back to the CMA to be heard inter-parties before another competent Mediator.

It is so ordered.



I.D. Aboud

JUDGE

30/09/2020