

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 704 OF 2018
BETWEEN
MKONO & COMPANY ADVOCATES APPLICANT
VERSUS
CHANGILA GAMBANILA & OTHERS RESPONDENTS

JUDGMENT

Date of Last Order: 06/05/2020

Date of Judgment: 05/06/2020

S.A.N. Wambura, J.

This is an application for revision and extension of time within which the applicant is seeking to set aside the ruling of the Commission for Mediation and Arbitration Dar es Salaam [herein after referred to as CMA] which was delivered on the 21st September, 2018. The application is made under the provisions of Sections 91(1)(a), (2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, [CAP 366 RE 2019] [herein referred as ELRA] Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and

28(1)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007. The applicant moved the Court on the following grounds:-

- 1. That the Honourable Arbitrator erred in law and in fact in dismissing the application for extension of time to set aside ex-parte award holding that the applicant defaulted filing his submission in chief.*
- 2. The Arbitrator erred in law and in fact by failing to take into consideration the fact that the applicant was not notified when the award was delivered.*
- 3. That the Arbitrator erred in law and fact by failing to take into account that the applicant just became aware that the award was delivered ex-parte when he was served with the application for execution.*
- 4. That the Arbitrator failed to analyze the evidence adduced by the applicant that there was no proof of service hence reaching into a wrong conclusion.*

The application was supported by the affidavit of Mr. Charles Mathias Masoka, the applicant's Advocate while Mr. Waziri Mchome, respondent's advocates bitterly challenged the application through his counter affidavit.

Facts giving rise to the present application can be briefly stated as follows:- The respondents were employees of the applicant employed on different dates and positions. They referred the dispute to CMA demanding to be paid their salary arrears. The respondents alleged before CMA that they pursued the applicants claims but some of their claims were not paid. They all decided to resign and referred the dispute to CMA. The application was heard ex-parte and the applicants were awarded accordingly.

The applicant alleged that, the application came to their knowledge at the execution stage before the High Court of Tanzania Labour Division. They filed an application for extension of time to set aside the exparte award at CMA Labour Dispute No. CMA/DSM/KIN/R.1180/16/601). However the same was dismissed after the applicant failed to file his submission within the prescribed time. That decision is now the subject matter of this revision.

With leave of the Court hearing of the matter proceeded by way of written submissions. I thank both parties for their submissions and for adhering to the schedule.

Arguing in support of the application Mr. Nkoba 1st brought to the attention of this Court the fact that the second respondent, namely REMYA KALATH PRADURAJAN has not lawfully opposed the application. That the said Remya has attempted to appoint one FRANCIS KAMUZORA to act on her behalf in this matter by executing a Power of Attorney dated 18th day of January, 2017 and which was attested by Advocate Jacqueline Tarimo. He argued that the said Jacqueline Tarimo is the 7th Respondent in this Application. That this was unlawful as the law under Section 7 of the Notaries Public and Commissioner for Oaths Act Cap 12 RE 2002 provides as follows:-

"Section 7 No Commissioner for Oaths shall exercise any of his powers as a Commissioner for Oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested".

In the light of the above provision the learned Counsel argued that, in this case, The Commissioner for Oaths, one Jacqueline Tarimo, who exercised her powers of Commissioner for Oath by attesting the Oath of the second respondent one Remya, is an interested party in this case as she is, herself, the 7th Respondent. He therefore submitted that the Power

of Attorney attached is bad in law and should not be taken into account by this Court.

In the event, this court should find that the second Respondent, concedes this application.

On the first ground of this application, Mr. Nkoba submitted that, the order of the Honourable Arbitrator was that after the counter affidavit has been filed on the 27th day of July, 2018, each party was given 14 days within which to file their written submissions. The applicant in the said application was given 14 days to file his submission in chief, thus the deadline set for filing of the said submissions was the 10th day of August, 2018. This was exactly 14 days from the 27th July, 2018. The Respondent therein was given (14 days) up to the 24th August, 2018 to file a reply to the submission. The rejoinder (if any) was given seven (7) days up the 31st August, 2018.

He stated that, the applicant duly filed the submissions on the 10th of August, 2018 but later in the decision it was held that he was required to file it on the 1st of August, 2018 instead of the 10th August contrary to the applicant's recorded schedule. The Counsel contended that, if the Order

was from the 27th July, 2018 to 1st of August 2018 makes it three (3) days only from when the counter affidavit was filed, which is an unreasonable short period of time within which one could file the written submissions.

The Learned Counsel further to argued the remaining three grounds in consolidation. He submitted that, there is no proof of service produced by the Respondents to prove that the applicant was duly served as required under Rule 7 (3) of the Labour Institutions (Maadili na Kanuni za Maadili) Rules, GN. 67/2007.

Mr. Nkoba submitted that, the law requires that “sufficient notice” must be given to the parties before the Mediator or Arbitrator decides to proceed with the matter ex-parte and that there must be proof of service as provided under Rule 7 (1) of GN. 67/2007. However the same was not complied with in the present application.

He therefore prayed that, this Honourable Court be pleased to revise and set aside the ex-parte award of CMA in Labour Dispute No. CMA/DSM/KIN/R. 1180/2016. That the same be heard inter parties for the rights of each party to be determined.

Responding to the application the respondent submitted that, the applicant has raised a new point not raised in the affidavit or counter affidavit that the second respondent is not properly represented. He stated that the point should be rejected since it is not clear if it raised as a preliminary objection or under what procedure. The Counsel submitted that, the said Jacqueline Tarimo cannot have an interest on what Remya was awarded. That even CMA's proceeding will reveal the same. That the cases were only consolidated but each respondent had his/her own claims and was awarded separately.

On the first ground it was submitted that, the applicant's prayer is vague, it is not specific in particular if he wants to revise or extend time or both at the same time.

On the second ground it was submitted that, the allegation that the applicant was not properly served is not true as disputed under paragraph 6 of the counter affidavit.

That the applicant was aware of CMA's proceeding. That he attended at the Mediation stage and when the matter was scheduled for Arbitration he was served but negligently refused to appear.

It was further submitted that, the applicant became aware of the execution proceeding at the Labour Court on 31/01/2018 but did not take any steps to set aside the ex-parte award until 11/05/2018. He stated that the applicant delayed for almost five months from when the application for execution was filed. They therefore argued that they ought to account for each day of the delay as was held in the case of **Loshilu Karaine & Others Vs. Abraham Melkizedeck**, Civ. Appl. No. 140/02 of 2018 CA.

In regard to submissions before CMA the respondents stated that, CMA's record should govern the same and not the applicant's submission. They further stated that the law is very clear that submissions filed out of time are not allowed. They cited the case of **Ramadhani Said Mussa Makulika & Another Vs. Administrator General of Tanzania & Another**, Land. Case No. 29 of 2015 (unreported).

Having gone through the records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are:-

1. Whether the second respondent is properly represented.

2. Whether the applicant adduced sufficient reasons to be granted extension of time.

1. Was the second respondent properly represented?

I note that this is not an issue which was properly raised by the applicant as argued by the respondent. But since they responded to it, I believe I should determine it.

From the record it is apparent that the 7th respondent attested the Power of Attorney of the second respondent. It is also crystal clear that Mr. Waziri Mchome, Learned counsel is the legal representative of all respondents in this matter. In the circumstances, I am in agreement with the respondents submissions that the 7th respondent cannot have an interest in the second respondent's claims. This is because even CMA's proceeding reveal that each respondent filed his/her own claims. The cases were consolidated on the reason that they all had claims from the same applicant. However each respondent was awarded in accordance with his/her claims.

In my view the provision of Section 7 of the Notaries Public would have applied if the 7th respondent was the legal Counsel of all respondents herein or if she had an interest in the 2nd respondent's claims. However that is not the case in the present application. I therefore find the second respondent is properly represented in the application at hand, and has thus challenged the application.

2. Has the applicant adduced sufficient reasons to be granted extension of time?

The applicant alleged that they filed their submissions on the 10th of August, 2018 but later in the decision it was held that they were required to file the same on the 1st of August, 2018. I have been forced to carefully go through CMA's record. As rightly submitted by the applicant the Arbitrator issued an order that the submissions in chief ought to be filed on or by 10/08/2018. This is what is on record at the proceedings dated 17/07/2018.

"Tume: Ombi limekubaliwa kwa utaratibu ufuatao:-

Counter affidavit ipo katika mwenendo wa jalada hili ila mjibu maombi alikuwa hajapatiwa, sasa apatiwe tarehe

20/07/2018. Reply affidavit tarehe 27/07/2018.

Submission in chief/ mleta maombi tarehe 10/08/2018.

Counter submission tarehe 24/08/2018.

Reply tarehe 31/08/2018.

Ruling tarehe 14/09/2018.

*(Imesainiwa)
Faraja, J
Muamuzi
17/07/2018"*

Therefore the applicant complied with the Arbitrator's Order. The ruling could not be delivered on 10/08/2018 before the reply and rejoinder submissions were filed on 14th of September, 2018.

I thus find that the Arbitrator misdirected herself and denied the applicant the right to be heard, by refusing to consider the applicants submissions.

There is no doubt the Arbitrator finalized the matter by denying the applicant the right to be heard which is a fundamental principle in administration of justice. This position was firmly stated in the case of

Abbas Sherally & Another vs. Abdul S.H.M Fazalboy, Civil Application
No. 33 of 2002.

The applicant has prayed for extension of time to file an application to set aside the exparte award. I have no need to issue that order because I have stated that the denial of the right to be heard upon the applicant in refusing to consider their filed written submissions vitiated the proceeding.

In the result I thus allow the application. Matter is remitted back to CMA. Applicant's submissions to be considered and ruling to be delivered by another Arbitrator. It is so Ordered.

S.A.N. Wambura
JUDGE
05/06/2020

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 704 OF 2018

BETWEEN

MKONO & COMPANY ADVOCATES APPLICANT

VERSUS

CHANGILA GAMBANILA & OTHERS RESPONDENTS

Date: 05/06/2020

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

Applicant:

For Applicant:

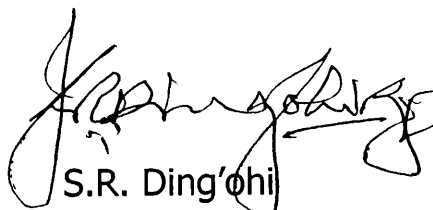
Respondents:

For Respondents:

} Absent

CC: Lwiza

COURT: Judgment delivered this 05th day of June, 2020 in the absence of parties.


S.R. Ding'ohi
DEPUTY REGISTRAR
05/06/2020