IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 196 OF 2019

BETWEEN

KENYA KAZI SECURITY (T) LTD..... APPLICANT

VERSUS

SOPHIA KALISTI GUAREHHI..... RESPONDENT

JUDGEMENT

Date of Last Order: 16/07/2020

Date of Judgment: 11/09/2020

Aboud, J.

The Applicant, **KENYA KAZI SECURITY (T) LTD.** filed the present application seeking to revise the ruling of the Commission for Mediation and Arbitration (herein after to be referred as CMA) on refusal to set aside ex parte award. The applicant moved the Court on the following grounds:-

1. The Honourable Court be pleased to revise and set aside the CMA ruling/Order issued by Hon. Alfred Amos (Mediator) in the Commission for Mediation and Arbitration on 04/02/2019 in dispute No. CMA/DSM/KIN/R.159/18.

2. The Honourable court having set aside the Ruling/Order determines the dispute in the manner it considers appropriate.
3. Any other relief (s) that the Court may deem fit to grant.

The applicant was represented by Ms. Rose Kashamba, Learned Counsel while the respondent appeared in person. The matter was argued by way of written submissions.

Arguing in support of the application Ms. Rose Kashamba submitted that the Mediator failed to consider the applicant failure to enter appearance due to heavy rain which caused the collapse of Kivule Bridge. He stated that the Mediator was supposed to postpone the hearing according to Rule 15 of The Employment and Labour Relations (Code of Good Practice) Rules GN. 42 of 2007 (hereinafter referred as GN. No. 42 of 2007).

Ms. Rose Kashamba further submitted that, the applicant was denied the right to be heard guaranteed by Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977. She argued that the decision reached in violation of principles of natural justice is void. To strengthen her argument she cited the case of **Ridge vs. Baldwin** (1963) 2 All ER 66.

Ms. Rose Kashamba went on to submit that, the applicant was not represented by any Advocate as wrongly held by the Arbitrator. She added, the applicant started to be represented by Mseke Advocates when the ex parte award was already issued.

She further argued that, the ex-parte award of the CMA is tainted with irregularities of which if this application is not allowed the respondent will benefit from an illegal award. Ms. Rose Kashamba submitted that the award is defective as the applicant was not notified the date in which the ex-parte award was issued so as to allow him to take necessary steps and protect his interest. To buttress her argument she cited the case of **Chausiku Athumani vs. Atuganile Mwaitege**, Civ. Appl. No. 122 of 2007 HC (unreported). She finally prayed the application be allowed.

Responding to the application the respondent strongly submitted that, the grounds on which the Arbitral award may be set aside are provided under section 91 (2) of the Employment and Labour Relations Act, [CAP 366 RE 2019] (herein referred as the Act). He stated that in the application at hand the applicant did not indicate the presence of any grounds set in the relevant provision.

As to the merit of the application she submitted that the only remedy the Commission or Court has for a party who has an habit of failing to enter appearance without adducing good grounds is to proceed ex-parte, as provided under section 87 (3) (b) of the Act. She further stated that the applicant was represented by a law firm which has many advocates and Legal Officers who would have entered appearance. She added that the applicant obtained the impugned award three (3) days after the award was pronounced therefore his argument that he was not notified is baseless.

The respondent submitted that, the Arbitrator's ruling decided was based on the evidence on record, thus the applicant was not denied the right to be heard as alleged. She therefore prayed the application to be dismissed.

Having gone through CMA's and 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 has adduced sufficient reasons to justify the sought order of setting aside ex-parte award.

It is an undisputed fact that the application before CMA was heard ex parte since the applicant failed to attend mediation hearing.

The power by the CMA to proceed ex-parte as rightly submitted by the respondent are given under section 87 (3) (b) of the Act ready together with Rule 14 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. 67 of 2007 (to be referred as GN. 67 of 2007).

Section 87 (3) (b) of the Act provides that, I quote:-

> "In respect of complaint referred under this Act, the mediator may decide the complaint if the other party to the complaint fails to attend a mediation hearing".

Also Rule 14 (1) of the GN. No. 67 of 2007 is to the effect that:-

> "Rule 14 (1) - where a party is not present at the commencement date and time set, for the mediation, the Mediator shall wait for a reasonable time to give the party an opportunity to arrive.
>
> (2) Where a party fails to appear at mediation, the mediator may do the following:-
>
> (a) in the case of a complaint the Mediator may postpone the hearing

in accordance with rule 15 or may:-

(i) dismiss the complaint if the referring party fails to attend a meditation hearing during the initial 30 days period;

(ii) **decide the complaint if the other party to complaint fails to attend a mediation hearing.**"

[Emphasis is mine].

In this application the applicant alleged that the reason for his failure to attend mediation is due to heavy rain which caused the collapse of Kivule Bridge. Ms. Kashamba told the Court that, the Arbitrator disregarded reason for non-appearance as advanced and deliberately refused to set aside the ex-parte award.

It is trite law that sufficient reasons must be adduced for the CMA and Court to set aside ex-parte order or decision. Section 87 (5) (b) of the Act provide that:-

"The Commission may reverse a decision made under this section if the Commission is

satisfied that there are good grounds for failing to attend the hearing".

The Court notes that the relevant section provides for the consequences of not attending a mediation hearing as it is in the marginal note of the Act.

This is also the position of this Court in the case of **Mbeki Teachers Saccoss Vs. Zahra Justas Mango, Labour Revision No. 164/2010,** HC Mbeya Sub registry (unreported) where it was held that:-

" **...** Sufficient reasons are pre conditions for Court to set aside its ex-parte order".

In this application the record reveals that the applicant did not attend mediation proceeding three times. Thereafter the mediator proceeded with hearing as required in law. The applicant alleged that on the last date fixed for hearing he failed to attend due to heavy rain, however he did not state before the CMA and this Court why he failed to attend on the previous set dates as indicated that he failed to attend for mediation, three times.

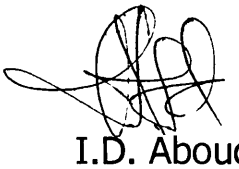
Under the circumstances of the case is my view the Arbitrator was right to proceed with hearing ex-parte for the reason that the matter had been adjourned for a number of days in the absence of the applicant. From the record it is crystal clear that the applicant was aware of the existence of such complaint as reflected at the proceedings dated 09/04/2018, where K.K. Daniel Mwakajila appeared for the applicant. It is also my view that the applicant as a Company had no reason not to send a person to represent at the CMA. Applicant had a number of staff members/employees who could have entered appearance and seek an adjournment but they neglected to do so. Thus, is my considered view the applicant acted negligently in pursuing the matter as reflected above. He was afforded with the right to be heard but he chooses not to attend at the CMA, so he cannot claim such right which decided to sleep over it and delayed the successful party to benefit from the Court or CMA decision.

Let me say, I have carefully considered the applicant's submission on the right to be heard. I fully agree with Ms. Kashamba's submission that a party should not be condemned unheard. However, in the present application the applicant did not

establish any circumstances in which he was deprived with the right to be heard. I have also noted Ms. Kashamba's submission that the Arbitrator wrongly stated that the applicant was represented by a Learned Counsel during mediation. But after going through the record I observed the applicant was not represented by any legal counsel, thus indeed the Arbitrator misdirected himself on such fact.

On the basis of the above discussion is my view the applicant did not advance any good cause for the failure to appear on the scheduled mediation hearing. In the result, I find the present application has no merit. The applicant has failed to adduce sufficient reasons to warrant setting aside the Arbitrator's ruling dated 22/01/2019. Hence arbitrator's ruling is upheld. The application is dismissed.

It is so ordered.



I.D. Aboud

JUDGE

11/09/2020