

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

REVISION APPLICATION NO. 118 OF 2020

BETWEEN

COLOSSEUM HOTEL & SPA.....APPLICANT

AND

ISSA BAKARI.....RESPONDENT

JUDGMENT

Date of the Last Order: 22/09/2020

Date of the Judgment: 13/11/2020

A. E. MWIPOPO, J.

The Commission for Mediation and Arbitration delivered an ex-parte ruling in favour of Respondent namely **ISSA BAKARI** In Labour Dispute No. CMA/DSM/ILA/R.1033/207, on 23rd January, 2018, before Hon. Fungo E.J., Mediator. The Respondent who was employed by the Applicant on 30th October, 2013, in the post of Gym Trainer for the monthly salary of Tshs. 570,000/= was terminated from employment by the Applicant namely Colosseum Hotel and Spa on 7th August, 2017 for misconduct. The Respondent referred the dispute to the Commission for Mediation and

Arbitration (CMA). The dispute was heard and determined in *Exparte* following the failure of the Applicant to appear before the Commission. The Commission delivered *Exparte* Award on 23rd January, 2018 in favour of the Respondent. Aggrieved by the Commission's *Exparte* Award, the Applicant filed before the Commission an application to set aside the *Exparte* Award on 28th January, 2018. The Commission delivered its ruling on 31st May, 2018, where the application was dismissed for want of merits. Dissatisfied by the Commission Ruling the Applicant filed the present revision application.

The Application is accompanied by Chamber Summons supported with the Affidavit of Raymond B. Balemwa, Principal Officer of the Applicant. The Applicant is praying for the following orders:-

1. That the Court to be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/R.1033/17, revise and setting it aside.
2. That, the Court be pleased to grant cost of this application.
3. That, the Court be pleased to make such any other orders as it may deem fit.

The grounds of revision which is contained in paragraph 7 of the Applicant's Affidavit is that the Applicant's non – appearance was neither due to inaction nor its negligence but rather it was a result of unanticipated circumstances.

When the matter came for hearing the Applicant was represented by Mr. William Mwankusye, Advocate, whereas the Respondent was represented by Mr. Hemed Omary, Personal Representative. The hearing of the application proceeded orally.

Mr. William Mwankusye, the Counsel for the Applicant submitted in support of the application that non - appearance of the Applicant herein in the dispute before Commission was not caused by lack of interest or negligence by the applicant but rather negligence of the Applicant's former Advocate namely Advocate Arbogast Sivonika who was handling the matter. The above named Advocate was trusted to represent the interest of the Applicant. In the case of **Preetam Kaur Mohan Singh Ajmani vs. Nagar Palika Parishad Pithaura**, his Lordship Shri Sinjay K. Agrawal referred to the case of **Rafiq and Another vs. Munshiral and Another**, (1981) 2 SCC 788, where the supreme Court of India held that:-

"The disturbing feature of the case is that under our present adversary legal system where parties generally appear through their Advocate, the obligation of parties is to select his advocate, brief him, pay the fees demanded by him and then trust the Advocate to do the rest of the things..... After engaging a lawyer, the party may remain supremely confident that the lawyer will look at his interest."

The Court of Appeal recently in the case of **Kambona Charles** vs. **Elizabeth Charles**, Civil Application No. 529/17 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), the Court referred to the case of **Zuberi Musa** vs. **Shinyanga Town Council**, Civil Application No. 3 of 2007, unreported, where it was held that:-

"Advocates are human and they are bound to make mistakes sometime in the cause of their duties. Whether such mistake amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an Advocate is grossly negligence and makes the same mistake several times, that is lack of diligence. But, if he makes only a minor lapse or oversight only once and makes a difference on next time that would not, in my view, amount to lack of diligence"

In this matter, the applicant should not pay for lack of inaction of his advocate while he has done everything in his power such as to engage an Advocate to protect his interest.

The Applicant argued that he has been fighting for his right to be heard as it was held in the case of **DPP Vs. Sabina Tesha and others (1992)** TLR at page 237, that denial of right to be heard in any proceedings vitiate

any proceedings. The entitlement to fair hearing including principle of right to be heard, but in the present case the principle was not adhered. This Court sitting in Dar Es Salaam in its Ruling in Revision No. 182 of 2019 between **Colosseum Hotel Spa vs. Issa Bakari**, held that the applicant shall not be punished for the error that was committed by his advocate. The same position was taken in the case of **Rosebay Elton Mwakakabuli Vs. Haruna Mohamed Kitelebu**, Miscellaneous Land Application No. 664 of 2015, High Court of Tanzania, Land Division at Dar es Salaam, (Unreported).

The Applicant Counsel submitted further that the non – appearance of the Applicant before the Commission was not caused by lack of interest or negligence but blunder of the Advocate who handled the case. It is a trite law that in exercise of its duty of adjudication, Court of law are required to give emphasis on substantive justice than relying on legal technicalities. In the case of **Kastan Mining PLC vs. Devota Salum**, Miscellaneous Labour Application No. 302 of 2019, High Court Labour Division, at Dar es Salaam, (Unreported), the Court emphasized on the principle. The Applicant is of the view that affording him with the right to be heard t will cause no injustice to the Respondent. The Applicant prayed for the application to be allowed and the prayer be granted.

Mr. Hemed Omari, Personal Representative for the Respondent, rebutted the Applicant's submission. He submitted that the application to set aside *ex parte* award were made without any prayer. The Section 87(5) (b) of the Employment and Labour Relations Act, 2004, provides for the power of the Commission to sit and set aside its decision read together with rule 29(1) (2) (3) of GN No. 64 of 2007. Since the application was not properly before the Commission then the Commission rightly rejected the application. As the application was tainted with errors and mistakes the commission rightly dismissed the application for the reason that there was no sufficient reason for non - appearance before the Commission.

The application before the Commission stated clearly that the applicant was represented by stallion Attorney Chamber and not with the respective mentioned Advocate. Different Advocates from the chamber know the dispute and were in position to appear before the Commission. The applicant have failed to show the good reason for non-appearance before the Commission despite the fact that the applicant decided not to appear after being served with summons to appear which is part of the record. The Respondent prayed for the application to be dismissed for want of merits.

In rejoinder, it was submitted by the Counsel for the Respondent that reason for non-appearance of the counsel for the applicant before the

commission is not known. The Applicant retaliated his prayer in the submission in chief.

After hearing submission from both parties and the records available, the issue for determination in this application is whether the Applicant have sufficient cause for the Court to grant his application to set aside the Commission *exparte* award.

It is a trite law that an application to set aside an *ex parte* award is granted where the applicant constitute sufficient ground for the Commission or the Court to set aside the *ex parte* award. This Court in the case of **Mbeki Teachers Sacco's vs. Zahra Justas Mango**, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (Unreported), held that sufficient reason is pre – condition for Court to set aside *experte* order.

The Applicant ground for revision is that non - appearance of the Applicant in the dispute before Commission was caused by negligence of the Applicant's former Advocate who was handling the matter and that the Applicant is interested with the case. In opposition, the Respondent submitted the Arbitrator rightly dismissed the application to set aside *exparte* Award since there was no sufficient reasons provided by the Applicant for his failure to appear before the Commission on the hearing date.

The evidence in record shows after the Commission delivered the Exparte Award the Applicant filed an application to set aside the Exparte Award on 21st January, 2018, following the failure of the Applicant to appear before the Commission. The Applicant filed the Application to set aside the Exparte CMA Award on 28th January, 2018, which was dismissed for the want of merits. The Mediator reason for dismissing the application is that the Applicant failed to provide sufficient reason for his non-appearance on 22nd November, 2017, (the hearing date), despite being aware of it. The Applicant's reason was that the Applicant Counsel before the Commission, Advocate Arbogast Sionike, resigned from employment. The Mediator was of the view that the Stallion Attorney's Chamber which was engaged by the Applicant was supposed to inform the Commission of the incident and pray for adjournment of the matter. The Mediator held that the reason adduced by the Applicant have no merits.

I'm of the same opinion with the Arbitrator that the Applicant's reason for non-appearance on the hearing dates has no merits. The Applicant was afforded right of hearing but failed to use it. Thus, it is not true that the right was denied. In this application the applicant blamed the former Advocate for failure to appear on the hearing date. The Applicant submitted before this

Court that the reason for non-appearance is not known hence he should not be punished for the mistake of his former Advocate. However, the CMA ruling shows the opposite that the Applicant's reason for non-appearance on the hearing date was caused by the act of former Advocate to resign. Therefore, the Applicant is relying on the different reason for non-appearance from the one argued before the Commission hence there is contradiction as to the Applicant reason for non - appearance. I'm of the view that this was done for the purpose of concealing the negligence on his party. The case of **Kambona Charles vs. Elizabeth Charles, (Supra)**, cited by the Applicant is distinguished as in the circumstances of the present case the Applicant was negligent and failed to provide sufficient reasons for the Commission to set aside its *exparte* award.

The Commission's *Exparte* Award is set aside if the Court or Commission is satisfied that the party was prevented from appearing by sufficient cause. This Court in the case **M/S Jaffer Academy vs. Hhawu Migire**, Revision No. 71 of 2010, High Court Labour Division, at Arusha, (Unreported), held that:

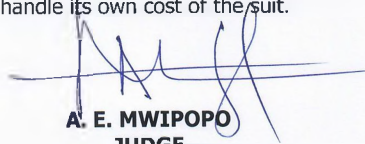
"When a party aggrieved by an ex parte award on ground that the order to proceed ex parte was wrongly made, the proper procedure open to the aggrieved party is to apply to the CMA, explaining reasons for the failure to appear before it, and

seeking its order to set aside the ex parte award. If the Commission is satisfied that such a party had a good ground for failing to attend hearing, it will reverse the ex parte order so made and allow the matter to proceed interparty”.

Also, in the case of Mbeki **Teachers Sacco’s vs. Zahra Justas Mango**, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (Unreported), this Court held that sufficient reason is pre – condition for Court to set aside experte order.

In the preset application it is clear that the Applicant failed to provide sufficient reason for failure to appear on the hearing date and also there was contradiction on the reasons adduced for non-appearance before the Commission and before this Court.

Therefore, I find that the Applicant have failed to provide sufficient reasons for the Court to set aside the Commission’s *Exparte* Award. Consequently, the application is hereby dismissed and the CMA award is upheld. Each party to handle its own cost of the suit.



A. E. MWIPOPO
JUDGE
13/11/2020