

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

**REVISION NO. 410 OF 2019**

**BETWEEN**

**CHRYSANTH P. BUSHOKE.....APPLICANT**

**VERSUS**

**NARCO LTD.....RESPONDENT**

**JUDGEMENT**

Date of last Order: 14/09/2020

Date of Ruling: 23/10/2020

**Aboud, J.**

The present application emanates from the Commission for Mediation and Arbitration (herein CMA) where the applicant herein, **CHRYSANTH P. BUSHOKE** filed his complaint claiming for unfair termination. At the CMA the matter was dismissed at arbitration stage after the applicant failed to enter appearance. The applicant unsuccessful made an application at the CMA to set aside the dismissal order. Being aggrieved by the CMA's refusal to set aside the dismissal order the applicant filed the present application calling upon this court to grant for the following orders:-

- a) This Honourable Court be pleased to call for records, revise and set aside the CMA ruling issued at Dar es Salaam on 29/03/2019 by the in Miscellaneous Application No. CMA/DSM/ILA/R.709/13/917 by Hon. Mbena, M.S Arbitrator.
- b) Consequent to the grant of relief no 1 above, this Honourable Court be pleased to grant an order for restoring the Applicant's Labour Dispute No. CMA/DSM/ILA/R.709/2013 so it proceeds to be heard interparties at the CMA.
- c) Any other relief this Honourable Court deems fit and just to grant.

By leave of the Court the matter was argued by way of written submission. Both parties were represented by Learned Counsel's. Ms. Flora Jacob from Prime Attorneys was for the applicant while Mr. Mafuru M. Mafuru from Mafuru and Co. Advocates appeared for the respondent.

Arguing in support of the application Ms. Flora Jacob submitted that, it is clear under paragraph 14 (v) of the supporting affidavit that the dispute at the CMA was dismissed for non appearance while the

case was proceeding with hearing on the respondent's case. The Learned counsel was of the view that the appropriate procedure was for the Arbitrator to proceed with hearing of the respondent's case ex-parte and decide whether termination of the applicant's employment was fair or not as the employer is obliged to prove the same as provided under section 37 (2) of the Employment and Labour Relations Act, [CAP 366 RE 2019], (herein referred as the Act).

Ms. Flora Jacob went on to argue that, there was serious irregularity committed by the Hon. Arbitrator in making the above referred decision which illegally was of sufficient importance to constitute sufficient reasons for setting aside dismissal order. To strengthen her submission she cited the Court of Appeal case of **Etiennes Hotel Vs. National Housing Corporation**, Civ. Ref. No. 32 of 2005 and the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia** (1992) TLR 185.

Ms. Flora Jacob for the applicant further submitted that, there were sufficient cause for non-appearance of the applicant and his advocate at the CMA as they are reflected at paragraph 4 to 9 and 14

to 16 of the annexed affidavit (annexture PA-2). She stated that, firstly the applicant's Advocate one Emmanuel Safari was attending criminal session at Moshi in Criminal session case No. 12 of 2014 with the respondent and the CMA were dully informed through summons. She added that the said Advocate fell sick after encountering an accident in which his right arm was broken and as a result was treated at Kisarawe District Hospital and discharged for home rest until 15/04/2018 when he was required to open POP as per annexture PA-2.

The Learned Counsel also submitted that, the applicant himself was not in Dar es Salaam so he could not attend his case in absence of his Advocate. She said during his absence the applicant's Advocate requested the respondent's Advocate to hold his brief unfortunately he did not update him regardless of several and repeated follow ups through phone. She strongly submitted that all those reasons were sufficient for the Arbitrator to set aside its dismissal order. To cement her submission she cited the case of **National Bank of Commerce Limited Vs. Ahmed Freight Limited & others**, Misc. Commercial Case No. 230 of 2016 where it was held that:-

"...in determining whether there is sufficient cause certain factors has to be taken into account, including why the applicant absented himself; whether or not the absence was deliberate; whether the application has been brought promptly; the conduct of the applicant i.e. lack of diligence on the part of the applicant; and whether the successful party would be prejudiced by the judgment being set aside...".

Ms. Flora Jacob for the applicant further submitted that the conduct of the applicant/his advocate prior to the dismissal order was good. She argued that it is our legal jurisprudence that the applicant's conduct before the alleged non-appearance must be taken into account in an application for setting aside dismissal order. To lighten her argument she cited the case of **Sadru Mungaiji vs. Abdul Aziz Llani**, Misc. Comm. Appl. No. 126 of 2016 HC, Mza.

The Learned Counsel went on to submit that, the Honourable Arbitrator misdirected herself by failing to consider the applicant's allegation against the respondent's advocate, Mafuru Mafuru for

failure to inform the applicant's advocate on the scheduled date, to warn him on his absence. She strongly submitted that the respondent's advocate did not act with courtesy towards the applicant's advocate. She therefore urged the Court to allow the application.

Responding to the application Mr. Mafuru Mafuru submitted that, the CMA record show that the reasons for non appearance of the applicant's advocate was due to the fact that he was attending criminal session at Moshi. The Learned Counsel stated that the court session was not scheduled at all times when the referral was being scheduled for hearing.

As to the reason of sickness he submitted that, such reason did not hold water at the CMA warranting the grant of application for restoration. He argued that the applicant would have appeared personally upon being informed by his advocate about his sickness but he did not do so. He further submitted that advocate Emmanuel Safari is not the sole practitioner in the chamber of Prime Attorneys, so another advocate would have prosecuted the matter.

Mr. Mafuru Mafuru went on to submit that, the reason that after termination of his employment the applicant shifted from Dar es Salaam to Arusha was not a good and sufficient cause for the applicant's failure to prosecute his case against the respondent. He added that, the applicant would have been travelling to attend his case on every date when it was scheduled. He said the fact that the applicant engaged an advocate to prosecute his case did not waive his duties and responsibility as far as his case was concerned.

The Learned Counsel further submitted that, the cited case of **Sadru Mangaji** (supra) is irrelevant to the present application because the applicant's conduct in the present application was not good because he never appeared personally since the dispute was referred at the CMA. He argued that, the Arbitrator was right to consider the allegation that, Advocate Mafuru was not duty bound to act for his fellow advocate so far as his absence in the proceedings were concerned.

Regarding the submission that the CMA ruling is tainted with material irregularities he submitted that, the complaint was dismissed for non appearance of the referring party as per the provision of Rule 28 (1) (a) of the Labour Institutions (Mediation and Arbitration

Guidelines) Rules, GN 67 of 2004. The Learned Counsel contended that the Arbitrator was right to dismiss the complaint since the omission of the applicant to attend his case was an indication that he was no longer interested with the claims against his former employer.

He further submitted that, it is not in dispute that section 37 (2) of the Act obliges the respondent to prove about fairness of the termination of employment, however the provision has been construed improperly by the applicant's Counsel. He argued that, the respondent had no obligation to continue proving his case while in fact the claiming party was no longer interested with the matter. He therefore prayed for the application to be dismissed.

Having gone through the submissions from parties, records of the case and relevant labour laws and practice I find the issues for determination before the Court are; whether the Arbitrator was right to dismiss the applicant's complaint and whether the applicant has adduced sufficient reasons warranting restoration of his complaint at the CMA.

On the first issue as to whether the Arbitrator was right to dismiss the applicant's complaint. The applicant's Counsel submitted



that the Arbitrator was wrong to dismiss the application for want of prosecution. The Learned Counsel argued that so far as it is the duty of the employer to prove about fairness of termination then the Arbitrator should have proceeded with the respondent's hearing and determines the application but not to dismiss it as he did. The Arbitrator's power to proceed or dismiss the complaint on non appearance of parties is derived from Rule 28 (1) of GN 67 of 2007 as rightly cited by the respondent's counsel. The relevant provision is to the effect that:-

"Rule 28 (1) - When a party fails to attend an Arbitration hearing, an Arbitrator may do the following:-

(a) **where a party who referred the dispute to the Commission fails to attend the hearing, the Arbitrator may dismiss the matter** or postpone the hearing.

(b) where a party against whom relief is sought fails to attend, the Arbitrator may proceed in the absence of that party or postpone the hearing."

[Emphasis is mine].

From the provision above the Arbitrator is empowered to dismiss the application if the referring party fails to attend Arbitration hearing. In the present application the applicant was the referring party at the CMA and he did not attend arbitration proceeding. Under such circumstance it is my view that, the Arbitrator was right to dismiss the complaint. The applicant's counsel submission that the Arbitrator should have proceeded to determine the complaint is baseless and not backed up with any provision of the law.

As to the second issue of whether the applicant has adduced sufficient reasons warranting restoration of his complaint at the CMA, It has been argued in a number of cases that for the Court to order restoration of an application which was dismissed for non appearance of a party sufficient reasons must be adduced for failure to attend hearing on the scheduled date. This is also the position in the case of **National Bank of Commerce Limited** (supra) of which the factors listed in that case will be considered in the present decision. In the present application the applicant's reasons for failure to attend hearing were due to three main reasons namely, his advocate was

attending criminal sessions, his advocate was sick and that the applicant was not in Dar es Salaam.

The record reveals that, at the CMA the matter was scheduled for hearing on 22/11/2017 where the respondent's Advocate, Mafuru appeared and hold brief for the applicant's advocate and the matter was adjourned to 24/01/2018. Again on 24/01/2018 neither the applicant nor his Advocate appeared at the CMA. Thereafter the matter was adjourned to 15/02/2018 where again neither the applicant nor his advocate entered appearance. The matter was further adjourned to 12/03/2018 where only the respondent's advocate appeared. Again the matter was adjourned to 26/03/2018 where the applicant and his advocate did not enter appearance. Thereafter the matter was lastly adjourned to 03/04/2018 where the applicant and his advocate did not enter appearance and the matter was dismissed for want of prosecution.

Under such circumstances it is my view that the applicant and his advocate acted negligently in pursuing this matter at the CMA as rightly submitted by the respondent's Counsel. As the record reveals the applicant and his Advocate did not enter appearance from

November 2017 to April 2018 when the matter was dismissed for want of prosecution.

I find it inappropriate for the applicant's Advocate to shift all the blame for their failure to enter appearance to the respondent's advocate. If at all the applicant's advocate made effort to know the status of their case from the respondent's advocate unsuccessful as a diligent person he would have gone personally at the CMA to peruse the case file in view of knowing the status of their case but not to sit reluctantly at home waiting for the respondent's advocate update. The applicant's submission that the Arbitrator misdirected herself for failure to consider his allegation against his fellow advocate is baseless. As rightly held by the Arbitrator the CMA is not the proper forum to deal with the conduct of advocates, therefore the applicant's advocate was supposed to institute his claims in a proper forum.

Furthermore it is on record the applicant was represented by a firm which had a number of employees, thus they should have sent one of their employees to make follow up of the case apart from the advocate who was assigned to prosecute the present application. Moreover the applicant himself would have made follow up but he did not do so, he claimed to have been out of Dar es Salaam without

producing any evidence to prove that fact. I fully agree with the respondent's counsel submission that the fact that the applicant engaged an advocate to prosecute his case did not waive his duties and responsibility as far as his case was concerned.

I have noted the applicant's reason that his advocate had a criminal session, however such reason would have merit if the said Advocate did not enter appearance only for the days in which he was attending criminal session which is not the case in the matter at hand. As per annexure PA-1 the alleged criminal session was held from 16 October to 17 November, 2017 of which the matter at the CMA was not scheduled during the session period, thus the reason of attending criminal session cannot stand. Furthermore, the alleged criminal session was scheduled on 05/02/2018 the date in which the CMA did not schedule the matter at hand. Therefore, had it been the applicant's advocate acted diligently he would have entered appearance as scheduled regardless the fact that he had been attending criminal session in Moshi, Rombo and Same in different date.

I will not pretend that I did not see a picture of the applicant's advocate showing that he was sick and had a Plaster of Palace (POP)

in his hand as reflected at "annexture PA-3", however I do not consider the POP as sufficient reason which prevented him from entering appearance. As indicated in the relevant annexture the POP was fixed to him on 05/03/2018 and it was directed to be removed on 15/04/2018 the days in which the matter was not scheduled at the CMA. I am surprised that the POP only prevented him from appearing at the CMA but he managed to attend the criminal session at Same and Rombo as evidenced by annexture PA-4.

On the basis of the foregoing discussion it is my view that the applicant has failed to adduce sufficient reasons for failure to attend arbitration hearing which resulted to dismissal of the complaint.

In the result I find the present application fails for want of merit. Thus, the Arbitrator's ruling dated 29/03/2019 is hereby upheld.

It is so ordered.



I.D. Aboud

**JUDGE**

23/10/2020