

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

REVISION NO. 365 OF 2019

BETWEEN

CASH SALE STORES LIMITED..... APPLICANT

VERSUS

DAMAS NJOWI & ANOTHER RESPONDENTS

JUDGMENT

Date of Last Order: 24/03/2020

Date of Judgment: 08/05/2020

S.A.N. Wambura, J.

The applicant **CASH SALE STORES LTD** has filed the present application seeking to revise the ruling of the Commission for Mediation and Arbitration [herein to be referred to as CMA] which was delivered on 28th February, 2019 on the following grounds:-

- (1) That the Honorable Court be pleased to revise, quash and set aside the Ex parte Award of the Labour Dispute No. CMA/DSM/ILA/R.8722017 delivered by Hon. KATTO, J. on 9th September, 2018 and ruling delivered on 28th February, 2019.*

(2) Any other relief this Honourable Court deems fit and proper to grant.

The application was supported by affidavit of Lameck Rukanga Principal Officer of the applicant.

Mr. Hemedi Omary Kimwaga the Personal Representative of the respondents filed a counter affidavit challenging the application.

At the hearing of the application the applicant was represented by Mr. Daniel Kalasha Personal Representative whereas Mr. Hemedi Omary appeared for the respondents.

Arguing in support of the application Mr. Kalasha prayed to adopt the affidavit of one Lameck Rukanga to form part of his submissions.

He also prayed to abandon Item 4:3 of the legal issues and remain with only two grounds in his submissions. He submitted that:-

- (i). According to CMA's record on 03/08/2017 the applicants were given letters to show cause on 11/08/2017. The respondents attended the disciplinary hearing. Abdul Ibrahim is the one who attended the hearing which was conducted on 16/08/2017. Before the applicant issued the outcome of the same, the

respondents filed CMA Form No. 1 on 17/08/2017 arguing they had been terminated.

He further argued that it was wrong for CMA to proceed with the hearing of the matter as the applicant had not issued a decision. Since the matter was premature CMA was wrong in proceeding with the Ex parte hearing.

- (ii). The Arbitrator erred to proceed with the hearing of the matter ex parte while a preliminary objection had been raised. He further argued that the preliminary objection was filed on 02/05/2018. Having received a notice of preliminary objection the same ought to be heard or withdrawn by the person who filed it.

Mr. Kalasha submitted that it was wrong to proceed with the ex parte hearing while there was a preliminary objection which was filed before CMA, the same was raised in the application to set aside the ex parte award. In the ruling delivered on 28/02/2019 at Page 7 paragraph 3 and 4 of CMA's award the respondent conceded that a preliminary objection had been filed but was not heard.

To cement his argument he referred this Court to the case of **Benjamin Pima Sota Vs. Mrs. Esther Maneno**, Civil Appeal No. 84 of 2010 DSM, where Court of Appeal issued a directive on such issues but CMA did not abide to it.

They thus prayed for CMA's Ex parte award and it's ruling to be set aside as the award was premature.

In reply, Mr. Omari prayed to adopt the affidavit of the respondents to form part of his submissions. He argued that:-

- (i) As for the hearing of the matter while there was a pending preliminary objection he submitted that Rule 23(9) of GN 67/2007 allows the Arbitrator to proceed with the hearing as it is also provided for in the Section 14(1) (b) of LIA, 2007. He stated that the ruling was issued after the applicant failed to enter appearance at CMA as scheduled. No reason was adduced for failure to enter appearance on 06/08/2018.

Mr. Omari argued that, since the applicant was summoned to attend the hearing under BRN and no reason was adduced for not entering appearance as required under Section 20(3) (a) of LIA 2007, the Hon. Arbitrator was right to hear the matter ex

parte. He further argued that the decision on the preliminary objection was also ruled upon in the same.

- (ii) As for hearing of the matter which was premature, he argued that since there is no dispute that the disciplinary hearing was conducted, it was the applicant's duty to prove the same.

They prayed for the application to be dismissed accordingly and CMA's award be upheld.

In rejoinder, Mr. Kalasha reiterated his submission in chief. He insisted on the issue of preliminary objection that no ruling was issued in respect of preliminary objection. As for the issue of non- appearance, he stated that on 30th July, 2018 all parties were served. They entered appearance on 08th August, 2018. On 06th August, 2018 is when the ex parte hearing was conducted while the matter was scheduled to be heard on 22nd of August 2018. That change of the hearing date made the applicant fail to know when he was actually supposed to appear. Even the summons did not state that hearing was to be on a Crash Program they were not notified so.

It is an established principle in law that good reasons have to be adduced for the Arbitrator to postpone the hearing. This is per Rule 29(1) of the Labour Institution (Mediation and Arbitration Guidelines) GN No. 67 of 2007 read together with Section 20(3) of LIA, 2007. Rule 29(1) provides as herein quoted:-

"Rule 29(1)-An Arbitrator shall postpone a hearing in the following circumstances;-

*a)If there is a **good reason** to do so; and"*

Section 20(3)(a) of the LIA, 2007 provides as follows;-

"Section 20(3) Any person, who does or omits to do any of the acts provided for in paragraphs (a) to (i) of this subsection, commit contempt of Commission:

*a) If, after having been summoned to appear before a Mediator or Arbitrator, the person, **without good cause** fails to appear the place, date and time stated in the summons;"*

[Emphasis is mine].

Where a party fails to enter appearance on the date set for hearing, the arbitrator has to proceed exparte and the exparte award may be set aside upon good cause adduced by the applicant.

Rule 28(b) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. 67 provides:-

"When a party fails to attend an arbitration hearing, an arbitrator may do the following-

(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."

An application to set aside the ex parte award, has to be made in compliance with Rule 30 (1) of the Labour Institutions (Mediation and Arbitration) GN 64. It states that:-

"An application by a party to correct or set aside an arbitration award in terms of Section 90 of the Employment and Labour Relations Act, shall be made within fourteen days from the date on which the applicant became aware of the arbitration award."

In the case of **M/S Jaffer Academy v Hawu Migire**, Rev. No. 71 of 2010, It was held that:-

"When a party is 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 failure to appear before it and seeking for an order to set aside ex parte award.***"

Again in the case of **Mbeki Teachers Saccoss V Zahra Justas Mango**, Labour Revision No. 164/2010 HC Mbeya Sub-Registry (unreported) It was held that:-

"...Sufficient reasons are pre conditions for court to set aside its ex parte order"

From the above legal position the Arbitrator has a duty to determine whether there was a good reason or cause which made the applicant fail to appear before CMA.

Did the applicant adduce sufficient reasons to set aside Ex parte award?

The applicant in this matter filed a Preliminary Objection. There were also crash program issues which are not disputed by the respondent. That the crash program confused them on the hearing date as the application was not under crash program. It is also on record (at page 7 of CMA's proceeding) that the matter was adjourned to 22nd August, 2018 for

hearing. Yet hearing was conducted on 06th August, 2018. There is no evidence on record indicating that the applicant had a tendency of not appearing before CMA without any notification.

Therefore the decision of the arbitrator to proceed with the matter ex parte without adducing reasons on record was contrary to the Labour practices. This was explained in the case of **MAC Contractors Ltd v. Nicodemus Kilwax**, Revision No. 17/2008 where it was held that:-

"It is vital that the reason for a decision to proceed ex parte must be made part of the record".

In this matter this was not done by the Hon. Arbitrator.

However let's consider that the decision of the Arbitrator to entertain the matter ex parte on 06th August, 2018 was right on the ground that he was not aware of the reason or cause for non-attendance.

In my view it was not proper for the Arbitrator in his ruling to disregard the reasons or causes adduced by the applicant such as; confusion on the hearing dates and crash program, despite of the pending preliminary objection raised so as to observe the right to be heard as the principle of natural justice. In the case of **SAMSON NGW'ALIDA VS. THE COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY**, CIVIL APPEAL

NO. 86 OF 2008 at page 13, it was held that it was equitable for both parties to be given an opportunity to be heard as the principles of natural justice require.

I believe it is in the interest of justice that since all parties are now available then hearing of the preliminary objection ought to proceed inter-parties at CMA before another arbitrator.

I allow this application and set aside the ex parte award. The record to be remitted back to CMA for hearing inter parties before another arbitrator.

S.A.N. Wambura
JUDGE
08/05/2020

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DAMAS NJOWI & ANOTHER RESPONDENTS

Date: 08/05/2020

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

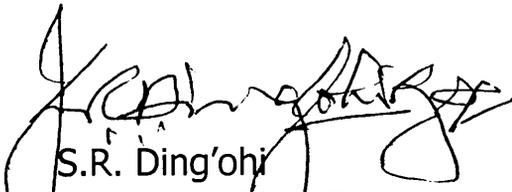
Applicant: }
For Applicant: } Absent

Respondents:

For Respondents: Mr. Hemedi Omari Personal Representative

CC: Lwiza

COURT: Judgment delivered this 08th day of May, 2020.


S.R. Ding'ohi
DEPUTY REGISTRAR
08/05/2020