

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

REVISION APPLICATION NO.296 OF 2020

BETWEEN

DONGXING INTERNATIONAL REAL ESTATE LIMITED APPLICANT

AND

EMMANUEL T. AWINO..... RESPONDENT

JUDGMENT

Date of last order:15/9/2021

Date of Ruling:26/11/2021

B.E.K. Mganga, J

On 23rd September 2016 applicant employed the respondent as security guard. On 25th April 2019 applicant terminated employment of the respondent. Being aggrieved with termination, on 8th May 2019, respondent referred Labour dispute No. CMA/DSM/KIN/34/2019 to the Commission for Mediation and Arbitration hereinafter referred to as CMA claiming to be paid TZS 10,000,000/= being one-month salary in lieu of notice, unpaid leave, unpaid salary and twelve months salary compensation. On 2nd August 2019, Abdallah, M, arbitrator issued an

exparte award and ordered the applicant to pay the respondent a total sum of TZS 15,312,709/=.

On 27th July 2020 applicant filed this application seeking to revise the said exparte award. The Notice of Application is supported by an affidavit sworn by Paul Makang'a, counsel for the applicant. In the said affidavit, the deponent deponed that applicant became aware of existence of the said exparte award on 30th June 2020 at the time Tambaza Auction Mart Court broker served the applicant with warrant of attachment issued in execution application No. 734 of 2019 that was filed by the respondents. That after being served with the exparte award, applicant went to CMA to peruse CMA record and found that unknown person made application to set aside the said exparte award, but the application was dismissed. It was deponed that the said application to set aside an exparte award was made by the respondent who forged the signature of Alexander Bange, the principal officer of the applicant.

On 14th September 2020, respondent filed a notice of opposition together with a counter affidavit resisting the application. On 18th

September 2021 the respondent filed a notice of preliminary objection that the application is time barred.

When the matter was called for hearing of the preliminary objection on 15th September 2020, Mr. Stephen Minde, the personal representative for the respondent appeared and argued for and on behalf of the respondent. On the other hand, Mr. Athanas Wigan advocate appeared and argued for and on behalf of the applicant. Having heard submissions from both sides, I overruled the preliminary objection and reserved the reasons promising to deliver the same in the judgment as I hereby do.

Mr. Minde submitted that an ex-parte award was issued on 2nd August 2020 but the applicant has filed this application on 27th July 2020 while out of time. He submitted further that, applicant filed application No. CMA/DSM/KIN/341/2019 that was dismissed by CMA on 18th October 2019. He went on that, if applicant was aggrieved by the decision in the later application, she was supposed to file revision application within 42 days that ended in November 2019. He concluded by praying this application be dismissed for being time barred.

Mr. Wigan, counsel for the applicant submitted that the application was filed within time as applicant became aware of existence of the exparte award on 30th June 2020, the date the applicant received the two awards after being served with warrant of attachment and decided to go at CMA to conduct a perusal of the CMA record. Counsel submitted that there is no proof that applicant received summons or that applicant filed application to set aside the ex-parte award. He went on that, applicant noted that one Alex Bange who is not an employee of the applicant made application to set aside the said ex-parte award. counsel was of the view that, time started to run against the applicant from the date she made perusal and was issued with the awards.

In rejoinder, Mr. Minde, submitted that the application to set aside exparte award was made by Alex Bange the Human resources officer of the applicant and that there was no forgery.

I have carefully studied the CMA file and find that on 23rd June 2020 CMA received a letter from Aymak Attorneys praying to peruse the file. In the said letter, an attorney for the applicant wrote:-

"... that we have recently noted with concern that the above-mentioned matter has been decided ex-parte the (sic) respondent as per the decision delivered on 2nd August 2019.

Your honour, considering the fact that we do not have any facts or documents relating the aforementioned application, we hereby request your esteemed office to permit us to peruse the aforementioned order in order to establish the facts of the application as well make copies of the relevant documents so that we can review the same and advise our client accordingly..."

As applicant alleged that she became aware of existence of the ex-parte award on 23rd June 2020, and that there were forgeries, I dismissed the preliminary objection to allow the parties to argue the main application. Counting from 23rd June 2020 to 27th July 2020 i.e., date of filing this application is 34 days well within time. If we count from 30th June 2020 the date it is alleged that applicant was served with warrant of attachment, the application was filed 30 days after.

The main issue is whether there is evidence to show that the award was procured through forgery. This issue depended on arguments of the parties in the main application on merit.

When arguing the main application, Mr. Wigan counsel for the applicant submitted that there was fraud and impersonation in procurement of the award. That, applicant did not receive summons and

that the person who was appearing allegedly from the office of the applicant, impersonated the name of the officer of the applicant. The said person who was impersonated is Alexander Bange. This led to ex parte award to be issued in favour of the respondents. Counsel went on that, on 23rd June 2020 applicant made file perusal at CMA and noted that there was impersonation. He argued that, applicant did not file an application at CMA to set aside an ex parte award as there was another CMA ruling dated 18th October 2019 dismissing an application filed by unknown person, to set aside the said ex parte award.

Counsel for applicant submitted that applicant wrote a letter to Regional Police Commander complaining against impersonation and forgery committed by the respondent. When asked by the court as whether there is evidence on the affidavit showing that the said letter was received by police, counsel conceded that there is no evidence to that effect. Counsel conceded further that, there is no name or stamp of Police Station at which the said letter was received and that the letter itself does not show the name of the author. He conceded further that, names of the author in the document intends to verify authenticity and originality of the document and that the author can be traced if anything happens. Counsel for applicant

also conceded that, he does not know investigation file number relating to the alleged impersonation and fraud committed in relation to this application.

Mr. Wigan, counsel for the applicant submitted that respondent forged the signature of Alexander Bange, the Human Resources and Administrator of the applicant and made application to set aside an exparte award and that; based on that forgery, CMA dismissed the application on 18th October 2019. He however conceded that, there is no affidavit of Alexander Bange stating that his signature was forged and that he (Alexander Bange) in no time, entered appearance at CMA in the dispute in question. Counsel conceded further that, in absence of the affidavit of the said Alexander Bange, the allegation of forgery of his signature cannot be proved. Counsel conceded further that, in absence of affidavit of the said Alexander Bange, what is contained in the CMA application to set aside the exparte ruling and the ruling itself cannot be proved that they were not stated by him.

Mr. Wigan, counsel for applicant submitted that Alexander Bange is in office of the applicant. He submitted that, there are three revisions pending before this Court all in which it is alleged that the

signature of Alexander Bange was forged. These revisions are No. 134/2021 that is before Hon. Rwizile, J, No. 319 of 2020 before Hon. Maghimbi, J and this one. All these relates to exparte award and that respondents are different. In all these revisions applications, respondents forged the signature of the said Alexander Bange and that applicant has reported to Police that there is forgery. Counsel for applicant conceded that, Alexander Bange was not asked to file an affidavit in this application and all others that are pending before other judges and failed. When asked by the court as to whether the report relating to forgery was reported to police by Paul Makang'a, an advocate for the applicant, who swore an affidavit in this application, counsel conceded that the said Paul Makang'a, did not report to police. When asked by the court as to whether, it was proper for Paul Makang'a, advocate to verify in the verification clause that the information, including that of forgery, impersonation and a report to Police thereof, is correct according to his knowledge. Counsel conceded further that it was not proper. With all these, counsel for applicant maintained that the application be granted, and the award be revised.

On his side, Steven Minde, the personal representative of the respondent argued that applicant has failed to advance good grounds.

Mr. Minde submitted that, there are no valid reasons for absence of the affidavit of Alexander Bange and that in absence of that affidavit, all what is stated in the affidavit in support of the application becomes hearsay. Mr. Minde went on that, applicant was supposed to challenge the ruling that dismissed application to set aside exparte award and not the exparte award as applicant has done. He submitted that if at all applicant believed that the said ruling was procured by fraud, she was supposed to file application for revision so that it can be revised. Mr. Minde concluded that the application to set aside the exparte award was made by the said Alexander Bange who appeared and argued the application at CMA and that there was not fraud whatsoever. He therefore prayed the application be dismissed.

I have passionately examined both the affidavit and counter affidavit filed in this application and submissions thereof and find that the application hinges on the claim of the alleged forgery of the signature of one Alexander Bange, the Human Resources and Administrator of the applicant. I agree with the submissions by Mr. Minde, the personal representative of the respondent, that applicant was supposed to make an application first at CMA to set aside the said ruling on ground that it was

obtained by fraud or challenge the said ruling at this court and not to challenge the award. Applicant was duty bound to file the affidavit of the said Alexander Bange at CMA and be ready for the said Alexander Bange to be cross examined by the respondent, but she did not. It is my view that, applicant has done so for obvious reason that she feared her trick to be unclothed. It is my view that, all allegations relating to fraud was made as an afterthought after applicant has failed to set aside the exparte award and became out of time, which is why, she waited to pray her last card based on warrant of attachment as the date she first became aware of existence of the exparte award. I should confess that applicant has been so treacherous in this application such that respondent who is being represented by a non-lawyer was somehow caught unaware. I should point here that, parties advocate inclusive, should try to their best to assist the court to arrive at just and fair decisions without manipulating facts and evidence to favour their side. I should also point that, in some occasions, the court may take strong measures against those who manipulate facts and or evidence in their favour, to defend its integrity and for the purposes of delivering fair and just decision to the people.

In the application at hand, the affidavit of the said Alexander Bange was not annexed to the affidavit in support of the application. In my view, and without choosing for the applicant who to file an affidavit, in the circumstances of this application, it was more appropriate for the said Alexander Bange to file an affidavit in support of the application than Mr. Paul Makang'a advocate or the later to file an affidavit as he did and annex it to the affidavit of the said Alexander Bange. Absence of the affidavit of the said Alexander Bange, has made all facts relating to fraud and or impersonation as hearsay. In fact, there are a plethora of decisions by the Court of Appeal that an affidavit which mentions another person is hearsay unless that other person swears as well. Some of these decisions are ***Sabena Technics Dar Limited v. Michael J. Luwunzu, Civil Application No. 451/18 of 2020***, CAT (unreported), ***Franconia Investments Ltd v. TIB Development Bank Ltd***, Civil Application No. 270/01 of 2020, ***Benedict Kimwaga v. Principal Secretary Ministry of Health***, Civil Application No. 31 of 200, ***NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd***, Civil Application No. 13 of 2002 (all unreported to mention but a few.

As pointed herein above, the central claim by the applicant is that the respondent committed fraud by impersonating and forging the signature of Alexander Bange to show that the said Alexander Bange made an application to set aside the exparte award and appeared at CMA. Counsel for applicant conceded that, in the application at hand, the affidavit of the said Alexander Bange was not filed or annexed to the affidavit of Paul Makang'a, advocate, who filed an affidavit in support of the application. It was alleged that, applicant reported to police complaining about the alleged fraud but counsel for applicant conceded, correctly in my view, that it is not known at which police station the report was made. He conceded further that, the author of the alleged report is not known and further that the said Alexander Bange did not report at police complaining that the respondent has committed impersonation and forged his signature. Counsel for the applicant conceded further, correctly in my view, that, the affidavit in support of the application was improperly verified by Paul Makang'a advocate in relation to matters relating to forgery of the signature of the said Alexander Bange and impersonation that were within his domain of his knowledge as the whole fraud did not relate to him. In

short, counsel conceded that all paragraphs relating to fraud, offended the rules on affidavit.

Once a paragraph has been found to have offended the rules relating to both an affidavit and a counter affidavit, it has to be struck out leaving the ones in compliance with the rules as it was held by the Court of Appeal in the case of ***Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi, Civil Application No. 80 of 2009*** (unreported). Guided by that decision of the Court of Appeal, I hereby expunge all paragraphs relating to fraud and impersonation from the affidavit of Paul Makang'a advocate in support of the application. After expunging these paragraphs, nothing material remains in support of the application to justify this court to revise the exparte award hence the application fails.

As pointed herein above, in CMA F1. Applicant was claiming to be paid TZS 10,000,000/= but in the exparte award he was awarded TZS 15,312,709/=. In short, the applicant was awarded more than what he pleaded in the CMA F.1. This, in my view, is wrong. Parties are bound by their own pleadings and are not supposed to depart therefrom as it was held by the Court of Appeal in the case of ***Astepro Investment Co. Ltd***

v. Jawinga Company Limited, Civil Appeal No. 8 of 2015, CAT
(unreported) that:-

"...proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings' ... the decision which was delivered by the learned trial Judge, did not arise from what had been averred by the parties in their pleadings."


The respondent was bound by his pleading and the arbitrator was supposed to determine the dispute based on those pleadings. Unfortunately, the arbitrator in awarding the respondent, went beyond the pleadings that were filed. I am very cautious with the use of inherent powers of the court but for the interest of justice I have to. In **Rustamali's case**, supra, the Court of Appeal held:-

"There is no doubt that this court has inherent powers under certain circumstances to put things right in the interest of justice, but that power should not be used to advance abuse of court process. In our view, it is an abuse of process to invoke the court's inherent powers to correct counsel's error or mistake, or condone a flagrant breach of the law or rules of the court."

In the application at hand, the respondent prayed to be awarded TZS 10,000,000/= as pleaded in CMA F.1 but he was awarded TZS 15,312,709/=. The amount awarded come from the arbitrator and not from

pleading filed by the respondent. Guided by the above Court of Appeal decision, I have to invoke inherent powers of the court and correct the error committed by an arbitrator who awarded the respondent more than what was claimed in the pleading. I believe that, in correcting that error, justice will not only smile, but cherish between the parties. I therefore, invoke revisionary power under section 94(1)(b)(i) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and revise the award to the extent that respondent shall be paid TZS 10,000,000/= claimed in the CMA F1 and not the amount awarded. The application is allowed only to that extent.

It is so ordered.


B.E.K. Mganga
JUDGE
26/11/2021

