IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 887 OF 2019

BETWEEN

SABENA TECHNICS DAR ES SALAAM LTD.....................APPLICANT

VERSUS

ALFRED KIRSCHSTEN..RESPONDENT

JUDGEMENT

Date of Last Order: 23/06/2021

Date of Judgement: 05/7/2021

A.Msafiri, J.

The Applicant filed the present application seeking revision of the proceedings and decision of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 19th November 2019 in Labour Dispute No. CMA/DSM/ILA/ 292/2019 by Hon. Mollel, B.L Mediator. The application was made under the provisions of Rules 24(1), 24 (2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), Rule 24(11),Rule 28(1)(a)(b)(c)(d)(e) ; Rule 50 and Rule 55(2) of the Labour Court Rules, GN No. 106 of 2007.

The application was supported by the affidavit of Benson Adam Mahuna, Advocate of the applicant and for the respondent, Juvenalis J.

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Ngowi, Advocate filed a counter affidavit challenging the application. Following is the brief background facts to the application. The respondent was employed by the applicant as an engineer from 2014. That on 11th January 2019, the respondent was served by the applicant, a notice of termination of employment and payment of the benefits. The respondent was aggrieved with the decision because he was not involved in any way and was not given a chance to be heard and did not agree with the reason for termination.

The respondent referred the matter to the CMA claiming unfair termination. On 4th June 2016, the matter was heard exparte before the CMA and the award was given in favour of the respondent and was delivered on 19th July 2019. Following an exparte award, the applicant was aggrieved and filed an application before CMA to set aside the said award on the ground that they were not served with summons to appear for mediation sessions.

The application was filed before CMA on 2nd September 2019, the hearing was on 4th October 2019 and the ruling was delivered on 19th November 2019 in which the Mediator dismissed the application on the reason that the applicant was well informed through the means of service

of summons. Not satisfied, the applicant has filed this application before this court praying for the court to revise and set aside the CMA decision and replace it with appropriate order.

When this application was placed before me for hearing, Mr. Benson Adam Mahuna, learned advocate appeared for the applicant. The respondent was represented by Mr. Luka Elingaya, Advocate. Submitting in support of the application, Mr. Benson Adam Mahuna prayed to submit on grounds pointed out in the affidavit and also prayed for the affidavit and reply to counter affidavit to form part of his submissions.

He started by submitting that, the respondent CMA file was filed at the CMA without proof of service to the other party. Section 86(2) of the Employment and Labour Relations Act, makes it mandatory for the party referring the dispute to the CMA to satisfy the Commission that the referral form has been served to the other party of the dispute. Furthermore, Rule 12 (2) of GN. No.64 of the Labour Institutions (Mediation And Arbitration) Rules of 2007 also require the proof of service to be attached to the referral form at the time the referral form was served to the Commission.

He pointed that, Rule 12(3) (supra) direct the CMA to refuse accepting the referral form if the written proof is not attached to the form.

In the counter affidavit by the respondent had pointed out that the service of CMA F1 was received to the other party by only being stamped and signed by unknown person. And Rule 7(1) (c) (i) of GN. No.64 of 2007 points out the requirements in case the document is served by hand, that is the document to;

i) Show the name of recipient

ii) Designation

iii) Place, time and date of service.

Mr Mahuna stated further that, a signature and stamp (seal of applicant) is seen in CMA F1, which the applicant denies the purported seal to be the seal of the applicant's company. The respondent tried to show that the referral form was served to the applicant when the matter came before CMA by attaching a post receipt dated 11th April 2019 while the CMA F1 was filed on 4th April 201. This shows that the CMA F1 was filed first then the proof of service was obtained few days later after filing CMA F1.

On the issue regarding the service of summons,Mr Mahuna submited that the first summons issued on 8th April 2019 was not served to the applicant. By court records it shows that the summons was served by

Sweetbert Eligidius to the applicant. The same summons which was served by Sweetbert was signed on the space provided for the server which directs us to the rule 7(1) (C) (ii) of G.N. No.64 of 2007 which provides that anyone who is serving summons, should confirm by a statement that the said summons was served and or left to the premises .

In the disputed summons, Sweetbert Eligidius only signed indicating his position and date of serving the summons without giving a confirmation on whether he had served the summons to the applicant or left the same in the premises.

Mr Mahuna stated that, when the matter was at the CMA, the respondent tried to serve the applicant by DHL (done on 6th September 2019) however at the time when the respondent was making the efforts to serve the applicant, the matter had already came to the end. The same summons were never received by the applicant. This is according to DHL Report (electrically generated). Also by that time, the applicant has stopped its operation since March 2019.

Arguing about the second summons which was issued by the CMA, Mr. Mahuna said the same was issued on 24th April 2019 and was never received by the applicant. This was because the summons were served to

the former employee of the applicant one Abdalla Misanya who is purported to have received the said summons on 29th April 2019. Mr Mahuna stated that Abdalla Misanya was not an employee of the applicant. Basing on exhibit SML5 in the Court record, the applicant and Misanya had agreed to end their employment contract effectively from 26th March 2019. However, the said summons was received by Abdalla Misanya on 29th April 2019, a month later. The said summons, shows a seal of the applicant which the applicant denies the same to be its seal. And the applicant had never directed one Abdalla Misanya to receive any document on its behalf following the agreement entered between them which effectively started on 26th March 2019.

Therefore, bearing the fact that, Abdallah Misanya was the former employee of the applicant, he was not entitled to receive any document on behalf of the applicant. Mr. Mahuna submitted further that, in the Ruling by the Mediator specifically on page 13, paragraph 2, she concluded that the summons and all other documents were served to the applicant, relying on her experience as pointed out that signatures and seal on the document is suffice to prove that the document is served to another part. While the laws provides more than that as per Rule (7) (1) of G.N.No. 64. of 2007.

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The Commission issued only two summons in a span of 13 days which made the Mediator to conclude that the other party (now the applicant) has refused to attend the Mediation sessions and proceed to hear the matter ex-parte. Mr. Mahuna argued that the Mediator erred in law by failure to observe the requirement provided in section 86(4) of the Act which states that the mediator shall resolve the dispute within 30 days of the referral or any longer period to which the parties agree in writing. Basing on that requirement, in the present matter, even the initial 30 days had not nearly seems to be approaching to the end when the matter was heard exparte. Furthermore, it was not on record that there was a Certificate of urgency moving the Commission to entertain the matter in such a shorter period of 13 days.

The counsel pointed that, even when the matter was heard exparte and the exparte award delivered, there was no any summons to summon the applicant to appear and attend the delivery of the exparte award. It should be noted that it is a well settled principle in our laws that the summons for delivery of exparte award should be served to the other party to the dispute even if the other party did not attend during the proceedings. The said principle was given in the case of **Cosmas Construction Company Ltd vs. Arrow Garments Ltd,** CAT, that was

under scored in the case of **Chausiku Athumani vs. Atuganile Mwaitege**, Civil Application No. 2017 of 2007 (HC).

Submitting on whether the Mediator exercised his powers legally and judicially, Mr Mahuna stated that it is on the record that the dispute was decided by Hon. Mediator relying on section 87(3) (b). He averred that the said section was wrongly interpreted by the Mediator and there by renders what was decided to be against the spirit of Mediation.

The counsel for the applicant cited Rule 3(1) of the Labour Institutions (Mediation & Arbitrator Guidelines) G.N No 67 of 2007, which gives the definition of the Mediation. By that definition, the only role the Mediator has during the Mediation is to assist parties to reach an amicable settlement. The Rule elaborates more on what the Mediator should decide when mediating the parties to the dispute.

He states further that even the Black's Law Dictionary 8th 6dn, defines the Mediation to mean the Method of non-binding dispute resolution involving a neutral parties to reach mutual agreeable solution. The word "decide" has been used in the section 87(3) (b) of the Act was meant to direct the Mediator to decide by issuing a Certificate stating whether the dispute has been resolved or not. The word "decide" is also meant to give chance to the mediator to decide the manner in which

mediation should be conducted. And this is per section 87(5) of the Act. It is also a fundamental principle of mediation that the parties ultimately choose whether to settle the dispute or not and the recommendations of the mediator shall not be binding unless the parties agrees. This is provided under Rule 3 of G.N. No. 67 of 2007.

He also cited the cases of **Agakhan Foundation vs. Rainad Chingumile, Tanga Cement vs. Leah Mchome** Labour Division of the High Court at Dar es Salaam, Revision No. 15 of 2009 and the case of **Best Com. Ltd vs. Jacob Mtalitinya** Civil case no. 160 of 2012.

He concluded by praying that the decision delivered by Hon. Mollel on 19th November 2019 be set aside and this Honorable Court to issue appropriate orders in the circumstances to allow the applicant to exercise his constitutional right of being heard before any action is taken against it.

In response, Mr. Luka Elingaya, counsel for respondent started his submission by characterizing the affidavit of the applicant. He pointed that the said affidavit was sworn by Benson Adam Mahuna who is the counsel for the applicant. Paragraph 3 of the Affidavit carries the title "statement of material facts". It indicates that the deponent was instructed by the client that the exparte award was delivered on 19th July 2019 and file perusal was conducted on 14th August 2019. That means the deponent became

aware of the facts of this case at the CMA after conducting the file perusal. Also going through the affidavit, it make reference to the summonses though the deponent did not indicate where they obtained the summons. And as per paragraph (iii), (iv), (v), the deponent claims that the applicant was not served.

On the contents of paragraph 3(i)-(iv) there are information which were obtained from the Court record. Going to the verification clause, the deponent has verified that all the stated information in the named paragraph are true to the best of his own knowledge. Mr Elingaya submitted that, these information could not be to the deponent's own knowledge who did not present the applicant during the CMA proceedings as the matter proceeded exparte and that is a contravention of Order XIX sub. Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019.

He referred this Court to the case of **Uganda vs. Commissioner Of Prisons Ex-parte Matovu**, (1966) EALR at page 520 in which it was held that the affidavit author should indicate the source of his/her knowledge. He submitted that, the contents of the affidavit in the mentioned paragraphs, makes the affidavit to be defective as the deponent did not indicate the source of information.

On the second issue as to whether the mediator exercised her powers judiciously, Mr Elingaya submitted that there is no dispute that the matters proceeded ex-parte after the applicant defaulted appearance. The principle is where there is no ambiguity in the wording of the statutes, it should be interpreted the way the words are. So, the argument that the mediator did not exercise her power judiciously is misconceived because the mediator exercise the same according to the law.

He cited Section 87(3), of the Act and Rule 14(2) of the G.N. No. 67 of 2007. He referred this court to the case of **Sabena Technics Dar Ltd vs. Michael Luwunzu**, Revision No. 807 of 2019 High Court Labour Division. Mr Elingaya responded on the issues which were submitted jointly by the applicant, where the applicant stated that the CMA F1 was not served to the applicant and further submitted that there was no proof of service attached to the CMA F1.He stated that the CMA F1 was served to the applicant on 4th April 2019 and the same was received and stamped by the applicant and it was signed. The copy of CMA F1 was attached to the counter affidavit as "KA1" and it was well referred by the mediator in the Ruling at page 7.

He stated further that, the CMA F1 was served at the applicant's place of business and was received and it was stamped by the applicant's Official Stamp which clearly indicates the address of the applicant. So, the CMA F1 was served at the applicant's registered office. He objected the applicant's statement that there was no proof attached. He stated that, the law does not state that the proof should be attached as a separate document but can be signed, or in the case of a Company, stamped by the Official Stamp of the Company as per Rule 7(I1)(c)(i) of G.N. 64 of 2007.

He also objected to the applicant submissions that he was not served with the summons but the summons was served to a person known as Abdalla Misanya who was claimed to be a former employee of the applicant. Mr Lengaya pointed to the court that this submission by the applicant has contradiction in such that the applicant is denying that he was served, and at the same breath he agree that he was served through a former employee. Mr. Elingaya maintained that the first summons was served to the applicant on 11th April 2019 through the applicant's registered mail. The copy of the summons was attached to the respondents counter affidavit at the CMA and it was tendered before the CMA as "KA2" with a proof of service and the delivery note. The second summons was served to the applicant on 29th April 2019 requiring the

applicant to appear for mediation hearing on 6th May 2019, the said summons was received by a person known Abdalla Misanya and was stamped by the Applicant's Official Stamp and signed. The argument that Abdalla Misanya was applicant's former employee cannot be used by the applicant to deny that he was not served. Abdallah Misanya stamped the summons with the applicant's Official Stamp. If he was not the applicant's employee, how did he get the latter's official stamp?

Counsel for the respondent pointed that, in his submission, the counsel for the applicant tried to deny the Official Stamp purported to be one of the applicant's Office. He argued that, that is an afterthought because that point was not raised during the Application to set aside the exparte award by the CMA. He argued further that the applicant tried to argue that he was not notified on the date of the exparte award. However, the applicant did not state on how they came to know the existence of the matter before CMA. So, he avers that the applicant was aware and decided to ignore appearing for Mediation and hearing of the matter. He maintained that the applicant was properly served and the Mediator exercised her powers judiciously and in accordance with the law.

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In conclusion, he prayed for the Court to uphold the CMA Ruling and dismiss the Application.

In rejoinder, Mr. Mahuna objected to preliminary objection which was raised by the counsel for the respondent by characterizing the applicant's affidavit. He stated that it is a well principle in our jurisdiction that it is only the preliminary objection regarding the jurisdiction which can be raised at any stage. So, raising an objection regarding the verification of an affidavit should be disregarded by this Court as there was no formal notice before this Court.

He reiterated his submissions in chief and prayed for this court to disregard the case of **Sabena Technics vs. Michael Luwunzu**(supra) which was referred by counsel for the respondent for the reason that it is tainted with a lot of irregularities and part of the submission in the said case which he attended as the Advocate for the applicant were not recorded thus rendering to all the irregularities and the same case is now being challenged in the Court of Appeal. He reiterated his prayers before this court.

Having heard and considered the submissions of both parties and carefully considered the evidence on record, I believe the issues to be considered by this Court are;

i) Whether the applicant has sufficient grounds to justify restoration of an exparte award;

ii) Whether the summons were properly served;

iii) Whether the Mediator exercised her powers judiciously and in accordance with the law.

Starting with the first issue as to whether the applicant has adduced sufficient reasons to set aside ex-parte award, it is a trite law that for a Court to invoke its powers to set aside the exparte award, the applicant has to adduce sufficient reasons for non appearance when the matter was scheduled for hearing.

This principle was observed in the case of **Barclays Bank (T) Ltd vs. Ayyam Matessa,** Revision No. 392 of 2015 (High Court Labour Division, Dar es salaam). In the matter at hand, the applicant's counsel contended before this Court that the applicant was neither duly served with a summons to appear on the first mediation sessions which was conducted on 24th April 2019, nor was they served with a second summons for second

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mediation which was on 6th May 2019 in which an order for ex-parte hearing was issued.

That the applicant became aware of the existence of the exparte award on 14th August 2019 after conducting a file perusal at the CMA in Dar es salaam and found that the ex-parte award was issued on 19th July 2019. After that the applicant preferred an application to set aside the said exparte award on 2nd September 2019 and the Ruling on the same was delivered on 19th November 2019.

From such analysis, it is apparent that the applicant made follow up on the matter one month after the delivery of exparte award and promptly filed an application to set aside the award. I have perused the record of the proceedings at the CMA and observed that two summons were issued by CMA to the applicant on the matter.

The first summons was served on 08th April 2019 and it was served by one Sweetbert Elgidius who signed on the part of server, the same summons was sent to the applicant by DHL on Tuesday, September 10, 2019 as per exhibit ST-4 in the record. However, I have observed that, this summons by DHL was sent almost two months after the delivery of exparte award.

The second summons was served on 29th April 2019. The summons does not show the name and signature of the person who served the summons and the date of service. However, the part of the person who received the summons was signed by one Abdallah Misanya, a Driver, on 29th April 2019. The summons was stamped by the official stamp of the applicant.

The summons which was served by Abdallah Misanya was subject of a serious debate between the parties, the applicant stating that by that time Abdallah Misanya was not the applicant's employee, so he was not authorized by the applicant to receive any document on their behalf. The applicant also denied the official stamp appearing on the disputed document that it did not belong to his Company.

However, going through the evidence on record, exhibit ST- 5 was a Deed of Settlement on Termination of employment between the applicant and Abdallah Misanya. The exhibit shows that the parties agreed to terminate their contract effectively from 26th March 2019.

The agreement was signed by the applicant on 20th April 2019 and the other part Abdallah Misanya signed on 02nd May 2019. These dates shows that Abdallah Misanya still has access to the applicant's office by 2nd May 2019.

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By this analysis, I find that the summons served and received on 29th April 2019 by one Abdallah Misanya was properly served as per Rule 7(1)(c)(i) of G.N. No. 64 of 2007. The applicant has failed to prove and establish that Abdallah Misanya was not authorised to receive any document on behalf of the applicant. The applicant also, has failed to prove to this Court, the claim that the official stamp appearing on the summons did not belong to their Company. The official stamp appearing in the summons, is similar to the one appearing in exhibit "ST- 5" the Deed of Settlement between applicant and Abdallah Misanya.

For this reason, I am inclined to agree with respondent counsel that this denial of official stamp was an afterthought because it was not raised during the CMA hearings. The law governing service of summons in this matter is Rule 6 of G.N No. 64 of 2007.

Rule 6(1) *A party shall serve a document to the other party:-*

a) By delivering or handling a copy of the document to,

i. The person concerned;

ii. A representative authorized in writing to accept service on behalf of the person;

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iii. *A person who appears to be at least 18 years old in charge of the person's place of residence, business or place of employment at the time;*

iv. *A person identified in sub-rule (2)*

In addition, Rule 7(1) of G.N. 64 of 2007 provides for standard of proof of service of documents. From this analysis above, the first issue is answered in affirmative that the applicant failed to give sufficient reasons for the non appearance at the CMA hearings when the matter was scheduled for mediation sessions, particularly the session of 06th May 2019.

I am satisfied that the summons which were served on 24th April 2019 and received on 29th April 2019 by Abdallah Misanya, stamped with official stamp of the applicant was properly served. I was inclined to find that the summons served on 08th April 2019 and signed by one Sweetbert Eligidius, on 10th April 2019 was not established to be properly served as per Rule 7(1)(c)(i) of G.N. 64 OF 2007. This is because the summons tendered as exhibit ST- 3 raised an ambiguity on to which summons was served to the applicant.

First there is a summons signed by unknown person who is a receiver on 12th April 2019 and this is stamped by Official Stamp of the applicant. In this summons, the part of a person who served it is not filled or signed (it

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is blank). At the same time, there is a summons which is filled on the place of server with a name Gilbert Eligidius who signed on 10th April, 2019. The place of receiver is blank.

It is from this blank summons where the applicant is vehemently claiming that this summon was not served to him. Both summons were for the hearing of mediation sessions scheduled to take place on 24th April 2019 and were tendered as exhibit STDL 1 and ST- 3. By this ambiguity, the Court has failed to detect which of these summons was properly served to the applicant, and the mediator did not address this fact of two summons before he reached his findings.

Therefore, the summons which was properly served to the applicant was the one issued on 24th April 2019, served to Abdallah Misanya and scheduled for hearing on 06th May 2019. Also I find that the applicant was properly served with CMA F-1, which was exhibit AK1.

The referral form was stamped by official stamp of the applicant and signed to be received on 04th April 2019 as stated. So, as stated earlier, the applicant failed to prove the denial of this official stamp. This is also a proof that the applicant was properly served and was aware of the mediations session since April 2019. This also answer in affirmative the issue on whether the applicant was properly served.

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Finally, I will ponder on the issue of whether the mediation exercised her power judiciously and in accordance with the law. In his submission, Mr. Mahuna, counsel for the applicant argued that, the mediator erred in law by failure to observe the requirements provided in section 86(4) of the Employment and Labour Relations Act, Cap 366 which provides that the Mediator shall resolve the dispute within 30 days of the referral or any longer period to which the parties agree in writing.

He submitted further that in this matter, only two summons were issued in a span of 13 days which made the Mediator to conclude that the other party (applicant) has refused to attend the Mediation sessions and proceed to hear the matter exparte. He avers that, even the initial 30 days had not nearly seems to be approaching to the end when the matter was heard exparte.

Basing on this argument by the applicant's counsel, I went through the CMA proceedings and observed that on 24th April 2019, when the matter came for first session, the applicant was absent, on 6th May 2019 the applicant was absent, on 27th May 2019 also the applicant did not enter appearance. In such circumstances, the Mediator was right to order that the matter proceed ex-parte.

I don't agree with the argument of the applicant's counsel that only two summons was issued in a span of 13 days. What was in issue here is the fact that the applicant was summoned and was aware of the matter before the CMA through the service of summons and CMA F1, and failed to enter appearance.

On the provisions of section 86(4) of the Act (supra), it is provided that;

Section 86(4);

> *'subject to the provisions of section 87, the Mediator shall resolve the dispute within 30 days of the referral* ***or any longer period to which the parties agree in writing'***
>
> (emphasis mine)

I find that the Mediator correctly observed the provisions of section 86(4) as quoted above. Furthermore, there is no evidence that there was any agreement by the parties to extend the matter further. I find that the Mediator was right and exercised her powers as conferred under section 87(3)(a),(b), and section (4) of G.N. 67 of 2007 as it was correctly observed in the case of **Barclays Bank (T) Ltd vs. Ayyam Matessa** (supra). So, this issue is also answered in affirmative.

Therefore, under the circumstances of this case, it is apparent that the applicant was duly served with CMA Form No.1 on 4th April 2019, and was again served with summons on 29th April 2019, so he was aware of the matter before CMA but chose not to enter appearance. Since the applicant did not adduce sufficient reasons for failure to attend Mediation, I find no justifiable reasons to fault with the Mediator's findings. In the result, I find the present application has no merit. As discussed above, the applicant failed to adduce sufficient reasons for the Court to set aside the CMA's proceedings, Ruling and exparte award.

Thus the application is hereby dismissed and the CMA's Proceedings, Ruling and exparte award is upheld. Right of appeal explained.

It is so ordered.

A. Msafiri
JUDGE
05/07/2021

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