IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 548 OF 2019

BETWEEN

LIVERCOT IMPEX (T) LTD ..... APPLICANT

VERSUS

HASSAN SAID BULUGU ..... 1ST RESPONDENT

MASOUD RASHID ..... 2ND RESPONDENT

MWANAISHA TEZURA ..... 3RD RESPONDENT

PASCHAL KIWENGE ..... 4TH RESPONDENT

SALMA MWANGU ..... 5TH RESPONDENT

JUDGEMENT

Date of Last Order: 24/05/2021

Date of Judgement: 16/07/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 17/05/2019 by Hon. Mikidadi, A Arbitrator in labour dispute No. CMA/DSM/TEM/503/2017. The application is made under section 91 (1) (a) (b), 91 (2) (b) and section 94 (1) (b) (i) 94 (3) (a) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1) 24 (2) (a) (b) (c) (d)

(e) (f) 24 (3) (a) (b) (c) (d) and 28 (1) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The application emanates from the following background; the respondents were employed by the applicant on different dates, positions and salary scale until 21/07/2017 when they were terminated from the employment. Aggrieved by the termination the respondents referred the matter at the CMA claiming for unfair termination. At the CMA the applicant herein did not enter appearance thus, the matter proceeded ex-parte where the respondents were awarded in favour.

The applicant alleges that, following the existence of the CMA award he filed an application for extension of time to set aside the ex-parte award and decree which was later dismissed for want of prosecution. The applicant unsuccessful made an application to set aside dismissal order, therefore, he filed the present application.

The matter was argued by way of written submission. The applicant was represented by Mr. Thomas Brash, Learned Counsel

from Rutabingwa & Co. Advocates while Mr. Edward Simkoko, Trade Union representative appeared for the respondent.

Arguing in support of the application the applicant's Counsel adopted the applicant's affidavit to form part of his submission. He submitted that, the respondents were employees of the applicant and their employment was lawfully and procedurally terminated through mutual agreements. It was submitted that, the termination of the employment was a result of total closure of the applicant's business following economic hardship which went to the extent of failure to meet operational costs and statutory obligations.

It was further submitted that, after all the process the applicant closed her business and her directors together with other Ugandan residents of went back to their homeland. It was added that, the closure of the office and business left no office bearer and there was communication between the parties thereto. It was stated that, the respondents instituted the application knowingly the applicant had no business or office in Tanzania. The Learned Counsel submitted that, there was no notice sent to the Directors in Uganda.

It was argued that, the respondents posted the notice for attachment of the building formally used by the applicant as office in effort to execute the decree of the award. It is also alleged that, there was mishandling of the case file moving from one Arbitrator to another without any explanation. The applicant's counsel stated that, it was their understanding that the application for extension of time was assigned to Hon. Kokusima who attended the case file once, thereafter the file was twice attended by Hon. Farida. However, on 11/12/2019 same file was dismissed by Hon. Mikidadi. It was submitted that, it is not clear how Hon. Mikidadi came in the picture and dismiss the matter which he was not assigned handled it.

It was further submitted that, when the Arbitrator was called upon to restore the application he did not give weight to the predicaments that faced the applicant's Counsel which was on medical grounds. It was argued that, the Arbitrator ought to have considered the fact that the applicant's Directors are base in Uganda and have never been served with any summons hence, the applicant was not afforded an opportunity to be heard. To cement his submission the Learned Counsel referred the Court of appeal case of

Juto Ally V. Lukas Komba and Alloyce Msafiri Musika, Civ. Appl. No. 484/17 of 2019 (unreported).

It was argued that, our court system has approved that, wherever there is any allegation for illegality and breach of natural justice the court has to grant leave to the parties to be heard. It was added that, the grounds stated constitutes breach of section 91 (2) (b) of the Act.

Moreover, it was submitted that, although this application is not for extension of time the need of justice and abiding to the command of law falls on the same conclusion which is for this court to take revisionary powers. It was argued that, the powers to revise and set aside the award is not limited to the decision dated 17/05/2019 but also goes to the proceedings prior to that decision. He therefore urged the court to grant the application.

Responding to the application the respondent's representative expressly agreed with the applicant's counsel that, Hon. Kokusima attended the file once and the same was also attended by Hon. Farida twice and, on 11/12/2019 the matter was dismissed by Hon.

Mikidadi who was assigned to handle the case file. It was argued that, since the ex-parte award was delivered by Ho. Mikidadi it is automatically the application to set aside the same was also assigned to her.

On the second ground it was submitted that, the applicant failed to prove validity of the reason because he did not bring any evidence on that aspect. It was strongly submitted that, the applicant acted negligently and he did not adduce sufficient reason for the grant of this application.

Regarding the point of illegality, it was submitted that, the same should not be used as a ground to set aside the CMA's ruling but in the merit of the application. To support his submission, he cited the Court of Appeal case of **Ngao Godwin Losero V. M/S Julius Mwarabu**, Civ. Appl. No. 10 of 2015. It was added that, the point of law established by the applicant is not clearly apparent on the face of the impugned decision.

The respondent's representative also disputed the allegation that the applicant was not served with summons. He submitted that,

the summons were sent through registered post authority and the proof was tendered at the CMA. He therefore prayed for the application to be dismissed.

After considering the rival submissions from both Counsels, I find that the Court is called upon to determine only one issue; whether the applicant adduced sufficient reason to let the court grant this application.

It is an established principle under the law that sufficient reasons have to be adduced for the Court to set aside the dismissal order. As discussed above, the applicant prays for this Court to set aside the CMA's ruling which refused to set aside the dismissal order in labour dispute No. CMA/DSM/TEM/503/2017. The record shows that, at the CMA the application was dismissed for failure of the applicant to enter appearance. In the application for restoration the applicant stated that, he failed to attend at the CMA because he was attending his sick wife who was undergoing operation. From the CMA record the applicant did not produce any documentary evidence to prove his assertion that on the material day he was attending his sick wife as rightly held by the Arbitrator.

I have noted the issue of mishandling of case file as submitted by the applicant's Counsel. Generally, the practice requires Judges/Magistrates/Arbitrators to assign reasons for the transfer of case file from one to another. In my view the principle is applicable when the case is partly heard by one Judges/Magistrates/Arbitrators and has to proceed with another Judges/Magistrates/Arbitrators. In my observation the relevant principle does not extend to the circumstances of this case where the involved Arbitrators only adjourned the matter but none of them heard the parties. Additionally, the applicant did not state how he was affected by the transfer of case file from one Arbitrator to another. The record shows that the ex-parte award was delivered by Hon. Mikidadi therefore, it is obvious all applications arising from the ex-parte award were assigned to her as rightly submitted by the respondent's representative. Thus, the alleged illegality cannot stand as a ground to grant the present application. In the case of **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civ. Appl. No. 2 of 2010 cited in the case of **Ngao Godwin Losero** (supra) it

was held that:-

> *'Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S, case the court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.'*

Equally, I mindful of the case of **Juto Ally** (supra) cited by the applicant's Counsel on the issue of illegality. However, in the cited case the issue of illegality raised was on point of jurisdiction which was apparent on the face of record, but this is not the case in this application where the alleged issue of illegality is uncertain.

I have also considered the applicant's submission on the right to be heard. In my view, the principle should not be used as an

excuse for not abiding the law, to wit Court rules and procedures. It is my considered view that, a person seeking for the right to be heard ought to be diligent to avoid unnecessary delay, however applicant herein failed to do so.

The court noted the applicant's concern on the service of summons. In a nutshell, without prejudice to the applicant's application, the available CMA's record shows that the alleged summons were dully posted to the registered post office of Uganda. Thus, it is apparent the applicant was afforded with the right to be heard but he decided not to appear at the CMA and defend the case.

In the circumstance of the case I do not hesitate to say that, the applicant's Counsel negligently handled this matter and have to suffer the consequences of non-appearance in court without good cause or sufficient reasons. In my observation if the applicant acted diligently, he would have appointed other officials from his firm to represent him on his absence or even take initiative to notify the arbitrator that he was unable to appear because of reasons he advanced in this court. It is right time now to let legal representatives be conscious that, they have responsibility to defend their clients' cases to justify

the service rendered and cost that parties in matters before the court do incur in the whole process of accessing justice. Judges will not turn blind to anyone who deliberately would opt not to comply with laws and legal orders. The court will not tolerate those counsels or personal representatives who takes for granted that this court is the court of equity so even when they mishandle their cases judges will entertain them and decide in their favour!

In the circumstance of the case I find the applicant did not adduce sufficient reasons to warrant the court to grant the application to set aside the dismissal order of the CMA. Consequently, the application is dismissed for want of merit.

It is so ordered.

I.D. Aboud,
JUDGE
16/07/2021