IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 970 0F 2019

BETWEEN

SHALLO STEPHEN SHALLO.....APPLICANT

VERSUS

SRS- A RENT CAR & TOURS LTD.....RESPONDENT

JUDGMENT

Date of last Order: 21/06/2021

Date of Judgment: 28/06/2021

Z.A. Maruma,J.

Before this court is an application for revision to set aside the decision of Commission for Mediation and arbitration (CMA) with ref. CMA/KIN/254/19/156 delivered on 20/11/2019 the before arbitrator one Mpapasingo. Briefly, on 25th March 2019 applicant one Shallo Peter Shallo instituted a dispute before the Commission for Mediation and Arbitration following a termination of employment relationship between him and the respondent one SRS- A Rent Car & Tours Ltd. on 11/06/2018.

Briefly, the background to this application is that, the applicant was a driver for the respondent since 17th September 2012. Somewhere in between the respondent transferred the applicant to another company in the name of SCHLUMBER. The Applicant worked for overtimes (subject to the claims) until 2015 without being paid the overtime allowances despite several reminders to the respondent. After the completion of the task, the applicant went back to his original office on January 2016 and continued to work while reminding his employer about his overtime allowances. On 14th November the applicant was transferred again to work to another task at project of Kinyerezi II power plant. Before moving to the second task the applicant did submit the log book with the record of his claims of unpaid overtime promised to be paid. The applicant continued to work under the second project till 6th October 2018 when the project of Kinyerezi II came to an end. Reporting back to his original company, he reminded his employer about his unpaid overtime allowances. This was when he was informed that his employment was over and he was not entitled to anything. The Applicant wrote a letter on 18th January 2019 hence the dispute filed on 11th June 2018 before the Commission.

The dispute was proceeded by the preliminary point of objection raised by the respondent that the dispute was time barred hence struck out by the Commission as it was brough out of the prescribed time under the law. Aggrieved with the decision of the Commission he preferred this application for revision to this court brought under Rule 24 (1) & (2) (a) (b) (c) (d) (e) & (f), 24 (3) (a) (b) (c) (d), Rule 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules of the ELRA No.6 of 2004.

Both counsel for the applicant and respondent made submissions to support their arguments in issue raised in their notices, affidavit and cited relevant authorities to the application. I appreciate their efforts on this without dwelling into details of the authorities.

Going through the record and submissions made by counsel for both sides, I agree that there is no dispute that the applicant's claim was time barred before the Commission. It is very clear from the evidence that the claim was instituted after the lapse of 145 days from the date when the termination of the applicant employment occurred, that was on October 2018 and the date which the claim was instituted before the Commission was on 25th March 2019. This is

contrary to rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules GN. 64 of 2007 which provides time limit for other disputes be referred to CMA within sixty (60) days. Therefore, this delay goes to a fundamental issue of jurisdiction as was also decided in the case of **Tanzania One Mining Ltd. Versus Andre Venter Labour Revision No. 276 of 2009** (unreported).

The record in hand shows that, the decision of the Arbitrator dated on 20th November 2019 determined the preliminary point of law raised by defendant (Respondent herein) that the complainant claim was time barred as indicated at page no. 1 of the decision. After the determination, the Arbitrator ruled that the claim was time barred hence he struck out and dismissed the dispute as clearly indicated at page 7 of the decision, I quote:-

> ***"…. Ni wazi Tume haina mamlaka ya kushughulikia mgogoro huu hivyo naliondoa shauri hili na linarekodiwa kuwa "dismissed" leo hii."***

In his finding and ruling above, the arbitrator exercised the jurisdiction vested on him under Rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules GN. 64 of 2007 by rejecting the claim which was time barred.

However, the ruling on the face of record shows very clear that the arbitrator used two terms of "*striking*" and "*dismissed*" at the same time. This is the question to be determined by this court on whether the decision made by the Arbitrator was proper? And what is the fate of the applicant after the striking and dismissal of his claim.

Looking into the definition of the words "*Striking*" under the find law dictionary, this term means to remove or delete something and the word "*dismiss*" under the Concise Oxford dictionary, it defines that in law this term means refuse further hearing to a case. In my view the effect of striking out of a case is that a party has a right to bring the same matter before the Court, but the effect of dismissal is that a decision is conclusive and a party cannot bring the same matter to that court. Then question I asked my self is whether the two words can be used at the same time or interchangeably in a case?

In the case of **Olam Uganda Ltd. suing through its Attorney United Youth Shipping Co. Ltd. v. Tanzania Harbours Authority, Civil Appeal No. 57 of 2002**. The Court in this case defines that, the dismissal amounted to conclusive determination of the suit by the high Court as it was found to be not

legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same Court or on appeal or revision by this Court.

Also, the case of **Cyprian Mamboleo Hiza v. Eva Kioso and Mrs. Semwaiko, Civil Application No. 3 of 2010 Court of Appeal of Tanzania at Tanga**, cited with approval the Court of Appeal of Eastern Africa in the celebrated case of **Ngoni Matengo Cooperative Marketing Union Ltd. v. AN Mohamed Osman (1959) EA 577 at page 580**, the Court distinguished the meaning of "*striking out*" and "*dismissing*" an appeal, thus: This Court, accordingly had no jurisdiction to entertain it, what was before the Court being abortive, and not properly constituted appeal at all. What is this Court ought strictly to have done in each case was to "*strike out*" the appeal as being incompetent, rather than to have "dismissed" it for the latter phrase implies that a competent appeal has been a proper appeal capable of being disposed of.

Basing on the explanation given on the above cited decisions, it is my considered view that the two terms of "*striking*" and "*dismissal*" cannot be used at the same time and have the same fate. I find that

the ruling of arbitrator is of contradictory nature and cannot be sustained. For the interest of justice to the parties, I quash the ruling of CMA dated 20th November, 2019 and the proceedings thereof. The parties are at liberty to pursue appropriate remedies, as they may so wish.

Z.A. Maruma

JUDGE

28/06/2021